



Digital Commons@
Loyola Marymount University
LMU Loyola Law School

Loyola of Los Angeles International and Comparative Law Review

Volume 12 | Number 2

Article 2

3-1-1990

Asylum and Withholding of Deportation—Challenges to the Alien after the Refugee Act of 1980

Elwin Griffith

Follow this and additional works at: <https://digitalcommons.lmu.edu/ilr>



Part of the [Law Commons](#)

Recommended Citation

Elwin Griffith, *Asylum and Withholding of Deportation—Challenges to the Alien after the Refugee Act of 1980*, 12 Loy. L.A. Int'l & Comp. L. Rev. 515 (1990).

Available at: <https://digitalcommons.lmu.edu/ilr/vol12/iss2/2>

This Article is brought to you for free and open access by the Law Reviews at Digital Commons @ Loyola Marymount University and Loyola Law School. It has been accepted for inclusion in Loyola of Los Angeles International and Comparative Law Review by an authorized administrator of Digital Commons@Loyola Marymount University and Loyola Law School. For more information, please contact digitalcommons@lmu.edu.

Asylum and Withholding of Deportation— Challenges to the Alien After the Refugee Act of 1980

ELWIN GRIFFITH*

I. INTRODUCTION

Every year many aliens seek admission to the United States as visitors,¹ but admission may be denied through exclusion proceedings.² After admission as a visitor, an alien may be deported if he overstays his visit in the United States.³ Whether he undergoes exclusion or deportation proceedings, an alien still may seek relief by applying for asylum.⁴ However, the alien does not have to wait for

* Professor of Law, Florida State University, College of Law, Tallahassee, Florida.

1. Visitors are known as nonimmigrants. Every alien who wants to come to the United States is regarded as an immigrant unless he falls within one of the nonimmigrant classes set out in the Immigration and Nationality Act, 8 U.S.C. §§ 1101-1525 (1988). There are several classifications of nonimmigrants. *Id.* § 101(a)(15), 8 U.S.C. § 1101(a)(15) (1988). For example, some nonimmigrants may come for short stays as visitors for business or pleasure. *Id.* § 101(a)(15)(B), 8 U.S.C. § 1101(a)(15)(B) (1988). During the 1987 fiscal year, 12,272,000 nonimmigrants were admitted, among whom were 8,887,000 visitors for pleasure. 1987 STATISTICAL YEARBOOK OF THE IMMIGRATION AND NATURALIZATION SERVICE 68 [hereinafter 1987 INS STATISTICAL YEARBOOK].

2. There are thirty-three classes of excludable aliens. Immigration & Nationality Act § 212(a), 8 U.S.C. § 1182(a) (1988). If an immigration officer does not believe that an alien (with certain exceptions) is entitled beyond a doubt to land, the officer will usually detain the alien for a hearing before an immigration judge. *Id.* § 235(b), 8 U.S.C. § 1225(b) (1988). The alien must be advised of his right to counsel at no expense to the government, and of the free legal services programs. 8 C.F.R. § 235.6 (1989).

3. There are twenty classes of deportable aliens. Immigration & Nationality Act § 241(a), 8 U.S.C. § 1251(a) (1988). If an alien is in the United States illegally or violates his nonimmigrant status, he is subject to deportation. *Id.* § 241(a)(2), (9), 8 U.S.C. § 1251(a)(2), (9) (1988).

4. An asylum applicant must be physically present in the United States or at a port of entry. *Id.* § 208(a), 8 U.S.C. § 1158(a) (1988). In addition, any alien who applies for asylum must qualify as a refugee. *Id.* Refugee is defined as "any person who is outside any country of such person's nationality." *Id.* § 101(a)(42)(A), 8 U.S.C. § 1101(a)(42)(A) (1988). Asylum applicants must have "a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion." *Id.* The Immigration and Naturalization Service ("INS") received 26,107 applications for political asylum during the 1987 fiscal year and 99,408 applications were pending at the beginning of that year. The INS granted asylum during the same period to 5,093 aliens. 1987 INS STATISTICAL YEARBOOK, *supra* note 1, at 58. These data do not cover aliens who were apprehended by the INS for immigration violations.

exclusion or deportation proceedings before applying for asylum. The alien may apply immediately upon arrival or after being admitted to the United States as a lawful visitor.

If an alien applies for asylum during exclusion or deportation proceedings, his application is treated as an application for withholding of deportation under section 243(h) of the Immigration and Nationality Act ("INA").⁵ This provision stays the alien's deportation once the Attorney General of the United States determines that the alien's life or freedom would be threatened if the alien returned to his country.⁶

This concept of asylum relief developed slowly. Its underlying rationale focused on protecting those aliens who had fallen out of favor with their home government. It became available as early as 1875, when Congress created an exception for political offenders in an exclusion statute.⁷ The trend continued in 1950, when Congress enacted a provision to prevent the deportation of an alien to any country in which the alien would be physically persecuted.⁸

Furthermore, the INA refined the 1950 provision by making the remedy discretionary with the Attorney General.⁹ The Supreme Court applied this new provision to deportation proceedings only,¹⁰ while the Immigration and Naturalization Service ("INS") had to use its parole power to grant relief to aliens in exclusion proceedings.¹¹

5. 8 U.S.C. § 1253(h) (1988). After an alien is involved in deportation proceedings, he may file an asylum application with the immigration judge. Such an application is also regarded as an application for withholding deportation. 8 C.F.R. § 208.3(b) (1989).

6. Section 243(h) provides as follows:

The Attorney General shall not deport or return any alien (other than an alien described in section 1251(a)(19) of this title) to a country if the Attorney General determines that such alien's life or freedom would be threatened in such country on account of race, religion, nationality, membership in a particular social group, or political opinion.

Immigration & Nationality Act § 243(h)(1), 8 U.S.C. § 1253(h)(1) (1988).

7. Act of Mar. 3, 1875, ch. 141, § 5, 18 Stat. 477.

8. Internal Security Act of 1950, ch. 1024, § 23, 64 Stat. 987, 1010.

9. Immigration and Nationality Act of 1952, Pub. L. No. 414, ch. 477, § 243(h), 66 Stat. 163, 214.

10. *Leng May Ma v. Barber*, 357 U.S. 185 (1958).

11. Parole was a purely administrative mechanism of the INS until Congress recognized it statutorily in the INA. Immigration & Nationality Act § 212(d)(5)(A), 8 U.S.C. § 1182(d)(5)(A) (1988). This section allows the Attorney General in his discretion to parole aliens into the United States "for emergent reasons or for reasons deemed strictly in the public interest." *Id.* The executive branch used the parole device to allow certain aliens to come into the United States, including refugees, when the existing INA provisions did not accommodate them. The Refugee Act added a provision which prevented the parole of refugees except in individual cases of compelling public interest. *Id.* § 212(d)(5)(B), 8 U.S.C. § 1182(d)(5)(B)

The INA amendments of 1965 introduced some relief for overseas refugees who, because of persecution or fear of persecution, fled Communist countries or countries within the general area of the Middle East.¹² These aliens were admitted as conditional entrants, rather than immigrants, with the expectation that they would later receive permanent residence.¹³ However, no statutory mechanism existed for aliens who wished to apply for asylum from within the United States.

In 1968, the United States took another step in developing asylum-type relief by ratifying the United Nations Protocol Relating to the Status of Refugees ("Protocol").¹⁴ In so doing, the United States became bound to articles 2 through 34 of the United Nations Convention Relating to the Status of Refugees ("Convention").¹⁵ Congress made no move at that time to amend the immigration laws, because it believed that the United States could fulfill its responsibilities under the Protocol without any statutory changes.¹⁶ This reasoning was, perhaps, overly optimistic because INA section 243(h) conflicted with article 33 of the Convention. Article 33 made it mandatory rather than discretionary for a state to withhold deportation of a refugee to a place where that refugee would be persecuted.¹⁷ Given this conflict, the United States had to review its own legislation, not only to ex-

(1988). See also T. ALEINIKOFF & D. MARTIN, IMMIGRATION PROCESS AND POLICY 639 (1985).

12. Act of Oct. 3, 1965, Pub. L. No. 89-236, § 3, 79 Stat. 911, 913, *amending* Immigration & Nationality Act § 203(a)(7).

13. *Id.* Falling within the seventh-preference category of the immigration scheme, these conditional entrants were usually eligible for adjustment of status to lawful permanent residence two years after entry. *Id.* The Refugee Act of 1980 completely overhauled the refugee system and removed the seventh-preference conditional category. Refugee Act of 1980, Pub. L. No. 86-212, 94 Stat. 102.

14. United Nations Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223, T.I.A.S. No. 6577, 606 U.N.T.S. 267 [hereinafter Protocol].

15. United Nations Convention Relating to the Status of Refugees, July 28, 1951, 19 U.S.T. 6259, T.I.A.S. No. 6577, 189 U.N.T.S. 137 [hereinafter Convention]. The United States is bound by the Convention because article I(1) of the Protocol incorporates articles 2 through 34 of the Convention.

16. See *INS v. Stevic*, 467 U.S. 407 (1984). The Board of Immigration Appeals ("BIA") was confident that the Attorney General would use his discretion under section 243(h) in a way that was consistent with the treaty. See *Matter of Dunar*, 14 I. & N. Dec. 310, 322 (1973). See also D. MARTIN, MAJOR ISSUES IN IMMIGRATION LAW 79 (1987); Anker, *Discretionary Asylum: A Protection Remedy for Refugees Under the Refugee Act of 1980*, 28 VA. J. INT'L L. 1, 33 & n.162 (1987).

17. Article 33 of the Convention prohibits the return of a "refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership in a particular social group or political opinion." Convention, *supra* note 15, art. 33(1). Section 243(h) of the INA protects an "alien." Therefore, any alien in the United States is entitled to have his deportation withheld if he meets the

amine the discretionary element of section 243(h), but also to consider enacting some provision that recognized the alien's interest in remaining in the United States indefinitely.

In 1980, Congress passed the Refugee Act,¹⁸ which affected both asylum and withholding of deportation. Congress added a new provision that set up a statutory framework under which aliens could apply for asylum.¹⁹ Previously, an alien's eligibility for asylum rested on administrative regulations rather than congressional statutes.²⁰ It became clear that an alien who qualified as a refugee²¹ and was in the United States, at the border or at a port of entry, would be eligible, at the Attorney General's discretion, for status as an "asylee."²²

Section 243(h) also underwent change.²³ Since that section provided only discretionary relief prior to the Refugee Act, it was necessary to bring the statute in line with the mandatory provision in the Convention. Section 243(h) survived in the statutory scheme because Congress wanted to respect the "nonrefoulement" provisions of the Convention,²⁴ while at the same time providing some mechanism for

appropriate standards. The alien does not have to qualify as a refugee. *INS v. Stevic*, 467 U.S. 407, 422 (1984).

18. Refugee Act of 1980, Pub. L. No. 86-212, 94 Stat. 102 (codified in scattered sections of 8 U.S.C.).

19. Immigration & Nationality Act § 208, 8 U.S.C. § 1158 (1988).

20. Before 1974 there was no provision specifically authorizing asylum. Anyone in the United States applying for asylum had to rely on the Attorney General's parole power. See *INS v. Cardoza-Fonseca*, 480 U.S. 421, 427 & n.4 (1987). The 1974 regulation created a system under which aliens in the United States could apply for relief. The alien had to apply to the district director who had jurisdiction over the alien's place of residence in the United States. See 8 C.F.R. pt. 108 (1975). The Refugee Act of 1980 was the first statute to spell out an alien's right to apply for political asylum. Anker, *supra* note 16, at 33 & n.163. See also Blum, *The Ninth Circuit and the Protection of Asylum Seekers Since the Passage of the Refugee Act of 1980*, 23 SAN DIEGO L. REV. 327, 330 & n.14 (1986); Note, *Political Bias in the United States Refugee Policy Since the Refugee Act of 1980*, 1 GEO. IMMIGR. L.J. 495, 517 (1986).

21. A refugee must have a "well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion." Immigration & Nationality Act § 101(a)(42)(B), 8 U.S.C. § 1101(a)(42)(B) (1988).

22. *Id.* § 208(a), 8 U.S.C. § 1158(a) (1988). The INS is required to interview the "asylee" annually to determine continued eligibility. 8 C.F.R. § 208.8(e)(i) (1989).

23. The Refugee Act of 1980 made withholding of deportation mandatory instead of discretionary once the alien could show that he met the requirements. The Act also required the Attorney General to determine that "such alien's life or freedom would be threatened," replacing the previous language that the alien "would be subject to persecution" and the grounds for persecution were expanded to include "nationality" and "membership in a particular group." Refugee Act of 1980, Pub. L. No. 96-212, § 203(e), 94 Stat. 102, 107 (amending Immigration & Nationality Act § 243(h)).

24. Article 33.1 of the Convention provides that "[n]o Contracting State shall expel or return ('refouler') a refugee in any manner whatsoever to the frontiers of territories where his

true asylum status under section 208.

While section 243(h) prevents the INS from returning an alien to a country where his life or freedom would be threatened, nothing prevents the INS from sending that alien to another safe country because section 243(h) does not intend to confer permanent residence status.²⁵ Alternatively, once the Attorney General grants the alien asylum, the alien can qualify for permanent residence after one year.²⁶

Since section 208 relief is discretionary and section 243(h) relief is now mandatory, an alien may sometimes obtain relief under one section, but not the other.²⁷ However, the alien's eligibility for either remedy will depend in large measure on his ability to meet the applicable standard of proof. Although the United States Supreme Court recently settled the disagreement among the circuits about the standard of proof to be applied to each form of relief,²⁸ there is still some question as to how the standards will be applied to particular facts. Disagreement also exists regarding what factors qualify an alien for relief. This article will examine these issues to determine how the Board of Immigration Appeals ("BIA")²⁹ and the courts have treated

life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group, or political opinion." Convention, *supra* note 15, art. 33.1.

25. The Attorney General cannot return the alien "to a country if the Attorney General determines that such alien's life or freedom would be threatened in *such* country." Immigration & Nationality Act § 243(h), 8 U.S.C. § 1253(h) (1988) (emphasis added). But there is no prohibition on returning the alien to another country which will accept him. In *Matter of Salim*, the BIA prevented the alien's deportation to Afghanistan but did not see any problem with sending the alien to "Pakistan or any other hospitable country . . . if that country will accept him." 18 I. & N. Dec. 311, 315 (1982).

26. An asylee has the right to apply for lawful permanent residence. If granted, the asylee's lawful permanent residence is recorded as beginning one year prior to the application's approval date. 8 C.F.R. § 209.2(f) (1989).

27. Compare Immigration & Nationality Act § 243(h), 8 U.S.C. § 1253(h) (1988), providing for mandatory withholding, with Immigration & Nationality Act § 208, 8 U.S.C. § 1158 (1988), providing for asylum at the Attorney General's discretion.

28. In *INS v. Stevic*, the Supreme Court held that an alien must show a clear probability of persecution to be eligible for withholding of deportation, thus introducing a "more likely than not" standard. 467 U.S. 407, 429-30 (1984). In *INS v. Cardoza-Fonseca*, the Court did not indicate a specific standard for asylum, but left no doubt that an alien who has a well-founded fear does not have to show a clear probability of persecution, thus making the alien's burden slightly less than that in *Stevic*. 480 U.S. 421, 448-49 (1987). Prior to *Cardoza-Fonseca* there was a conflict among the circuits. See, e.g., *Carcamo-Flores v. INS*, 805 F.2d 60 (2d Cir. 1986); *Sankar v. INS*, 757 F.2d 532 (3d Cir. 1985); *Carvajal-Munoz v. INS*, 743 F.2d 562 (7th Cir. 1984).

29. The BIA is in the Department of Justice and is supervised by the Director of the Executive Office for Immigration Review. The Board consists of a chairman and four other members. 8 C.F.R. § 3.1(a)(1) (1989). An appeal to the BIA may be taken from an immigration judge's decision denying an alien relief in an exclusion or deportation proceeding. 8

aliens who have sought relief since the Refugee Act of 1980. Further, it suggests that there is still room for statutory clarification.

II. THE STATUTORY CHALLENGE

A. *The Applicable Standards*

A controversial issue in asylum and withholding of deportation cases concerns the applicable standard of proof. Before the United States acceded to the Protocol in 1968, the law seemed clear that an alien had to show a clear probability of persecution to withhold his deportation under section 243(h).³⁰ Initially, the Protocol did not appear to change existing U.S. law.³¹

Soon after the United States' accession to the Protocol, the BIA dealt with this question of proof in *In re Dunar*.³² In that case, the alien asserted that he deserved to have his deportation withheld if he showed a well-founded fear of persecution. However, the BIA upheld the "clear probability of persecution" standard of section 243(h), since it had received wide judicial support and nothing indicated that the United States' accession to the Protocol intended to change that approach.³³

The confusion surrounding the relationship between "well-founded fear" and the "clear probability" standard continued as some courts either used the terms interchangeably or suggested that the standards would converge in practice.³⁴ Although the Refugee Act retained section 243(h) of the INA, the new section 208 made it possible for an alien to obtain asylum if he possessed a well-founded fear of persecution. Eventually, an explanation of the difference between these two sections emerged.

C.F.R. § 301(b)(1)-(2) (1989). Judicial review of exclusion decisions is available in a habeas corpus proceeding in federal district court, while review of deportation decisions is available in the court of appeals. Immigration & Nationality Act § 106(a)-(b), 8 U.S.C. § 1105a(a)-(b) (1988).

30. See *Matter of Dunar*, 14 I. & N. Dec. 310 (1973); T. ALEINIKOFF & D. MARTIN, *supra* note 11, at 640.

31. See *Stevic*, 467 U.S. at 417 (1983) (citing S. EXEC. REP. NO. 14, 90th Cong., 2d Sess. (1968)).

32. 14 I. & N. Dec. 310 (1973).

33. *Id.* at 318-19.

34. See, e.g., *Fleurinor v. INS*, 585 F.2d 129, 132 (5th Cir. 1978) (probable political persecution not proved); *Martineau v. INS*, 556 F.2d 306, 307 (5th Cir. 1977) ("clear probability" of persecution); *Kashani v. INS*, 547 F.2d 376, 379 (7th Cir. 1977) (well-founded fear converges with clear probability standard); *Paul v. INS*, 521 F.2d 194, 200 (5th Cir. 1975) (aliens did not prove that they had well-founded fear of political persecution).

In 1984, the Supreme Court solved the first part of the puzzle in *INS v. Stevic*³⁵ when it decided that, under section 243(h), the alien had to abide by a "clear probability" standard and show that it was "more likely than not" that he would be persecuted on one of the statutorily enumerated grounds.³⁶ The Court rejected the Second Circuit's interpretation that "every alien who qualifie[d] as a 'refugee' . . . [was] also entitled to a withholding of deportation under [section] 243(h)."³⁷ The Court noted that Congress, by developing a complete statutory scheme for the admission and resettlement of refugees, did not intend asylum relief to displace the section 243(h) remedy.³⁸ Since section 243(h) contains no language referring to refugees or the "well-founded fear" standard of asylum relief, the alien in *Stevic* had difficulty convincing the Court that the section 243(h) standard should be anything less than "clear probability."³⁹

Eventually the Court could not avoid answering the question it had dodged in *Stevic*. In *INS v. Cardoza-Fonseca*,⁴⁰ the Court held that the "well-founded fear" standard of proof should apply in asylum proceedings. Since the standard is more generous than the "clear probability" standard, the alien's burden of proof is easier to meet in asylum cases.

The Court first observed that the Refugee Act had introduced a definition of "refugee" that required an alien to possess a well-founded fear of persecution.⁴¹ The Act had also amended section 243(h), but had not attempted to convert the "withholding" statute into anything approximating the language in section 208.⁴² Therefore, in this case, section 208 did not require the alien to prove that he *would* be persecuted. The only issue was one of the alien's fear. The Court emphasized that the fear requirement highlighted the subjective nature of the asylum standard.⁴³ However, the Court noted that the standard also contained an objective ingredient, as the fear had to

35. 467 U.S. 407 (1984).

36. *Id.* at 429-30. The Court specifically avoided defining the term "well-founded fear of persecution," leaving that issue to another day.

37. *Id.* at 428.

38. S. REP. NO. 590, 96th Cong., 2d Sess. 19 (1980).

39. *Stevic*, 467 U.S. at 422.

40. 480 U.S. 421 (1987).

41. *Id.* at 428.

42. *Id.* at 430.

43. *Id.* at 430-31. The BIA had previously agreed in *Matter of Acosta* that the term "fear" referred to a subjective determination of the alien's mental state. Int. Dec. No. 2986, at 14 (BIA 1985).

possess a stable foundation.⁴⁴ The Court did not see how a bona fide, subjective fear based on objective factors could require the "more likely than not" standard of *Stevic*.

The *Cardoza-Fonseca* Court considered the historical background of the "well-founded fear" standard. The Protocol had incorporated the definition of "well-founded fear" contained in the Constitution of the International Refugee Organization.⁴⁵ This definition functioned well if the alien's fear rested on reasonable grounds. The Office of the United Nations High Commissioner for Refugees also supported the approach in its *Handbook*, which recognizes an alien's fear as well-founded if the alien can show to a "reasonable degree" that it would be intolerable for him to return to his country.⁴⁶ Congress clearly wanted to conform its own definition of "refugee" to the Protocol's.⁴⁷

The INS worried that the asylum provision would be perceived as granting greater benefits because of its more liberal standard.⁴⁸ The *Cardoza-Fonseca* Court answered that concern by reminding the INS that asylum was at the Attorney General's discretion, while with-

44. In his concurring opinion in *Cardoza-Fonseca*, Justice Blackmun stated that "the very language of the term 'well-founded fear' demands a particular type of analysis—an examination of the subjective feelings of an applicant for asylum coupled with an inquiry into the objective nature of the articulated reasons for the fear." 480 U.S. at 450.

45. The United Nations established the International Refugee Organization ("IRO") in 1946 to deal with the refugee problem arising at the end of the Second World War. It completed its work in 1952. The IRO constitution included as refugees those persons who expressed valid objections to returning to their country of nationality or former residence. Among the objections considered valid were those based on "persecution because of race, religion, nationality or political opinion." International Refugee Organization Constitution, Annex 1, Sec. C, art. 1(a)(i), 62 Stat. 3037, 3050. See also G. GOODWIN-GILL, *THE REFUGEE IN INTERNATIONAL LAW* 4 (1983); 1 A. GRAHL-MADSEN, *THE STATUS OF REFUGEES IN INTERNATIONAL LAW* 136 (1966); Cox, "Well-Founded Fear of Being Persecuted": *The Sources and Application of a Criterion of Refugee Status*, 10 BROOKLYN J. INT'L L. 333, 337-39 (1984).

46. OFFICE OF THE UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES, *HANDBOOK ON PROCEDURES AND CRITERIA FOR DETERMINING REFUGEE STATUS* 12-13 (1979) [hereinafter *HANDBOOK*]. The *Handbook* does not have the force of law, but it is helpful in construing the Protocol, and courts have looked to it for guidance. *INS v. Cardoza-Fonseca*, 480 U.S. 421, 439 n.22 (1987).

47. Congress specifically incorporated the United Nations definition of refugee in its statute. H.R. CONF. REP. NO. 781, 96th Cong., 2d Sess. 19 (1980), reprinted in 1980 U.S. CODE CONG. & ADMIN. NEWS 160. With respect to withholding of deportation, Congress enacted the section 243(h) amendment with the understanding that "it [was] based directly upon the language of the Protocol and it [was] intended that the provision be construed consistent with the Protocol." *Id.* at 20, reprinted in 1980 U.S. CODE CONG. & ADMIN. NEWS at 161. See also Helton, *Political Asylum Under The 1980 Refugee Act: An Unfulfilled Promise*, 17 MICH. J. L. REF. 243, 251 (1984).

48. *Cardoza-Fonseca*, 480 U.S. at 443.

holding of deportation was mandatory once it was determined that deportation would threaten the alien's life or freedom.⁴⁹ Therefore, even if an alien possessed a well-founded fear of persecution, the alien had no assurance of relief⁵⁰ as the Attorney General still had to exercise his discretion.

If any doubt remained about the statutory differences, Congress' amendment of section 243(h) in 1980 dispelled them. Some aliens may find the lower threshold unappealing because it does not guarantee asylum. However, achieving the "more likely than not" standard gives the alien the certainty of temporary relief under section 243(h), not merely the possibility of permanent relief under section 208.

Arguably, the mathematical formulation of the "well-founded fear" standard is what unsettled the INS in *Cardoza-Fonseca*. The *Stevic* formula required evidence that the alien would more likely than not undergo persecution on one of the statutorily specified grounds.⁵¹ However, the *Cardoza-Fonseca* Court believed that an alien could possess a well-founded fear even when "there [was] less than a 50% chance of the occurrence taking place."⁵² This proposition might have caused the BIA discomfort, because in *Matter of Acosta* the BIA had already signalled its dependence on such terms as "likelihood" or "probability" of persecution.⁵³ The BIA preferred a qualitative, rather than a quantitative, assessment of the available evidence.⁵⁴ The

49. *Id.*

50. *Id.* In *Matter of Salim*, the BIA found that the alien was eligible for both asylum and withholding but denied him asylum by exercising its discretion. 18 I. & N. Dec. 311 (1982). *Matter of Pula* modified *Salim* somewhat by holding that an alien's manner of entry was only one factor to be considered in evaluating an asylum application. Int. Dec. No. 3033, at 9 (BIA 1987). In *Matter of Salim*, the BIA placed undue emphasis on the alien's fraudulent entry.

51. *INS v. Stevic*, 467 U.S. 407, 429-30 (1984).

52. *INS v. Cardoza-Fonseca*, 480 U.S. 421, 431 (1987). The Court made the point by referring to Grahl-Madsen's example that if every tenth male person in a country is either killed or sent to a labor camp, then any alien male from that country would have a well-founded fear of persecution. *Id.* See A. GRAHL-MADSEN, *supra* note 45, at 180.

In *R v. Secretary of State*, 1 All E.R. 193 (1988), the House of Lords decided that in order for an alien to show a well-founded fear of persecution, the alien must demonstrate a reasonable degree of likelihood that he would be persecuted. *Id.* at 193. The decision-maker can take into account not only facts known to him, but also facts unknown to the alien in order to justify the objective basis for the fear. *Id.* The United Kingdom had acceded to the Convention and Protocol and, in his opinion, Lord Goff said that the term "well-founded" must require that "an inquiry should be made whether the subjective fear of the applicant is objectively justified." *Id.* at 202. However, he was unable to agree with the court below that the test for a well-founded fear under article 1(a)(2) and the test for non-refoulement under article 33(1) of the Convention were different. *Id.* at 202-03.

53. *Matter of Acosta*, Int. Dec. No. 2986, at 22 (BIA 1985).

54. *Id.* at 25.

"likelihood" language closely resembled the "more likely than not" standard in *Stevic*. In the BIA's view, this similarity argued powerfully for the convergence of the standards.⁵⁵

One wonders whether this "realistic likelihood" test appealed to the BIA because it avoided the necessity of distinguishing the objective features of sections 208 and 243(h). In practice, courts will normally defer to the expertise of the agency which oversees the administration of a statute, but that deference should arise only when the proper standard has been agreed upon.⁵⁶ Therefore, the *Cardoza-Fonseca* Court did not deny the INS its rightful zone of influence. The INS was still expected to assess the alien's evidence to see whether this evidence met the required standard. The INS stood on shaky ground in denying the existence of two different standards, simply because an alien might qualify, in many cases, for relief under both sections. In essence, this is the function of the INS. The INS must determine if the alien's particular situation meets the statutory requirements for relief.

The BIA's conclusion in *Acosta* that the standards for asylum and withholding of deportation "[were] not meaningfully different and, in practical application converge[d]"⁵⁷ did not mean that the standards were the same. Applying the standards may have presented difficulty, but even the BIA could not categorically state that the two sections called for identical treatment.

The BIA created difficulty for the courts through its failure to recognize the differing standards. For example, in *Vides-Vides v. INS*,⁵⁸ the Ninth Circuit dealt with the BIA's perplexing language that the alien did not possess a well-founded fear of persecution regardless of whether the alien's claim of persecution was based on a "'clear probability,'" a "'reasonable probability,'" or a "'good reason to fear.'"⁵⁹ Although the BIA never explicitly stated that the asylum standard was more liberal, the court examined the BIA's decision in its entirety to determine whether the BIA had in fact acknowl-

55. In *Acosta*, the BIA stated: "We find no meaningful distinction between a standard requiring a showing that persecution is likely to occur and a standard requiring a showing that a persecution is more likely than not to occur." *Id.* at 25. The BIA then concluded that "the standards for asylum and withholding of deportation are not meaningfully different, and in practical application, converge." *Id.*

56. *INS v. Cardoza-Fonseca*, 480 U.S. 421, 448 (1987).

57. *Acosta*, Int. Dec. No. 2986, at 2.

58. 783 F.2d 1463 (9th Cir. 1986).

59. *Id.* at 1468 (quoting from the BIA's opinion).

edged the difference in the standards. Fortunately, the BIA had held that the alien was not eligible for withholding of deportation because he did not show a "clear probability of persecution."⁶⁰ The BIA further held that the alien could not receive asylum because he did not show a "well-founded fear of persecution."⁶¹ These findings satisfied the court that the BIA's language denying the alien asylum did not reflect a misunderstanding of the applicable standard.⁶²

However, after the BIA's decision in *Acosta*, courts became somewhat more concerned about the BIA's imprecise language. The courts found themselves under pressure to demand an explicit statement from the BIA that a more generous standard applied in asylum cases. In *Sanchez-Trujillo v. INS*,⁶³ the BIA's occasional use of the terms "will be" and "would be" in its assessment of the alien's asylum claim did not overly upset the Ninth Circuit because the BIA expressly accepted that court's holding in *Cardoza-Fonseca* that the asylum standard was more generous.⁶⁴ The court forgave the BIA's imprecise language since, in the court's reasoning, the BIA merely wanted to emphasize the requirement of an objective basis for an alien's well-founded fear.⁶⁵

Further clarifying its position in *Rodriguez v. INS*,⁶⁶ the Ninth Circuit required the BIA to state clearly in post-*Acosta* cases that the BIA was applying the more generous standard to asylum decisions.⁶⁷ The court took this position because the BIA had adhered to its *Acosta* position and had used the language of the "clear probability" test in assessing the alien's asylum claim.⁶⁸ Therefore, the court deemed it unacceptable for the BIA to use the same general boiler-

60. *Id.*

61. *Id.* The court was not upset by the BIA's failure to state explicitly that the asylum standard was more liberal. It was more concerned with the BIA's actual analysis. *Id.*

62. The court was not interested in the "utterance of certain magic words by the BIA." *Id.* It looked at the BIA opinion as a whole to determine whether the BIA understood the two different standards. This BIA opinion in *Vides-Vides* pre-dated *Acosta*, where the BIA took the position that no meaningful difference in the standards existed. *Matter of Acosta*, Int. Dec. No. 2986 (BIA 1985).

63. 801 F.2d 1571 (9th Cir. 1986).

64. *Id.* at 1578.

65. *Id.* at 1579.

66. 841 F.2d 865 (9th Cir. 1987).

67. *Id.* at 869.

68. *Id.* at 870. Not only did the BIA reiterate its *Acosta* position that the two standards were not meaningfully different, but, with respect to asylum, it addressed the question whether the aliens *would* be singled out for persecution. *Id.*

plate language that it had used all along to assess asylum claims.⁶⁹

In *Arteaga v. INS*⁷⁰ the court re-emphasized its point that the BIA should make some clear statement about the applicable standard. In that case, the BIA deferred to *Matter of Acosta*, even as it quoted from the Ninth Circuit's decision in *Cardoza-Fonseca*.⁷¹ The BIA disappointed the court by requiring the alien to show that he *would* be targeted for persecution.⁷² This language certainly leaned more toward the "clear probability" standard with little in the BIA's analysis favoring the more generous asylum test. The court remanded the case to the BIA for an explicit application of the "well-founded fear" standard. Although the BIA had paid lip service to *Cardoza-Fonseca*, it had confused the issue not only by referring to *Acosta*, but also by using language associated with the clear probability standard.⁷³

In *Arteaga*, the Ninth Circuit could have dismissed the BIA's approach as a minor inconsistency that did not displace an overall application of the correct standard. The court made such a judgment in *Sanchez-Trujillo*⁷⁴ because the BIA persuaded the court that it was on the right track when it quoted from, and explicitly recognized, the Ninth Circuit's decision in *Cardoza-Fonseca*. In *Arteaga*, however, the BIA took a different tack. In its asylum review, the BIA not only clung to the "likelihood" and "would be" language normally associated with the "clear probability" standard, but supported its position by reference to that line of cases. Therefore, in reviewing the BIA's decision as a whole, the Ninth Circuit had no choice but to conclude that the BIA had incorrectly applied the clear probability standard to an asylum case.

The Ninth Circuit had another chance to review the BIA's approach in *Rodriguez-Rivera v. INS*.⁷⁵ *Rodriguez-Rivera* greatly resem-

69. *Id.* at 869. See also *Doe v. INS*, 867 F.2d 285, 290 (6th Cir. 1989).

70. 836 F.2d 1227 (9th Cir. 1988).

71. *Id.* at 1231.

72. *Id.* at 1232.

73. *Id.* at 1231. See also *Castaneda-Hernandez v. INS*, 826 F.2d 1526 (6th Cir. 1987) (although BIA used language suggesting different standards for asylum and withholding of deportation, the issue remained whether the BIA in fact used a more generous standard for asylum).

74. In *Sanchez-Trujillo v. INS*, the court said that "[t]he use of one particular word [was] not dispositive of whether the proper standard was applied." 801 F.2d 1571, 1579 (9th Cir. 1986). The court saw a substantial difference between a requirement that an alien "*would be* persecuted" and a requirement that an alien have a "well-founded fear that he *would be* persecuted." *Id.* (quoting *Florez-De Solis v. INS*, 796 F.2d 330, 336 (9th Cir. 1986) (Wallace, J., concurring)).

75. 848 F.2d 998 (9th Cir. 1988).

bled *Arteaga*. In both cases, the Ninth Circuit found that the BIA had affirmed its *Acosta* position even after it had quoted from that court's opinion in *Cardoza-Fonseca*. However, the court upheld the BIA's decision in *Rodriguez-Rivera*. It realized that the BIA had qualified its *Acosta* reference by acknowledging the Ninth Circuit's differing views of the standards under asylum and withholding of deportation.⁷⁶ While, in both cases, the BIA held that the alien had failed in his asylum claim because he did not show that he *would* be singled out for persecution,⁷⁷ the court noted that the BIA in *Rodriguez-Rivera* had not followed the statement with a citation to cases applying the clear probability standard as it had in *Arteaga*.⁷⁸

The *Rodriguez-Rivera* court pointed out, however, that it did not rely solely on any of the above factors, because it wanted to continue the *Sanchez-Trujillo* approach of looking at the BIA's entire opinion before reaching any conclusions.⁷⁹ Understandably, the court did not want to attribute any undue significance to the BIA's citation of *Acosta* or to the "likelihood of persecution" language. By themselves, those references meant little when not taken within the context of the entire opinion. However, the court digressed by suggesting that the presence of the three *Arteaga* factors in another context would not "necessarily mandate reversal."⁸⁰

At some point the Board's reliance on a number of *Arteaga*-type factors should suffice to provoke judicial concern about the appropriate standard. If the BIA cites *Cardoza-Fonseca* but then promotes *Acosta*, the "clear probability" cases and the "likelihood of persecution" language, this imprecision generates doubt about the BIA's approach. While the mere use of certain words should not provide a magical solution to the problem, the court in *Rodriguez-Rivera* seemed reluctant to acknowledge the BIA's vacillation. A court must examine the BIA's entire opinion; however, a combination of *Arteaga*-type factors must create concern about the BIA's application of the proper standard. Obviously, in asylum cases, courts must have a "clear indication . . . that the BIA applied the more generous well-founded fear standard to a petitioner's asylum claim."⁸¹

76. *Id.* at 1003.

77. Compare *Arteaga v. INS*, 836 F.2d 1227, 1230 (9th Cir. 1986), with *Rodriguez-Rivera v. INS*, 848 F.2d 998, 1003 (9th Cir. 1988).

78. *Rodriguez-Rivera*, 848 F.2d at 1000 (9th Cir. 1988).

79. *Id.*

80. *Id.*

81. *Id.* at 1004. The court tried to reach a satisfactory compromise. However, if the BIA

After the Supreme Court's decision in *Cardoza-Fonseca*, the BIA retreated from its position that the asylum and withholding standards converged. In *Matter of Mogharrabi*,⁸² the BIA had its first opportunity to assess the impact of *Cardoza-Fonseca*. Although the BIA accepted the Court's holding on the asylum standard, it still had to determine the meaning of "well-founded fear."

After reviewing the approaches of different circuits, the BIA adopted the Fifth Circuit's formulation that a "well-founded fear" exists if the alien shows that "a reasonable person in his circumstances would fear persecution."⁸³ The BIA believed that this formulation restated the principle that the alien's fear should be subjectively genuine and objectively reasonable.⁸⁴ This reasoning agreed with the notion that a reasonable person could fear persecution even if no clear probability of its occurrence existed.⁸⁵

Although the BIA reiterated that the evidence presented in support of asylum and withholding applications will usually be identical, it emphasized that there must be separate findings on each application.⁸⁶ This was a welcome turn of events in light of the difficulty caused by the BIA's occasional interchange of terminology. The BIA's adherence to this position will facilitate determining whether the BIA is applying the correct test. Furthermore, courts can evalu-

cites Supreme Court authority and then goes on to ignore the appropriate standard, there is hardly any clear indication that the BIA is playing by the rules. As the *Arteaga*-type factors increase, a court should exercise more care in looking to the BIA's assessment of the case.

82. Int. Dec. No. 3028 (BIA 1987).

83. *Id.* at 9 (citing *Guevara-Flores v. INS*, 786 F.2d 1242 (5th Cir. 1986)). See also *Carcamo-Flores v. INS*, 805 F.2d 60 (2d Cir. 1986).

84. See *Diaz-Escobar v. INS*, 782 F.2d 1488, 1492 (9th Cir. 1986). See also *Yousif v. INS*, 794 F.2d 236, 243-44 (6th Cir. 1986) (subjective fear must be supported by objective evidence); *Hernandez-Ortiz v. INS*, 777 F.2d 509, 513 (9th Cir. 1985) (fear must be genuine); *Cardoza-Fonseca v. INS*, 767 F.2d 1448, 1453 (9th Cir. 1985) (alien's subjective fears are relevant after sufficient objective evidence introduced).

85. In *Matter of Mogharrabi*, the BIA restated the four elements that it required in *Acosta* for an asylum applicant to establish a well-founded fear of persecution. The evidence must show that

(1) the alien possesses a belief or characteristic a persecutor seeks to overcome in others by means of punishment of some sort; (2) the persecutor is already aware, or could easily become aware, that the alien possesses this belief or characteristic; (3) the persecutor has the capability of punishing the alien; and (4) the persecutor has the inclination to punish the alien.

Int. Dec. No. 3028, at 11 (quoting *Matter of Acosta*, Int. Dec. No. 2986, at 22 (BIA 1985)). However, in *Mogharrabi* the BIA changed the second requirement by omitting the word "easily" in an effort to bring the requirements into line with *Cardoza-Fonseca*. *Mogharrabi*, Int. Dec. No. 3028, at 11.

86. *Id.* at 12. This approach would avoid the difficulties of cases like *Rodriguez v. INS*, 841 F.2d 865 (9th Cir. 1987), and *Vides-Vides v. INS*, 783 F.2d 1463 (9th Cir. 1986).

ate the BIA's findings in accordance with the appropriate standards of *Stevic* and *Cardoza-Fonseca*.

B. The Evidence

Even before the Supreme Court's ruling in *Cardoza-Fonseca*, some courts tried to define "well-founded fear." In attempting to define this term, the Seventh Circuit required an alien to show "specific facts establishing that he or she has actually been the victim of persecution or has some other good reason to fear that he or she will be singled out for persecution."⁸⁷ Quite often, the alien's own testimony reflects the basis of his fear. If that is the case, the alien's testimony alone will not suffice unless it is credible and specific.⁸⁸

The alien often has difficulty obtaining corroborating evidence of his persecution claims. Although the lack of such evidence will not necessarily defeat an alien's asylum petition, it places the burden on the alien to provide a detailed, consistent and believable account of the grounds for his fear.⁸⁹ Giving a general account of oppressive conditions in one's native country will not suffice. However, showing that others in the alien's position generally have suffered at the hands of the persecutors will help.⁹⁰ Evidence of threats or past persecution will also help when examining conditions in the alien's homeland. Nevertheless, the alien should not rely on conclusory statements to obtain relief, because courts will generally analyze the evidence to reach their own conclusions.

The Sixth Circuit took a step forward in *Dawood-Haio v. INS*⁹¹ by requiring the BIA to reconsider an alien's case in the absence of independent corroboration of the alien's allegation. Originally, the BIA had discounted the alien's statements as having no basis in fact simply because the statements were undocumented and self-serving.⁹² However, no evidence impugned the alien's credibility. Further, in its advisory opinion to the INS, the State Department's Bureau of Human Rights and Humanitarian Affairs had accepted the alien's

87. *Carvajal-Munoz v. INS*, 743 F.2d 562, 574 (7th Cir. 1984).

88. *Id.*

89. *See Sarvia-Quintanilla v. INS*, 767 F.2d 1387 (9th Cir. 1985); *Bolanos-Hernandez v. INS*, 767 F.2d 1277 (9th Cir. 1984); *Carvajal-Munoz v. INS*, 743 F.2d 562 (7th Cir. 1984); *Matter of Mogharrabi*, Int. Dec. No. 3028 (BIA 1987); *HANDBOOK*, *supra* note 46, para. 197.

90. *See Matter of Mogharrabi*, Int. Dec. No. 3028, at 10-11; *HANDBOOK*, *supra* note 46, para. 43.

91. 800 F.2d 90 (6th Cir. 1986).

92. *Id.* at 96.

version of events as true.⁹³ The alien had testified that the Iraqi government had detained the alien and his father, and that the father later died in jail from a heart attack. Despite these facts, the INS seemed preoccupied with the idea that the alien was using the asylum procedures to prolong his stay in the United States. Fortunately, the court disagreed that the lack of documentary evidence meant that the alien's testimony was "without basis in fact."⁹⁴

With no corroborating testimony, the alien's credibility takes on additional significance. No unanimity exists among the courts regarding the respect that should be accorded to credibility determinations of immigration judges. In one case, the Ninth Circuit decreed that an immigration judge did not have to believe an alien just because evidence of widespread violence in the alien's country supported the alien's testimony.⁹⁵ The court was impressed that the immigration judge was "uniquely qualified to decide whether an alien's testimony [had] about it the ring of truth."⁹⁶ Therefore, although an alien's evidence of persecution does not require direct corroboration, the alien still must clear a credibility hurdle when presenting his case before the immigration judge. Because an alien must satisfy his burden of proof even if the INS does not challenge his evidence, he may be denied relief if the express and implied findings of the immigration judge concerning credibility are not favorable.⁹⁷

However, sometimes a court will come to an alien's rescue when trivial errors appear in the alien's testimony. For example, in *Martinez-Sanchez v. INS*,⁹⁸ some confusion existed as to when the alien had joined a paramilitary group. In addition, the alien claimed on his application that he had two children but his testimony indicated that he had four children. The court reasoned that these inconsistencies were not enough for the BIA to question the alien's credibility and remanded the case to the BIA for a decision on the merits. Inconsistencies also appeared in the alien's evidence in *Platero-Cortez v. INS*,⁹⁹ but again the Ninth Circuit did not think that these inconsistencies

93. *Id.* The INS district director was required to request an advisory opinion from the Bureau of Human Rights and Humanitarian Affairs of the Department of State. 8 C.F.R. § 208.7 (1989).

94. *Dawood-Haio*, 800 F.2d at 96.

95. *Sarvia-Quintanilla v. INS*, 767 F.2d 1387, 1395 (9th Cir. 1985).

96. *Id.*

97. *Diaz-Escobar v. INS*, 782 F.2d 1488, 1492 (9th Cir. 1986); *Saballo-Cortez v. INS*, 761 F.2d 1259, 1266 (9th Cir. 1985).

98. 794 F.2d 1396 (9th Cir. 1986).

99. 804 F.2d 1127 (9th Cir. 1986).

should have affected the alien's petition. Doubt existed regarding the date of the alien's departure from El Salvador and the date of the alien's deportation from the United States.¹⁰⁰ The BIA focused on the inconsistency in the alien's testimony concerning his employer's place of death.¹⁰¹ The court viewed these inconsistencies as having "little or no relevance to the merits of [the alien's] claim."¹⁰² This decision was hardly surprising, because the central question was whether the alien was detained and tortured.¹⁰³ The determination of this issue certainly did not depend upon a departure date or the place of his employer's death.

The Ninth Circuit also rejected the credibility findings of the immigration judge in *Turcio v. INS*,¹⁰⁴ where the alien had lied about his citizenship. The alien in *Turcio* feared that the United States would deport him to El Salvador, his homeland.¹⁰⁵ The alien believed that he could avoid returning to El Salvador if he said that he was from Mexico.¹⁰⁶ The court put the alien's false claim of citizenship in perspective and characterized it as evidence of the alien's persecution fears.¹⁰⁷ The court did not make its decision in a vacuum, but instead reflected on the rationale for the alien's desire to avoid returning to his homeland.

Under ordinary circumstances, these misstatements would have worked against the alien because they had some bearing on his credibility. However, the court first interpreted the alien's motivation for lying before making a proper assessment of the alien's predicament.¹⁰⁸ The court considered the political climate in El Salvador to secure a better understanding of the alien's claim. The court's reasoning came as an encouraging sign for asylum-seekers and was consistent with the Supreme Court's focus on the alien's fear of persecution in *Cardoza-Fonseca*. In determining whether that fear has any foundation, a court should consider the alien's credibility, especially when his testimony stands alone.

100. *Id.* at 1131.

101. *Id.*

102. *Id.*

103. *Id.*

104. 821 F.2d 1396 (9th Cir. 1987).

105. *Id.* at 1400.

106. *Id.*

107. *Id.* at 1401.

108. The court said that "[u]ntrue statements by themselves are not reason for refusal of refugee status and it is the examiner's responsibility to evaluate such statements in the light of all the circumstances of the case." *Id.* at 1400.

Sometimes a court will side with the alien when the immigration judge has no "legitimate, articulable basis to question the alien's credibility."¹⁰⁹ However, courts will usually grant substantial deference to an immigration judge's findings and will not overturn these findings if substantial evidence supports them.¹¹⁰ This deference is reasonable because the judge has the alien before him and can view the witness as the testimony is given. If the BIA makes no finding regarding credibility and the BIA has explained its decision, then the court will presume that the BIA found the alien credible.¹¹¹ This presumption puts the burden on the BIA to make credibility findings to guide the court once an appeal is filed. Any other approach would cause a court needless worry about the alien's credibility, even when the BIA raised no questions about it.¹¹²

Even when the alien gets past the credibility problem, he still must deal with the type of evidence required for relief. In *Bolanos-Hernandez v. INS*,¹¹³ Salvadoran guerrillas threatened to kill an alien if he did not join their organization. Although these specific threats occurred in an environment of general civil unrest, the court still found a likelihood of persecution.¹¹⁴ This result came as little surprise. Even though the Ninth Circuit had previously held that general conditions of violence alone could not sustain a claim of persecution,¹¹⁵ the *Bolanos-Hernandez* court could not ignore a specific threat against the alien, just because the threat reflected widespread violence in his region. Indeed, the general unrest in the region must have lent more credibility to the seriousness of the alien's situa-

109. In *Damaize-Job v. INS*, 787 F.2d 1332 (9th Cir. 1986), the Ninth Circuit held that the immigration judge determined the alien's credibility on matters that revealed nothing about whether the alien feared for his safety in Nicaragua. *Id.* at 1338. The immigration judge had questioned (1) the discrepancies in the dates the alien provided in his asylum application; (2) the alien's failure to marry the mother of the alien's children; and (3) the alien's failure to apply for asylum in the other countries the alien visited before coming to the United States. *Id.*

110. *Vilorio-Lopez v. INS*, 852 F.2d 1137, 1141 (9th Cir. 1988); *Turcios v. INS*, 821 F.2d 1396, 1399 (9th Cir. 1987); *Saballo-Cortez v. INS*, 761 F.2d 1259, 1262 (9th Cir. 1985).

111. *Maldonado-Cruz v. INS*, 883 F.2d 788, 792 (9th Cir. 1989); *Damaize-Job v. INS*, 787 F.2d 1332, 1338 (9th Cir. 1986).

112. See *Damaize-Job v. INS*, 787 F.2d 1332, 1338 (9th Cir. 1986); *Canjura-Flores v. INS*, 784 F.2d 885, 889 (9th Cir. 1985).

113. 767 F.2d 1277 (9th Cir. 1984).

114. *Id.* at 1286.

115. See *Zepeda-Melendez v. INS*, 741 F.2d 285 (9th Cir. 1984); *Martinez-Romero v. INS*, 692 F.2d 595 (9th Cir. 1982).

tion.¹¹⁶ Understandably, the *Bolanos-Hernandez* court recognized the significance of the specific threats against the alien, even though no independent corroboration backed up these threats.¹¹⁷ The imposition of a corroboration requirement in a case like *Bolanos-Hernandez* would deny the alien the protection the statute contemplates.¹¹⁸ The court found that the alien's testimony was so credible and convincing that it would have contradicted the statutory objective to require other evidence, especially when nothing refuted the alien's story. The court knew that a contrary approach would make it almost impossible for an alien to comply with section 243(h).¹¹⁹

In section 243(h) cases, even if the alien proves that he has received threats, he still must show that the threat is serious and that, more likely than not, the threat will come to fruition. This will depend on whether the threatening entity has the ability to carry out the threat.¹²⁰ In *Bolanos-Hernandez*, the court found it significant that guerrillas had killed or injured some of the alien's friends who had previously rejected the guerrillas' overtures.¹²¹

Occasionally, an alien may consider himself subject to attack in the general melée of civil strife because others perceive him as a representative of the government. Whether an alien has a legitimate fear of persecution in this situation is questionable. In *Matter of Fuentes*¹²², a policeman from El Salvador feared returning to his native country because of the guerrillas there. The BIA believed that any danger facing the policeman strongly related to the nature of his employment as well as the domestic unrest prevalent in El Salvador.¹²³ This result paralleled the decision in *Acosta*, where the BIA resisted the temptation of converting general civil unrest into individual persecution.¹²⁴ In *Fuentes*, the situation was even clearer for the BIA, because the BIA viewed a policeman as an extension of the government forces.¹²⁵

116. See *Bolanos-Hernandez v. INS*, 767 F.2d 1277 (9th Cir. 1985); *Zavala-Bonilla v. INS*, 730 F.2d 562 (9th Cir. 1984); *McMullen v. INS*, 658 F.2d 1312 (9th Cir. 1981).

117. See *Bolanos-Hernandez*, 767 F.2d at 1285.

118. *Id.* See also *Canjura-Flores v. INS*, 784 F.2d 885 (9th Cir. 1985).

119. *Bolanos-Hernandez*, 767 F.2d at 1285. See also *McMullen v. INS*, 658 F.2d 1312, 1319 (9th Cir. 1981); *Developments in the Law-Immigration Policy and the Rights of Aliens*, 96 HARV. L. REV. 1286, 1355 (1983).

120. *Bolanos-Hernandez*, 767 F.2d at 1285.

121. *Id.* at 1286.

122. Int. Dec. No. 3065 (BIA 1988).

123. *Id.* at 5.

124. See *Matter of Acosta*, Int. Dec. No. 2986, at 17, 29.

125. *Matter of Fuentes*, Int. Dec. No. 3065, at 5.

The policeman just happened to oppose the guerrillas. Thus, the BIA equated the danger the alien faced to that of an ordinary military combatant in the internal fray. However, an interesting paradox arose here since the policeman's chances for showing persecution decreased as the overall level of violence in El Salvador increased. The policeman found it rather difficult under such circumstances to convince the BIA that he was singled out for persecution.¹²⁶

Occasionally an alien cannot meet the burden of proof under section 243(h) but instead can qualify for asylum under section 208. The clear probability standard of section 243(h) requires the alien to produce objective evidence, whereas his section 208 claim only requires proof of a subjective fear that is based on some reasonable ground. In *Blanco-Comarribas v. INS*,¹²⁷ the Ninth Circuit had an opportunity to distinguish between these two standards of proof. While the court upheld the BIA's decision to deny section 243(h) relief, it reversed the BIA's decision to deny asylum relief under section 208. The alien's relatives opposed the Nicaraguan government and were persecuted on that account. However, the alien presented no evidence that the relatives' conduct placed his life in jeopardy. Therefore, the alien could not comply with the required burden of proof for withholding of deportation. However, the court believed the alien's fear of persecution was well-founded because the alien had demonstrated against the government and his father had disappeared in Nicaragua.¹²⁸

III. GROUNDS FOR RELIEF

A. Political Opinion

An alien may seek asylum and withholding of deportation on several grounds. One such statutory ground is political opinion. This political opinion basis of relief may be substantiated by evidence that the alien's action or inaction incites others to persecute him.

126. See 65 INTERPRETER RELEASES 997 (Sept. 26, 1988).

127. 830 F.2d 1039 (9th Cir. 1987).

128. *Id.* at 1043. The court understood that the alien's fear had to be "both subjectively genuine and objectively reasonable." *Id.* (quoting *Sanchez-Trujillo v. INS*, 801 F.2d 1571, 1579 (9th Cir. 1986)). The court accepted the immigration judge's assessment of the alien's testimony as candid and sincere. 830 F.2d at 1042. This satisfied the subjective component. The alien's father disappeared and his aunts and cousins were arrested and threatened with death because of their opposition to the revolution. The alien himself was accused of subversive conduct and was arrested for three days. These events satisfied the second prong of the test by being objectively reasonable. *Id.*

1. Neutrality

Occasionally, the alien will base his political opinion claim on his neutrality. In *Bolanos-Hernandez v. INS*, the Ninth Circuit dealt with the question whether it should characterize the alien's neutrality as a political opinion.¹²⁹ The court stated that the alien's neutrality was no less a political choice than joining a particular faction.¹³⁰ The court believed that the decision not to join one group or the other constituted a political rejection of both camps, and, in that sense, expressed a political opinion.¹³¹ The court thought it unrealistic to confine the "political opinion" element to a choice between the two conflicting groups—the guerrillas or the government. By simply remaining neutral, the alien was expressing his opinion that he rejected the political ideologies of both groups. Only by allowing for this possibility would the alien be able to enjoy a genuine expression of political opinion under the statute.¹³²

However, merely neglecting to join a particular group without making a conscious decision to remain neutral does not constitute an expression of political opinion. In those cases where courts have accepted neutrality as a grounds for relief, the alien had previously rejected overtures from a certain political faction and had consciously decided to remain uninvolved. In *Bolanos-Hernandez*, the alien severed his connections with right-wing groups in El Salvador and then refused to join the guerrillas despite their threats.¹³³ In *Del Valle v. INS*, the alien declined specific invitations to join an insurgent group and remained neutral while pursuing his studies.¹³⁴ The court had no difficulty in recognizing the alien's "considered choice to take a neutral stance."¹³⁵ However, if the alien is apathetic about conditions in his country, and has given no thought to joining or avoiding political factions, claiming neutrality will not help the alien in his quest for asylum or withholding of deportation.¹³⁶ The mere non-commitment to either side of a political struggle does not provide enough evidence

129. *Bolanos-Hernandez v. INS*, 767 F.2d 1277, 1286 (9th Cir. 1984).

130. *Id.*

131. *Id.*

132. *Id.*

133. *Id.* at 1280.

134. 776 F.2d 1407, 1413-14 (9th Cir. 1985).

135. *Id.* at 1414. See also *Argueta v. INS*, 759 F.2d 1395 (9th Cir. 1985) (alien testified that he had political opinion that was not in accord with either government or guerrillas and therefore was politically neutral).

136. *Diaz-Escobar v. INS*, 782 F.2d 1488 (9th Cir. 1986). See also *Lopez v. INS*, 775 F.2d 1015 (9th Cir. 1985); *Saballo-Cortez v. INS*, 761 F.2d 1259 (9th Cir. 1984).

to show a likelihood of persecution, especially if nobody has threatened the alien. In this case, he would simply face the same danger as any other person living in the community.¹³⁷

While the Ninth Circuit is the only court to explore this neutrality principle in depth,¹³⁸ the BIA has rejected the principle where the alien waited until his deportation hearing to express his position. In *Matter of Vigil*,¹³⁹ the alien testified at his deportation hearing that he wanted to remain neutral during the civil war in El Salvador, yet he had done nothing before the hearing to evince his neutrality. The BIA decried the alien's plea for asylum because it did not want to blur the distinction between genuine neutrality and a fear of general violence in the community.¹⁴⁰ The BIA's decision concurred with the rationale of *Bolanos-Hernandez*, that the neutrality defense should be restricted to those cases where the alien has taken a principled position of non-involvement, rather than one of mere disinterest.¹⁴¹

2. Motivation

When determining whether the alien's political opinion could subject him to persecution, the BIA and the courts have little reason to examine the motivation behind an alien's political choice. The pertinent inquiry should be whether the alien has made a political decision. If the alien prefers one group over another, or if the alien remains neutral amidst the political fray, it should not matter why he has done so. An alien may make that kind of decision for non-political reasons, but that decision would not affect his political opinion in the statutory sense.

As a matter of policy, delving into the motivation for an alien's political decision would be undesirable. Section 208 and section 243(h) grant aliens the opportunity to take certain positions in the United States for which they may be persecuted elsewhere. It would be problematic to suggest that an alien should be rescued from perse-

137. See, e.g., *Zepeda-Melendez v. INS*, 741 F.2d 285 (9th Cir. 1984). "To the extent that [the alien] also faces danger because of his noncommitment to either side, his danger is the same as faced by other Salvadorans." *Id.* at 290.

138. In *Cruz-Lopez v. INS*, the Fourth Circuit would not take a position on the neutrality principle because the alien did not prove persecution. 802 F.2d 1518, 1520 n.3 (4th Cir. 1986).

139. Int. Dec. No. 3050 (BIA 1988).

140. *Id.* at 7 (citing *Bolanos-Hernandez v. INS*, 767 F.2d 1277 (9th Cir. 1985) (neutrality is a political opinion) and *Matter of Mogharrabi*, Int. Dec. No. 3028 (BIA 1987) (general fear of violence not enough for asylum)).

141. See *Arteaga v. INS*, 836 F.2d 1227 (9th Cir. 1988); *Turcios v. INS*, 821 F.2d 1396 (9th Cir. 1987); *Diaz-Escobar v. INS*, 782 F.2d 1488 (9th Cir. 1986).

cution because of his political opinion and then turn around and question the alien's motivation for that opinion. Congress did not intend to protect only those aliens whose motivation for political expression agrees with our own. Furthermore, examining the alien's motivation does not help determine whether the alien was persecuted on account of his political persuasion. Even the persecutors do not examine their targets in this degree of detail. If an alien remains neutral and refuses to support anyone, the persecutors will hardly pause to examine the alien's rationale for not siding with them, focusing instead on the alien's manifestations of political opinion.¹⁴²

In contrast, it is appropriate to examine the persecutor's motivation. If a government erroneously believes that an alien subscribes to a certain political philosophy, showing the government's motivation for persecuting him becomes relevant. A government normally would not persecute its own supporters. Therefore, in this situation, the central issue is how the government evaluates the alien's philosophy.¹⁴³ The government's perceptions assume a particularly important role if the alien has not taken any public position against those in power. After all, why would the government threaten such an alien or seek to do him harm?

This question confronted the court in *Hernandez-Ortiz v. INS*.¹⁴⁴ The BIA had held that the alien was not threatened because of political opinion, as neither the alien nor her family had engaged in any political activity in El Salvador.¹⁴⁵ Nevertheless, guerrillas continually beat, kidnapped, harassed and even killed relatives of the alien. In determining the significance of these tragic events, the court looked

142. See *Turcios v. INS*, 821 F.2d 1396, 1401 (9th Cir. 1987); *Bolanos-Hernandez v. INS*, 767 F.2d 1277, 1286-87 (9th Cir. 1985).

143. See *Diaz-Escobar v. INS*, 782 F.2d 1488 (9th Cir. 1986); *Hernandez-Ortiz v. INS*, 777 F.2d 509 (9th Cir. 1985); *Argueta v. INS*, 759 F.2d 1395 (9th Cir. 1985).

144. 777 F.2d 509 (9th Cir. 1985). The alien petitioned the Ninth Circuit for a review of the INS denial of her motion to reopen her deportation proceedings. The alien had originally entered the United States without inspection and had appealed her deportation. While that appeal was pending, the government deported her in error. She was eventually brought back to the United States. She made a motion to reopen the deportation proceedings so that she could apply for asylum on the basis of events that occurred during her stay in El Salvador when the government mistakenly deported her. *Id.* at 512. A motion to reopen must be supported by "affidavits or other evidentiary material." 8 C.F.R. § 103.5 (1989). The petition must also be based on new material evidence. 8 C.F.R. § 3.2 (1989). The abuse of discretion standard is used to review the BIA's decision that an alien has not satisfactorily explained his failure to apply for asylum before. *INS v. Abudu*, 108 S. Ct. 904 (1988).

145. *Hernandez-Ortiz*, 777 F.2d at 516.

at the government's motivation.¹⁴⁶ The government regarded Hernandez-Ortiz and her relatives as part of the opposition. Therefore, in reversing the BIA, the court concluded that the persecution centered on the government's perception of the alien's political preferences.¹⁴⁷ This solution dealt realistically with the problem, because the court emphasized the government's beliefs about the alien. The alien's actual political conduct no longer existed as the only pertinent factor.¹⁴⁸

The persecutor's motivation is not relevant unless his actions are meant to subvert the alien's political views.¹⁴⁹ Therefore, if a political faction engages in persecution as a part of a destabilization campaign against the government, this action would not necessarily constitute persecution for political opinion. One must examine whether the persecutor has targeted the alien because of the latter's particular characteristics or beliefs. This approach is consistent with the notion that the political ramifications of general civil disturbances, by themselves, do not involve the political opinion element.¹⁵⁰ There must be more substantiation.

3. Forcible Recruitment

Sometimes an alien is forced to join a guerrilla brigade. If he escapes, he may then fear persecution not only from the guerrillas, but also from the government forces. In *Maldonado-Cruz v. INS*,¹⁵¹ the

146. *Id.*

147. *Id.* In trying to arrive at the persecutor's motivation, the court thought it helpful to examine the relationship between the political views of the persecutor and those of the alien. *Id.*

148. The court expressed its view by stating that "it is irrelevant whether a victim actually possesses any of these opinions as long as the government believes that he does." *Hernandez-Ortiz v. INS*, 777 F.2d 509, 517 (9th Cir. 1985). See also *Argueta v. INS*, 759 F.2d 1395, 1397 (9th Cir. 1985) (government erroneously believed that alien was a guerrilla).

149. See *Hernandez-Ortiz v. INS*, 777 F.2d 509, 516-17 (9th Cir. 1985); *Matter of Acosta*, Int. Dec. No. 2986, at 32 (BIA 1985).

150. See *Campos-Guardado v. INS*, 809 F.2d 285, 290 (5th Cir. 1987), *cert. denied*, 484 U.S. 826 (1987). The Refugee Act of 1980 does not define the term "political opinion." However, there is evidence that Congress intended to exclude from the term "refugee" those aliens who were simply displaced by general civil strife. An early version of the Senate bill provided relief for displaced persons. The Senate Report stated that "[t]he new definition has been amended by the Committee to include 'displaced persons' who are not technically covered by the United Nations Convention to insure maximum flexibility in responding to the needs of the homeless who are of concern to the United States." S. REP. NO. 256, 96th Cong., 1st Sess. 4 (1979). However, the joint conference committee's explanatory statement left no doubt that the conference substituted a House amendment which incorporated the U.N. definition, thus rejecting the Senate's attempt to stray from that definition. See H. REP. NO. 781, 96th Cong., 1st Sess. 19 (1979).

151. 883 F.2d 788 (9th Cir. 1989).

alien faced such a dilemma. The alien was drafted into a guerrilla organization in El Salvador. When he escaped and applied for asylum in the United States, he feared harm from two fronts. First, he believed that the guerrillas would harm him because he had deserted them. Second, he feared that the military forces would persecute him because of his previous guerrilla activity.¹⁵²

The guerrillas' political strategy in *Maldonado-Cruz* focused on overthrowing the government by force. They welcomed additional guerrilla recruits and used their persuasive powers to enlist them. The guerrilla regime valued a loyal membership as this was the only way that the guerrillas' mission could succeed. Therefore, the alien's initial association with the guerrillas did not possess any element of persecution. The guerrillas wanted the alien's help and looked forward to the alien's energetic participation in their military ventures. However, the alien did not align himself with the guerrillas, and after his escape, he did not join the military forces either. The Ninth Circuit interpreted the alien's actions as an expression of neutrality in the on-going conflict, thus characterizing the alien's fear as one founded on political opinion.¹⁵³ The alien knew that the guerrillas would be upset about his decision, and he feared that they would convey their displeasure with him through terrorist tactics. But the court also determined that the alien had reason to fear government persecution since the authorities had labelled him a subversive because of his previous association with the guerrillas,¹⁵⁴ even though this association was involuntary. Thus, the court viewed both the government's and guerrillas' perceptions of the alien's activities to determine that the "political opinion" criterion was satisfied.

The result in *Maldonado-Cruz* does not mean that all guerrilla activity equates to an exercise in persecution. The alien in *Matter of Rodriguez-Mano*¹⁵⁵ had essentially the same fears as the alien in *Maldonado-Cruz*. However, Rodriguez-Mano had to refute allegations that his involuntary guerrilla service had rendered him ineligible for relief because he had persecuted others. Characterizing the guerrillas' objective as the overthrow of the government, the BIA decided that any harm arising incidentally out of such action should not be treated as persecution.¹⁵⁶ This assessment gave a degree of respectability to

152. *Id.* at 790.

153. *Id.* at 791.

154. *Id.* at 792.

155. Int. Dec. No. 3088 (BIA 1988).

156. *Id.* at 6-7.

the guerrillas' agenda that must have surprised even the alien, but the BIA did not want to expand the persecution definition. Instead, the BIA held that activities directly related to a civil war were not persecution, and that therefore recruitment by the guerrillas was not persecution.¹⁵⁷

In making its decision, the BIA must have visualized the frenzy involved in the guerrillas' recruitment. An alien's rejection of the guerrillas' overtures would lead to another phase of the insurgent strategy: not-so-gentle persuasion to convince the alien of his error. However, the BIA still did not perceive this conduct as persecution, since a guerrilla organization cannot afford continuous desertions within its ranks. If it had designated the guerrillas' conduct as persecution in the civil war context, the BIA feared that it would have expanded the number of freedom fighters that might be disqualified from relief.¹⁵⁸

The seemingly conflicting decisions in *Rodriguez-Mano* and *Maldonado-Cruz* can be reconciled by distinguishing between the general upheaval caused by guerrilla warfare from the coercion used to return an ex-guerrilla to the fold. The court in *Maldonado-Cruz* granted relief because it found the guerrillas had targeted the alien because of his desertion and his clear desire to discontinue any relationship with them. The guerrillas' pursuit of the alien had ceased to be mere recruitment. Furthermore, the court found it significant that the alien feared mistreatment because of his articulated neutrality.¹⁵⁹

4. Draft Evasion

Other considerations may arise when an alien evades military service in his own country. Under ordinary circumstances, a draft evader will not obtain asylum, even though his failure to serve may in itself constitute an expression of political opinion.¹⁶⁰ But where the

157. *Id.* at 8 (citing *Martinez-Romero v. INS*, 692 F.2d 595 (9th Cir. 1985); *Matter of Sanchez & Escobar*, Int. Dec. No. 2996 (BIA 1985); *Matter of Acosta*, Int. Dec. No. 2986 (BIA 1985)).

158. *Rodriguez-Mano*, Int. Dec. No. 3088, at 8.

159. *Maldonado-Cruz v. INS*, 883 F.2d 788, 791 (9th Cir. 1989).

160. *See Rodriguez-Rivera v. INS*, 848 F.2d 988 (9th Cir. 1988); *Espinoza-Martinez v. INS*, 754 F.2d 1536 (9th Cir. 1985); *Matter of Vigil*, Int. Dec. No. 3050 (BIA 1988); *Matter of Lee*, 13 I. & N. Dec. 236 (1969); *Matter of Liao*, 11 I. & N. Dec. 113 (1965). In *Kaveh-Haghig v. INS*, an alien claimed that Khomeini was conducting "an illegal, revolutionary war that [made] military service tantamount to persecution of all young males in the country." 783 F.2d 1321, 1323 (9th Cir. 1986) (per curiam). The Ninth Circuit denied asylum because,

government militia has a policy of engaging in atrocities, the alien's chances of gaining asylum relief improves.

In *M.A. A26851062 v. INS*,¹⁶¹ the Fourth Circuit addressed this issue on a motion to reopen an asylum proceeding. The BIA had denied the alien asylum relief because he had not shown that his military duties would require him to participate in atrocities. Finding that the BIA had imposed an unduly harsh burden of proof on the alien, the court insisted on inquiring further into the possibility that the alien, by not evading the draft, would participate in the government's misconduct.¹⁶² The court determined that that inquiry could be made only by first assessing the pervasiveness of the atrocities. It was confident that the likelihood of the alien's involvement in the government's atrocities increased as such misconduct became more widespread.¹⁶³ This approach departed from the BIA's doctrine that where the danger is widespread, the alien has less chance of making his case.¹⁶⁴ It preserved an opportunity for the alien to separate himself from the dreadful activities of a group bent on mischief, without having to provide any evidence that he would actually engage in atrocious conduct.

The court did not think the alien had to show that the atrocious acts stemmed from the policies of the government in power. The alien met his burden of proof when he showed that the government had neither the ability nor the desire to control the armed forces.¹⁶⁵ Furthermore, it did not matter whether it was the lawful government of the alien or some foreign invader who controlled the persecutors. In

"[a]bsent exceptional circumstances, it is not the place of the judiciary to evaluate the political justifications of the actions of foreign governments." *Id.*

Disproportionately severe punishment for a draft evasion attributable to persecution triggers other issues. See *M.A. A26851062 v. INS*, 858 F.2d 210, 215 (4th Cir. 1988), *reh'g granted*, 866 F.2d 660 (4th Cir. 1989); *Matter of Vigil*, Int. Dec. No. 3050, at 10 (BIA 1988); *HANDBOOK*, *supra* note 46, para. 169.

161. 858 F.2d 210 (4th Cir. 1988), *reh'g granted*, 866 F.2d 660 (4th Cir. 1989).

162. *Id.* at 218.

163. *Id.*

164. See *Matter of Fuentes*, Int. Dec. No. 3065 (BIA 1988); *Matter of Sanchez & Escobar*, Int. Dec. No. 2996 (BIA 1985); *Matter of Acosta*, Int. Dec. No. 2986 (BIA 1985). In these cases the BIA might have been preoccupied with the idea that the alien should have to show that he would be singled out for persecution. Under this theory the alien would be lost in the general melée as the danger intensified and therefore would be less of a target.

165. See *M.A. A26851062*, 858 F.2d at 210 (government unwilling or unable to control armed forces); *Lazo-Majano v. INS*, 813 F.2d 1432 (9th Cir. 1987) (persecution by single soldier whom government could not control was basis for well-founded fear); *Bolanos-Hernandez v. INS*, 767 F.2d 1277 (9th Cir. 1985) (persecution must be by government or group that government cannot control).

Matter of Salim, the BIA had accepted the alien's draft evasion as a basis for persecution since the alien, as a soldier in the Soviet army, would have been forced to commit atrocities on his own people.¹⁶⁶ The BIA tried to distinguish *Salim* from *M.A. A26851062* based on the fact that the source of the persecution in *Salim* emanated from foreign invaders. The court in *M.A. A26851062* did not find this distinction relevant. After all, the Salvadoran military had contravened the 1949 Geneva Conventions as a result of its atrocities. The court thought that there was no reason to give atrocities committed by domestic forces greater respect than those committed by forces under foreign control.¹⁶⁷

5. Insurrection

Some aliens find political satisfaction in evading a draft; others prefer to take an active role in organizing an underground opposition against the government in power. In countries that do not tolerate that opposition, aliens may resort to a coup d'état. If the coup fails, the alien may find himself at the mercy of the surviving government. The question presented in this context is whether fear of that danger should qualify the alien for asylum.

Ordinarily, one would expect that this sort of conduct would encounter severe punishment. Mindful of that prospect, the alien in *Dwomoh v. Sava*¹⁶⁸ argued that such punishment would constitute de facto political persecution, because the government in Ghana strove to silence all opposition.

The *Dwomoh* court acknowledged that no constitutional method of changing the government in Ghana existed at the time of the alien's conduct.¹⁶⁹ Therefore, the court was faced with a difficult policy question: whether it would protect an alien who had defied the laws of his own country and engaged in conduct which would not legitimately be tolerated elsewhere.¹⁷⁰ The court sympathized with the alien's belief that a coup d'état represented the only mechanism for changing his government. However, the BIA had reservations about

166. 18 I. & N. Dec. 311, 313 (1982).

167. *M.A. A26851062 v. INS*, 858 F.2d 210, 218 (4th Cir. 1988), *reh'g granted*, 866 F.2d 660 (4th Cir. 1989).

168. 696 F. Supp. 970 (S.D.N.Y. 1988).

169. *Id.* at 978.

170. An alien who advocates the overthrow of the United States Government by "force, violence, or other unconstitutional means" is excludable from the United States. Immigration & Nationality Act § 112(a)(28)(F), 8 U.S.C. § 1182(a)(28)(F) (1988).

the legitimacy of this claim, as the alien had not openly criticized the Ghanaian government before the attempted coup. Therefore, the BIA believed that the alien faced prosecution solely for the act of attempting a coup rather than persecution for his political views.¹⁷¹ The court countered this view by pointing out that the alien's political expressions alone could have resulted in his imprisonment.¹⁷² Therefore, only through his actions, rather than his opinions, could the alien guarantee success in changing the political status quo. Once he made the decision to proceed with his plan, he could not realistically discuss it if he hoped for success. However, the appropriate question is whether the alien's participation in this kind of activity should prevent him from meeting the criterion for political persecution.

At first glance, this question appears easily resolved because one would reasonably expect a government to protect itself from insurrection. Therefore, an alien like Dwomoh would normally receive little sympathy for his asylum claim. This assertion, however, has merit only if the alien's punishment truly results from prosecution for his acts rather than persecution for his beliefs. Therefore, in analyzing whether the alien is subject to retaliation for trying to remove a government or for evading a draft, one should focus on the nature and motivation underlying the prosecution.¹⁷³

If the country from which the alien seeks refuge does not guarantee basic human rights, the alien dissident should find greater sympathy for his claim. As a result, it is essential to take account of the political conditions in the alien's country.¹⁷⁴ This analysis puts the alien's conduct in perspective before resolving the persecution issue. The asylum regulations themselves provide guidance in this regard by

171. *Dwomoh*, 696 F. Supp. at 979.

172. *Id.*

173. *Dwomoh v. Sava*, 696 F. Supp. 970, 978 (S.D.N.Y. 1988). See HANDBOOK, *supra* note 46, para. 86.

174. See *Dwomoh*, 696 F. Supp. at 978-79. At the time of this alien's application, the government had to seek an advisory opinion from the State Department's Bureau of Human Rights and Humanitarian Affairs ("BHRHA"). Effective November 2, 1987, the BHRHA will cease giving advisory opinions on every asylum application. The objective is to give input that is not available to the INS. In special cases, therefore, the BHRHA will give an individual advisory opinion. Thus, from now on, the State Department's *Country Reports on Human Rights Practices* will be quite important in the final analysis of the alien's application. 64 INTERPRETER RELEASES 1215 (1987) (letter dated Oct. 21, 1987 from Edward H. Wilkinson, Director of Asylum Affairs, BHRHA, to Chief Immigration Judge William R. Robie). The State Department report on the human rights in Ghana was not very encouraging and the court used it as a guide in assessing the nature of the law on which the alien's prosecution was based. See *Dwomoh*, 696 F. Supp. at 978 & n.11, 979.

denying relief if the alien has committed a serious non-political crime.¹⁷⁵ Therefore, a political crime may be defined differently as the perspective varies.¹⁷⁶ This explains why a court may sympathize in some cases with a draft evader or a coup organizer despite the fact that each faces punishment for seemingly nonpolitical offenses. Conditions in some countries are so oppressive that aliens may feel the necessity to take action that may be misunderstood outside of its political context.¹⁷⁷ This suggests that an alien's actions must rest on genuine political motives and must focus on change in the political structure.¹⁷⁸ Further, an alien must ensure that his actions are not "grossly out of proportion to the alleged objective" and that a direct, causal link exists between the two.¹⁷⁹

175. 8 C.F.R. § 208.8(f)(1)(v) (1989). See also Immigration & Nationality Act § 243(h)(2)(C), 8 U.S.C. § 1253(h)(2)(C) (1988) (withholding of deportation must be denied if alien has committed serious non-political crime).

176. See *Dwomoh*, 696 F. Supp. at 978. The *Handbook* provides the rationale for giving the alien this protection. It recognizes that it is quite appropriate to exclude an alien who poses a threat to the state while at the same time recognizing that there are circumstances where the alien's conduct may be forgiven. It states:

The aim of this exclusion clause is to protect the community of a receiving country from the danger of admitting a refugee who has committed a serious common crime. It also seeks to render due justice to a refugee who has committed a common crime (or crimes) of a less serious nature or has committed a political offence.

HANDBOOK, *supra* note 46, para. 151.

177. The *Handbook* gives some guidance on the definition of a political crime. It says that "regard should be given in the first place to its nature and purpose i.e. whether it has been committed out of genuine political motives and not merely for personal reasons or gain." HANDBOOK, *supra* note 46, para. 152. See also Note, *Political Legitimacy in the Law of Political Asylum*, 99 HARV. L. REV. 450, 466 (1985).

178. See G. GOODWIN-GILL, *supra* note 45, at 60-61; HANDBOOK, *supra* note 46, para. 152.

179. See HANDBOOK, *supra* note 46, para. 152. In *McMullen v. INS*, 788 F.2d 591 (9th Cir. 1986), the court denied withholding of deportation relief to the alien because there were serious reasons to believe that the alien had committed serious non-political crimes. The alien proposed that an act should "be considered a political offense when (1) there was an insurrection or rebellion at the time the criminal acts were committed, and (2) the criminal acts were incident to or in furtherance of that insurrection or rebellion." *Id.* at 596. The court rejected the alien's focus on the state of mind and concentrated on the circumstances surrounding the alien's acts. It said that "[a] balancing approach including consideration of the offense's 'proportionality' to its objective and its degree of atrocity makes good sense." *Id.* (citing G. GOODWIN-GILL, *supra* note 45, at 61). The court was careful to observe, however, that for an act to be characterized as political, the alien must have political motivations. *McMullen*, 788 F.2d at 597. In the final analysis, it is the direct causal link between the crime and political objective, when balanced with the proportionality and atrocity, that warrants the "political crime" protection. *Id.* The court also drew a distinction between this case and the political offense exception in extradition proceedings. The analysis in extradition cases depends on the language of a particular treaty, while in withholding cases it depends on the standard in the U.N. Convention and Protocol which is reflected in INA § 243(h). *Id.* at 596. The political

6. Personal Dispute v. Personal Persecution

In *Lazo-Majano v. INS*,¹⁸⁰ the political opinion criterion arose in another context. Olympia Lazo-Majano, a thirty-four-year-old woman whose husband worked with a paramilitary group which the guerrillas pursued, alleged that she was repeatedly beaten and raped by a Sergeant Zuniga of the Salvadoran military because he knew that her husband had left El Salvador for the United States. According to Lazo-Majano, Zuniga spread rumors that she was a subversive.¹⁸¹ Upon finally reaching the United States herself, Lazo-Majano sought asylum under section 208 and withholding of deportation under section 243(h). The court was faced with the question whether Zuniga's conduct constituted persecution on account of Lazo-Majano's political opinion or merely a personal vendetta on Zuniga's part.¹⁸²

In her defense, Lazo-Majano alleged that Zuniga had spread rumors that she was a subversive. She contended that this constituted evidence of persecution for political opinion.¹⁸³ The question facing the court was whether Zuniga really believed these allegations or, alternatively, whether he had spread these rumors merely to cover his personal agenda.¹⁸⁴ The fact that Lazo-Majano asserted she wanted to escape from Zuniga, but continually returned to him and made no effort to complain about his conduct,¹⁸⁵ was sufficient to raise the question whether Zuniga made the accusations solely to subject Lazo-Majano to his carnal desires.¹⁸⁶ However, the court thought differently and held it was the "cynical imputation of political opinion" to the alien that mattered.¹⁸⁷ But the court could also have justified its position by recognizing that Zuniga's allegations might have reached the ears of other prospective persecutors. Thus, the alien would then

offense exception on which the alien in *McMullen* relied was restated recently in *Quinn v. Robinson*, 783 F.2d 776 (9th Cir.), *cert. denied*, 479 U.S. 882 (1986). The court said, "[f]irst, there must be an uprising—a political disturbance related to the struggle of individuals to alter or abolish the existing government in their country Second, the charged offense must have been committed in furtherance of the uprising." *Id.* at 817.

180. 813 F.2d 1432 (9th Cir. 1987).

181. *Id.* at 1433.

182. *Id.* at 1434.

183. *Id.* at 1433. In *Hernandez-Ortiz v. INS*, 777 F.2d 509, 517 (9th Cir. 1985), the court said that "it is irrelevant whether a victim actually possesses any of these opinions as long as the government believes that he does." See also *Argueta v. INS*, 759 F.2d 1395, 1397 (9th Cir. 1985).

184. See *Lazo-Majano v. INS*, 813 F.2d 1432, 1437 (9th Cir. 1987) (Poole, J., dissenting).

185. *Id.* at 1440.

186. *Id.* at 1439.

187. *Id.* at 1435.

have had a reasonable fear that these other persecutors would believe the sergeant's imputations and act against her on that basis.¹⁸⁸

One should note that Lazo-Majano did not receive threats because she refused to join a political organization. Thus, her case differed from that of *Argueta v. INS*,¹⁸⁹ where the alien was threatened because his persecutors actually believed that he was politically involved. Lazo-Majano's case also differed from *Bolanos-Hernandez*, in which the alien took a politically neutral position.¹⁹⁰ The *Lazo-Majano* court identified the alien's belief that the Armed Force was responsible for "lawlessness, rape, torture and murder" as a political opinion.¹⁹¹ If the alien was persecuted for this opinion, one might question whether she formulated it only after her own unfortunate experience. After all, the statute requires the persecution to be on account of political opinion. It does not explicitly cover persecution engendering a political opinion.¹⁹² Furthermore, although one might regard disbelief in the government's ability to control the military as a political statement, a close question existed as to whether Zuniga abused her for that reason.¹⁹³ However, it was encouraging that the court took a liberal view in assessing the political opinion requirement of the statute.

Some courts have resisted the temptation to assign a "political opinion" label so liberally to a government official's actions against an alien. For example, in *Zayas-Marini v. INS*,¹⁹⁴ the alien refused to involve himself in a smuggling scheme with one government official in Paraguay, while accusing another official of embezzlement. Subsequently, both officials threatened the alien. The court affirmed the

188. Note, "Political Opinions" of Refugees: Interpreting International Sources, 63 WASH. L. REV. 395, 412 & n.109 (1988).

189. 759 F.2d 1395 (9th Cir. 1985). The alien was threatened because the "death squad" believed that he was a member of a political organization. *Id.* at 1397. The court also found that the alien had chosen to remain "politically neutral." *Id.*

190. *Bolanos-Hernandez v. INS*, 767 F.2d 1277, 1280 (9th Cir. 1985).

191. *Lazo-Majano v. INS*, 813 F.2d 1432, 1435 (9th Cir. 1987).

192. An alien may qualify for asylum if he has a "well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion." Immigration & Nationality Act § 101(a)(42)(A), 8 U.S.C. § 1101(a)(42)(A) (1988). An alien will qualify for withholding of deportation "if the Attorney General determines that [the] alien's life or freedom would be threatened . . . on account of race, religion, nationality, membership in a particular social group, or political opinion." Immigration & Nationality Act § 243(h), 8 U.S.C. § 1253(h) (1988). See Note, *supra* note 188, at 415 n.128.

193. See *Lazo-Majano*, 813 F.2d at 1440 (Poole, J., dissenting). There was evidence that the alien kept returning to the persecutor's apartment and that she actually lived with the persecutor's sister for some time. *Id.* at 1440-41.

194. 785 F.2d 801 (9th Cir. 1986).

BIA's decision that the alien's political opinion did not result in his differences with these officials.¹⁹⁵ After all, the alien had close relationships with other members of the Paraguayan government and did not receive any threats from the two officials in question prior to his altercation with them. Further, despite the fact that the alien's political preferences were well known, the police did not detain the alien for anything more serious than non-political, curfew violations.¹⁹⁶ If the officials disliked the alien, the court could find no basis other than personal animosity.¹⁹⁷

In *Lazo-Majano*, the court did not treat the confrontation between the alien and the persecutor as personal, perhaps because of the persecutor's power. Zuniga, as a sergeant in the Armed Forces, held a threat over the alien's head to continue his domination. Judge Poole, in his dissent, characterized this conduct as merely the actions of a bully.¹⁹⁸ Lazo-Majano herself failed to clarify this issue by suggesting that Zuniga would have acted the same way, even if he was not a member of the military.¹⁹⁹ If genuine, these feelings indicated a personal conflict between the two parties, not a politically motivated persecution.

The Fifth Circuit dealt with a similar problem in *Campos-Guardado v. INS*,²⁰⁰ and yet reached a different conclusion. There, the alien visited an uncle who was involved in the agrarian reform movement in El Salvador and was raped by two men who attacked her uncle's family during the course of the visit. She subsequently recognized one of the attackers, who threatened to kill her if she disclosed his identity.

The alien tried to benefit from the political implication of the attack on her uncle, who was the chief of a local agricultural cooperative. The civil disturbances which arose from the agrarian reform movement eventually affected the uncle's farm, where the alien happened to be visiting. However, the court considered the alien's presence fortuitous and believed that if her attacker subsequently pursued her, it was solely because of his concern that she could identify him rather than because of her political opinion.²⁰¹ The court recognized

195. *Id.* at 806.

196. *Id.*

197. *Id.*

198. *Lazo-Majano v. INS*, 813 F.2d 1432, 1439 (9th Cir. 1987) (Poole, J., dissenting).

199. *See id.* at 1440.

200. 809 F.2d 285 (5th Cir.), *cert. denied*, 108 S. Ct. 92 (1987).

201. *See id.* at 297.

that the uncle's involvement in agrarian reform had political implications but asserted that no evidence existed that the alien herself was attacked for her own beliefs.²⁰² Clearly, the alien feared that her uncle's opponents might, in turn, attack her. However, she lacked the evidence to connect that persecution to her own real or perceived political opinion.

Clearly, however, in assessing the political nature of persecution, courts consider the persecutor's position of power. The *Lazo-Majano* court reflected this view by indicating that Zuniga asserted "the political opinion that a man has a right to dominate and [that] he . . . persecuted Olympia to force her to accept this opinion without rebellion."²⁰³ This trend continued in *Desir v. Ilchert*,²⁰⁴ when an alien refused to pay bribes to the Haitian security forces, the Ton Ton Macoutes, and as a result he was arrested, assaulted, and prevented from earning a living in Haiti.

The court perceived the relationship between *Desir* and the Ton Ton Macoutes as one pitting the weak against the powerful.²⁰⁵ This is analogous to the relationship in *Lazo-Majano*. In both cases, the government agents had the ability to carry out their threats due to their superior status and political power.²⁰⁶ The *Desir* court carefully contrasted these two cases with *Zayas-Marini*, in which the disagreement arose between social and political equals. In *Desir* no such semblance of equality existed, because the trademark of the persecutors was their power of intimidation. They exercised their authority through extortion. Therefore, *Desir's* failure to succumb to their demands placed him in a vulnerable position. The Ton Ton Macoutes could easily characterize *Desir* as disloyal and subversive, thus aligning the full force of the government against him. Thus, whether the victim actually has a political view at all is sometimes of little importance. All that matters is the persecutor's perception of the victim's refusal to cooperate.²⁰⁷ Therefore, the court in *Desir* accepted the fact that the

202. See *id.* at 289. See also *Pierre v. Rivkind*, 825 F.2d 1501 (11th Cir. 1987) (dispute with chief of Haitian security forces was personal in nature and not on account of political opinion). Cf. *Coriolan v. INS*, 559 F.2d 993 (5th Cir. 1977).

203. *Lazo-Majano v. INS*, 813 F.2d 1432, 1435 (9th Cir. 1987).

204. 840 F.2d 723 (9th Cir. 1988).

205. *Id.* at 728.

206. Compare *Lazo-Majano*, 813 F.2d at 1435, with *Desir*, 840 F.2d at 728.

207. *Desir*, 840 F.2d at 728. See also *Lazo-Majano v. INS*, 813 F.2d 1432 (9th Cir. 1987) (alien is at risk if persecutor thinks the alien guilty of political opinion); *Argueta v. INS*, 759 F.2d 1395 (9th Cir. 1985) (persecution based on political opinion where persecutors believed that alien was a guerrilla); *Hernandez-Ortiz v. INS*, 777 F.2d 509 (9th Cir. 1985) (alien's

Ton Ton Macoutes had attributed subversive views to the alien merely because he would not succumb to extortion.

However, something that begins as a personal dispute between two parties may blossom into government persecution, as was the case in *Blanco-Lopez v. INS*.²⁰⁸ There, the alien disagreed with one Gallos about the latter's treatment of an employee. Gallos retaliated by falsely informing the Salvadoran police that the alien was a guerrilla who illegally imported arms.²⁰⁹ The police arrested Blanco-Lopez and detained him and three others for three days. After his release, the security forces searched in vain for Blanco-Lopez, threatening to kill him because he was reported to be a guerrilla.²¹⁰

Interestingly, the initial dispute did not take place between the alien and any member of the government forces, making a decision as to whether the "personal" dispute had changed into "political" persecution more problematic. Although Gallos' false charges against Blanco-Lopez originated from a personal, non-governmental disagreement, the government's forces translated those charges into a search and destroy mission.²¹¹ They believed Gallos' allegations and sought to persecute the alien on that ground. Like the situation in *Lazo-Majano*, it did not matter whether Blanco-Lopez was in fact a guerrilla or a subversive.²¹² Rather it was the persecutors' designation

actual political views not relevant as long as government attributed certain political opinion to alien).

208. 858 F.2d 531 (9th Cir. 1988).

209. *Id.* at 532.

210. *Id.* at 532-33.

211. The court stated:

We thus find it irrelevant that Blanco-Lopez's conflict with the Salvadoran government may have been instigated in the first instance through a personal dispute with Gallos, for it developed into a situation in which the security forces believed him to be a guerrilla and attempted to persecute him for it.

Id. at 533-34.

212. Compare *Lazo-Majano v. INS*, 813 F.2d 1432, 1435 (9th Cir. 1987) (cynical imputation of political opinion is what counts), with *Blanco-Lopez v. INS*, 858 F.2d 531, 533 (9th Cir. 1988) (security forces believed alien to be guerrilla). In *Matter of Canas*, Int. Dec. No. 3074 (BIA 1988), the aliens lost the "imputation of political opinion" argument that the government would treat them as "subversives" or "guerrilla sympathizers" for their failure to perform military service. *Id.* at 20. The aliens had objected to military service because of their religion. The BIA viewed the aliens' "imputed political opinion" argument as not resting on the aliens' particular circumstances, but on the belief that any male who failed to perform military service was subject to prosecution. This was not sufficient to prevail because mere failure to serve would not mean automatic characterization as a subversive. *Id.* According to the BIA, a reasonable person in the aliens' position would have a fear of prosecution for his failure to perform his military duty rather than a fear of persecution when all violators receive the same treatment. *Id.* at 17.

that mattered. It was pointless to argue about Blanco-Lopez's affiliation if the government had already labelled him a guerrilla.

B. *Membership in a Particular Social Group*

An alien facing deportation may qualify for asylum if he is threatened with persecution on account of his race, religion, nationality, membership in a particular social group, or political opinion. Persecution based on "membership in a particular social group" was first accepted as a legitimate basis for asylum in the Convention Relating to the Status of Refugees.²¹³ Its inclusion was fortuitous, considering the original U.N. Committee did not recognize this ground when it drafted the refugee definition.²¹⁴ The draftsmen intended the "social group" criterion to cover any possible gap in the definition since it was broader than the "race", "religion" or "nationality" components.²¹⁵ The term itself is difficult to define. Authorities suggest that it encompasses people of "similar background, habits or social status"²¹⁶ or people who share the same culture, language and education.²¹⁷ As the cases illustrate, this basis for political asylum does not lend itself to easy application.

In *Matter of Acosta*,²¹⁸ the BIA provided some guidance on the construction of "membership in a particular social group." It looked at the context in which the phrase appeared and found that each of the persecution grounds dealt with an "immutable characteristic."²¹⁹ But the BIA was careful to explain that such a characteristic not only had to be one that the alien was powerless to change, but also one that he should not be required to change because of its fundamental nature.²²⁰

In *Acosta*, the BIA did not regard members of a taxi cooperative

213. See Convention, *supra* note 15, art. 1(A)(2).

214. A. GRAHL-MADSEN, *supra* note 45, at 219. The U.N. Conference of Plenipotentiaries added the term. See *U.N. Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, Draft Convention Relating to the Status of Refugees* [hereinafter *U.N. Conference*], U.N. Doc. A/Conf.2/SR.23, at 8 (1951).

215. A. GRAHL-MADSEN, *supra* note 45, at 219.

216. HANDBOOK, *supra* note 46, para. 77.

217. *Matter of Acosta*, Int. Dec. No. 2986, at 30 (BIA 1985); G. GOODWIN-GILL, *supra* note 45, at 30.

218. Int. Dec. No. 2986 (BIA 1985).

219. *Id.* at 56. See also A. GRAHL-MADSEN, *supra* note 45, at 217; G. GOODWIN-GILL, *supra* note 45, at 30; Helton, *Persecution on Account of Membership in a Social Group as a Basis for Refugee Status*, 15 COLUM. HUM. RTS. L. REV. 39, 48 (1983).

220. *Acosta*, Int. Dec. No. 2986, at 31. See also *Matter of Vigil*, Int. Dec. No. 3050 (BIA 1988), where the BIA took the view that the factors in that case—age, living environment,

in El Salvador to be members of a particular social group.²²¹ The group had two common characteristics, namely driving a taxi and failing to participate in the work stoppages organized by the guerrillas. These characteristics did not meet the criterion of immutability because the taxi drivers could either change their jobs or cooperate with the guerrillas.²²²

Occasionally, an alien will argue that violence against his family is evidence that his life or freedom will be threatened. Some courts have paid particular attention to the family's experience in trying to assess the potential danger to the alien. For example, in *Hernandez-Ortiz v. INS*,²²³ the court acknowledged that the alien had described specific incidents of threats and violence to her family—"a small, readily identifiable group."²²⁴ The court did not decide whether the alien's membership in this family unit was sufficient in itself to prove her claim. However, it was certainly relevant to the question.²²⁵

The attempt at defining the term "particular social group" has been complicated by the fact that even the Handbook acknowledges that mere membership in that group will not normally support a claim for refugee status, absent special circumstances.²²⁶ Unfortunately, the meaning of "special circumstances" is also unclear.²²⁷

The definition of a "particular social group" must be limited to some degree. Surely it cannot include every segment of a population

military status—are not factors that are "fundamental to individual identity or conscience." Thus the alien's group did not qualify as a "particular social group." *Id.* at 5.

221. *Acosta*, Int. Dec. No. 2986, at 31-32.

222. *Id.* at 32.

223. 777 F.2d 509 (9th Cir. 1985).

224. *Id.* at 516.

225. *Id.* at 515. See also *Del Valle v. INS*, 776 F.2d 1407 (9th Cir. 1985); *Maroufi v. INS*, 772 F.2d 597 (9th Cir. 1985); *Argueta v. INS*, 759 F.2d 1395 (9th Cir. 1985); *Blum*, *supra* note 20, at 355.

226. See HANDBOOK, *supra* note 46, para. 79. "Mere membership of a particular social group will not normally be enough to substantiate a claim to refugee status. However, there may be special circumstances where mere membership can be a sufficient ground to fear persecution." *Id.* See also *Martinez-Romero v. INS*, 692 F.2d 595, 596 (9th Cir. 1982).

227. Aliens have tried in many ways to show that their situation is peculiar. In *Mendez-Efrain v. INS*, 813 F.2d 279 (9th Cir. 1987), there was some controversy over a land redistribution program in El Salvador through which the alien's family had received some land. The alien believed himself in danger because other beneficiary families had been threatened and he was the eldest son in his family. The court held that the alien could not be granted relief in the absence of specific evidence that the previous landowners had targeted the alien's group. *Id.* at 282. See also *Zepeda-Melendez v. INS*, 741 F.2d 285, 290 (9th Cir. 1984) (alien's status as young, urban male not specific enough for asylum); *Chavez v. INS*, 723 F.2d 1431, 1434 (9th Cir. 1984) (alien's assertions of potential persecution based on remote membership in union not convincing and status as a young, urban male not specific enough for asylum).

that has something in common. The confusion surrounding its scope explains the difficulty which many aliens have encountered in designating young, working class, urban males as a particular social group.²²⁸ Because this is a very broad group, courts find it difficult to make someone eligible for refugee status on the basis of mere membership in this class.

No doubt there are certain situations where an alien's membership will qualify him for relief. But in those cases where aliens have alleged that persecution would be based on their status as young, urban males, they also assert that they would suffer because they had not supported the guerrillas in El Salvador. In *Sanchez-Trujillo v. INS*,²²⁹ aliens introduced evidence that the Salvadoran military tended to be more suspicious of young males.²³⁰ This was not surprising because one would expect young males to be more active in political opposition and more sympathetic to the rebel cause. But even this possibility was a far cry from holding that youth and gender alone should be the dispositive factors in any persecution scheme.²³¹ Since a group of "young, working class, urban males" includes so many different kinds of people with different lifestyles and interests, it would be pointless to try classifying them with any degree of particularity. This group is simply a "demographic division" and the term, "particular social group," should mean more than that.²³² A different conclusion would allow any broad segment of the population to attain refugee status once it was exposed to some serious risk of persecution arising from general conditions of unrest.²³³

Nevertheless, in *Castaneda-Hernandez v. INS*,²³⁴ the Sixth Circuit asked the BIA to reconsider the case of a young Salvadoran because it thought that the BIA had not given much consideration to the claim that the alien would be subject to persecution on the basis of membership in a particular social group. The alien advanced the traditional argument that the military would brand him as a subversive because he had avoided military service. One affidavit attested to the threat of persecution that hovered over young men who had left

228. See *Zepeda-Melendez v. INS*, 741 F.2d 285 (9th Cir. 1984); *Chavez v. INS*, 723 F.2d 1431 (9th Cir. 1984). See also *Vides-Vides v. INS*, 783 F.2d 1463 (9th Cir. 1986).

229. 801 F.2d 1571 (9th Cir. 1986).

230. *Id.* at 1577.

231. *Id.*

232. *Id.*

233. A court can distinguish a particular social group from a demographic division only by assessing the facts in a particular context. *Id.* at 1576 & n.7.

234. 826 F.2d 1526 (6th Cir. 1987).

El Salvador because the government viewed them as conspirators against the regime in power.²³⁵ The court was concerned that the BIA had not taken this aspect seriously. In its decision, the Sixth Circuit seemed to give future claimants hope that there may be something to this concept of a "particular social group."

Despite the Sixth Circuit's apparent optimism, no other court has endorsed the theory that mere membership in a particular social group will bring relief.²³⁶ Even where aliens allege that they will be persecuted because they are young, urban males or members of some particular family, courts eventually focus on the political opinion component of asylum.²³⁷ Admittedly, it may be relevant that an alien is a young and vibrant opponent of the government. However, this characterization only becomes important because the government views the opponent in political terms. Therefore, the alien's claim inevitably comes down to one involving persecution on account of political opinion, which may arise from the alien's identification with some organization.²³⁸ Possibly, the special circumstances required for a recognition of "social group" persecution really may involve the

235. *Id.* at 1528. The court was also concerned with the fact that the BIA may not have complied with the more generous asylum standard of *INS v. Cardoza-Fonseca*, 480 U.S. 421 (1987), but in remanding the case, the court also instructed the BIA to give a more thorough review of the affidavits supporting the risky status of the young alien. *Castaneda-Hernandez*, 826 F.2d at 1531.

236. *Castaneda-Hernandez*, 826 F.2d at 1531.

237. In *Cruz-Lopez v. INS*, the alien defined the social group as "affluent students who attend private schools, have relatives in the intelligentsia, have received direct threats against their lives, and have friends and family members who have been singled out for persecution." 802 F.2d 1518, 1520 n.2 (4th Cir. 1986). The court expressed no opinion on whether the alien properly identified the type of social group required by the statute. The court preferred to deal with the alien's probability of persecution. *Id.* at 1521-22.

238. For example, in *Sanchez-Trujillo v. INS*, 801 F.2d 1571 (9th Cir. 1986), the alien tried to convince the court of his vulnerability as a young, urban, working class male in El Salvador. The Ninth Circuit stated as follows:

Although a substantial number of the victims have been young males—which would hardly be surprising in any violent conflict—the IJ and the BIA reasonably found that the evidence was inconclusive to establish that mere age and gender, even when combined with labor class background, urban residence, or political neutrality, had any bearing on the likelihood of persecution. Instead, the evidence indicates that the risk of persecution relates principally to the existence of actual or imputed political opinion.

Id. at 1577.

The court in *Hernandez-Ortiz v. INS*, 777 F.2d 509 (9th Cir. 1985), took a similar approach. "The fact that there have been a number of threats or acts of violence against members of an alien's family is sufficient to support the conclusion that the alien's life or freedom is endangered." *Id.* at 515. The court added in a footnote: "Because of the conclusion we reach regarding the political-opinion issue, we need not consider Hernandez-Ortiz's contention that her family constitutes a 'social group' for purposes of section 243(h)." *Id.* at 517 n.8.

political element. The persecutor's motivation for attacking some young member of a particular social group may depend on the persecutor's assessment of that group as a political threat to the government. But, the alien will have difficulty proving that he will be persecuted on account of mere membership in that group.²³⁹

The aliens' "social group" rationale for relief likewise failed in the recent case, *Matter of Fuentes*.²⁴⁰ The alien must have thought that his case was strong enough to bring him within the special circumstances envisaged by the Handbook.²⁴¹ The alien was a former member of the national police in El Salvador who feared persecution by leftist insurgents there. At first blush, the BIA's position seemed encouraging for the alien because it conceded that the alien's status as a former policeman was an immutable characteristic,²⁴² which the BIA had already prescribed as a necessary element of a "particular social group."²⁴³ Next, the BIA conceded the possibility that, in appropriate circumstances, mistreating an alien because of his job as a policeman could be persecution.²⁴⁴ However, the alien was unable to convince the BIA that he had satisfied the special circumstances which would allow him to benefit from his identification with a particular social group. Moreover, the alien could not point to any examples of mistreatment that were tied to his status as a former policeman.²⁴⁵

Another disappointment awaited the alien in this case. The ongoing conflict in El Salvador made the BIA unwilling to characterize a policeman or a guerrilla as a victim of persecution. This reluctance

239. See, e.g., *Maroufi v. INS*, 772 F.2d 597 (9th Cir. 1985); *Chavarria v. U.S. Dep't of Justice*, 722 F.2d 666 (11th Cir. 1984); *Shoae v. INS*, 704 F.2d 1079 (9th Cir. 1983). In *Ananeh-Firempong v. INS*, 766 F.2d 621 (1st Cir. 1985), the First Circuit was somewhat sympathetic to the alien by recognizing that the facts of that case, if true, would qualify the alien for section 243(h) relief on account of membership in a social group. The facts of the case included "the house arrest of [the alien's] parents, the beating of her nephew, the seizure of the family's bank account, the persecution of petitioner's tribe, social class, and political persuasion." *Id.* at 626.

240. Int. Dec. No. 3065 (BIA 1988).

241. The *Handbook* makes this point: "Mere membership of a particular social group will not normally be enough to substantiate a claim to refugee status. There may, however, be special circumstances where mere membership can be a sufficient ground to fear persecution." *HANDBOOK*, *supra* note 46, para. 79. See also *Zepeda-Melendez v. INS*, 741 F.2d 285, 290 (9th Cir. 1984); *Chavez v. INS*, 723 F.2d 1431, 1434 (9th Cir. 1984); *Blum*, *supra* note 20, at 354.

242. *Fuentes*, Int. Dec. No. 3065, at 6.

243. *Matter of Acosta*, Int. Dec. No. 2986, at 31 (BIA 1985).

244. *Matter of Fuentes*, Int. Dec. No. 3065, at 6 (BIA 1988).

245. *Id.*

is understandable because if the BIA had accepted the proposition that either side was victimizing the other, then all participants in either camp would be ineligible for asylum or withholding because of their characterization as "persecutors."²⁴⁶ Such an expansive definition of persecution would have represented a definite policy shift against the interest of aliens. As things now stand, aliens have a hard enough time making their case. This new concept of persecution would have worsened their plight.

Presently, the courts are reluctant to grant asylum or withholding relief to an alien based on persecution caused by the alien's membership in a particular social group. Even if a court accepts the argument that the alien is a member of a particular social group, the alien still must establish a nexus between his membership and the alleged persecution. This has proved difficult to do.

IV. A QUESTION OF ELIGIBILITY: PARTICULARLY SERIOUS CRIME

Section 243(h) requires the Attorney General to withhold the deportation of certain aliens.²⁴⁷ Among the statutory exceptions is one that denies relief if the Attorney General determines that "the alien, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of the United States."²⁴⁸ This language comes from article 33.2 of the U.N. Convention,²⁴⁹ and although the draftsmen discussed the ramifications of that provision, they did not leave any clear statement as to its meaning. Therefore, in answering the basic question whether there must be both a finding that the alien has been convicted and a finding that he is a danger to the community, courts have relied on their own interpretation of the language. Courts have held that no need exists for two findings because the alien's conviction of a particularly serious crime means that the alien is dangerous to the community.²⁵⁰ Thus, both the courts

246. *Id.* at 5-6. The Attorney General will not grant asylum or deportation withholding relief if the alien "participated in the persecution of any person on account of . . . membership in a particular social group." Immigration & Nationality Act §§ 243(h)(2)(B), 208(a), 101(a)(42)(B), 8 U.S.C. §§ 1253(h)(2)(B), 1158(a), 1101(a)(42)(B) (1988).

247. Immigration & Nationality Act § 243(h)(1), 8 U.S.C. § 1253(h)(1) (1988).

248. *Id.* § 243(h)(2)(B), 8 U.S.C. § 1253(h)(2)(B).

249. Convention, *supra* note 15, art. 33.2.

250. *Arauz v. Rivkind*, 845 F.2d 271 (11th Cir. 1988); *Ramirez-Ramos v. INS*, 814 F.2d 1394 (9th Cir. 1987); *Crespo-Gomez v. Richard*, 780 F.2d 932 (11th Cir. 1986); *Matter of Carballes*, Int. Dec. No. 3007 (BIA 1986).

and the BIA believe that there is a cause and effect relationship between convictions and dangerousness.

Section 243(h) requires the Attorney General to assess the present dangerousness of an alien who has been convicted.²⁵¹ The phrase, "having been convicted by a final judgment of a particularly serious crime," follows "the alien."²⁵² Therefore, the Attorney General should not make any determination unless he is dealing with a convicted alien. This suggests that there should be two findings: one of conviction, and the other of dangerousness. The statute requires the Attorney General to judge whether the alien shall remain in the United States. Among other things, he should consider the effect of the alien's conviction on the community. If Congress wanted to equate conviction with dangerousness, it could have made relief unavailable to any alien who has been convicted. The fact that section 243(h) includes both provisions suggests that there is no direct relationship between conviction and dangerousness. Reading the section to make an alien's conviction enough to exclude him from relief renders the "danger" component surplusage. It also shifts the emphasis from the Attorney General's determination that the convicted alien is a community threat, to a simple conclusion that the alien has been convicted of a particularly serious crime. Surely, Congress did not intend this result.

The BIA recently interpreted the statute in *Matter of Carballé*.²⁵³ The BIA decided that "the Act does not require two separate and distinct factual findings [to] be made in order to render an alien ineligible for withholding of deportation."²⁵⁴ The BIA agreed that the INS had to show that the alien was a danger to the community and that the statute provided the necessary guidance on that determination.²⁵⁵ But, the BIA believed that the alien's conviction made the alien only "presumptively" dangerous.²⁵⁶ One could have hoped for a clearer explanation than that. Apparently, the alien would have the opportunity to overcome the presumption. That opportunity would support the proposition that dangerousness is not an indispensable el-

251. The alien's deportation cannot be withheld if the Attorney General "determines that the alien . . . constitutes a danger to the community of the United States." Immigration & Nationality Act § 243(h)(2)(B), 8 U.S.C. § 1253(h)(2)(B) (1988) (emphasis added).

252. *Id.*

253. Int. Dec. No. 3007 (BIA 1986).

254. *Id.* at 4.

255. *Id.* at 4-5.

256. *Id.* at 5.

ement of a serious crime.²⁵⁷

The INS argued against a "two findings" requirement, relying on the legislative history of section 243(h) for support. A congressional report noted that an exception exists for "aliens . . . who have been convicted of particularly serious crimes which make them a danger to the community of the United States."²⁵⁸ This language does not support the INS position because it clearly limits the disqualifying crimes to those which put the community in danger.²⁵⁹ That language does not suggest that all "particularly serious crimes" automatically fall into that category.

Some courts are apprehensive about requiring a determination of an alien's danger to the community.²⁶⁰ This concept is not foreign to the INA since, in the same section, there is another exception which denies relief if the Attorney General determines that "there are reasonable grounds for regarding the alien as a danger to the security of the United States."²⁶¹ This exception is even more troublesome because the only limitation on this determination of an alien's dangerousness is a "reasonable grounds" basis.²⁶²

257. The BIA must have rejected this possibility. In any event, the BIA did not deal with the requirement that the alien must be dangerous to the "community." The ninety-year-old man who murders his gravely ill wife because they both want to end her suffering can hardly be said to be a danger to the community. Yet there is a powerful argument that this murder would be a "particularly serious crime." Or if one concedes the commission of such a crime and then the alien becomes totally physically disabled, one would have a hard time showing the alien's danger to the community.

258. H.R. REP. NO. 608, 96th Cong., 1st Sess. 18 (1979).

259. There is a difference between the language "aliens . . . who have been convicted of particularly serious crimes, which makes them a danger to the community," and the language of the report. The report language suggests that there must be a finding that the conviction is one that makes the alien dangerous, while the former regards the conviction itself as including the finding of dangerousness. *Cf.* Anker, *supra* note 16, at 51. One author has stated that "[c]onsidering significantly egregious behavior, such as the commission of a serious criminal act which makes the applicant a substantial threat to the community, is relevant to the exercise of discretion in asylum." *Id.* This language identifies the relevant act as one that makes the alien a danger to the community. While the district director must deny asylum if the alien has been convicted of a particularly serious crime, 8 C.F.R. § 208.8(f)(1)(iv) (1989), the immigration judge and the BIA may use their discretion despite the alien's convictions. *Castro-O'Ryan v. INS*, 847 F.2d 1307 (9th Cir. 1988).

260. *See, e.g., Zardui-Quintana v. Richard*, 768 F.2d 1213, 1222-23 (11th Cir. 1985) (Vance, J., concurring).

261. Immigration & Nationality Act § 1253(h)(2)(D), 8 U.S.C. § 1253(h)(2)(D) (1988).

262. The INA requires the exercise of reasonable judgment. For example, an alien "whom the consular officer or the Attorney General knows or has reasonable ground to believe probably would . . . engage . . . in other activity subversive to the national security" can be excluded from the United States. Immigration & Nationality Act § 212(a)(29), 8 U.S.C. § 1182(a)(29) (1988). There is little reason to fear the difficulty involved in judging an alien's dangerousness,

A similar phrase caused concern during the drafting stage of the Convention. The delegate from the Holy See was uncomfortable with it until the United Kingdom delegate explained that states must have the leeway to determine whether there were "sufficient grounds for regarding any refugee as a danger to the security of the country."²⁶³ Since the delegates were concerned that states should have flexibility in balancing their security interests with genuine needs of refugees, they focused on identifying criminals who not only represented security problems, but had a propensity for infecting the community.²⁶⁴

The requirement of a conviction for a "particularly serious crime" provides a better guide to determining an alien's dangerousness. If the INS finds it difficult to assess an alien's dangerousness in one exception, then it should have the same difficulty in the other. Although courts have denied the necessity of making a dangerousness assessment once a conviction has been proved, one must wonder why some of the same courts find it necessary to uphold the BIA's opinion on this same ground. For example, in *Mahini v. INS*,²⁶⁵ the Ninth Circuit agreed with the BIA that the alien's drug dealing was a particularly serious crime. However, the court further stated that the BIA was correct in ruling that the alien was a danger to the community because of "heroin's deleterious effect on people."²⁶⁶ If a dual finding of conviction and dangerousness was unnecessary, the BIA should have considered only the conviction in denying relief to the alien. The important issue was whether the alien had committed a particularly serious crime. Apparently, the court wanted to justify the BIA's decision regarding the alien's dangerousness, not merely to relate it to the seriousness of the crime, but because the statute required that finding. Had the court been content to rely solely on the conviction as automatic proof of dangerousness, it would not have had to assure us that "the Board did not err in ruling that the petitioner constituted a danger to the community within the meaning of section 243(h)(2)(B)" of

even if it involves assessing the alien's potential for recidivism. If an alien faces possible death upon returning to his native country, avoiding the alien's petition on the basis of administrative convenience is insufficient. Judge Vance's concerns for the practical problems involved in making the dual findings under section 243(h)(2)(B) were somewhat exaggerated. See *Zardui-Quintana*, 768 F.2d at 1222-23 (Vance, J., concurring).

263. *U.N. Conference*, *supra* note 214, U.N. Doc. A/Conf.2/SR.16, at 7-8.

264. See *id.* at 7 (French delegate argued for a distinction between undesirable elements and genuine refugees).

265. 779 F.2d 1419 (9th Cir. 1986).

266. *Id.* at 1421.

the Refugee Act.²⁶⁷

The Ninth Circuit had another opportunity in *Ramirez-Ramos v. INS*²⁶⁸ to interpret section 243(h)(2)(B). The seriousness of the crime was undisputed.²⁶⁹ However, the fortuitous convergence of the two factors in these drug cases—the seriousness of the crime and the danger to the community—did not establish the permanent cause and effect relationship sought by the *Ramirez-Ramos* court. Yet the court persisted in its denial of a two-step requirement because the statute excludes from relief those dangerous aliens “who have been finally convicted of serious crimes.”²⁷⁰ Though it was reasonable, this position failed to support the court’s conclusion that the alien was a danger to the community because he was convicted of a particularly serious crime. It is one thing to say that the statute requires the Attorney General to look for dangerous aliens among the convicted only, but it is quite another to say that a conviction automatically leads to a finding of dangerousness. Unfortunately, the court in *Ramirez-Ramos* thought it was upholding the automatic connection when it accepted the proposition limiting the category of dangerous aliens to those who were convicted criminals.²⁷¹

The court must have been troubled by its position in *Mahini* where it sanctioned the BIA’s explanation of the relationship between

267. *Id.* By finding that the BIA did not err on this point, the court implied that the BIA had to make a finding that the alien was dangerous. It is doubtful that this separate finding would be required if the BIA found the commission of a particularly serious crime.

268. 814 F.2d 1394 (9th Cir. 1987).

269. *Id.* at 1397. An alien is deportable for being a drug addict. Immigration & Nationality Act § 241(a)(11), 8 U.S.C. § 1251(a)(11) (1988). The statute does not even require a conviction. If an alien is convicted, he cannot benefit from a judicial recommendation against deportation that would be available to aliens who are convicted of crimes involving moral turpitude. *Id.* § 241(b), 8 U.S.C. § 1251(b). In other words, Congress regards involvement with drugs as such a serious matter that no waiver from deportation exists unless conviction is for a single offense of simple possession of 30 grams or less of marihuana. In addition, the alien must have a prescribed close family relationship with a citizen or lawful permanent resident, separation from whom would cause extreme hardship, in order to avoid deportation. Even then, the Attorney General has discretion to grant the waiver. *Id.* § 241(f)(2), 8 U.S.C. § 1251(f)(2).

270. *Ramirez-Ramos*, 814 F.2d at 1397.

271. *Id.* This limitation is reasonable, but it does not follow that all aliens who have committed particularly serious crimes constitute a danger to the community. The statute can be interpreted to mean that the Attorney General must look for the dangerous aliens among convicts only. In commenting on Convention article 33.2, one author has said that “[a]s to the second group of ‘dangerous persons,’ they comprise only cases of a final judicial decision in particularly serious crimes.” N. ROBINSON, CONVENTION RELATING TO THE STATUS OF REFUGEES: ITS HISTORY, CONTENTS AND INTERPRETATION 164 (1953) (footnote omitted). Therefore, the alien must first be a convict in order to qualify for the group.

the heroin seller and his dangerous impact on the community.²⁷² Because the BIA ruled that the alien was a danger to the community within the meaning of section 243(h)(2)(B), the court may have been concerned that this "danger" element would be viewed as a separate requirement. The court in *Ramirez-Ramos* side-stepped this issue by treating the BIA's explanation about the heroin menace as a gratuitous gesture that did not convert the statute into a two-step procedure.²⁷³

In *Crespo-Gomez v. Richard*,²⁷⁴ an Eleventh Circuit case, the alien was convicted of cocaine possession and there was no disagreement about the seriousness of the crime. The court refused to make two separate findings because the two clauses of the statute were not connected by a conjunction.²⁷⁵ Had Congress clearly stated that the alien must be convicted of a particularly serious crime *and* be a danger to the community, there would be little room for disagreement. Clearly, this case exemplifies the sometimes inconsistent results of statutory interpretation. The question is whether one can find a requirement of two separate findings even without the word "and." The court seemed rather confident that "the only finding required by [section 243(h)(2)(B)] is that the alien has been convicted of a 'particularly serious crime.'"²⁷⁶ One might be just as confident in making the observation that the statute requires the Attorney General to *determine* that "the alien . . . constitutes a danger to the community of the United States."²⁷⁷ Therefore, in the interest of consistency, the court should not have substituted a statutory determination about criminal conduct for a finding about the alien's danger to the community and, simultaneously, insisted that a conjunction was the only way to sustain the requirement of two findings.

Congress knew full well how to impress an alien with the consequences of criminal conduct since an alien may be deported if he is

272. See *Mahini v. INS*, 779 F.2d 1419, 1421 (9th Cir. 1986).

273. *Ramirez-Ramos v. INS*, 814 F.2d 1394, 1397 (9th Cir. 1987). In *Mahini*, the BIA must have realized that a determination about the alien's danger to the community was necessary. But, under section 243(h)(2)(B), denial of relief is dictated only if the statutory determination is made concerning a convicted alien. Pursuant to the statute, the Attorney General determines whether the alien constitutes a danger to the community of the United States after the alien is convicted. Immigration & Nationality Act § 243(h)(2)(B), 8 U.S.C. § 1253(h)(2)(B) (1988).

274. 780 F.2d 932 (11th Cir. 1986).

275. *Id.* at 934. See also *Ramirez-Ramos v. INS*, 814 F.2d 1394, 1397 (9th Cir. 1987).

276. *Crespo-Gomez*, 780 F.2d at 934-35.

277. Immigration & Nationality Act § 243(h)(2)(B), 8 U.S.C. § 1253(h)(2)(B) (1988).

"convicted of a crime involving moral turpitude committed within five years after entry."²⁷⁸ This deportation language is closer to the Eleventh Circuit's interpretation of section 243(h)(2)(B) than the actual language of the section. The court offered no explanation for the differences in language in the two sections. If Congress had wanted to restrict the inquiry to a finding of criminal conviction, it could have used language that definitively would have done so. The court in *Crespo-Gomez* suggested that the presence of a conjunction in the statute was the only way to require two findings.²⁷⁹ Arguably, Congress used different language in section 243(h)(2)(B) to require something more than a single finding.²⁸⁰

It is possible for a convicted alien to present no danger to the community. If not, then the courts' interpretation requiring only one finding—conviction of a serious crime—would be valid. One reasonable interpretation of the statute is that the Attorney General must *determine* the alien's dangerousness as long as he is dealing with a convicted alien. The government should not apply the section mechanically once it has obtained a conviction, without pausing to reflect on the alien's *current* danger to others.²⁸¹

It is noteworthy that the grounds of ineligibility for withholding of deportation do not parallel those of asylum. However, by regulation, the district director must also deny asylum if the alien has been convicted of a particularly serious crime.²⁸² The regulation does not affect the discretion of the immigration judge or of the BIA. Once the alien is in exclusion or deportation proceedings, he may reapply for asylum, subject to the discretion of the immigration judge.²⁸³ The

278. *Id.* § 241(a)(4), 8 U.S.C. § 1251(a)(4).

279. *Crespo-Gomez v. Richard*, 780 F.2d 932, 934 (1986).

280. If conviction for a particularly serious crime means that the alien is a danger to the community, then Congress could simply have required conviction as the disqualifying element in the statute. Congress' approach makes the conviction of a crime involving moral turpitude a deportable ground. Compare Immigration & Nationality Act § 243(h)(2)(B), 8 U.S.C. § 1253(h)(2)(B) (1988), with Immigration & Nationality Act § 241(a)(4), 8 U.S.C. § 1251(a)(4) (1988). If conviction is the sole determinant for applying the exception, the language concerning the danger to the community is redundant.

281. One author states that

[i]t is unclear to what extent, if at all, one convicted of a particularly serious crime must also be shown to constitute a danger to the community. The jurisprudence is sparse, and the notion of 'particularly serious crime' is not a term of art, but principles of natural justice and due process of law require something more than mere mechanical application of the exception.

G. GOODWIN-GILL, *supra* note 45, at 96 (footnote omitted).

282. 8 C.F.R. § 208.8(f)(1)(iv) (1989).

283. *Id.* § 208.9.

alien may maintain his petition for asylum even upon the denial of withholding relief.²⁸⁴ Therefore, after an unfavorable withholding decision, the immigration judge must still consider the evidence supporting the alien's asylum claim. The alien's conviction for a particularly serious crime does not excuse the immigration judge from considering the merits.²⁸⁵ While he may take the conviction into account, the judge must be careful not to convert his discretion into a statutory bar because of the alien's conviction. The judge or the BIA must make findings to support the decision on the alien's asylum claim so that there is an adequate basis for review.²⁸⁶

The confusion over the ineligibility grounds for asylum and withholding cases prompted one court to remind the BIA that the BIA could not take away an alien's right to present all his evidence simply because it thought that the immigration judge had no obligation to consider the evidence in the face of the alien's conviction. In that case, *Shahandeh-Pey v. INS*,²⁸⁷ the Seventh Circuit remanded the case, giving the alien the chance to overcome any of the negative factors affecting his petition. The court refused to accept the BIA's decision when the BIA did not even attempt to consider all aspects of the case.²⁸⁸ Since the BIA did not explain its reasons for denying discretionary relief, the court could not reasonably assume that the BIA had adequately considered the alien's evidence.²⁸⁹ Further, the immi-

284. The standard for withholding deportation is higher than that for asylum. Compare *INS v. Stevic*, 467 U.S. 407 (1984), with *INS v. Cardoza-Fonseca*, 480 U.S. 421 (1987). Therefore, even if an alien cannot meet the "clear probability" standard of *Stevic*, he may be able to show a "well-founded fear" of persecution. The BIA's view is that the asylum claim should be reviewed first because of the lower standard of proof. If the alien obtains asylum, the courts need not consider withholding deportation. See *Matter of Mogharrabi*, Int. Dec. No. 3028 (BIA 1987). However, the Ninth Circuit has opted for the reverse procedure. See *Blanco-Comarribas v. INS*, 830 F.2d 1039 (9th Cir. 1987); *Turcios v. INS*, 829 F.2d 720 (9th Cir. 1987).

285. While the district director must deny asylum if the alien has been convicted of a particular serious crime, 8 C.F.R. 208.8(f)(1)(iv) (1988), there is no similar provision controlling the immigration judge. See *Arauz v. Rivkind*, 845 F.2d 271 (11th Cir. 1988); *Matter of Gonzalez*, Int. Dec. No. 3071 (BIA 1988). An alien may be granted asylum at the Attorney General's discretion if the alien is a refugee. Immigration & Nationality Act § 208(a), 8 U.S.C. § 1158(a) (1988). There is no specific provision preventing a criminal from coming within the term "refugee."

286. *Castro-O'Ryan v. INS*, 847 F.2d 1307, 1314 (9th Cir. 1987). See also *Shahandeh-Pey v. INS*, 831 F.2d 1384 (7th Cir. 1987); *Matter of Pula*, Int. Dec. No. 3033 (BIA 1987).

287. 831 F.2d 1384 (7th Cir. 1987).

288. *Id.* at 1388.

289. *Id.* "At no point in the opinion did the board say that regardless of the favorable factors which the petitioner did—or could have presented, the negative factors could not be overcome." *Id.*

gration judge had thought that the alien was statutorily ineligible for relief because of the alien's conviction.

In *Matter of Gonzalez*,²⁹⁰ the BIA held that aliens who are statutorily ineligible for withholding of deportation on criminal grounds, nevertheless have a right to a full evidentiary hearing when applying for asylum. In recognizing this right, the BIA has rejected the practice of premitting asylum applications of aliens convicted of particularly serious crimes.²⁹¹ This is an encouraging development because it confirms the role that the immigration judge and the BIA must play in assessing the true nature of the harm the alien faces abroad. It is only by providing this opportunity for separate review that the humanitarian features of asylum will be preserved.²⁹² Even though the alien may have committed a particularly serious crime, the adjudicators of his case should consider the danger that awaits the alien so as to make a complete evaluation of the alien's circumstances. If certain death or torture awaits the alien upon return to his native country, the immigration judge or the BIA ought to hear about it before ruling on the discretionary asylum remedy.²⁹³ Otherwise, the alien's conviction would become the only criterion for ineligibility and there would be no opportunity for the exercise of discretion.

The BIA's decision in *Matter of Gonzalez* is in line with the current judicial trend in this area.²⁹⁴ This current trend interjects an element of reality in the asylum process, but it remains to be seen whether subsequent decisions will produce any real change in the final outcome of asylum petitions. After considering all of the alien's evidence, the immigration judge still must face the government's claim that the alien is a danger to the community because of his conviction. Therefore, the immigration judge must have the discretion to decide whether the alien is *currently* a danger to the community, in spite of the alien's commission of a particularly serious crime.

V. SOME DIFFICULTIES FOR THE ALIEN

A. *The Discretionary Element*

Although many aliens choose asylum, some scholars have voiced

290. Int. Dec. No. 3071 (BIA 1988).

291. *Id.* at 5-6.

292. *Id.* at 7 (Heilman, BIA member, concurring).

293. *Id.* at 5.

294. See *Castro-O'Ryan v. INS*, 847 F.2d 1307 (9th Cir. 1987); *Arauz v. Rivkind*, 845 F.2d 271 (11th Cir. 1988); *Shahandeh-Pey v. INS*, 831 F.2d 1384 (7th Cir. 1988).

reservations about its discretionary element.²⁹⁵ This is understandable, for it must be disconcerting indeed for an alien to convince the government of his well-founded fear of persecution only to discover that the government has denied relief in the exercise of its discretion. This can be especially unsettling when the alien has failed to meet the higher standard for withholding deportation and therefore is left without any remedy if the government exercises its discretion against him.

The elements weighed by the government in its exercise of discretion are unclear but certain factors are gaining importance as asylum applications increase. For instance, in *Matter of Salim*,²⁹⁶ the BIA made clear its disapproval of the alien's fraudulent entry and circumvention of the normal refugee procedures. In particular, it found the circumvention of refugee procedures to be "an extremely adverse factor which [could] only be overcome with the most unusual showing of countervailing equities."²⁹⁷ Thus, even if an alien escaped the dangers of his homeland, he still had to argue (with the most unusual showing) the fairness of his jumping the refugee queue.

By focusing on the alien's fraud under section 212(a)(19)²⁹⁸ and the alien's evasion of the normal refugee procedures in *Salim*, perhaps the BIA wanted to avoid providing an incentive for aliens to profit from a violation of the law. However, the BIA seemed to go beyond reasonable measures in setting the ground rules. It did not treat the alien's avoidance of the procedures as merely "adverse" but "extremely adverse." The alien was required to make not merely a "showing" of equities on the other side, but a "most unusual showing."²⁹⁹ The BIA's tough stance was perhaps an admirable approach, but surely unrealistic.

After *Salim*, the BIA heard another case involving fraud and circumvention of the ordinary refugee procedures, *Matter of Shirdel*.³⁰⁰ In *Shirdel*, the BIA quickly assured the alien that even if no fraud

295. See Anker, *supra* note 16, at 16; Helton, *The Proper Role of Discretion in Political Asylum Determinations*, 22 SAN DIEGO L. REV. 999, 1019 (1985).

296. 18 I. & N. Dec. 311 (1982).

297. *Id.* at 316.

298. The alien conceded a violation of section 212(a)(19) of the INA by arriving in the United States with a fraudulent passport. *Id.* at 315-16. See Immigration & Nationality Act § 212(a)(19), 8 U.S.C. § 1182(a)(19) (1988). The BIA found the alien qualified for both withholding of deportation under INA § 243(h) and asylum under INA § 208. However, the BIA then had to decide whether it would grant asylum as a matter of discretion. *Salim*, 18 I. & N. Dec. at 314.

299. *Salim*, 18 I. & N. Dec. at 316.

300. Int. Dec. No. 2958 (BIA 1984).

existed, there was still no guaranty of asylum.³⁰¹ In its view, the critical factor for denying relief rested on the alien's improper subversion of the refugee procedures abroad.³⁰² The BIA was upset that the alien had used smugglers to help him reach the United States after he had already escaped from the country of persecution.³⁰³ More importantly, the BIA relied on the State Department's opinion which advised that the alien's application should be rejected because of the alien's attempt to gain an advantage over other refugees.

Since *Salim* and *Shirdel* involved both fraud and circumvention of refugee procedures, one might hold out hope for an alien whose only transgression was of the latter kind. In *Matter of Gharadaghi*,³⁰⁴ there was no finding of fraud, and the alien tried to distinguish his case from *Salim* on that basis. The BIA, however, did not see the distinction. It did not view the absence of a finding of fraud as a positive feature. In other words, a finding of fraud might have hurt the alien, but lack of it certainly did not help him. In the BIA's view, even though there was no fraud, the alien benefitted from a false passport and a smuggler in circumventing the prescribed procedures.³⁰⁵

In *Gharadaghi*, the BIA balanced the positive and negative factors. Among the persuasive factors were the alien's good fortune in escaping from Iran, finding safe haven in Pakistan, later obtaining temporary respite in Canada (where he also received financial aid from the government),³⁰⁶ and an overriding objective to join his immediate family in the United States.³⁰⁷ The BIA found it difficult to identify equities which might counterbalance the alien's rejection of the orderly refugee procedures.³⁰⁸ In sum, *Salim* and *Shirdel* left a mixed message about the combination of fraud and circumvention of

301. *Id.* at 7.

302. *Id.*

303. *Id.* at 8. The BIA seemed to suggest that it would look more kindly on an alien's subterfuge if the alien was trying to escape the land of persecution. But having made his escape, the alien could not then jump the queue by fraudulent means.

304. Int. Dec. No. 3001 (BIA 1985).

305. *Id.* at 6.

306. *Id.*

307. Interestingly, none of Gharadaghi's family were lawful permanent residents or citizens of the United States. As a matter of fact, each of them was also applying for asylum. *Id.* at 7.

308. In *Gharadaghi*, the BIA required the alien to show "sufficient countervailing equities" for a favorable decision. *Id.* at 5. This was more liberal than the *Salim* requirement of "the most unusual showing of countervailing equities." See *Matter of Salim*, 18 I. & N. Dec. 311, 316 (1982).

orderly procedures, and *Gharadaghi* made the latter factor the dominant theme in the discretionary exercise.

It was not until *Matter of Pula*³⁰⁹ that the BIA retreated from its *Salim* position. Although it still treated the circumvention of refugee procedures as a serious matter, it did not take the extreme position of restricting asylum to the most unusual situations due solely to that factor. Therefore, the evasion of ordinary procedures was just one element to be weighed in the balance.³¹⁰

Before diluting the effect of the alien's misconduct in *Pula*, the BIA rejected the alien's argument that section 208 prevented the Attorney General from considering the alien's manner of entry.³¹¹ The alien sought to tie the language "irrespective of such alien's status" to the Attorney General's grant of asylum.³¹² As such, there could be no consideration of the alien's method of entry because it would be irrelevant to the alien's eligibility for asylum under section 208. The BIA disagreed, interpreting the clause simply as ensuring that asylum applications would be *accepted* from aliens physically present in the United States, or at a land border or port of entry, "irrespective of such alien's status."³¹³ However, nothing prevented the Attorney General from considering the alien's status as a factor in his decision on asylum.³¹⁴ Although the alien failed to get his status excluded entirely from consideration, at least the BIA retreated from its former position which had made it almost impossible for an alien to profit from an irregular entry.

While retreating from the *Salim* proposition that the circumvention of orderly refugee procedures was enough to require unusual counterbalancing equities, the BIA did advocate an examination of the circumstances of the alien's flight from persecution.³¹⁵ The BIA

309. Int. Dec. No. 3033 (BIA 1987).

310. *Id.* at 9.

311. *Id.* at 8-9.

312. The statute provides that

[t]he Attorney General shall establish a procedure for an alien physically present in the United States or at a land border or port of entry, irrespective of such alien's status, to apply for asylum, and the alien may be granted asylum in the discretion of the Attorney General if the Attorney General determines that such alien is a refugee within the meaning of section 1101(a)(42)(A) of this title.

Immigration & Nationality Act § 208(a), 8 U.S.C. § 1158(a) (1988).

313. Int. Dec. No. 3033, at 8. The BIA noted that section 208 contains two independent clauses connected by the conjunction "and." The alien wanted to interpret the language so that "irrespective of such alien's status" was tied to the second clause rather than the first. *Id.*

314. *Id.* at 9.

315. *Matter of Pula*, Int. Dec. No. 3033, at 9 (BIA 1985).

took this position because it wanted to use its discretion in deciding whether the alien could find a safe haven in another country. If the alien's fraud remained the overriding consideration, the BIA could not exercise true discretion in deciding on the alien's application for relief. Thus, the length of the alien's stay in another country, the alien's potential for permanent residence there, and whether the alien had the opportunity to apply for asylum elsewhere may be relevant considerations. This is clearly different from insisting that any contact with a third country should be a negative factor in asylum cases.³¹⁶

It is also encouraging that in *Pula* the BIA favored the consideration of humanitarian factors in the discretionary determination.³¹⁷ This is important because an alien may meet the statutory requirement for asylum, but fail the more stringent standard for withholding deportation. Should the alien fail the standard for withholding deportation, the discretionary factors become the only barrier between the alien and deportation to a foreign land. The BIA's call for a careful evaluation of discretionary factors was understandable in light of the harsh consequences which might await the alien on deportation. It is sensible that "the danger of persecution should generally outweigh all but the most egregious of adverse factors."³¹⁸ This approach recognizes asylum as a mechanism for protecting the alien from persecution, and leads to the presumption that the alien will qualify for discretionary relief in the absence of negative evidence.

The BIA, however, has not found it possible to reject the alien's method of entry as one of the discretionary factors in asylum adjudication. The BIA can make a commitment to the safe haven principle by demonstrating less interest in the alien's manner of entry, and concentrating instead on the alien's avoidance of persecution. Aliens who produce evidence of persecution should have a reasonable chance of relief despite the use of false documents. The threat of persecution in asylum cases should be given the same priority as family ties in suspension of deportation cases.³¹⁹

316. *Id.*

317. *Id.* at 10.

318. *Id.*

319. See Anker, *supra* note 16, at 46. Elsewhere in the statutory framework, aliens who have established certain ties in the United States can find relief despite certain negative factors. See Immigration & Nationality Act § 244(a), 8 U.S.C. § 1254(a) (1988) (suspension of deportation); Immigration & Nationality Act § 245(a), 8 U.S.C. § 1255(a) (1988) (adjustment of status). Also, in *Pula*, the BIA looked favorably on the alien's family ties in the United States. *Matter of Pula*, Int. Dec. No. 3033, at 11 (BIA 1987). However, in *Gharadaghi*, the BIA

Today, one may only guess how far the BIA will go in giving the protection element of asylum the prominence it deserves.³²⁰ In the meantime, the BIA recently made a further pronouncement on the discretionary element.

In *Matter of Soleimani*,³²¹ the BIA held that an alien's firm resettlement in another country did not preclude relief, but was only one factor to be taken into account in the exercise of discretion.³²² The BIA pointed out that firm resettlement was a statutory hindrance to the admission of refugees located outside the United States but not to the granting of asylum to aliens within the United States.³²³ The BIA also reminded the parties that although a regulation prohibited asylum to aliens who were firmly resettled in a foreign country, it only applied to district directors and not to immigration judges or the BIA.³²⁴ The BIA concluded that the firm resettlement concept played no part in the definition of a refugee and that Congress introduced the resettlement element to preclude the admission of an alien as a refugee from outside the United States.³²⁵

The *Soleimani* decision also reinforced the "totality of the circumstances" approach from *Matter of Pula*, requiring the immigration judge to consider the whole picture before deciding the alien's fate. The BIA's flexible position on the issue of firm resettlement was

seemed to take a dim view that "[r]ather than fleeing persecution, per se, the applicant's overriding purpose in seeking admission to this country [was] reunification with his immediate family." *Matter of Gharadaghi*, Int. Dec. No. 3001, at 5-6 (BIA 1985).

320. Arguably, the asylum statute recognizes this protection element when it uses the language, "irrespective of such alien's status." Immigration & Nationality Act § 208(a), 8 U.S.C. § 1158(a) (1988). The majority in *Pula* only applied this language to the asylum petitioning procedures. In other words, the Attorney General had to establish an asylum application procedure that was available to any alien. However, the actual asylum decision could still take the alien's status into account. Int. Dec. No. 3033, at 8-9. BIA member Heilman thought the majority's interpretation made the phrase redundant and preferred to relate the language to the alien who was being considered for asylum status, reading the phrase as describing the alien rather than the procedure. He believed the alien's status had little to do with the Attorney General's exercise of discretion because the asylum provisions were "humanitarian" in nature. *Id.* at 12-13 (Heilman, BIA member, concurring in part and dissenting in part).

321. Int. Dec. No. 3118 (BIA 1989).

322. *Id.* at 6-7.

323. *Id.* at 8. The statute provides that the Attorney General may admit any refugee who is not firmly resettled in any foreign country. Immigration & Nationality Act § 207(c)(1), 8 U.S.C. § 1157(c)(1) (1988).

324. *Soleimani*, Int. Dec. No. 3118, at 8. The regulation requires the district director to deny an asylum request if the alien has been firmly resettled in a foreign country. 8 C.F.R. § 208.8(f)(1)(ii) (1989).

325. *Matter of Soleimani*, Int. Dec. No. 3118, at 9 (BIA 1989).

encouraging. Specifically, the BIA will not find an alien to have firmly resettled in a third country if

[i]t is shown that his physical presence in the United States is a consequence of his flight in search of refuge, and that his physical presence is reasonably proximate to the flight and not one following a flight remote in point of time or interrupted by an intervening residence in a third country reasonably constituting a termination of the original flight in search of refuge.³²⁶

This approach is consistent with the BIA's thinking in *Matter of Pula*³²⁷ because the alien's actions in fleeing the country where he feared persecution were more important than the mere circumvention of refugee procedures. The BIA therefore has ensured that the sole determinant of firm resettlement will not be the alien's stopover in a third country en route to the United States, even if that country offered the alien permanent residence.

In sum, the BIA confirmed the element of discretion not only in deciding whether an alien had become firmly resettled, but also in deciding whether the resettlement itself should prevent the alien from gaining asylum. In this respect, the decision should give asylum-seekers cause for optimism.

B. *The Stowaway and the Security Risk*

An alien who arrives in the United States as a stowaway has an irregular status which subjects him to summary treatment. He is not entitled to a hearing and he may be excluded without a hearing.³²⁸ There is an important question whether a stowaway can benefit from the regular asylum procedure, including the right to renew his application in exclusion proceedings if he is denied asylum.

The Second Circuit decided the stowaway asylum issue in *Yiu Sing Chun v. Sava*.³²⁹ The court framed the issue this way: "[w]hether . . . the petitioners, arriving at a port of entry as stowaways, are entitled to a hearing before an immigration judge on the issue whether they are refugees within the meaning of the Act, and therefore entitled to asylum."³³⁰ The government argued that

326. *Id.* at 11.

327. Int. Dec. No. 3033 (BIA 1987).

328. Stowaways are excludable from the United States. Immigration & Nationality Act § 212(a)(18), 8 U.S.C. § 1182(a)(18) (1988). Unlike most other excludable aliens, stowaways are not entitled to a hearing. *Id.* § 235(b), 8 U.S.C. § 1225(b).

329. 708 F.2d 869 (2d Cir. 1983).

330. *Id.* at 872 (footnote omitted).

section 273(d) of the INA finalized the district director's order of exclusion and his denial of asylum.³³¹ Therefore, the INS contended that these stowaways could not assert their asylum claims in an exclusion proceeding before an immigration judge because they were not otherwise entitled to such a hearing under other provisions of the INA.³³²

The court strained its reading of the INA so that section 273(d) covering stowaways could be read consistently with the asylum provisions. The court noted that section 208(a) made it possible for an alien at the border to apply for asylum "irrespective of such alien's status,"³³³ and that INS regulations themselves provide for an exclusion hearing before an immigration judge if the district director denies the alien's asylum application.³³⁴ In light of this, the court allowed stowaways the same procedural rights as other asylum applicants, while also affirming the limitations of section 273(d) for stowaways in other contexts.³³⁵

The result in *Chun* did not satisfy the BIA. In a similar case, *Matter of Waldei*,³³⁶ the district director denied the stowaway's request for asylum and put the stowaway in exclusion proceedings before an immigration judge. As expected, the stowaway renewed his

331. *Id.* at 874. The statute provides in relevant part that "[t]he provisions of section 1225 of this title for detention of aliens for examination before special inquiry officers and the right of appeal provided for in section 1226 of this title shall not apply to aliens who arrive as stowaways" Immigration & Nationality Act § 273(d), 8 U.S.C. 1323(d) (1988).

332. *Chun*, 708 F.2d at 874.

333. *Id.* (citing Immigration & Nationality Act § 208(a), 8 U.S.C. § 1158(a) (1988)). Although the alien was excludable as a stowaway under section 212(a)(18), that section allowed the court to look elsewhere because of the language "[e]xcept as otherwise provided in this chapter." It is otherwise provided in section 208(a) that an alien may apply for asylum "irrespective of such alien's status." Immigration & Nationality Act § 208(a), 8 U.S.C. § 1158(a) (1988).

334. 8 C.F.R. § 208.9 (1989).

335. *Yiu Sing Chun v. Sava*, 708 F.2d 869, 876 (2d Cir. 1983). Arguably, this decision provides an incentive for aliens to use the stowaway mechanism to get a better shot at asylum. After all, the alien who is denied refugee status at an American consulate abroad has no right to appeal. The court's response was that Congress itself had distinguished between refugees and asylees. *Id.* (citing 8 U.S.C. § 1157(a), 1158(a) (1988)). In a later case, a district court, in following *Chun*, said that "[t]his holding hardly encourages stowaways." *Guo-Jun Cheng v. Ilchert*, 698 F. Supp. 825, 826 (N.D. Cal. 1988). See also *Fang-Sui You v. Gustafson*, 623 F. Supp. 1515 (C.D. Cal. 1985).

These cases simply recognize the fact that asylum seekers are specially protected. In *Matter of Pula*, Int. Dec. No. 3033 (BIA 1987), the BIA continued that trend by deemphasizing an alien's manner of entry, a concept that had received so much emphasis in *Matter of Salim*, 18 I. & N. Dec. 311 (1982). See Anker, *supra* note 16, at 27.

336. Int. Dec. No. 2981 (BIA 1984).

request for asylum but the immigration judge promptly disclaimed any jurisdiction over the matter on the ground that the alien was not entitled to a hearing, and therefore had no right to renew his asylum request.³³⁷

The BIA affirmed the immigration judge's decision that the alien was not entitled to an exclusion hearing. Moreover, it held that the INS had erred by putting the alien in exclusion proceedings before the immigration judge, where the alien could renew his asylum request.³³⁸ The BIA's position raised the question whether an alien's option to renew his asylum plea in an exclusion or deportation hearing depends upon his entitlement to that hearing in the first place, independent of the asylum procedure. It was a good question and the Second Circuit and the BIA parted company on this point. The *Chun* court felt that an alien's right to asylum procedures was independent of his right to exclusion or deportation hearings, meaning that stowaways had a right to asylum hearings.³³⁹ In contrast, the BIA in *Waldei* tied the jurisdiction of the immigration judge in asylum cases to his jurisdiction in exclusion cases. According to the BIA, a stowaway, not entitled to a hearing before the judge in an exclusion proceeding, was not entitled to one as part of the asylum procedure.³⁴⁰ In short, the BIA focused on and applied statutory provisions which restricted the rights of stowaways, even though the stowaway in *Matter of Waldei* was an asylum-seeker.

The same conflict arose again between the asylum provision and another section of the INA in *Azzouka v. Sava*.³⁴¹ This time the INS regional commissioner summarily excluded the alien under section 235(c)³⁴² because the alien's activities were deemed to be "prejudicial to the public interest, or [to] endanger the welfare, safety, or security of the United States."³⁴³ After the commissioner's ruling, the alien

337. *Id.* at 4-6.

338. *Id.* at 6.

339. *Chun*, 708 F.2d at 876.

340. *Waldei*, Int. Dec. No. 2981, at 6. The BIA was not interested in harmonizing the various immigration provisions because it was convinced that Congress wanted to "address and correct the growing serious problem that such stowaways and crewmen present." *Id.*

341. 777 F.2d 68 (2d Cir. 1985), *cert. denied*, 479 U.S. 830 (1986).

342. The Attorney General has the authority to exclude any alien without a hearing who poses a threat to the security of the United States and the Attorney General can withhold any confidential information on which he bases his decision if disclosure would be prejudicial to the public interest. Immigration & Nationality Act § 235(c), 8 U.S.C. § 1225(c) (1988). The Attorney General's authority is exercised by the regional commissioner. 8 C.F.R. § 235.8 (1989).

343. Immigration & Nationality Act § 235(c), 8 U.S.C. § 1225(c) (1988). There are 33 excludable classes. The class involved in *Azzouka* was comprised of "aliens who the consular

filed a claim for asylum which the district director promptly denied on the basis of the regional commissioner's finding of the alien's excludability.³⁴⁴ However, the alien maintained that he was entitled to an exclusion hearing before an immigration judge in accordance with the asylum procedure.³⁴⁵

The court distinguished *Chun* by noting that the INA prohibits asylum for security risks but not for stowaways.³⁴⁶ The court was unable to harmonize the asylum provisions with section 235(c) governing the summary exclusion of security risks the way that *Chun* had reconciled those provisions with section 273(d). The court seemed confident in its position that this alien should not have a hearing if the regional commissioner had already branded him a security risk. The court stated its position: "As an alien who is a threat to the national security is disentitled to the substantive right of asylum, he is not entitled to the asylum hearing."³⁴⁷ However, the asylum procedures give the alien the right to renew his asylum request in exclusion proceedings before an immigration judge, even after the district director's decision.

In *Chun*, the court did not apply procedural limitations "to the extent and only to the extent that an asylum determination [was] involved."³⁴⁸ The *Azzouka* court held that any hearing should deal only with the question whether the alien was a refugee and that his disqualification under one of the exceptions should occur outside of the asylum process.³⁴⁹ The *Azzouka* court thus supported the regional commissioner's decision to place the alien in one of the exclusion categories, and in so doing made it pointless to have an asylum hearing for one who had already been considered ineligible.

The *Azzouka* court further held that Congress did not intend to amend by implication the summary exclusion provision for security

officer or the Attorney General knows or has reason to believe seek to enter the United States solely, principally, or incidentally to engage in activities which would be prejudicial to the public interest, or endanger the welfare, safety, or security of the United States." *Id.* § 212(a)(27), 8 U.S.C. § 1182(a)(27).

344. The district director based his decision on the regional commissioner's finding that the alien was excludable under section 212(a)(27). He believed, therefore, that he had to deny the asylum request because "there [were] reasonable grounds for regarding the alien as a danger to the security of the United States," which is a basis recognized in the regulations. *Azzouka*, 777 F.2d at 73. See 8 C.F.R. § 208.8(f)(1)(vi) (1989).

345. *Azzouka*, 777 F.2d at 70.

346. *Azzouka v. Sava*, 777 F.2d 68, 75 (2d Cir. 1985), cert. denied, 479 U.S. 830 (1986).

347. *Id.* at 76.

348. *Yiu Sing Chun v. Sava*, 708 F.2d 869, 875 (2d Cir. 1983).

349. *Azzouka*, 777 F.2d at 75.

risks.³⁵⁰ It saw no inconsistency with *Chun* because it believed that Congress intended to deny asylum to such security risks and not to stowaways.³⁵¹

Chun allowed the stowaway access to the asylum procedure because of the broad invitation of section 208. Arguably, the same invitation should be available to an alien who may face exclusion because of a security problem. The finding of a security problem will come only after the alien has been subjected to the same scrutiny as any other asylum applicant. Therefore, if the alien's status in *Chun* was unrelated to his access to the asylum mechanism, then a consistent application of section 208 would require the same treatment of any other alien.³⁵²

The regulations grant the regional commissioner the right to make a determination about the alien's danger to security for the purposes of summary exclusion under section 235(c).³⁵³ However, the asylum procedure does not give that same right to the regional commissioner. If the *Azzouka* court believed that the regional commissioner should make that security determination, it offered no evidence to substantiate the commissioner's jurisdiction in the asylum context. Therefore, it is doubtful that the regional commissioner's findings about the alien as a security risk should have ended the alien's quest

350. *Id.*

351. *Azzouka v. Sava*, 777 F.2d 68, 75 (2d Cir. 1985), *cert. denied*, 479 U.S. 830 (1986). The regional commissioner determined that the alien was excludable under section 212(a)(27) because the alien would "engage in activities which would be prejudicial to the public interest or endanger the welfare, safety, or security of the United States." Immigration & Nationality Act § 212(a)(27), 8 U.S.C. 1182(a)(27) (1988). The regulation dealing with denial of asylum is much more specific. It requires the district director to deny asylum if "[t]here are reasonable grounds for regarding the alien as a danger to the security of the United States." 8 C.F.R. § 208.8(f)(1)(vi) (1989). Therefore, the asylum procedure arguably contemplates a specific determination of ineligibility for security reasons under the regulation and not under the broader statutory provision that covers more than security cases. Although Congress intended to deny asylum to security risks, it wanted to make sure that the judgment about the alien was made only after the Attorney General had followed the appropriate procedure, regardless of the alien's status. See Immigration & Nationality Act § 208(a), 8 U.S.C. § 1158(a) (1988).

352. The *Azzouka* court doubted that Congress "intended sub silentio to amend the statutes regarding the summary exclusion of aliens threatening national security by providing a new asylum hearing in which the security issue could be aimed." *Azzouka*, 777 F.2d at 75. But in *Chun*, the Second Circuit dealt with a similar problem by granting a stowaway an asylum hearing even though there was a provision for the summary exclusion of stowaways. The *Azzouka* court rationalized its position on the basis that Congress wanted to keep out security risks, but not stowaways. *Id.* Arguably, though, the judgment called for under the exclusion statute, Immigration & Nationality Act § 212(a)(27), 8 U.S.C. § 1182(a)(27) (1988), may be different from that under 8 C.F.R. § 208.8(f)(1)(vi) (1989). See *supra* note 334.

353. 8 C.F.R. § 235.8(b) (1989).

for an asylum hearing.³⁵⁴

In its defense, the BIA's approach in *Matter of Waldei* at least promotes a consistency in the application of the asylum section by tying the jurisdictional limitations of the particular exclusion provision to the requirements for asylum.³⁵⁵ If the alien is not entitled to an exclusion proceeding when he originally applies for admission, he is not eligible for a hearing during the asylum process.³⁵⁶ Therefore, the district director's denial of asylum confers no more rights on the alien than he would have as a mere applicant for admission.

This is precisely what bothered Judge Friendly in *Azzouka*. He agreed with the majority's conclusions in the case, but had some doubts about reconciling the *Chun* decision. He sympathized with the BIA's position in *Waldei*, but had difficulty distinguishing *Chun* from *Azzouka*.³⁵⁷ If aliens fell into categories which deprived them of exclusion hearings, he felt it was incumbent on the court to explain why the statute gave an asylum hearing in one case and not the other.³⁵⁸ In *Azzouka*, the court attempted to relate the exclusion ground to the asylum exception. The problem was that the exclusion provision, section 212(a)(27), is much broader than the asylum exception.³⁵⁹ The court can exclude an alien for not only being dangerous to the security of the United States, but also for engaging in activities that would be "prejudicial to the public interest."³⁶⁰ Hence, when the district director relied on the regional commissioner's decision to exclude the alien, he could not have understood the precise grounds.

354. Moreover, it is even unclear whether the regional commissioner must always make the security determination. The regulation says that the district director must deny asylum "if it is determined" that the alien is a danger to security. *Id.* The *Azzouka* court interpreted this to mean that the regional commissioner should make the security determination. *Azzouka*, 777 F.2d at 76. This stretches the construction of the section a bit. Section 208.8 deals with asylum decisions by the district director. If one follows the court's approach, then the district director could rely on some other person to decide whether the alien is disqualified from relief because the language "it is determined" covers not only aliens who are security risks, but other categories of aliens that must be denied asylum.

355. *Matter of Waldei*, Int. Dec. No. 2981, at 5-6 (BIA 1984).

356. *Id.*

357. *Azzouka v. Sava*, 777 F.2d 68, 77 (2d Cir. 1985), *cert. denied*, 479 U.S. 830 (1986) (Friendly, J., concurring in part and dissenting in part).

358. *Id.*

359. Compare Immigration & Nationality Act § 212(a)(27), 8 U.S.C. § 1182(a)(27) (1988), excluding an alien for engaging in "activities which would be prejudicial to the public interest, or endanger the welfare, safety, or security of the United States," with 8 C.F.R. § 208.8(f)(1)(vi) (1989), requiring the district director to deny asylum when "[t]here are reasonable grounds for regarding the alien as a danger to the security of the United States."

360. Immigration & Nationality Act § 212(a)(27), 8 U.S.C. § 1182(a)(27) (1988).

The regional commissioner might have relied on the other elements of section 212(a)(27) that did not affect the country's security. Therefore, there was perhaps an even stronger argument for denying an asylum hearing in both *Chun* and *Azzouka* on the basis of the aliens' ineligibility under the exclusion statutes.

VI. CONCLUSION

There is little doubt that the Supreme Court settled some difficult questions in *Stevic* and *Cardoza-Fonseca*. The BIA and the circuits were confused over the applicable standards and the Court resolved the doubts decisively. However, the battles are now being waged in the application of those standards. That is to be expected. However, the BIA must make clear which standard it is applying in each case. Moreover, the Ninth Circuit has properly demanded that BIA assess the aliens' claims under particular standards instead of allowing the BIA to conclude generally that the alien has failed regardless of which test is applied.

For many aliens, asylum or relief from deportation is the last hope. This is why every effort should be made to remove the statutory ambiguities which threaten an alien's eligibility for relief. Room for clarification exists in section 243(h)(2)(B) because an alien's conviction for a particularly serious crime is not conclusive of his danger to the United States community. If an alien's conviction was conclusive on the issue of dangerousness, Congress unnecessarily drafted language regarding the alien's threat to the community because the alien's conviction itself would satisfy congressional concern.

Assuming an alien's conviction automatically makes the alien a threat to the community, one would still have to ask whether that threat is permanent. This inquiry would follow, considering the statute calls for the Attorney General's present determination of the alien's dangerousness.³⁶¹ Therefore, even if the alien was convicted long ago, the Attorney General must still determine whether the conviction makes the alien a present danger to the community. It is no small wonder that Congress requires the Attorney General to make that judgment. The statute seeks to tie the conviction to the alien's present threat to society. Conceivably, if convictions were determina-

361. The Attorney General cannot withhold the alien's deportation if he determines that the convicted alien "constitutes a danger to the community." *Id.* § 243(h)(2)(B), 8 U.S.C. § 1253(h)(2)(B) (1988) (emphasis added). This calls for a present assessment unless one accepts that a conviction brands the alien for life as a dangerous person.

tive, then an alien's conduct fifty years ago would make him a danger today. In such a case, the Attorney General's determination would have nothing to do with the current propensities of the alien. Congress would hardly have intended the conviction itself to have such an effect if the alien's life was in grave danger.³⁶² Moreover, there would be no utility in the "danger to the community" language once the alien has committed a "particularly serious crime." It is time, therefore, for something to be done about this language. If the alien's conviction is sufficient to deny relief, then the statute should be amended to deny relief on the basis of the conviction only. On the other hand, the two-step process could be clearly required by a finding of an alien's conviction and a finding of dangerousness to the community.³⁶³ There would be little doubt about congressional intent in that statutory language.

As far as the discretionary element in asylum is concerned, one can only hope that the BIA will abandon its fixation on the alien's manner of entry. The BIA's position in *Pula* that asylum should be granted "[i]n the absence of *any* adverse factors" is encouraging.³⁶⁴ But that encouragement is short-lived when one realizes that the entry question arises in so many asylum cases. The BIA must pay more attention to the protection element of asylum rather than the issue of orderly immigration procedures.³⁶⁵

Unfortunately, a court may deny relief to an alien whose well-founded fear of persecution qualifies him as a refugee if he is unable to meet the higher standard of section 243(h).³⁶⁶ The alien may then be

362. Congress based the withholding provision, section 243(h), on the language of the Protocol and intended that they be construed consistently. S. REP. NO. 590, 96th Cong., 2d Sess. 19 (1980). In discussing this provision, one commentator said that "[t]he offence in question and the perceived threat to the community would need to be extremely grave if danger to the life of the refugee were to be disregarded" G. GOODWILL-GILL, *supra* note 45, at 96. It is therefore important to know whether the alien *was* or *is* dangerous.

363. Immigration & Nationality Act § 243(h)(2)(B), 8 U.S.C. § 1253(h)(2)(B), should be amended to provide for denial of withholding, and 8 C.F.R. § 208.8(f)(1)(iv) should be amended to provide for denial of asylum, if the alien who has been convicted of a particularly serious crime constitutes a danger to the community of the United States.

364. Matter of *Pula*, Int. Dec. No. 3033, at 10 (BIA 1987) (emphasis added).

365. See Anker, *supra* note 16, at 71. The objection to this may be that some consideration must be given to the fact that the alien has jumped the queue of aliens waiting to enter. But this is not held against the alien in other contexts, and it should hardly be held so in asylum situations. See, e.g., Immigration & Nationality Act §§ 244(a), 245A, 8 U.S.C. §§ 1254(a), 1255a (1988).

366. See T. ALEINIKOFF & D. MARTIN, *supra* note 11, at 79 (Supp. 1987); D. MARTIN, *supra* note 16, at 82; Helton, *INS v. Cardoza-Fonseca: The Decision and its Implications*, 16 N.Y.U. REV. L. & SOC. CHANGE 35, 53 (1987-88).

facing the prospect of persecution, uncertain as it may be. This is why, as a matter of principle, the BIA should deny asylum only on account of genuine compelling factors which justify sending the alien back where he may face "a threat of imminent danger to his life or liberty."³⁶⁷ It is important that some prescription exist for the exercise of discretion in asylum adjudications. In this respect, *Matter of Pula* and *Matter of Soleimani* are steps in the right direction. Although the Supreme Court recognized in *Cardoza-Fonseca* that courts will not grant asylum to all aliens qualifying as refugees,³⁶⁸ courts should not turn asylum applicants away on the slightest pretext. The alien in *Matter of Salim* was fortunate. He was denied asylum, but his deportation was withheld because he met the higher standard of section 243(h). At least he managed to avoid the clutches of his persecutors. An alien who possesses genuine fear but cannot meet the higher standard should still have a chance at asylum.

367. See *Hernandez-Ortiz v. INS*, 777 F.2d 509, 519 (9th Cir. 1985); Helton, *supra* note 366, at 53.

368. *INS v. Cardoza-Fonseca*, 480 U.S. 421, 443 (1987).

