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Persecution Abroad as Grounds for Withholding Deportation: The Standard of Proof and the Role of the Courts

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Edward A. Smith III

Abstract

The immigration laws of the United States have long recognized a policy against deporting a person who seeks refuge in the United States, when it appears that person would be subject to persecution following deportation. The Immigration Act of 1952 permitted the Immigration and Naturalization Service to withhold the deportation of any person who could show that he would suffer persecution in the nation to which he would be deported. A similar provision is contained in the UN Protocol Relating to the Status of Refugees. The INS and the courts, having ruled that "no real conflict" existed between the Protocol and the Immigration Act, continued to adhere to to the latter without ever examining the significance of fundamental discrepancies.

PERSECUTION ABROAD AS GROUNDS FOR WITHHOLDING DEPORTATION: THE STANDARD OF PROOF AND THE ROLE OF THE COURTS

INTRODUCTION

The immigration laws of the United States have long recognized a policy against deporting a person who seeks refuge in the United States, when it appears that the person would be subject to persecution following deportation.[1] The Immigration and Nationality Act of 1952[2] (Immigration Act) permitted the Immigration and Naturalization Service (INS) to withhold the deportation of any person who could show that he would suffer persecution in the nation to which he would be deported.[3] A similar provision was contained in the United Nations Protocol Relating to the Status of Refugees[4] (Protocol), which the United States adopted in 1968. Under the Protocol, contracting states are forbidden to return persons to countries where they would be subject to persecution.[5]

The Protocol and the Immigration Act differed in at least two significant respects. The Protocol's provision was mandatory, entitling the applicant to relief upon an appropriate showing of eligibility.[6] By contrast, the Immigration Act made relief discretionary,

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1. The first provision of the immigration laws of the United States on this subject was included in the Internal Security Act of 1950, ch. 1024, § 23, 64 Stat. 987, 1010 which forbade the Attorney General to deport any alien to a country where the Attorney General determined that such alien would be subject to physical persecution. *Id.* The Immigration and Nationality Act, Pub. L. No. 414, § 243(h), 66 Stat. 163, 214 (1952), amended this section, authorizing but not requiring that the deportation of any alien be withheld when, in the opinion of the Attorney General, the alien would be subject to physical persecution. *Id.* In 1965, Congress liberalized the section's definition of persecution by deleting "physical persecution" and inserting "persecution on account of race, religion, or political opinion." Act of Oct. 3, 1965, Pub. L. No. 89-236, § 11(f), 79 Stat. 911, 918. Finally, Congress amended the section in 1978 to disallow withholding of deportation of aliens who aided in the Nazi persecution. Act of Oct. 30, 1978, Pub. L. No. 95-549, § 104, 92 Stat. 2065, 2066. The Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102 (codified in scattered sections of 8 U.S.C.), substantially changes this section. *See infra* notes 87-112 and accompanying text.

2. Pub. L. No. 89-414, 66 Stat. 163 (1952) (current version at 8 U.S.C. §§ 1101-1503 (1976)).

3. 8 U.S.C. § 1253(h) (Supp. III 1979). *See infra* notes 13-19 and accompanying text.

4. *Opened for signature* Jan. 31, 1967, 19 U.S.T. 6225, T.I.A.S. No. 6577, 606 U.N.T.S. 268 [hereinafter cited as Protocol].

5. *Id.* art. 33, § 1.

6. Article 33 of the Protocol embodied the principle of non-refoulement, an obligation to refrain from returning an alien within its borders to a country where he would be subject to persecution. *See infra* notes 48-51 and accompanying text. Thus, the claimant had a *right* to protection under article 33 provided he could show that he was eligible for relief.

authorizing but not requiring that deportation be withheld upon the demonstration of statutory eligibility.[7] The legal standards governing eligibility were also significantly different. The strict evidentiary standards necessary to establish eligibility under the Immigration Act resulted in the failure of many claims.[8] The Protocol's more lenient standards made eligibility more readily attainable.

Before the enactment of the Refugee Act of 1980,[9] these discrepancies and their implications were ignored. The INS and the courts, having ruled that "no real conflict" existed between the Protocol and the Immigration Act, continued to adhere to the latter without ever examining the significance of these fundamental discrepancies.[10]

The Refugee Act makes relief mandatory upon a showing of eligibility as required by the Protocol.[11] Moreover, the courts have thus far interpreted the statutory change as requiring the judiciary to ensure the observance of correct legal standards under the Refugee Act.[12] A consequence of the courts' utilization of their increased authority has been to conform the legal standard employed under the immigration laws with that of the Protocol. The courts have made it clear that they will now have the final word in interpreting the provisions of the immigration laws relating to withholding of deportation. The exercise of this increased authority has resolved the conflict between the international obligations of the United States under the Protocol and the immigration laws of the United States. In order to understand fully the legal standards presently applied in withholding of deportation cases, it is necessary to examine the substance as well as the policies underlying the standards found within the immigration laws and the Protocol.

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7. The "favorable exercise of relief [in 243(h) cases] is manifestly not a matter of right under any circumstances, but rather is in all cases a matter of grace. The very wording of the law provides freedom of decision, to wit: the possibility of denial on purely discretionary grounds." Sihasale, 11 I. & N. Dec. 531, 532 (1966).

8. *E.g.*, Tan, 12 I. & N. Dec. 564, 568 (1967) (claim denied on basis of policy restricting favorable exercise of discretion to cases of clear probability of persecution of the particular individual claimant).

9. Pub. L. No. 96-212, 94 Stat. 102 (1980) (codified in scattered sections of 8 U.S.C.).

10. *See infra* notes 69-86 and accompanying text.

11. 8 U.S.C. § 1253(h) (Supp. IV 1980).

12. *See infra* notes 87-110 and accompanying text.

I. *WITHHOLDING OF DEPORTATION UNDER THE IMMIGRATION ACT*

Section 243(h) of the Immigration Act[13] authorized the Attorney General[14] to withhold the deportation[15] of any alien within the United States[16] when, in his opinion, the alien would be subject to persecution[17] in the country to which he was being deported. Under section 243(h), the withholding of deportation was within the discretion of the INS.[18] Upon a determination of statutory eligibility, this section authorized, but did not require that deportation be withheld.[19]

13. 8 U.S.C. § 1253(h) (Supp. III 1979), *amended by* 8 U.S.C. § 1253(h) (Supp IV 1980). Section 1253(h) read:

> The Attorney General is authorized to withhold deportation of any alien . . . within the United States to any country in which in his opinion the alien would be subject to persecution on account of race, religion, or political opinion and for such period of time as he deems to be necessary for such reason.

Id.

14. Without divesting himself of any of his powers, privileges or duties under the immigration and naturalization laws, the Attorney General has delegated his authority to the Commissioner of the INS to direct the INS and to enforce all laws relating to immigration and naturalization of aliens. 8 C.F.R. § 2.1 (1982). The Commissioner of the INS has the power to redelegate his authority to any other officer or employee of the INS. *Id.*

15. Aliens who have entered the United States are subject to expulsion from the country if they are determined to be within one of the classes of deportable aliens set forth in the Immigration and Nationality Act. 8 U.S.C. § 1251 (Supp. IV 1980). All deportation determinations are made at a deportation hearing. 8 C.F.R. § 242.8 (1982). A special inquiry officer, also termed an immigration judge, has the authority to determine deportability. 8 C.F.R. § 242.8 (1982). The INS is required to establish deportability by "clear, unequivocal and convincing evidence." 8 C.F.R. § 242.14 (1982).

16. Under the Immigration Act, only deportable aliens as defined in 8 U.S.C. § 1251 (1976 & Supp. IV 1980) were within the United States for the purposes of § 243(h). The classes of excludable aliens enumerated in 8 U.S.C. § 1182 (1976 & Supp. IV 1980) are made the subject of exclusion proceedings in order to determine whether they "shall be allowed to enter or shall be excluded and deported." 8 U.S.C. § 1226(a) (1976).

Although certain classes of excludable aliens were, by definition, physically present in the United States, they were not "within the United States" for the purposes of § 243(h), and could therefore not raise such a claim. *See* Leng May Ma v. Barber, 357 U.S. 185 (1958); Shaughnessy v. Mezei, 345 U.S. 206 (1953); United States v. Kavazanjian, 623 F.2d 730 (1st Cir. 1980); Yuen Sang Low v. United States, 479 F.2d 820 (9th Cir.), *cert. denied*, 414 U.S. 1039 (1973).

17. Persecution has been defined as "the infliction of suffering or harm upon those who differ (in race, religion, or political opinion) in a way regarded as offensive." Kovac v. Immigration & Naturalization Serv., 407 F.2d 102, 107 (9th Cir. 1969).

18. In Kasravi v. Immigration & Naturalization Serv., 400 F.2d 675 (9th Cir. 1968), the court stated: "Congress . . . by the express wording of . . . [§ 243(h)] . . . [has] . . . left to the broad discretion of the Attorney General the authority to suspend deportation in such cases and the questions of both eligibility and merit . . . are part and parcel of this adminstrative determination." *Id.* at 677 (footnote omitted).

19. *See supra* note 7 and accompanying text.

A. *Burden of Proof*

Under section 243(h) the applicant had the burden of presenting evidence demonstrating a "clear probability of persecution."[20] Sustaining this burden was difficult because the person making a 243(h) claim was in a foreign land with little or no access to evidence or witnesses in his home country. In many cases the only evidence available to support the claimant's allegations was his own unsubstantiated testimony,[21] which was not sufficient to meet the burden under the clear probability standard.[22] Furthermore, this standard required that, to be probative, any corroborating evidence show that the particular claimant would be subject to persecution.[23] The evidence available to support claims of persecution, however, was generally limited to documents in the nature of newspaper and magazine articles depicting political conditions in the country from which the applicant had fled.[24]

The requirement that corroborating evidence relate specifically to the claimant diluted the value of evidence tending to show

20. *E.g.*, Kashani v. Immigration & Naturalization Serv., 547 F.2d 376, 379 (7th Cir. 1977); Cisternas-Estay v. Immigration & Naturalization Serv., 531 F.2d 155, 159 (3d Cir.), *cert. denied*, 429 U.S. 853 (1976); Rosa v. Immigration & Naturalization Serv., 440 F.2d 100, 102 (1st Cir. 1971); Cheng Kai Fu v. Immigration & Naturalization Serv., 386 F.2d 750, 753 (2d Cir. 1967), *cert. denied*, 390 U.S. 1003 (1968); Lena v. Immigration & Naturalization Serv., 379 F.2d 536, 538 (7th Cir. 1967); Dunar, 14 I. & N. Dec. 310, 319-20 (1973); Joseph, 13 I. & N. Dec. 70, 72 (1968); Tan, 12 I. & N. Dec. 564, 568 (1967).

21. *See* Sihasale 11 I. & N. Dec. 759, 762 (1966); Weis, *The Concept of the Refugee in International Law*, 87 JOURNAL DU DROIT INTERNATIONAL 928, 986-88 (1960).

22. *See, e.g.*, Moghanian v. United States Dep't of Justice, 577 F.2d 141, 142 (9th Cir. 1978); Kashani v. Immigration & Naturalization Serv., 547 F.2d 376, 379 (7th Cir. 1977); Rosa v. Immigration & Naturalization Serv., 440 F.2d 100, 102 (1st Cir. 1971). *See also* McMullen, 17 I. & N. Dec. 542, 547 (1980) (claimant's own testimony not sufficient to show that the government has any present interest in persecuting him).

23. In Fleurinor v. Immigration & Naturalization Serv., 585 F.2d 129 (5th Cir. 1978), the court rejected a claim that an Amnesty International report depicting conditions in Haiti was relevant to a 243(h) claim. In making such a determination, the court noted that "in order for evidence to be 'material' . . . the evidence must be probative on the issue of the likelihood of *this* alien being subject to persecution in the event of deportation." *Id.* at 133. *See also* Lena v. Immigration & Naturalization Serv., 379 F.2d 536, 538 (7th Cir. 1967) (evidence must show a clear probability of persecution of the "particular individual" applicant); Tan, 12 I. & N. Dec. 564, 570 (1967) (mere fact that the claimant was a member of an ethnic group that was subject to persecution in Indonesia not sufficient in the absence of "convincing evidence" that the claimant would be singled out for persecution). *Cf.* Coriolan v. Immigration & Naturalization Serv., 559 F.2d 993, 1002 (5th Cir. 1977) (immigration authorities could not properly decide an alien's fate without taking into account conditions in the alien's country).

24. *See, e.g.*, McMullen, 17 I. & N. Dec. 542 (1980).

that circumstances existed in the home country which exposed the claimant to a risk of persecution. Such evidence, although admissible, was given little weight. For example, an applicant's proof of his home government's indiscriminate and widespread persecution of a particular group, regardless of the claimant's association with that group, was not sufficient without a specific showing that he would be singled out for such persecution.[25] Likewise, a person was not entitled to relief on the mere claim that he had been persecuted in the past and that similar circumstances presently existed in his homeland which created the risk of further persecution. Only specific evidence demonstrating that the claimant would presently be subject to persecution was sufficient under the clear probability standard.[26]

B. *Judicial Review of INS Decisions Made Under Section 243(h)*

Claimants under section 243(h) had the right to appeal INS decisions to the United States Courts of Appeals.[27] However, the appellate courts regarded the scope of their review in 243(h) cases as extremely limited.[28] The courts were permitted to review administrative determinations to ensure that the applicant had a reason-

25. *See, e.g.*, Fleurinor v. Immigration & Naturalization Serv., 585 F.2d 129, 133-34 (5th Cir. 1978); Kasravi v. Immigration & Naturalization Serv., 400 F.2d 675, 676 (9th Cir. 1968).

26. *See Fleurinor*, 585 F.2d at 133.

27. A decision of the special inquiry officer concerning deportability may be appealed to the Board of Immigration Appeals (Board). 8 C.F.R. § 3.1(b)(2) (1982). The Board's appellate jurisdiction is set forth in 8 C.F.R. § 3.1(b) (1982). With certain limited exceptions, decisions of the Board are "final." 8 C.F.R. § 3.1(d)(2). Final decisions of the Board are appealable to the Courts of Appeals. 8 U.S.C. § 1105(a) (1976).

28. In Kasravi v. Immigration & Naturalization Serv., 400 F.2d 675 (9th Cir. 1968), the court stated:

> By finding that the petitioner is not "statutory eligible" for relief it might appear that the special inquiry officer was making a finding of fact based upon an evaluation of the record before him. If such a finding of fact were required by the statute, the decision of the Attorney General would be subject to review in order to determine whether such findings were supported by reasonable, substantial and probative evidence . . . . However, Congress has made it abundantly clear by the express wording of the statute that no such finding is contemplated or required. It left to the broad discretion of the Attorney General the authority to suspend deportation in such cases and the questions of both eligibility and merit . . . are part and parcel of this administrative determination. The scope of our review, therefore, does not permit this Court to substitute its opinion for that of the Attorney General.

Id. at 677 (footnotes omitted).

able opportunity to present evidence on his own behalf.[29] Thus, the Second Circuit in *United States ex. rel. Dolenz v. Shaughnessy*[30] wrote: "[A] court might intervene to stay deportation, if the Attorney General or his delegate should deny the alien any opportunity to present evidence on the subject of persecution or should refuse to consider the evidence presented by the alien."[31]

Some courts reviewed INS determinations for an "abuse of discretion."[32] In *Wong Wing Hang v. Immigration & Naturalization Service,*[33] the court defined an abuse of discretion as a decision "made without a rational explanation, inexplicably departed from established policies, or rested on an impermissible basis such as an invidious discrimination against a particular race or group, or . . . on other 'considerations that Congress could not have intended to make relevant.'"[34] The court's examination, however,

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29. *See* Sovich v. Esperdy, 319 F.2d 21, 24 (2d Cir. 1963); Kam Ng v. Pilliod, 279 F.2d 207, 210 (7th Cir. 1960), *cert. denied*, 365 U.S. 860 (1961). *See also* Pereira-Diaz v. Immigration & Naturalization Serv., 551 F.2d 1149, 1153-54 (9th Cir. 1977); Daniel v. Immigration & Naturalization Serv., 528 F.2d 1278, 1280 (5th Cir. 1976); Cheng Kai Fu v. Immigration & Naturalization Serv., 386 F.2d 750, 753 (2d Cir. 1967), *cert. denied*, 390 U.S. 1003 (1968).

30. 206 F.2d 392 (2d Cir. 1953).

31. *Id.* at 394-95 (footnote omitted).

32. *E.g.*, Moghanian v. United States Dep't of Justice, 577 F.2d 141, 142 (9th Cir. 1978); Pierre v. United States, 547 F.2d 1281, 1289 (5th Cir.), *cert. granted, vacated and remanded*, 434 U.S. 962 (1977); Pereira-Diaz v. Immigration & Naturalization Serv., 551 F.2d 1149, 1154 (9th Cir. 1977); Daniel v. Immigration & Naturalization Serv., 528 F.2d 1278, 1280 (5th Cir. 1976); Shkukani v. Immigration & Naturalization Serv., 435 F.2d 1378, 1380 (8th Cir.), *cert. denied*, 403 U.S. 920 (1971); Muskardin v. Immigration & Naturalization Serv., 415 F.2d 865, 866-67 (2d Cir. 1969); Hosseinmardi v. Immigration & Naturalization Serv., 405 F.2d 25, 27 (9th Cir.), *reh'g denied*, 405 F.2d 28 (1968). *Cf.* Hamad v. Immigration & Naturalization Serv., 420 F.2d 645, 646 (D.C. Cir. 1969) (two tiered standard of review); Wong Wing Hang v. Immigration & Naturalization Serv., 360 F.2d 715, 718 (2d Cir. 1966) (two tiered standard of review).

Professor Jaffe has defined the abuse of discretion standard of review:

> Discretion . . . is the power of the administrator to make a choice from among two or more legally valid solutions. Any solution presumptively is valid if it is an exercise of a granted power and the exercise is motivated by considerations relevant to the purposes of the statute . . . . The courts have developed devices for controlling the exercise of discretion. Perhaps they are all, in an extended sense, variants of the concept of "abuse of discretion." Broadly stated an abuse of discretion is an exercise of discretion in which a relevant consideration has been given an exaggerated, an "unreasonable" weight at the expense of others . . . . Discretion implies a "balancing"; where the result is eccentric, either there has not been a balancing, or a hidden and mayhap improper motive has been at work . . . .

JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 586 (1965).

33. 360 F.2d 715 (2d Cir. 1966).

34. *Wong Wing Hang*, 360 F.2d at 719. *See also* Khalil v. District Director, 457 F.2d 1276, 1277 (9th Cir. 1972) (decision not based upon a reasonable foundation).

was always conducted with great deference to the discretionary authority of the INS under section 243(h).[35]

The narrow scope of review given administrative determinations under section 243(h) reflected a judicial attitude of noninterference. The courts viewed immigration law as an area within the exclusive control of the executive and legislative branches of government because of the foreign policy considerations attached to it.[36] The judiciary considered that the broad discretionary authority given to the INS by Congress to administer the statute precluded the courts from undertaking an extensive substantive review of INS decisions. This position is illustrated in the Ninth Circuit's decision in *Kasravi v. Immigration & Naturalization Service*.[37] Kasravi, an Iranian citizen, contended that he would be subject to persecution if returned to Iran because of his vocal opposition to the Shah during his stay in the United States.[38] Kasravi sought relief under section 243(h).[39]

The majority recognized that the claimant's position was "strongly supported by two expert witnesses, each of whom [had] impressive qualifications."[40] The court stated that the only evidence submitted in opposition to the application for relief was a "perfunctory letter" written by a State Department official which concluded that Iranian students in the United States would not "in all likeli-

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35. *See supra* note 28 and accompanying text.

36. This policy was expressed in Hariasides v. Shaughnessy, 342 U.S. 580 (1952), wherein the Court wrote:

> any policy toward aliens is vitally and intricately interwoven with contemporaneous policies in regard to the conduct of foreign relations, the war power, and the maintenance of a republican form of government. Such matters are so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference.

Id. at 588-89 (footnote omitted). *See also* Mathews v. Diaz, 426 U.S. 67, 81-82 (1976); Kleindienst v. Mandel, 408 U.S. 753, 765-67 (1972).

37. 400 F.2d 675 (9th Cir. 1968).

38. *Id.* at 676. In claiming that the administrative officer erred in deciding that he was not eligible under the statute, Kasravi offered a "large volume of printed material" which, according to the court, tended to show that the Iranian government suppressed undesirable ideas and punished and tortured those who opposed the Shah, that Kasravi had vehemently opposed the Shah during his stay in the United States, and that his criticism had been made known to the Shah and to other Iranian officials. *Id.* Kasravi claimed that "by virtue of the publicity he [had] received . . . if he [were] returned to Iran, he [would] be subject to persecution, imprisonment and possibly death for his opposition to the Shah." *Id.*

39. *Id.*

40. *Id.*

hood" be persecuted for their actions in the United States.[41] The court questioned both the admissibility and the persuasiveness of this letter.[42] Nonetheless, the Ninth Circuit, perceiving its role as limited by the discretion given the INS in making such determinations,[43] affirmed the agency's decision.[44]

Until the enactment of the Refugee Act, the clear probability standard was the burden of proof required to be satisfied by all applicants raising claims under section 243(h) of the Immigration Act. The Protocol provided the basis for the changes ultimately brought about by the Refugee Act.

II. *THE UNITED NATIONS PROTOCOL RELATING TO THE STATUS OF REFUGEES*

The United States became a party to the Protocol in 1968.[45] The Protocol adopted articles 2-34 inclusive of the 1951 Convention Relating to the Status of Refugees[46] (Convention) and extended the Convention's protection to persons who became refugees as a result of events occurring after January 1, 1951.[47] The Convention set forth certain rights which all contracting nations were required to accord refugees.[48] One such right was non-refoule-

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41. *Id.* at 676-77.

42. *Id.* at 677. Concerning the letter's admissibility, the court noted:

> Such letters from the State Department do not carry the guarantees of reliability which the law demands of admissible evidence. A frank, but official, discussion of the political shortcomings of a friendly nation is not always compatible with the high duty to maintain advantageous diplomatic relations with nations throughout the world. The traditional foundation required of expert testimony is lacking; nor can official position be said to supply an acceptable substitute. No hearing officer or court has the means to know the diplomatic necessities of the moment, in light of which the statements must be weighed.

Id. at n.1.

43. *Id.* at 677-78.

44. *Id.* at 678.

45. Protocol, *supra* note 4.

46. *Opened for signature* July 28, 1951, 189 U.N.T.S. 150 [hereinafter cited as Convention].

47. Protocol, *supra* note 4 art. 1.

48. Notwithstanding isolated exceptions, these rights included nondiscrimination in applying the provisions of the Convention with respect to race, religion and country of origin, *id.* art. 3, and at least equal treatment with that of nationals of the contracting nations with regard to freedom to practice religion, *id.* art. 4, protection of industrial property and of rights in literary, artistic and scientific works, *id.* art. 14, freedom of association with non-political and non-profit making associations and trade unions, *id.* art. 15, free access to

ment,[49] "an obligation to refrain from forcibly returning a refugee to a country where he is likely to suffer political persecution."[50] The right of non-refoulement was contained in article 33 of the Protocol which read: "No Contracting State shall expel or return ('refouler') 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 of a particular social group or political opinion."[51]

The applicability of article 33 is contingent upon a finding that the claimant is in fact a refugee.[52] Article 1[53] defines a refugee as a person having a "well-founded fear" of persecution.[54] Therefore, a claimant was required to demonstrate a well-founded fear of persecution in order to qualify for protection under article 33.

It has been suggested that the well-founded fear standard incorporates both objective and subjective elements.[55] According to one commentator supporting this position, "the circumstances and background of the person, his psychological attitude and sensitivity

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courts, *id.* art. 16, freedom to engage in wage earning employment, *id.* art. 17, freedom to engage in self-employment, *id.* art. 18, freedom to practice the liberal professions, *id.* art. 19, right to housing, *id.* art. 21, right to education, *id.* art. 22, labour legislation and social security, *id.* art. 24. The Convention also secured refugees limited rights to administrative assistance, *id.* art. 25, freedom of movement, *id.* art. 26, identity papers, *id.* art. 27, travel documents, *id.* art. 28, freedom from discrimination in fiscal charges, *id.* art. 29, transfer of assets, *id.* art. 30, freedom from expulsion, *id.* arts. 32, 33 and naturalization, *id.* art. 34.

49. Protocol, *supra* note 4, art. 33, § 1.

50. 2 A. GRAHL-MADSEN, THE STATUS OF REFUGEES IN INTERNATIONAL LAW 93 (1966).

51. Protocol, *supra* note 4, art. 33, § 1.

52. Article 33 prohibits contracting states to return or expel refugees to the frontiers of territories where they would be subject to persecution. *See supra* note 51 and accompanying text.

53. Protocol, *supra* note 4, art. 1. Article 1 states that a refugee is a person who: "owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or owing to such fear, is unwilling to avail himself of the protection of that country . . . ." Convention, *supra* note 46, art. 1, *as revised by* Protocol, *supra* note 4, art. 1.

54. The U.N. Committee on Statelessness and Related Problems, involved in the drafting of the Convention, wrote that a well-founded fear exists where "a person has actually been a victim of persecution or can show good reasons why he fears persecution." Report of the Ad Hoc Committee on Statelessness and Related Problems, 11 U.N. ESCOR Annex (Agenda Item 32) at 39, U.N. Doc. E/1318 (1950) [hereinafter cited as Report of the Ad Hoc Committee]. *See also* 1 A. GRAHL-MADSEN, THE STATUS OF REFUGEES IN INTERNATIONAL LAW 181, 1966 (real chance of persecution).

55. UNITED NATIONS HIGH COMMISSIONER ON REFUGEES, HANDBOOK ON PROCEDURE AND CRITERIA FOR DETERMINING REFUGEE STATUS 11-12 (1979) [hereinafter cited as HANDBOOK]; Weis, *supra* note 21, at 970.

towards his environment play a role as well as the objective facts."[56] Grahl-Madsen, recognizing that the language of the Protocol requires that the fear be well-founded, applies an exclusively objective standard.[57] He points out that "[w]e cannot find a meaningful common denominator in the minds of refugees. We must seek it in the conditions prevailing in the country whence they have fled."[58]

The nature of the objective evidence required under the Protocol to establish eligibility is significantly different from that required under section 243(h). Section 243(h) mandated that to be probative corroborating evidence must relate specifically to the claimant.[59] The Protocol's well-founded fear standard does not require that such evidence relate specifically to the applicant. One German court, interpreting the standard to be applied under the Protocol, found that a well-founded fear exists "'when a reasonable person would draw the conclusion from external facts that he would be subject to persecution in his home country.'"[60] Although an applicant seeking relief must show good reason to fear persecution,[61] his claim under the Protocol would be supported by episodes of past persecution,[62] evidence that other persons in similar circumstances to those of the applicant have been persecuted,[63] and evidence of intervening events creating a risk of persecution during the applicant's absence.[64] Hence, a reasonable fear of persecution may "relate to any set of circumstances which may serve as an indication of the likelihood of future persecution."[65]

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56. Weis, *supra* note 21, at 970.

57. *See* 1 A. GRAHL-MADSEN, *supra* note 54, at 174-76.

58. *Id.* at 175.

59. *See supra* notes 14-21 and accompanying text.

60. 1 A. GRAHL-MADSEN, *supra* note 54, at 174 (quoting Judgment of Mar. 25, 1959, No. 3719, VerwG Ansbach, W. Ger., [1958] 2 Entscheidungen des Verwaltungsgerichts, a decision by the Bavarian administrative court of first instance in the former American zone).

61. HANDBOOK, *supra* note 55, at 11; Report of the Ad Hoc Committee, *supra* note 54, at 39.

62. "[I]f a person has experienced persecution, that may be considered *prima facie* proof to the effect that he may again become a victim of persecution should he return to his home country, so long as the regime which persecuted him prevails in that country." 1 A. GRAHL-MADSEN, *supra* note 54, at 176. *See also* Report of the Ad Hoc Committee, *supra* note 54, at 39 (well-founded fear exists when a person has actually been a victim of persecution).

63. 1 A. GRAHL-MADSEN, *supra* note 54, at 179.

64. *Id.*

65. *Id.*

Furthermore, evidentiary analysis in proceedings under article 33 was intended to take into account the generally acknowledged problems of the person claiming refugee status in obtaining corroborating evidence.[66] Weis, in discussing the evidence necessary to establish a successful claim states:

> The normal rules of evidence are, however, difficult to apply in proceedings for the determination of refugee status. The applicant may call witnesses in support of his statement and he may sometimes be able to present documentary evidence. But it follows from the very situation in which he finds himself as an exile, that he will rarely be in a position to submit conclusive evidence. It will essentially be a question whether his submissions are credible and, in the circumstances, plausible.[67]

This approach does not emphasize corroborating evidence but examines such things as the consistency of the claimant's own testimony. Thus, the evidence considered probative under the Protocol will be broadened to include the claimant's own testimony, provided his submissions are "credible" and "plausible." In contrast, section 243(h) dismissed the claimant's unsubstantiated testimony as not probative.[68]

III. *DISCREPANCIES BETWEEN ARTICLE 33 OF THE PROTOCOL AND SECTION 243(h) OF THE IMMIGRATION ACT*

In *Dunar*,[69] the Board of Immigration Appeals (Board) ruled that article 33 of the Protocol had "effected no substantial changes in the application of section 243(h), either by way of burden of

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66. Grahl-Madsen states:

> [I]t is a well-known fact that a person who claims to be a refugee may have difficulties in proving his allegations. He may have left his country without any papers, there may be nobody around who may testify to support his story, and other means of corroboration may be unavailable.

1 A. GRAHL-MADSEN, *supra* note 54, at 145-46. *See also* HANDBOOK, *supra* note 55, at 47 (refugees are often limited in the evidence they can submit to support their claims); Weis, *The International Protection of Refugees*, 48 AM. J. INT'L L. 193, 193-94 (1954) (problems plaguing refugees).

67. Weis, *supra* note 21, at 986.

68. *See supra* note 22 and accompanying text.

69. 14 I. & N. Dec. 310 (1973). In *Dunar*, the Board considered the claim of a native and citizen of Hungary who was admitted to the United States on January 10, 1966 as an immigrant visitor and remained longer than permitted. *Id.* The claimant conceded deport-

proof, coverage, or manner of arriving at decisions."[70] The Board applied certain "well-settled" principles generally used to determine whether a treaty[71] has modified or repealed a prior Congressional enactment. It stated that the "purpose of a treaty to supersede an act of Congress, in whole or in part, may not be lightly assumed. . . . Such a purpose must appear clearly and distinctly from the words used in the treaty."[72] The Board wrote that where a treaty and a statute relate to the same subject, an attempt must be made to give effect to both without violating the language of either.[73] If the treaty and the statute are irreconcilable, the treaty will control if it is of later date[74] and its provisions are self-executing.[75] The Board then examined the legislative history of the Proto-

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ability and requested withholding of deportation to Hungary under § 243(h). At a later hearing counsel withdrew the concession of deportability and contended that, as a refugee who had legally entered the United States as a nonimmigrant, the claimant was immune from deportation under article 32 of the Protocol. *Id.* at 311. However, the Board found the claimant deportable and found no inconsistency between article 32 and the existing immigration law. *Id.* at 311-18. Because the respondent was deportable, the Board was required to consider his eligibility for relief under § 243(h) of the Immigration Act. *Id.* at 318. In doing so the Board considered the effect of article 33 of the Protocol on § 243(h).

70. *Id.* at 323. No court had resolved the issue of the arguable discrepancies between the Protocol and § 243(h) of the Immigration Act before the *Dunar* decision. In Immigration & Naturalization Serv. v. Stanisic, 395 U.S. 62 (1969), the Supreme Court noted that it was "premature to consider whether, and under what circumstances, an order of deportation might contravene the Protocol and Convention Relating to the Status of Refugees". *Id.* 80 n.22.

In decisions rendered after *Dunar,* the courts acquiesced in the board's conclusions concerning the inconsistencies between the Protocol and the Immigration Act. *See* Kashani v. Immigration & Naturalization Serv., 547 F.2d 376 (7th Cir. 1977); Ming v. Marks, 367 F. Supp. 673 (S.D.N.Y. 1973), *aff'd per curiam,* 505 F.2d 1170 (2d Cir. 1974), *cert. denied,* 421 U.S. 911 (1975). *But see* Coriolan v. Immigration & Naturalization Serv., 559 F.2d 993, 996 (5th Cir. 1977) (Attorney General's broad discretion to withhold deportation under § 243(h) must be "measured in light of" the Protocol).

71. Dunar, 14 I. & N. Dec. at 313. The Board regarded the Protocol as a treaty because it supplemented and incorporated the substantive principles of the convention. *Id.*

72. *Id.*

73. *Id.* "Where fairly possible, a United States statute should be construed so as not to bring it into conflict with international law or an international agreement of the United States." RESTATEMENT (REVISED) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 134 (Tent. Draft No. 1 (1980). *See also* Johnson v. Browne, 205 U.S. 309, 321 (1907).

74. *Id.* "A rule of international law or a provision of an agreement that becomes effective as law in the United States supersedes any inconsistent . . . preexisting provision in the law of the United States." RESTATEMENT (REVISED) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 135 (Tent. Draft No. 1 1980).

75. The Restatement states the following concerning this concept:

[T]he intention of the United States determines whether an agreement is to be self-

col and concluded that Congress had not intended that the treaty change existing immigration law.[76] To the contrary,

> the general representations made to induce affirmative Senate action indicated that our immigration laws already embodied the humane provisions for refugees fostered by the Convention and Protocol. Accession by the United States, it was asserted, would lend the weight of our moral support to the measure and would influence other nations with less liberal refugee legislation to adhere to it.[77]

To justify its conclusion that the Immigration Act and the Protocol were not in conflict, the Board relied on Congress' lack of manifest intention to repeal section 243(h).[78]

The Board's analysis of the differing legal standards under the statute and the treaty focused on the distinction between "subjective" and "objective" fear of persecution.[79] The claimant had contended that under the Protocol's well-founded fear standard, the claimant's own state of mind was the primary test.[80] The Board reasoned that the Protocol's "requirement that the fear be 'well-founded' rules out an apprehension which is purely subjective. A fear which is illusory, neurotic or paranoid, however sincere, does not meet this requirement."[81] The Board noted that "some sort of a showing must be made and this can ordinarily be done only by

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> executing in the United States or should await implementing legislation. If the international agreement is silent as to its self-executing character and the intention of the United States is unclear, account must be taken of any statement by the President in concluding the agreement or in submitting it to the Senate for consent or to the Congress as a whole for approval, and of any expression by the Senate or by Congress in dealing with the agreement.

Id. § 131 comment h.

The legislative history of the Protocol in the Senate indicates that the United States believed that accession to the Protocol would not "impinge adversely upon established practices under existing laws in the United States" S. EXEC. K. 90th Cong., 2d Sess. III (1980) (letter of transmittal), and that in fact, the United States "already . . . [met] the standards of the Protocol . . . ." S. EXEC. REP. No. 14, 90th Cong., 2d Sess. 7 (1980) (statement of Leonard Dawson). Such statements would seem to indicate that the United States believed that no implementing legislation was necessary in order that the Protocol take effect. Since in that sense the Protocol was not intended to await "implementing legislation," it was arguably self-executing.

76. Dunar, 14 I. & N. Dec. at 314.

77. *Id.*

78. *See id.* at 314-15.

79. *Id.* at 319.

80. *Id.*

81. *Id.*

objective evidence." On that basis, the Board concluded that the clear probability standard required the same evidentiary showing as did the Protocol's well-founded fear standard.[82] The Board's conclusion was incorrect because it failed to extend its analysis to an examination of the objective showing required to establish eligibility under the well-founded fear standard and by the clear probability standard. The significant conflict between the two standards was in the different types of objective evidence accepted as probative.[83] This fundamental distinction brought into irreconcilable conflict the legal standards to be satisfied in establishing eligibility under the Protocol and under the immigration laws.

The conflict between the discretionary nature of the immigration law and the mandatory nature of the Protocol was exacerbated by the Board's statement that "we know of [no case] in which a finding has been made that the alien has established a clear probability that he will be persecuted and in which section 243(h) withholding has nevertheless been denied in the exercise of administrative discretion."[84]

The Board did not consider the implications arising from the fact that section 243(h) was discretionary. The rationale for the court's extremely limited role in reviewing 243(h) determinations had been the discretionary nature of that section and the vesting of that discretion in the INS by Congress.[85] A provision which entitles the applicant to relief upon a sufficient showing of eligibility, such as article 33 of the Protocol, limits this discretion. Such a mandatory provision creates a *right* to relief and would provide grounds for the courts to increase their role in reviewing such claims to ensure that the standards of law governing the conferral of relief are consistent with the requirements of the Protocol. This was not realized until Congress enacted the Refugee Act. The decisions of the Courts of Appeals rendered under the mandatory provision of the Refugee Act reflect the judiciary's independence in withholding of deportation cases.[86]

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82. *Id.*

83. *See supra* notes 20-25, 55-68 and accompanying text.

84. Dunar, 14 I. & N. Dec. at 322. *See also* 1A C. GORDON & H. ROSENFIELD, IMMIGRATION LAW AND PROCEDURE 5-176 to 177 (rev. ed. 1982) (although § 243(h) contemplated the exercise of discretion, it is doubtful that such discretion included the authority to deport an alien in the face of demonstrated persecution).

85. *See supra* notes 36-44 and accompanying text.

86. *See infra* notes 89-112 and accompanying text.

IV. JUDICIAL INTERPRETATION OF SECTION 203(e) OF THE REFUGEE ACT

In enacting the Refugee Act, Congress intended to conform the provisions of the immigration law previously embodied in section 243(h) of the Immigration and Nationality Act to the Protocol.[87] Section 203(e) of the Refugee Act reads: "The Attorney General shall not deport or return any alien . . . 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."[88]

The Ninth Circuit[89] and the Second Circuit[90] have rendered decisions construing the amended section. Both courts have ruled that the statute not only mandates that withholding of deportation be granted once statutory eligibility has been successfully established, but also limits the agency's discretion in making the determination of statutory eligibility and increases the role of the judiciary in reviewing INS decisions. Congress and the courts, by making and

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87. The legislative history of § 203(e) of the Refugee Act, the successor to previous § 243(h), indicates that § 203(e) is "based directly upon the language . . . [of article 33] of the Protocol and it is intended that the provision be construed consistent with the Protocol." S. REP. No. 590, 96th Cong., 2d Sess., 20 (1980). *See also* H. R. REP. No. 781, 96th Cong., 2d Sess. 20, *reprinted in* 1980 U.S. CODE CONG. & AD. NEWS 160, 161.

88. 8 U.S.C. § 1253(h) (Supp. IV 1980). Under the Refugee Act, the definition of refugee also has been made to conform to that contained in article 1 of the Protocol. According to the legislative history of the Refugee Act, § 201(a) incorporates the "internationally accepted definition of refugee contained in the Convention and Protocol Relating to the Status of Refugees." S. REP. No. 590, 96th Cong.,, 2d Sess. 19 (1980). *See also* H. R. REP. No. 781, 96th Cong., 2d Sess. 19 (1980); STAFF OF THE SENATE COMMITTEE ON THE JUDICIARY, 95th Cong., 2d Sess., REVIEW OF U.S. RESETTLEMENT POLICY, app. II, at 83 (Comm. Print 1980). Section 201(a) as codified in 8 U.S.C. § 1101(42) (Supp. IV 1980), reads:

> The term "refugee" means (A) any person who is outside any country of such person's nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion . . . .

8 U.S.C. § 1101 (42) (Supp. IV 1980).

Since the legislative history of the Refugee Act indicates that § 203(e) is to be construed consistently with the Protocol, the "well-founded fear" referred to in section 201(a) should be adopted as the new legal standard governing eligibility under the Refugee Act. Moreover, this standard should be construed as it has been under the Protocol. The Ninth Circuit has impliedly done so. *See infra* notes 91-102 and accompanying text.

89. McMullen v. Immigration & Naturalization Serv., 658 F.2d 1312 (9th Cir. 1981).

90. Stevic v. Sava, 678 F.2d 401 (2d Cir. 1982).

interpreting these changes, have effectively incorporated the principle of non-refoulement as embodied in article 33 of the Protocol into United States immigration law.

A. McMullen v. Immigration & Naturalization Service

In *McMullen v. Immigration & Naturalization Service*[91] the Ninth Circuit interpreted the Refugee Act as changing the administration of section 243(h). The first change mandated by the new legislation, according to the court, was an increase in the opportunity for judicial review. The Ninth Circuit wrote that the "role of the reviewing court necessarily changes when the charge to the agency changes from one of discretion to an imperative."[92] The court reasoned that because section 203(e) of the Refugee Act removed the absolute discretion previously vested in the INS, a formal finding of fact was required; deportation must, therefore, be withheld if certain facts are found to exist.[93] The court reasoned that because "[a]gency findings arising from public, record-producing proceedings are normally subject to the substantial-evidence standard of review,"[94] the same test would now be applied in reviewing claims of refugee status to which the Refugee Act applied.

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91. 685 F.2d 1312 (9th Cir. 1981). *McMullen* was an appeal from the Board's denial of a claim made under § 203(e) of the Refugee Act for withholding of deportation. McMullen, 17 I. & N. Dec. 542 (1980). The claimant, McMullen, was a former member of the Provisional Irish Republican Army (PIRA) who claimed that he would be persecuted if deported to his home country of Northern Ireland. *Id.* at 543. In addition to claiming that he would be persecuted by the Irish government because of his past association with the PIRA, McMullen asserted that he would be subject to persecution by the PIRA because of his refusal to participate any longer in their terrorist activities. *Id.*

Although a 243(h) claim normally contemplates persecution by the applicant's home government, such a claim can be made if the applicant proves that he will be persecuted by an organization that the government is unable or unwilling to control. The elements of proof of such a claim are equivalent to those in a case where the government is the persecutor. *Id.* at 544-45.

The INS brought deportation proceedings against McMullen on the grounds that he had entered the country illegally. *Id.* at 543. Conceding his deportability, McMullen claimed relief under § 203(e) of the Refugee Act. *Id.* at 543-44. The Board denied McMullen's claim, employing the clear probability standard. *Id.* at 544.

92. *McMullen*, 658 F.2d at 1316.

93. *Id.*

94. *Id.* The substantial evidence standard of review has been defined by the Supreme Court as "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Consolidated Edison Co. v. NLRB, 305 U.S. 197, 229 (1938); Consolo v.

The precise difference between the substantial evidence standard and the abuse of discretion standard mandated by the Immigration law is unclear.[95] In *McMullen*, however, the change in standards of review clearly reflects a changed attitude on the part of the court concerning its perceived role in reviewing administrative determinations. Whereas the courts had previously been extremely reluctant to review substantive evidence,[96] the Ninth Circuit conducted an extensive review of the evidence presented by both sides

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Federal Maritime Comm'n., 383 U.S. 607, 619-20 (1966). *See also* Universal Camera Corp. v. NLRB, 340 U.S. 474, 477 (1951); Labor Board v. Columbian Enameling & Stamping Co., 306 U.S. 292, 300 (1939).

Professor Davis points out that this standard does not allow the court to usurp the fact-finding function of the administrative agency. He indicates that fact finding may often involve the inference of basic facts from the testimony or demeanor of witnesses or of an ultimate fact from undisputed basic facts or from conflicting evidence. 4 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 29.05 at 137 (1958). The *weight* to be given to these facts and inferences to be drawn from them are not subject to judicial review. Rather the question for the reviewing court is whether the conclusions reached at the administrative level may be reasonably based on the facts so proven. *Id.* at 139. Thus, "[t]he court may not substitute its judgment on the question whether the inference drawn is the right one or whether a different inference would be better supported. The test is reasonableness, not rightness." *Id.*

95. In Charlton v. United States, 412 F.2d 390 (3d Cir. 1969), the court expressed the following view of the distinction between the abuse of discretion standard and the substantial evidence test:

> While agency action which is arbitrary and capricious, or which constitutes an abuse of discretion, would no doubt be action which is "unsupported by substantial evidence," the reverse is not true. In other words, even where the agency action is not arbitrary and capricious or an abuse of discretion, there may still not be "substantial evidence" in the accepted use of that test to justify the agency action.

Id. at 398 (Stahl, J., concurring) (footnotes omitted). On the other hand, one court viewed the distinction between the two as "semantic in some degree." Associated Indus. v. United States Dep't of Labor, 487 F.2d 342, 349-50 (2d Cir. 1973).

One commentator argues in another context that the two standards are the same where the grounds for challenging the agency action is the inadequacy of the evidentiary basis:

> [T]he two concepts are [not], in all contexts, coextensive, for often an assertion of arbitrariness or abuse of discretion is not based upon an alleged lack of evidentiary support for the determination. A decision may be "arbitrary," for example, if it rests in part upon unlawful considerations, or deviates unaccountably from previous agency decisions. But in the limited class of cases in which the ground for challenging the agency action is the inadequacy of its evidentiary basis, it is difficult to imagine a decision having no substantial evidence to support it which is not "arbitrary," or a decision struck down as arbitrary which is in fact supported by "substantial evidence." In short, in an evidentiary context the level of required support seems about the same whether the "substantial evidence" or the "arbitrary" test is used.

Scalia & Goodman, *Procedural Aspects of the Consumer Product Safety Act*, 20 U.C.L.A. L. REV. 899, 935 n.138 (1973).

96. *See supra* notes 28-44 and accompanying text.

in this case and made an independent judgment concerning the reasonableness of the agency's conclusions.

In conducting its review, the Ninth Circuit was willing to accept as probative evidence which was given little weight in proceedings under section 243(h) of the Immigration Act. Instead of assuming the unreliability of the claimant's own testimony,[97] the majority was willing to look at the nature of such testimony.[98] In this case the court determined that the "considerable length [of McMullen's testimony]; its reference to specific dates, places, incidents, details, and motivations; and its consistency under cross-examination . . . [indicate] that McMullen is either an elaborate and skilled liar, or that he was telling the truth."[99] The court's willingness to find the claimant's own testimony relevant to the issue of his being subject to persecution, provided that such testimony be consistent and believable, is a tacit rejection of the clear probability standard, under which all evidence must be corroborated. Instead, the Ninth Circuit adopted the well-founded fear standard under which such testimony is probative. Furthermore, the court did not require that McMullen produce evidence specifically relating to himself to meet this burden of proof, as had been previously required.[100] In considering the documentary evidence submitted, the majority wrote that "[e]vidence of a pattern of uncontrolled PIRA persecution . . . is relevant in determining whether McMullen is likely to face persecution upon deportation."[101] Once again the court seems to adopt the well-founded fear standard's requirement that to be probative, corroborating evi-

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97. *See supra* note 22 and accompanying text.

98. The Immigration and Naturalization Service had argued that McMullen's testimony was inherently unbelievable "not because it [was] internally inconsistent or lacking in the ring of truth—but because a [claimant] in a deportation case is motivated to lie in support of his own case." *McMullen*, 658 F.2d at 1318.

99. *Id.*

100. In support of his claim, McMullen offered

> documents . . . of a general nature, describing such things as Irish history and the workings of the IRA and PIRA. Descriptions of numerous killings and violent incidents relating to the Irish conflict are given. There are also Amnesty International reports . . . . The vast majority of the documents relate either to conditions in Ireland and Northern Ireland generally, or to persons other than the respondent.

McMullen, 17 I. & N. Dec. 542, 545-46 (1980). The Board had found that such evidence was not probative on the issue of this alien being subject to persecution if deported to Ireland. *Id.* at 546.

101. *McMullen*, 658 F.2d at 1318.

dence need only relate to circumstances which indicate a likelihood of persecution.

Finally, the court acknowledged the difficulties faced by a person "in McMullen's position" in presenting proof of anticipated persecution. The majority indicated that these difficulties would be taken into account in setting the legal standard to be employed under the Refugee Act.[102] Thus, without specifically mentioning the Protocol's well-founded fear standard, the Ninth Circuit has effectively incorporated significant elements of this standard into the immigration law.

B. Stevic v. Sava

The Second Circuit has also interpreted the Refugee Act to require certain changes in the administration of withholding of deportation claims. *Stevic v. Sava* was an appeal from a denial of a motion to reopen deportation proceedings by a citizen of Yugoslavia who claimed entitlement to relief under section 203(e) of the Refugee Act.[103] In its decision, the Second Circuit discussed the changes effected by the new legislation.

The court recognized that Congress, in enacting the Refugee Act, had intended to make a "comprehensive revision of immigration laws relating to asylum."[104] Concerning section 203(e) of that Act, the court concluded, based upon the legislative history and plain meaning of the section, that it should be construed consistently with the language and spirit of the Protocol.[105]

The majority stated, as the Ninth Circuit had in *McMullen*, that because section 203(e) of the Refugee Act made mandatory what was previously discretionary, certain changes were required

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102. *Id.* at 1319. The court wrote:

> If McMullen, a well known former PIRA member with an extensively documented claim of probable persecution, failed to present sufficient proof, then it appears close to impossible for anyone in McMullen's position to make out a § 243(h) case. *Cf.* United Nations High Commissioner for Refugees Handbook on Procedure and Criteria for Determining Refugee Status, ¶ 196, p. 47 (1979) (noting that refugees fleeing political persecution are often limited in the evidence they can submit to support their claims).

Id.

103. Stevic v. Sava, 678 F.2d 401 (2d Cir. 1982). *Stevic* was a consolidated action in which an appeal from a dismissal of a petition for a writ of habeas corpus was also at issue. *Id.* at 402.

104. *Id.* at 407.

105. *Id.* at 408.

in the administration of previous section 243(h).[106] The court stated that the clear probability test was the method by which the INS implemented what had been its discretion under section 243(h).[107] It reasoned that "[s]ince Article 33 of the Convention imposes an absolute obligation upon the United States, standards developed in an era of discretionary authority require some adjustment."[108] The majority recognized that as a result of the change from discretion to obligation, the judiciary was called upon to exercise independent judgment concerning the meaning of the Protocol[109] and an obligation was imposed upon the courts to ensure that the "non-discretionary exercise of Section 243(h) authority has been performed according to the correct standards of law."[110]

The court concluded that it had an obligation to determine the correct standard of proof to be used in withholding of deportation proceedings under amended section 203(e).[111] After considering the standard of proof contemplated by the drafters of the Protocol, the court held that under the new legislation, "deportation must be withheld, upon a showing far short of a 'clear probability' that an individual will be singled out for persecution."[112]

CONCLUSION

In exercising a newly acquired power to review INS determinations made under section 243(h) of the immigration law as amended, the courts have taken a significant step toward reconcil-

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106. *Id.* at 406.

107. *Id. See* Joseph, 13 I. & N. Dec. 70, 72 (1968); Tan, 12 I. & N. Dec. 564, 566 (1967).

108. *Stevic*, 678 F.2d at 406.

109. *Id.* at 409.

110. *Id.* at 410. The court further stated: "While we do not sit to second-guess the merits of the decisions reached under section 243(h), our obligation to assure observance of correct legal standards under this mandatory provision is to be contrasted with the more limited role of courts in reviewing [Board] decisions under grants of discretionary authority . . . ." *Id.*

111. *Id.* at 408-09.

112. *Id.* at 409. Regarding the specific nature of the standard to be applied under the Refugee Act, the court wrote:

> It would be unwise to attempt a more detailed elaboration of the applicable legal test under the Protocol. It emphasizes the fear of the applicant as well as the reasonableness of that fear. Its further development must await concrete factual situations as they arise. That development can be informed by the traditional indices of legislative intent, by the *Handbook* and by experience.

Id. at 410.

ing the legal standards required to establish eligibility for withholding of deportation under article 33 of the Protocol with the immigration laws of the United States. The Second Circuit in *Stevic* rejected the clear probability standard. The Ninth Circuit in *McMullen* has gone farther, impliedly adopting the Protocol's "well-founded fear standard."

The courts should continue their active role in assuring that correct legal standards are observed in this area by expressly adopting the well-founded standard as embodied in the Protocol. Adoption of this standard is necessary because of the obligations of the United States under the Protocol. Adoption would also accord with the express intent of Congress in enacting the Refugee Act. Finally, the express adoption of the well-founded fear standard would provide needed clarification of the law of withholding of deportation.

Edward A. Smith III