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INS v. Cardoza-Fonseca: Inching toward a Determinable Standard of Proof in Political Asylum Cases

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STUDENT COMMENT

INS v. Cardoza-Fonseca: Inching Toward a Determinable Standard of Proof in Political Asylum Cases

I. INTRODUCTION

The United States Supreme Court, in *INS v. Cardoza-Fonseca*, 480 US____,107 S.Ct 1207 (1987), recently decided that the standard of "clear probability" from section 243(h) of the Immigration and Nationality Act does not apply to section 208(a) asylum claims.

This article discusses both the holding and the scope of the *Cardoza-Fonseca* decision and identifies the issues left open for further resolution. This analysis reveals pertinent prior lower and Supreme Court cases as well as applicable legislative history from the U.S. Congress and the United Nations. Finally, the article discusses the need for a alternative standard in asylum determination and the implications of the *Cardoza-Fonseca* case in providing such a standard.

II. FACTS OF *INS v. CARDOZA-FONSECA*

On June 25, 1979 the Respondent, Luz Marina Cardoza-Fonseca, illegally entered the United States as a non-immigrant visitor. After exceeding the permitted stay, the Immigration and Naturalization Service (INS) commenced deportation procedures against her. Respondent requested withholding of deportation pursuant to section 243(h)[1] and asylum as a refugee pursuant to section 208(a).[2] The Board On Immigration Appeals (BIA) denied her claim for withholding of deportation under section 243(h) and political asylum under section 208(a).[3] The Respondent ap-

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1. The Immigration & Nationality Act sec.243(h), 8 U.S.C. § 1253(h) (1982) provides withholding of deportation if an alien can show that "it is more likely than not that the alien would be subject to persecution" in the country to which he would be returned.

2. The Immigration & Nationality Act sec.208(a), 8 U.S.C. § 1158(a) (1982) permits a discretionary grant of asylum by the Attorney General to an alien who has demonstrated persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion," § 101(a)(42), 8 U.S.C. § 1101(a)(4).

3. *In re* Cardoza-Fonseca, File No. A24 420 980 San Francisco at 3 (BIA Sept. 1983). The BIA converged the standards for withholding of deportation and political asylum by maintaining the immigration judge's holding that the Respondent had not established a

pealed the BIA decision to the United States Court of Appeals for the Ninth Circuit, which reversed and remanded for reconsideration.[4] The case was appealed to the U.S. Supreme Court and decided on March 9, 1987. The U.S. Supreme Court affirmed the Ninth Circuit's decision.[5]

III. STATUTORY HISTORY AND BACKGROUND

Contemporary asylum law can find its roots within U.S. assention to the 1967 United Nations Protocol Relating to the Status of Refugees[6] ("1967 Refugee Protocol" or "Protocol") Prior to this Protocol, relief was available to any alien who was within the United States if the deportable alien was subject to persecution upon deportation and could demonstrate a "clear probability of persecution" or a "likelihood of persecution."[7]

Relief was generally unavailable at U.S. borders to aliens seeking refuge due to persecution. Conditional entry was established in 1965 to address the admission of refugees outside U.S. boundaries.[8] Additionally, the Attorney General was authorized to "parole aliens temporarily into the country" for "emergency reasons" or for "reasons deemed strictly in the public interest."[9]

Conditional entry was restricted by a numerical ceiling placed on admission and, as with the parole power, it was severely limited by the ideology and geographic location of the applicant.[10] It was the 1967 United

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"clear probability of persecution." This was based on finding no difference between the clear probability and withholding of deportation standards.

4. The court in Cardoza-Fonseca v. INS, 767 F.2d 1448 (9th Cir. 1985), found that the Immigration Judge and the BIA erred in applying the clear probability standard of proof of § 243(h) to her § 208(a) asylum claim. Additionally, the court agreed with the Respondent's assertion that the well-founded fear standard of 208(a) is more generous than the clear probability standard of 243(h). The case was appealed to the U.S. Supreme Court and decided March 9, 1987.

5. For a more comprehensive examination of the facts, *see* INS v. Cardoza-Fonseca, 480 U.S. ____, 107 S. Ct. 1207 (1987).

6. The United Nations Protocol relating to the Status of Refugees was opened for signature on January 31, 1967. 19 U.S.T. 6233, T.I.A.S. No. 6577, 606 U.N.T.S. 267. It was ratified by the United States on October 4, 1968. 114 CONG. REC. 29,607 (1968). The Protocol incorporated the pertinent aspects of the "refugee" definition in article 1 and articles 2-34 of the 1951 Convention relating to the Status of Refugees, 19 U.S.T. 6260, T.I.A.S. No. 6577 (hereinafter cited as the 1967 Protocol).

7. The Attorney General was authorized to withhold deportation of a deportable alien under § 243(h) of the Immigration & Nationality Act of 1952, 8 U.S.C. § 1253(h) (1964 ed.) e.g. Lena v. INS, 379 F.2d 536, 538 (CA 7 1967); *In re* Janus and Janek, 12 I. & N. Dec. 866, 873 (BIA 1968); *In re* Kojoory, 12 I. & N. Dec. 215, 220 (BIA 1967).

8. Pub. L. No. 89-236 § 3, 79 Stat. at 913, repealed by 94 Stat. 107.

9. 1952 Act, § 212(d)(5), 66 Stat. at 188 (current version at 8 U.S.C. § 1182(d)(5) (1976)).

10. Both remedies for overseas refugees had gross favoritism to those fleeing communist countries. See World Refugee Crisis: The International Community's Response, Report to the Committee on the Judiciary, 96th Cong., lst Sess. 213 (1979). This report shows a pre-1968 use of parole power favoring total authorized Communist refugees, at 232, 711 to the non-communist refugees at 925.

Nations Protocol Relating to the Status of Refugees,[11] that set the stage for contemporary asylum law. Assention to the Protocol bound each party to the adopted provisions of the Protocol, including the definition of "refugee" as a person who has a "well-founded fear of being persecuted for reasons of race, religion, nationality, membership in a particular social group, or political opinion."[12]

The sponsors of the Protocol, as well as the Senate and the President, were certain that assention to the Protocol would not interfere with existing immigration law.[13] Ratification of the Protocol brought a recognition by Congress that INS lacked conformity to the standards set out in the Protocol. It became increasingly apparent to Congress that the INS was not properly implementing practices and procedures of the Protocol, but was using practices and procedures which were frustrating the implementation of the Protocol. Despite considerable flexibility permitted under the withholding of deportation provision, the BIA retained the clear probability standard.[14] Additionally, the courts lacked conformity in a refugee eligibility standard. As Justice Stevens noted in *INS v. Stevic*,[15] the courts that reviewed withholding of deportation determinations after the U.S. became a party to the Protocol differed in their application of an appropriate refugee eligibility standard. Some courts used the well-founded fear standard.[16] Other courts used the clear probability standard,[17] while other formulations were conceived by other courts.[18] The need for legislation to conform INS standards and practices to those of the 1967 Protocol was not met until the passage of the 1980 Refugee Act ("Refugee Act" or "Act").[19]

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11. *See supra* note 6.

12. 1967 Refugee Protocol, *supra* note 6, art. 1(2) (directly incorporating the definition of "refugee" contained in the 1951 Refugee Convention, *supra* note 6, art. 1(A)(2)).

13. The Senate Foreign Relations Committee report shows experts and Protocol sponsors were unequivocal in their assurances that ratification of the document "would not impinge adversely upon the federal and state laws of this country." S. Exec. Rep. No. 14, 90th Cong., 2d Sess. 2 (1968).

14. *In re* Joseph, 13 I. & N. Dec. at 72.

15. INS v. Stevic, 467 U.S. 407 (1984).

16. Pereira-Diaz v. INS, 551 F.2d 1149, 1154 (9th Cir. 1977); Zamora v. INS, 534 F.2d 1055, 1058 (2d Cir. 1976); Paul v. INS, 521 F.2d 194, 200 (5th Cir. 1975).

17. Martineau v. INS, 556 F.2d 306, 307 (5th Cir. 1977); *Pierre* v. United States, 547 F.2d 1281, 1289 (5th Cir. 1977), *vacated and remanded to consider mootness*, 434 U.S. 962 (1977); Cisternas-Estay v. INS, 531 F.2d 155, 159 (3d Cir.), *cert denied*, 429 U.S. 853 (1976); Rosa v. INS, 440 F.2d 100, 102 (lst Cir. 1971).

18. Khalil v. District Director, 457 F.2d 1276, 1277 n.3 (9th Cir. 1972) ("would be persecuted"); Henry v. INS, 552 F.2d 130, 131 (5th Cir. 1977) ("probable persecution"); Daniel v. INS, 528 F.2d 1278, 1279 (5th Cir. 1976); Shkukani v. INS, 435 F.2d 1378, 1380 (8th Cir.), *cert. denied*, 402 U.S. 920 (1971); Gena v. INS, 424 F.2d 227, 232 (5th Cir. 1970) ("likely" persecution); *Kovac* v. INS, 407 F.2d 102, 105 (9th Cir. 1969) ("probability of persecution").

19. Prior to the passage of the 1980 Refugee Act, bills were considered by the House of Representatives to contain the "wellfounded fear" language. *See* Western Hemisphere Immigration Hearings on H.R. 367, H.R. 981, and H.R. 10323, before the House Subcomm. on Immigration, Citizenship and International Law of the Comm. on the Judiciary, 94 Cong.,

A. *The 1980 Refugee Act*

The Refugee Act was designed to bring the United States into conformity with the Protocol. This created significant changes in existing immigration law. First, the Act established a new standard of uniform and non-ideological refugee eligibility. This was accomplished by incorporating the Protocol's definition of "refugee" into U.S. immigration law[20] and adding the asylum provision of section 208(a) to the INA.[21] Additionally, the Act amended section 243(h),[22] eliminating the discretionary power of the Attorney General by requiring that all aliens who meet the standard for eligibility be granted withholding of deportation.[23] The requirement that an alien be subjected to persecution was substituted for the require-

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lst & 2nd Sess. (1976).

20. Compare the definition included in the Refugee Act of 1980 which 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(a)(42) (1982), with the definition embodied in the 1951 Refugee Convention and the 1967 Refugee Protocol:

[T]he term "refugee" shall apply to any 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; or who, not having a nationality and being outside the country of his former habitual residence is unable or, owing to such fear, is unwilling to return to it.

The United Nations Convention Relating to the Status of Refugees, 189 U.N.T.S. 150 (July 28, 1951) [hereinafter referred to as the 1951 Convention], art. l(A), as amended by 1967 Refugee Protocol, *supra* note 6 at art. 1(2).

The joint explanatory statement of the Conference Committee on the bill which became the Refugee Act observed that both the House and Senate versions of the bill incorporated the Protocol's definition of refugee. H.R. conf. Rep. No. 781, 96th Cong., 2d Sess. 1, (1980), *reprinted in* 1980 U.S. CODE CONG. & ADMIN. NEWS 160. The conference report adopted the House provision which "incorporated the U.N. definition, as well as Presidentially-specified persons within their own country who are being persecuted or who fear persecution" and excluded "persons who themselves have engaged in persecution." *Id.*

21. H.R. Conf. Rep. No. 781, 96th Cong., 2d Sess. 19(1980), reprinted in 1980 U.S. CODE CONG. & ADMIN. NEWS 160. The asylum provision provides as follows:

The 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 and Nationality Act § 208(a), 8 U.S.C. § 1158(a) (1982).

22. 8 U.S.C.§ 1253(h) (1982).

23. 8 U.S.C. § 1253(h)(1) (1982). Prior to 1980, section 243(h) provided that: "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 necessary for such reason." Immigration and Nationality Act § 243(h), 8 U.S.C. § 1253(h) (1976) (amended 1980).

ment that an alien just show that his life or freedom is threatened.[24] Unfortunately, Congress failed to establish a definite standard for section 243(h) claims and this omission of an applicable standard has created numerous disputes over the degree of proof an alien needs to present for withholding of deportation.[25]

Given the multifarious results of the Refugee Act in approaching a refugee standard,[26] it was only a matter of time before the Supreme Court would hear a case on the withholding of deportation standard.

B. INS v. Stevic

The issue before the U.S. Supreme Court in *INS v. Stevic*[27] was whether Congress had intended to liberalize the standard of proof required to obtain withholding of deportation under section 243(h) of the Refugee Act. The case was brought up from the Second Circuit, which ruled that the Refugee Act had adopted a more liberal "well-founded fear of persecution" test in section 243(h) cases consistent with the international standards in the 1967 Protocol.[28]

In a unanimous decision, the Court held that an alien must establish a "clear probability of persecution" to avoid deportation under section

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24. *Id.* As amended by the Refugee Act, section 243(h)(l) of the INA provides that: "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." 8 U.S.C. § 1253(h)(l) (1982).

25. For a discussion on the different interpretations over whether the statutory revisions of the Refugee Act had changed the degree of proof an alien needs for § 243(h) claims, *see* Helton, *Political Asylum under the 1980 Refugee Act, An Unfulfilled Promise*, 17 U. MICH. J.L. REFORM 243, 252-53 (1984).

26. The well-founded fear standard as set forth in § 101(a); definition of refugee contributed to the inter-circuit dissension over the standard of proof applicable to § 243(h), withholding claims, and § 208(a), asylum claims.

The Second and Sixth Circuits took the position that the well-founded fear standard was more lenient than the clear probability standard. These courts applied the well-founded fear standard to both withholding of deportation and asylum claims. *See, e.g.*, Stevic v. Sava, 678 F.2d 401, 409 (2d Cir. 1982) ("asylum may be granted, and under Section 243(h), deportation must be withheld, upon a showing far short of a 'clear probability' that an individual will be singled out for persecution"), *rev'd sub nom.* INS v. Stevic, 467 U.S. 407 (1984); Reyes v. INS, 693 F.2d 597, 599 (6th Cir. 1982) (following Stevic v. Sava), *vacated*, 747 F.2d 1045 (6th Cir. 1984), *cert. denied*, 105 S. Ct. 2173 (1985). In contrast, the Third Circuit found no difference between the two standards and applied clear probability to both withholding and asylum claims. *See, e.g.*, Rejaie v. INS, 691 F.2d 139, 146 (3d Cir. 1982) ("We read 'well-founded fear' within the circumstances of its use and hold that it equates with 'clear probability.' "). The Board of Immigration Appeals also equated the well-founded fear standard with the clear probability standard following passage of the 1980 Refugee Act. *See, In Re* Lam, 18 I. & N. Dec. 15, 17-18 (BIA 1981); *In re* Salim, 18 I. & N. Dec. 311, 314 (BIA 1982). This view was rejected by the Supreme Court in INS v. Stevic, 467 U.S. 407, 425 (1984). *See infra* notes 48-49 and accompanying text.

27. INS v. Stevic, 467 U.S. 407 (1984).

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

243(h)[29] thus maintaining the BIA practice of construing the clear probability standard to mean that it was "more likely than not that the alien would be persecuted in the country to which he was being deported."[30] In *Stevic*, equal deference should be given to what the Court did not hold. It did not hold that the clear probability and well-founded fear standards are synonymous.[31] It did not define the meaning of the phrase "well-founded fear" of persecution. However, it did say that the "well-founded fear standard is more generous than the clear probability of persecution standard. . . ."[32]

Failing to define the well-founded fear standard in asylum cases perpetuated the incongruity between the circuit courts on the issue of whether there is any difference between the clear probability standard for withholding of deportation, and the well-founded fear standard for asylum eligibility.[33]

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29. *Id.* at 430.

30. *Id.* at 429.

31. *Id.* at 430.

32. *Id.* at 425. The court in *Stevic* seemed to lace this opinion with language of compromise in a very controversial case. The New York Times, in its analysis of the court's may shed some light into the court decision when it surmised:

> The Court's failure to reach the asylum issue may indicate that the case was more difficult than it appeared to be from the unanimous opinion. The narrow treatment may have been the result of a behind-the-scenes compromise designed to break a six-month deadlock. The case, *I.N.S. v. Stevic* [sic], No. 82-973, was argued Dec. 6, making it one of the oldest cases on the Court's docket. The Court does not ordinarily take that long on a case it decides unanimously. New York Times, June 6, 1984.

33. The Third Circuit singularly contended that there is no difference between the well-founded fear and clear probability standards. *See* Sotto v. INS, 748 F.2d 832 (3d Cir. 1984). The court was reaffirming its position in Rejaie v. INS, 691 F.2d 139 (3d Cir. 1982). The Sixth Circuit noted that the well-founded fear standard required a lesser showing than the clear probability standard. *See* Youkhanna v. INS, 749 F.2d 360 (6th Cir. 1984). The court in *Youkhanna* found that neither standard had been satisfied in that case. In contrast to the Sixth Circuit's silence on the issue, the Seventh Circuit addressed the difference in the evidence required for asylum and withholding of deportation. The court in Caravajal-Munoz v. INS, 743 F.2d 561 (7th Cir. 1985) indicated that the "clear probability" standard requires objective evidence to corroborate the applicant's testimony, while "sometimes" the applicant's testimony alone will be sufficient to meet the well-founded fear standard. *See* Carava-jal-Munoz, 743 F.2d at 562.

The United States Court of Appeals for the Ninth Circuit decided that the well-founded fear standard for asylum adjudication was easier to fulfill than the clear probability standard for withholding of deportation. Bolanos-Hernandez v. INS, 767 F.2d 1277, 1282-83 (9th Cir. 1985). In *Bolanos-Hernandez* the court held that there was a clear probability that the petitioner would be subject to political persecution if he returned to El Salvador. *Id.* at 1287-88. Specific threats against Bolanos-Hernandez were sufficient to establish a threat of persecution, even though they were representative of the general level of violence in El Salvador. *Id.* at 1284-85. Bolanos-Hernandez's neutrality constituted a political opinion. *Id.* at 1286-87. The court held that he had met the clear probability standard for withholding of deportation and reversed the denial of his section 243(h) claim. *Id.* at 1287-88. Holding that "an alien who has met the clear probability standard has, *a fortiori*, demonstrated a well-founded fear of persecution," the court reversed and remanded the denial of Bolanos-Hernandez's section 208(a) claim. *Id.* at 1288.

Additionally, *Stevic*'s failure to instruct on the differences between the "clear probability" standard for withholding of deportation and the "well-founded fear" standard for asylum eligibility, preserved the BIA's interpretation that the two standards converge.[34]

C. *In Matter of Acosta*

After years of inconsistency on the part of the BIA in interpreting the standards of proof for section 208 and section 243,[35] the Board *In Matter of Acosta*[36] attempted to clarify its understanding of the well-founded fear standard. In *Acosta*, the Board maintained its practice of converging section 208 asylum claims and section 243 withholding of deportation standard when it concluded that in practical applications the standards "converge."[37] The BIA based its determination of "well-founded fear of persecution" on its understanding of congressional intent when passing the Refugee Act.[38] The BIA also methodically selected favorable language from the UNHCR's Handbook on Procedures and Criteria for Determining Refugee Status[39] ("UNHCR Handbook" or "Handbook").

Acosta provided the BIA with a comprehensible opinion to base its understanding and application of well-founded fear by merging the standard with the clear probability standard and requiring refugees to satisfy the clear probability standard for their asylum claims. This burden of proof was placed on Cardoza-Fonseca by the BIA in her claim for asylum.[40] The BIA, after ignoring Cardoza-Fonseca's argument that the clear

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34. The BIA first converged the well-founded fear and clear probability standards of § 208 and § 243, respectively, in *In re* Dunar, 14 I. & N. Dec. 310 (BIA 1973) when the Board announced that it believed that the clear probability of persecution standard was not different from the well-founded fear of persecution standard found in the 1967 Protocol Relating to the Status of Refugees.

35. The Board's interpretation of section 208(a) regarding the standard of well-founded fear has been far from consistent. *Compare* Matter of McMullen, 17 I. & N. Dec. 542, *rev'd on other grounds*, McMullen v. INS, 658 F.2d 1312 (9th Cir. 1981) (requiring proof of actual persecution), with Matter of Salim, 18 I. & N. Dec. 311 (BIA 1982) (requiring "objective evidence that [the applicant] has a well-founded fear that he is likely to be singled out for persecution. . ."), and Matter of Sibrun, 18 I. & N. Dec. 354, 358 (BIA 1983) (requiring that the alien ". . . demonstrate a likelihood that he individually will be singled out and subjected to persecution.")

36. Matter of Acosta, Interim Dec. No. 2986 (Mar. 1, 1985).

37. *Id.* at 25.

38. *Id.*

39. *Id.* at 24. OFFICE OF THE UNITED NATIONS HIGH COMM'R FOR REFUGEES, HANDBOOK ON PROCEDURES AND CRITERIA FOR DETERMINING REFUGEE STATUS UNDER THE 1951 CONVENTION AND THE 1967 PROTOCOL RELATING TO THE STATUS OF REFUGEES (1979) [hereinafter UNHCR HANDBOOK]. To the extent that the Handbook does not require an asylum seeker to show that he is more likely than not to be persecuted, the Board rejects the Handbook as inconsistent "with Congress' intention and with the meaning of the Protocol." *In re* Acosta, Interim Dec. No. 2986, at 19, 25 (BIA Mar. 1, 1985).

40. *See generally* Cardoza-Fonseca v. INS, File No. A24 420 980, San Francisco at 3 (BIA Sept. 1983).

probability standard was the wrong standard to apply to the asylum request,[41] ruled that its conclusion would be the same whether it applied "a standard of clear probability," "good reason," or "realistic likelihood" of persecution."[42]

D. *The Ninth Circuit In Cardoza-Fonseca v. INS*

In reversing the BIA decision,[43] the Ninth Circuit, in *Cardoza-Fonseca*, embraced a well-founded fear standard that was contrasted with the clear probability standard by drawing a distinction between "probability" and "possibility" of persecution.[44] The court endorsed a formulation derived from *Bolanos-Hernandez v. INS*, an earlier Ninth Circuit case.[45]

The *Bolanos* court noted that an evaluation of "well founded fear" includes an inquiry into the subjective element of the applicant's state of mind, as well as objective elements like the conditions, the law and experiences of others in the country of origin.[46]The court's determination that "well-founded fear"[47] must be supported by objective evidence[48] must not be coalesced with the BIA construction of "well-founded fear." The BIA required that an individual's fear of persecution have a basis in objective facts that shows a "realistic likelihood" of persecution.[49] The applicable difference between the BIA and the Ninth Circuit's "well-founded fear" language is the BIA's interpretation of "realistic likelihood" to mean a clear probability of persecution,[50] whereas the Ninth Circuit interpreted "realistic likelihood" to mean a reasonable existence of persecution.[51]

IV. *INS v. CARDOZA-FONSECA* OPINION

In *Cardoza-Fonseca*,[52] the U.S. Supreme Court held that the "clear probability" standard of proof for section 243(h), "withholding of deportation," does not govern asylum applications under section 208(a).[53] Jus-

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41. *Id.* at 11.

42. *Id.* at 13.

43. *See generally* Cardoza-Fonseca v. INS, 767 F.2d 1448 (9th Cir. 1985).

44. *Id.* at 1450.

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

46. *Id.* at 1282. The *Bolanos* court went on to say that one who has qualified for asylum as opposed to withholding of deportation, may have established only the existence of a valid reason to fear. *Id.* at 1285.

47. The court in *Cardoza-Fonseca* notes that the well-founded fear standard requires that "the alien have a subjective fear." Cardoza-Fonseca v. INS, 767 F.2d at 1452.

48. The court requires that objective facts "support an inference of past or risk of future persecution. That the objective facts are established through the credible and persuasive testimony of the applicant does not make those facts less objective." *Id.* at 1452-53.

49. *In re* Acosta, Interim Dec. No. 2986 at 21 (BIA Mar. 1, 1985).

50. *See id.* at 25. *See also* Rozell Asylum Eligibility. The Proper Standard For Asylum Eligibility Is A Well-Founded Fear Of Persecution, 26 VA. INT'L L.J. 1039, note 68 and accompanying text.

51. *Cardoza-Fonseca*, 767 F.2d at 1452.

52. *See generally*, INS v. Cardoza-Fonseca, 480 U.S. ____, 107 S. Ct. 1207 (1987).

53. *Id.* at 1212-1215.

tice Stevens, in a 6 - 3 majority, delivered the opinion of the court. After an exhaustive examination of the legislative history surrounding the standards under sections 208(a) and 243(h), the majority concluded that the statutory language of the 1980 Refugee Act indicates a congressional intent that the two standards should differ.[54] The court based this conclusion on the statutory language of sections 208(a) and 243(h). In section 243(h) the court notes that the "would be threatened" language "has no subjective component." However, it requires that the alien "establish by objective evidence that it is more likely than not that he. . .will be subject to persecution."[55] The court contrasted the section 208 standard by concluding that the relevance to "fear" in the standard requires a subjective mental state in the alien and this is the foundation for eligibility.[56]

Congressional intent to have separate standards for section 208 and section 243, the court noted, was evident in the simultaneous drafting of the section 208 standard while leaving the standard of section 243(h) intact.[57]

The court, in its examination of the Refugee Act and its language, found it necessary to look at legislative history for support, despite its conclusions that the plain language of the Act appeared to settle the question before them.[58] It found influential precedent which was coactive with the Refugee Act in a historical interpretation in various bodies of law.

A. Section 203(a)(7)

The first was the link between pre-1980 section 203(a) (7)[59], and section 207 standards[60] of admission. The court found that Congress was satisfied with the procedural methods by which they dealt with refugees outside the United States[61] and they adopted the "well-founded" lan-

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54. *Id.*

55. *Id.*

56. *Id.*

57. *Id.*

58. *Id.* at 1213-1214. The court explained its examination of the legislative history with, "In this case, far from causing us to question the conclusion that flows from the statutory language, the legislative history adds compelling support to our holding that Congress never intended to restrict eligibility for asylum to aliens who can satisfy § 243(h)'s strict, objective standard." *Id.* at 1213-1214. *See* note 12 and accompanying text.

59. 8 U.S.C. § 1151. This statute authorized "conditional entry" to a regulated arrival of refugees fleeing from communistdominated areas of the Middle East based on "persecution or fear of persecution on account of race, religion, or political opinion."

60. The Immigration and Nationality Act, § 207 - 8 U.S.C. § 1157, regulates the admission of refugees who seek admission from foreign countries. Compare section 207 with section 208, which applies to refugees currently in the U.S. *See supra* note 2. Both look to section 101(a)(42) for the statutory definition of "refugee." *See also supra* note 20.

61. The procedure was considered acceptable under the U.N. Protocol. However, the court found that the geographical and political distinctions were unacceptable under the Protocol. *Cardoza-Fonseca*, 480 U.S. ____, 107 S. Ct. at 1215.

guage to be in conformance with the 1967 U.N. Protocol.[62] The court concluded that the requirements of clear probability of persecution "to show a well-founded fear" would be an abrogation of congressional intent, and that the standard for admission under section 207 is the same as the one previously applied under section 203(a)(7).

The U.N. Protocol[63] was, as the court concluded, the primary purpose for the 1980 Refugee Act.[64] The court traced back the Protocol's definition of "refugees" and found that it was incorporated into the 1951 U.N. Convention Relative to the Status of Refugees,[65] and eventually incorporated into the 1967 Protocol.

The court concluded that the standard of "well-founded fear" has been consistently understood as not requiring an alien "to show that it is more likely than not that he will be persecuted in order to be classified as a refugee."[66]

B. The UNHCR Handbook And U.N. Protocol

The court found additional assistance in separating the two sections, 208 and 243 respectively, in the UNHCR's Handbook on Procedures and Criteria for Determining Refugee Status.[67] It concluded that the Handbook is consistent with the court's examination of the standard to be considered for "well-founded fear." The court noted that the applicant's fear is well-founded when it is proven that staying in the country of origin has become intolerable for reasons stated in the definition, or that it would be intolerable if he/she returned, for the same reasons, and if this can be established by a reasonable degree.[68]

The Handbook provides guidance in construing the Protocol and has been widely used for establishing the obligations of the Protocol, the court noted.[69] However, it was not suggested by the court that the Handbook binds the BIA to its reference with section 208.[70]

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62. *Id.* at 1216-1217.

63. 1967 Protocol, *supra* note 6.

64. *Cardoza-Fonseca*, 480 U.S. ___, 107 S. Ct. at 1216.

65. The court found that the definition of "refugee" is found in the 1946 Constitution of the International Refugee Organization (IRO) which defined a "refugee" as a person who had a valid objection to returning to his country of nationality, and specified that "fear, based on reasonable grounds of persecution because of race, religion, nationality, or political opinions. . ." constituted a valid objection. See IRO Constitution 1 § C annex 1 art. 1(a)(i), as cited in *Cardoza-Fonseca*, at 1216.

189 U.N.T.S. 150 (July 28, 1951). The court noted that the Committee that drafted the provision explained that "[t]he expression 'well-founded fear of being the victim of persecution . . .' means that a person has either been actually a victim of persecution or can show good reason why he fears persecution." U.N. Rep. 39 as cited in *Cardoza-Fonseca* at 1216. *See also supra* note 20.

66. *Cardoza-Fonseca*, 480 U.S. ___, 107 S. Ct. at 1215.

67. UNHCR HANDBOOK, *supra* note 39.

68. *Cardoza-Fonseca*, 480 U.S. ___, 107 S. Ct. at 1217-1218.

69. *Id.* at 1217, and *supra* note 22.

70. *Id.* at 1217, and *supra* note 22. The suggestion of using the Handbook as guidance

The court analogized the 1951 United Nations Convention Relating to the Status of Refugees,[71] articles 33.1 and 34, with sections 208 and 243, respectively, and concluded that section 243's and section 208's discretionary mechanism is "precatory" and, like article 33, does not require the implementing authority actually to grant asylum to all those who are eligible.[72] The court concluded that the Protocol's article 33.1 requests a discretionary benefit for those aliens who qualify as refugees, while article 34 is an entitlement for the subcategory of those who "would be threatened." This distinction between the broad class of refugees and the subcategory entitled to section 243(h) relief is plainly revealed in the 1980 Act.[73]

C. *Rejection Of The Senate Bill*

The court's exhaustive examination of pertinent legislative history ended with a conclusion that congressional rejection of the Senate Bill[74] under consideration preceding the passage of the 1980 Act in favor of the House Bill;[75] "demonstrates that Congress eventually refused to restrict eligibility," for asylum only to aliens meeting the stricter standard.[76]

D. *Government's Arguments Rejected*

The government asserted two primary arguments for converging the section 208 and section 243 standards; both arguments were rejected by the Court.[77] The court found that the government's contention, that it is anomalous for section 208 to have a less stringent standard than section 243, when section 208 provides greater benefits than section 243, is nonsensical. The Court firmly rejected this argument when it said:

> We do not consider it at all anomalous that out of the entire class of

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for construing a "well founded fear" standard may have considerable consequences for future interpretation and application of "well-founded fear." This is discussed in text and accompanying notes 88-100.

71. 1961 Convention, *supra* at note 6. The court found that section 243(h) corresponds with article 33.1 in that section 243(h)'s imposition of a "would be threatened if deported" stems from article 33.1. *Cardoza-Fonseca*, 480 U.S. ____, 107 S. Ct. at 1218-1219, is comparable to article 33.1's requiring an applicant to satisfy the burden of proving that he/she has a well-founded fear of persecution, i.e. he/she is a refugee and that the refugee can show that his/her life or freedom would be threatened. *See id.* at 1218.

72. *Cardoza-Fonseca*, 480 U.S. ____, 107 S. Ct. at 1218.

73. *Id.* at 1218.

74. Senate Bill, S.643, 96th Cong. lst Sess. (1979).

75. House Bill, H.R. 2816, 96th Cong. lst Sess. (1979).

76. *Cardoza-Fonseca*, 480 U.S. ____, 107 S. Ct. at 1218-1219.

The Senate Bill contained a provision which included the additional burden on a refugee that he could not obtain asylum unless "his deportation or return would be prohibited under section 243(h)" S.Rep. 26. Thus, the court reasoned that the Senate's inclusion of this additional requirement for section 208 relief indicates that the Senate recognized a difference between the "well-founded fear" standard of section 208 and the "clear probability" standard of section 243. *Id.* at 1218.

77. *Id.* at 1219-1222.

> 'refugees,' those who can show a clear probability of persecution are entitled to mandatory suspension of deportation and are eligible for discretionary asylum, while those who can show a well-founded fear of persecution are not entitled to anything, but are eligible for the discretionary relief of asylum.[78]

The court also rejected the government's second argument, that substantial deference should be accorded the BIA's position of converging the "clear probability standard" and "well-founded fear" standard. The court reasoned that the issue of congressional intent to draft the standards as identical is subject to statutory construction.[79] This is not a question of case-by-case interpretation left to administrative agencies, but an issue of statutory construction of which the courts are the final authority.[80]

E. The Dissenting Opinion

Justice Powell, in writing the dissenting opinion,[81] found the BIA interpretation of sections 208 and 243, respectively, "reasonable."[82]

The dissenting opinion was drafted around three objections to the *Cardoza-Fonseca* decision. The first was the view that legislative history seems to indicate that congressional intent authorized the Attorney General to apply their interpretation of the "well-founded fear" standard prior to 1980, and that this standard should carry over in adjudicating asylum applications.[83]

The dissent, in its second objection, found the majority's reliance on the materials interpreting the U.N. Protocol, "marginally relevant."[84] Concluding that the materials encouraged a mathematical approach to the likelihood of persecution, the dissent asserted that the BIA's rejection of such an approach is consistent with the drafters of the Protocol.[85]

Finally, the dissent objected to the majority's reliance on the Conference Committee's rejection of the Senate bill in favor of the House bill.[86] The difference between the two bills is insignificant, thus the Conference Committee's choice of the language of the House bill is equally insignificant, the dissent concluded.

V. CONCURRING OPINIONS

A. Justice Scalia's Concurring Opinion

Justice Scalia, in his concurring opinion, provided an interesting

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78. *Id.* at 1219.
79. *Id.* at 1220-1221.
80. *Id.*
81. Justice Powell was joined by the Chief Justice and Justice White. *Id.* at 1225.
82. *Id.* at 1228-1229.
83. *Id.* at 1229.
84. *Id.* at 1229-1230.
85. *Id.* at 1230.
86. *See supra* note 76 and accompanying text.

summation of the majority's downfalls in reaching a judgment, of which the Justice concurs; but he objected to methods of reaching this conclusion: "Since the Court quite rightly concludes that the INS's interpretation [of "well-founded fear"] is clearly inconsistent with the plain meaning of that phrase and the structure of the Act, . . . there is simply no need and thus no justification for a discussion of whether the interpretation is entitled to deference."[87]

Justice Scalia further noted that the majority's excessively gratuitous examination of legislative history raises the potential for misuse in the principles of administrative law as well as the betrayal of the majority's assurance that they were not setting forth a detailed standard for "well-founded fear."[88]

One can only hope that Justice Scalia's conjecture becomes operational, thus providing the court with a detailed interpretation of the well-founded fear standard, based on the UNHCR Handbook. The Handbook has been widely circulated and approved by governments.[89] Additionally, the Handbook has been used in many judicial decisions in the interpretation of the 1967 Protocol,[90] and since the 1980 Refugee Act was designed to bring the U.S. into conformity with the 1967 Protocol, the use of the Handbook for interpretation of "well-founded fear" is a consistent choice.

The need for the Handbook's guidance after the *Cardoza- Fonseca* opinion is certain. Even though the majority clearly endorsed the Handbook as a legitimate interpretation of the "well-founded fear" standard, the court fell short in breathing substantive life into the standard, "but instead left the task to the INS in a process of case-by-case adjudication."[91]

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87. *Cardoza-Fonseca*, 480 U.S. ____, 107 S. Ct. at 1224. Justice Scalia is concerned about what he views as an "unjustifiable" use of the majority's "superfluous discussion to express controversial, and I believe erroneous, views." *Id.* at 1222 on refashioning important principles of administrative law in cases in which such "questions are completely unnecessary to the decision." *Id.* at 1225.

88. *See supra* note 71 and *Cardoza-Fonseca*, 480 U.S. ____, 107 S. Ct. at 1224, note 31. Justice Scalia referred to the majority's endorsement of the UNHCR Handbook, which explains "well-founded fear" as:

> In general, the applicant's fear should be considered well-founded if he can establish, to a reasonable degree, that his continued stay in his country of origin has become intolerable to him for the reasons stated in the definition, or would for the same reason be intolerable if he returned there.

UNHCR HANDBOOK, *supra* note 39 at Ch. II B(2)(a) § 42. *See also Cardoza-Fonseca*, 480 U.S. ____, 107 S. Ct. at 1216.

89. Report of the 30th Session, U.N. Doc A/AC.96/572 (1979) at paras. 68, 72 (l)(h); Report of the 31st Session U.N. Doc. A/AC. 96/5878 (1980).

90. McMullen v. INS, 658 F.2d 1312 (9th Cir. 1981); Carvajal-Munoz v. INS, 743 F.2d 562 (7th Cir. 1984); Ananoh-Firempory v. INS, 766 F.2d 621 (lst Cir. 1985). Matter of Rodriguez-Palma, 17 I. & N. Dec. 965 (BIA 1980); *In re* Frentescu, 18 I. & N. Dec. 244 (BIA 1982).

91. *Cardoza-Fonseca*, 480 U.S. ____, 107 S. Ct. at 1221.

B. Justice Blackmun's Concurring Opinion

Justice Blackmun, in his concurring opinion, noted this eschewal of a substantive attachment to the well-founded fear standard by the court, and noted that he understood "the court has directed the INS to the appropriate sources from which the agency should derive the meaning of the well-founded fear standard.[92] The need for a well-founded fear analysis that examines the "subjective feelings of an applicant coupled with an inquiry into the objective nature of the articulated reasons for the fear,"[93] was noted by Justice Blackmun. He found the necessity of such formula based on INS' previous interpretation of the well-founded fear standard, which was strikingly contrary to the plain language of the Refugee Act and legislative history.

Justice Blackmun concluded that "while the INS need not ignore other sources of guidance," the integration of the previously mentioned well-founded fear formula "should be significant in the agency's formulation. . ."[94]

VI. CONCLUSION

The Handbook's interpretation of "well-founded fear" provides satisfactory guidance for such a formula. Expanding on the previously mentioned explanation of "well-founded fear" as construed by the UNHCR Handbook, the definition of "well-founded fear" has been explicated in the Handbook as follows:

> Since fear is subjective, the definition involves a subjective element in the person applying for recognition as a refugee. Determination of refugee status will therefore primarily require an evaluation of the applicant's statements rather than a judgment of the situation prevailing in his country of origin.[95]

The Handbook recognizes that this element of fear is the added qualification of "well-founded." It is a state of mind that encompasses not only the frame of mind of the person in question that determines refugee status, "but this frame of mind must be supported by an objective situation."[96] As mentioned above, the Handbook recognizes the importance of the objective element in evaluating the statement made by the applicant. However, the Handbook emphasizes that the fear of the applicant, and not the hypothetical likelihood of future events, is the central element of the "refugee definition."[97] This evaluation sharply contrasts with conventional forms of evidence which the INS expected to substantiate well-

92. *Id.* at 1223.
93. *Id.*
94. *Id.*
95. UNHCR HANDBOOK, *supra* note 39 at para. 38.
96. *Id.* at para. 40.
97. *Id.* at para. 41.

founded fear claims.[98]

Thus, when INS converged the "well-founded fear" and "clear probability" standards, as in *Cardoza-Fonseca*, its evaluation of the respondent's political asylum claim sharply contrasted with the Handbook's interpretation of "well-founded fear." Clearly, an applicant for asylum might have a "wellfounded fear" of persecution long before "all or virtually all" of the members of his group had actually become victims of persecution.[99]

Unfortunately, the Supreme Court in *Cardoza-Fonseca* fell short of a precise determination of the necessary standard for asylum claims. The effects of the Supreme Court's failure to specify what is a minimum likelihood of persecution necessary to establish a well-founded fear are unclear. However, it is evident by the BIA's action in the *Matter of Sanchez and Escobar*,[100] decided subsequent to the Ninth Circuit's holding in *Cardoza- Fonseca*,[101] that an inequitable denial of asylum can exist under the standards laid out in *Cardoza-Fonseca*, based on a failure to satisfy the objective element in the evaluating statement.[102]

Additionally, the BIA can effectively close the gap between the two standards by requiring evidence of selective persecution, i.e. that an individual must show that he or she has been selected for persecution based on specific facts,[103] in order to satisfy the well-founded fear standard.

This BIA requirement of objective evidence falls short of the necessary evidence to take into account what is "well-founded fear." The court should not only take into account the general history of persecution in the home country and the applicant's personal experience and that of his or her family, (i.e. persecution based on race, religion, nationality, etc.) but also the intensity of fear, the nature of the projected harm (i.e.death,

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98. *Id.* at para 42. *See also supra* notes 47-50 and accompanying text.

99. The use of "clear probability" or a comparable standard for determining refugee status would require almost certainty of persecution. As noted by the petitioner in *Stevic*, 467 U.S. at note 26 and accompanying text, evidence to substantiate the "clear probability" of persecution is "evidence of persecution of all or virtually all members of a group or class to which the alien belonged. . ." Petitioner's Brief in INS v. Stevic at 9, 23 and notes 25 and 32.

100. *Sanchez and Escobar*, Interim Dec. No. 2996 at 5. (BIA Oct. 1985).

101. *See generally* Cardoza-Fonseca v. INS, 767 F.2d I448 (9th Cir. 1985).

102. The BIA found that the standard delineated by the court did not change the outcome in the *Sanchez and Escobar* Interim Dec. No. 2996 at 5 (BIA Oct. 1985). The BIA denied Sanchez and Escobar's claim because they failed to establish "a clear probability of persecution under section 243(h) or a well-founded fear of persecution under section 208(a) of the Act, as that standard is described in *Cardoza-Fonseca v. INS*." *Id.* at 14.

The BIA's denial of asylum and withholding was based on the objective limitations of the applicant's fear of persecution. They failed to establish that their persecution was based on or on account of race, religion, nationality, membership in a particular social group, or political opinion as required by the Act. *See Sanchez and Escobar*, Interim Dec. at 12.

103. As noted above, the BIA requires that specific facts that show a selective persecution based on, or on account of, race, religion, nationality, membership in a particular social group, or political opinion. *See Sanchez and Escobar*, Interim Dec. at 5.

imprisonment, torture, detention, serious discrimination, etc.) and all other surrounding circumstances.[104] One can only hope, with the Supreme Court's reliance on and endorsement of the UNHCR Handbook coupled with the Supreme Court's conclusion that "well-founded fear" focuses on the reasonableness of fear and not on the likelihood of events, that future courts will apply the appropriate standard.

The need for a humanitarian standard is unequivocal. The harm done by an erroneous decision, excluding a refugee from asylum status, is often worse than that caused by a wrongful conviction.[105] The likelihood of an erroneous decision transpiring is increased by an unrealistic standard of proof.[106]

An approach to an asylum determination which recognizes the gravity of harm subsequent to an erroneous decision, and the special situation of the applicant, would place the U.S. in accordance with its long history of rhetoric[107] in welcoming the "huddled masses yearning to breathe free."[108]

Jeff Jones

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104. Bolanos-Hernandez v. INS, 767 F.2d at note 45. This approach is illustrated by a recent decision of the Higher Administrative Court, Hamburg, decision of April 11, 1983 - OVG Bf. V 30182, *InfAuslR* 1983, p. 137, *also published in* Marx, 1 *Asylrecht* (1984) at 237-8: "In case of serious sanctions such as death penalty or long-term imprisonment or severe torture, it can be sufficient that the possibility of these sanctions being applied is *not remote*." (Translation by UNHCR) (emphasis supplied). *See also* Benipal v. Ministers of Foreign Affairs and Immigration, Action No. 878/83, 1016/83 (High Court of New Zealand, Nov. 29, 1985):

> Clearly there are subjective and objective considerations in the application of the definition to the facts. While as a matter of convenience it is useful to distinguish between the two ingredients, it can lead to error to regard them as separate and independent elements which can be considered in isolation. If fear exists, the issue whether that fear is well-founded cannot be divorced from the fear itself: it is *in relation to the fear* that the issue of 'well-founded' must be decided, not in relation to anything else. . . . (at 228)

105. *See supra* notes 89, 95 and accompanying text.

106. *Cf.* Bayles, *Principles for Legal Procedure*, 5 LAW AND PHILOSOPHY 30 (1986) at 33-57.

107. The history of refugees and U.S. governmental rhetoric have their origins at the foundation of the republic up to the present time. In 1783, George Washington proclaimed America a land whose "bosom is open to receive the persecuted and oppressed of all nations." George Washington's "Address to the Members of the Volunteer Association and Other Inhabitants of the Kingdom of Ireland Who Lately Arrived in the City of New York," Dec.7, 1973, in The Writings of George Washington, XXCII (GPA, Washington, D.C., 1983), P. 244. More recently, President Ronald Reagan, in his acceptance speech for the Republican nomination for President, said: "Can we doubt that only a Divine Providence placed this land , this island of freedom here as a refuge for all those people who yearn to breathe free? Jews and Christians enduring persecution behind the iron curtain; the boat people of southeast Asia,Cuba, and of Haiti; the victims of drought and famine in Africa; the freedom fighters in Afghanistan." Ronald W. Reagan, "acceptance Speech, " Detroit, Michigan, July 17, 1980, p.8. Unfortunately, President Reagan's speech was nothing more than rhetoric as displayed by his Executive Order directing the U.S. Coast Guard to intercept boats laden with Haitians sailing in the direction of the U.S. and tow them back to Port-au-Prince. *See* President Ronald W. Reagan, "High Seas Interdiction of Illegal Aliens,"Exec. Order No. 12324, 46 Fed. Reg. 48109 (1981).

108. E. LAZARUS, "THE NEW COLOSSUS," POEMS OF EMMA LAZARUS, 202 (The Riverside Press, Cambridge, Mass. 1982).