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Illegal Alien - Whether to Withhold Deportation to Avoid His Potential Persecution: Fleurinor v. Immigration & Naturalization Service

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The Illegal Alien—Whether to Withhold Deportation to Avoid His Potential Persecution: *Fleurinor v. Immigration & Naturalization Service*

Many aliens come into the United States illegally each day to escape political or economic oppression. Illegal aliens are subject to deportation to their native countries; however, when an alien legitimately fears persecution if returned to his native country, the Immigration and Nationalization Act provides for relief. The alien may apply for asylum within the United States apart from the deportation proceeding;[1] and, if that is unavailable, the alien may seek a withholding of deportation from the Attorney General within the deportation proceeding.[2]

Because both of these determinations are generally discretionary, the standards for review are limited. This is confounded by a policy dilemma facing the appellate courts. While U.S. policy of immigration quotas requires deportation of illegal aliens primarily due to economic reasons,[3] the statutes require that the aliens not be deported if they will be persecuted upon return for political reasons; and, in countries such as Haiti, both of these factors are potentially present in strength. This dilemma is exacerbated by the fact that both the alien and the courts have practical difficulties in determining whether the alien will be persecuted on return. Such considerations make interpretation of the statutes very crucial in order to provide effective relief.

A recent case, *Fleurinor v. Immigration & Naturalization Service*,[4] illustrates the current interpretations of the relevant statutes by the Fifth Circuit Court of Appeals. The court determined what type of additional evidence is sufficiently material to require remand for its consideration, what the standards for review currently are within the Fifth Circuit, and whether the court could remand an "asylum claim." The court of appeals affirmed the order of the Board of Immigration Appeals upholding Fleurinor's deportation despite the view taken by the court that the Haitian government has exhibited a "wholesale disregard of fundamental

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[1] 8 C.F.R. § 108.1 (1979).

[2] 8 U.S.C. § 1253(h) (1976).

[3] *See generally* 8 U.S.C. §§ 1151-1156 (1976) which outline the selection system procedures based on numerical quotas.

[4] 585 F.2d 129 (5th Cir. 1978).

human rights."[5] Fleurinor's deportation order was held valid because he failed to meet the statutory requirements necessary for deportation to be withheld.

Leconte Fleurinor, a Haitian native and citizen, entered the United States illegally[6] at Miami aboard a Liberian vessel. Having conceded his deportability during deportation proceedings, he alleged that he would suffer persecution if returned to Haiti. The hearings were temporarily suspended to allow him to apply for asylum in the United States, but the application was denied in 1976.[7] During resumed deportation proceedings, his application to withhold deportation to Haiti under section 243(h) of the Immigration and Nationality Act[8] was denied by the Immigration Judge, who held "that petitioner had failed to show a well-founded fear that his life or freedom would be threatened in Haiti on account of his political opinion."[9]

Fleurinor is the Fifth Circuit Court of Appeals' review of the order of the Board of Immigration Appeals affirming the decision of the Immigration Judge. Circuit Judge Fay, writing for a unanimous court, denied each of petitioner's three points of appeal: that the court remand the case for consideration of additional "material" evidence; that the Board's affirmance of the Immigration Judge's refusal to withhold deportation was an abuse of discretion; and that the Immigration Judge's refusal to remand the case to the Immigration & Naturalization Service (INS) for further consideration of his claim of impending persecution upon his return to Haiti was an abuse of discretion.[10]

The first claim was based on evidence provided by a recent report of Amnesty International[11] concerning political conditions in Haiti. The

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5 *Id.* at 133.

6 Fleurinor failed to present himself for inspection by a United States Immigration Officer upon entering the United States and was therefore deportable under 8 U.S.C. § 1251(a)(2) (1976). 585 F.2d at 131 nn.1 & 2.

7 585 F.2d at 131. *See* note 34 *infra*.

8 The relevant portion of 8 U.S.C. § 1253(h) (1976) provides:

> 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.

9 585 F.2d at 132. Fleurinor, his brother, and a friend testified at the deportation hearings that the petitioner had left Haiti for the Bahamas in 1963 seeking employment. On his second return to Haiti, he was arrested at Port au Prince Airport by the Ton Ton Macoute (the semi-official secret police of the government of former President Francois "Papa Doc" Duvalier and current President Jean-Claude "Baby Doc" Duvalier) and was taken to jail for ten days where he was beaten and robbed. He had been accused of having taken part in the invasion of Haiti from the Bahamas by officials at the Haitian consulate in the Bahamas. He testified that he bribed his way out of prison and escaped to the Bahamas.

The two witnesses admitted that their only knowledge of this was through correspondence with Fleurinor's mother in Haiti. It further appeared that his family in Haiti had not been harmed or arrested. *Id.*

10 *Id.* at 131.

11 *See id.* at 132-33. Amnesty International is the 1977 recipient of the Nobel Peace Prize and the 1978 recipient of the United Nations Human Rights Award.

court considered whether to order remand for consideration of the additional evidence under 28 U.S.C. § 2347(c) which provides in part:

> (c) If a party to a proceeding to review applies to the court of appeals in which the procedure is pending for leave to adduce additional evidence and shows to the satisfaction of the court that—
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> (1) the additional evidence is material; and
>
> (2) there were reasonable grounds for failure to adduce the evidence before the agency;
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> the court may order the additional evidence and any counterevidence the opposite party desires to offer to be taken before the agency.[12]

The court determined that Fleurinor failed to satisfy each part of this two-prong test.[13]

Regarding the first prong of the test, the court determined that the Report was not material to the claim of the petitioner in spite of a contrary holding by the Fifth Circuit merely one year earlier in *Coriolan v. Immigration & Naturalization Service*,[14] which used the same Amnesty Internation Report. The court distinguished *Coriolan* by stating that:

> in order for evidence to be material within the meaning of Section 2347(c), the evidence must be probative on the issue of the likelihood of *this* alien being subject to persecution in the event of deportation. Nothing in *Coriolan* is to the contrary . . . . [W]e do not see how the Report adds anything to Fleurinor's claim that he will be subject to persecution upon his return to Haiti. Thus, it is not "material" to this cause and the first prong of the two-pronged 2347(c) test is not satisfied.[15]

However, *Coriolan* does seem to have held that the Report added to the specific petitioner's claim in that case. *Coriolan* exhibited previous authority for the relevance of such a report[16] and held that "the materiality of the Amnesty International Report is surely beyond dispute."[17] The reasoning of the *Coriolan* court was that the Report "placed in issue the question of whether Haitian political conditions are so specially oppressive that a wider range of claims of persecution must be given credence."[18] This determination was made in view of the finding by Amnesty International that in Haiti one need not be politically active to suffer persecution.[19]

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[12] 28 U.S.C. § 2347(c) (1976) has been held applicable to INS decisions despite the provisions of the review statute, 8 U.S.C. § 1105(a)(4) (1976), directing that the INS action be reviewed solely on the administrative record. Coriolan v. Immigration and Naturalization Serv., 599 F.2d 993, 1003 (5th Cir. 1977).

[13] 585 F.2d at 133.

[14] 559 F.2d 993 (5th Cir. 1977). (*Coriolan* involved two Haitians in a remarkably similar fact situation. Concededly deportable, they had applied for and were denied § 243(h) status by the Immigration Judge, a decision upheld by the Board of Immigration Appeals. Judge Tuttle remanded the case, however, for reconsideration of the claims in light of the Amnesty Internatinal Report. Judge Coleman dissented).

[15] 585 F.2d at 133 (emphasis in original).

[16] 559 F.2d at 1003. *See* C. GORDON & M. ROSENFIELD, 1 IMMIGRATION LAW & PROCEDURE § 5.16b at 5-186 to 5-187 (1977).

[17] 559 F.2d at 1003.

[18] *Id.*

[19] See 559 F.2d at 1002 for excerpts of the Amnesty International Report which states in relevant part:

However, despite the fact that the court in *Fleurinor* did not meet this issue squarely, it further found that even if the Report were ruled material, the petitioner's argument still failed the second prong of the test. The fatal flaw of Fleurinor's first argument as the court reasoned was the fact that his counsel had received the Report only three months after the appellate brief had been filed with the Board of Immigration Appeals and over a year before the Board affirmed the Immigration Judge's decision. The court noted that it was "undisputed that petitioner could have petitioned the Board to reopen the case for consideration of the Report,"[20] a factor which the court had previously found central in evidencing the unreasonableness of a petitioner's failure to produce the evidence before the agency in *Paul v. Immigration & Naturalization Service*.[21] The court distinguished *Coriolan* in this instance by the fact that there the report was received after the Board's decision, and the court hinted that the rejection of the first claim ultimately rested on counsel's "dilatory tactics."[22]

Fleurinor's second claim—that in light of the evidence produced at trial, the Board's decision constituted an abuse of discretion—was also rejected by the court. Judge Fay delineated that the court of appeals' authority to review the determination that petitioner failed to meet his burden of proof that deportation will lead to persecution[23] is limited to the following issues: whether the applicant has been accorded procedural due process;[24] whether the decision had been reached in accordance

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> [T]he term 'political prisoners' has to be interpreted in the widest possible sense in the Haitian context. There may have been no political activity whatsoever, as a large number are imprisoned indiscriminately, due to technical mistakes, as a result of personal grudges, or simply for very minor offenses. As in most cases there are no judicial procedures whatsoever and as torture is systematic, these prisoners are well within Amnesty International's area of concern.

Id.

[20] 585 F.2d at 133; 8 C.F.R. § 3.8 (1978).

[21] 521 F.2d 194, 201 (5th Cir. 1975). In *Paul v. Immigration & Naturalization Serv.*, however, Judge Godbold in a vigorous dissent pointed out that the INS refused to reopen after suit had been filed in the Court of Appeals. This effectively barred that avenue between that time and the time of the oral argument. *Id.*

[22] 585 F.2d at 133. The *Coriolan* court had been concerned about this issue as well.

[23] 8 C.F.R. § 242.17(c); Martineau v. Immigration & Naturalization Serv., 556 F.2d 306, 307 (5th Cir. 1977); Henry v. Immigration & Naturalization Serv., 552 F.2d 130, 131 (5th Cir. 1977); Daniel v. Immigration and Naturalization Serv., 528 F.2d 1278, 1279 (5th Cir. 1976) (establishing that petitioner has the burden of proof).

[24] Significant in this regard is the fact that deportation proceedings have been determined to be civil and not criminal; therefore, the right to counsel has not been recognized, Immigration & Nationality Act §§ 242(b), 292 (codified at 8 U.S.C. §§ 1252(b), 1362 (1976)); Jolley v. Immigration & Naturalization Serv., 441 F.2d 1245 (5th Cir. 1971), *cert. denied*, 404 U.S. 946 (1971); C. GORDON & H. ROSENFIELD, *supra* note 16, at 1-87.

> Until the early 1960's most courts adopted a . . . restricted scope of review which was confined to the issues of procedural due process and abuse of discretion. In the early 1960's some courts began to review the Service's construction of the statutory language. Finally, in the late 1960's, several courts [not including the Fifth Circuit] expanded the scope of review to include a determination whether the Attorney General's action was supported by substantial evidence on the whole record.

Note, *Judicial Review of Administrative Stays of Deportation: Section 243(h) of the Immigration & Nation-*

with the applicable rules of law; whether there has been an exercise of administrative discretion; and, if the latter is affirmative, whether or not the manner of the exercise has been arbitrary or capricious.[25] Within this "narrow mandate,"[26] the court found no abuse of discretion.

Judge Fay held that the Immigration Judge "was correct in ruling that the testimony favorable to Fleurinor, even if true, does not prove probable political persecution."[27] According to the court, Fleurinor failed to show any basis for believing that the Haitian government has any interest in him today, eight years after his supposed arrest in Haiti. Regarding this as a necessary element to petitioner's burden of proving probable political persecution, the court determined that the Immigration Judge did not abuse his discretion by refusing to withhold deportation.

The court substantiated this finding by the fact that Fleurinor was issued a passport after he bribed his way out of jail and was allowed to return to the Bahamas.

> It is difficult to believe that Haiti would allow Fleurinor to return to the breeding grounds of the 1968 invasion if it feared his loyalty. Moreover, his family remains unmolested by the Duvalier regime. To prove probable persecution today, Fleurinor would have to prove some evidence that the Haitian government remembers him. Without this critical element his proof falls short of meeting his burden to show probable persecution.[28]

The court thereafter remarked that it was not insensitive to the claims of refugees who "legitimately fear persecution on return" but that the court was bound by the mandates of Congress.[29] Judge Fay concluded this second finding by saying that "[W]e hold simply that petitioner has failed to place himself within the statutory framework of those persons deemed eligible to remain. It follows that there was, therefore, no abuse of discretion."[30]

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ality Act of 1952, 1976 WASH. U.L.Q. 59, 79. The author advocates review on the "substantial evidentiary" basis. *Id.* at 105-07.

The Second Circuit has taken the view that the factual findings on which discretionary denial is predicated must pass the "substantial evidence test." Wong Wing Hang v. Immigration & Naturalization Serv., 360 F.2d 715, 717 (2d Cir. 1966). The Ninth Circuit, however, has limited the scope of review to abuse of discretion, having determined that 8 U.S.C. § 1253(h) does not require the Immigration Judge to make a finding of fact supported by substantial evidence. Hossienmardi v. Immigration & Naturalization Serv., 405 F.2d 25 (9th Cir. 1968). The Fifth Circuit has adopted neither view but has stated that "it is enough to recognize that judicial review of INS decisions on persecution claims is deferential, and at the same time to remember this review ought not be perfunctory." 559 F.2d at 998. While *Fleurinor* does review the evidence, it is only in light of "abuse of discretion" since no evidentiary basis for the Board's decision was set out by the Board.

[25] 585 F.2d at 133 (quoting Henry v. Immigration & Naturalization Serv., 552 F.2d at 130-31).

[26] *Id.* at 133.

[27] *Id.* at 134.

[28] *Id.*

[29] *Id.* at 134 & n.3.

[30] *Id.* at 134.

Regarding Fleurinor's third and final point, that the Immigration Judge had "abused his discretion by failing to remand the case to the district director in order that [Fleurinor] might 'rebut' any State Department communications which might have provided the basis for the District Director's finding that petitioner would not be persecuted if deported to Haiti,"[31] the court held that it lacked jurisdiction to review the question under 8 U.S.C. § 1105a(a).[32] This section in establishing the jurisdiction of the court of appeals with regard to immigration cases of this type vests exclusive jurisdiction in the court of appeals over all final orders of deportation made pursuant to 8 U.S.C. § 1252(b).[33] The "asylum claim" is not such an order.

The distinction between this "asylum claim" before the district director[34] and the 243(h) claim previously discussed is that the "asylum claim" is a separate proceeding which can obviate the need for any deportation hearing at all, whereas the 243(h)—"feared persecution"—claim is itself a part of the deportation proceedings.[35] Therefore, the court held that it is not possible for an Immigration Judge to err by refusing to remand a deportation case to a district director since the Judge has no power to review a director's denial of an asylum request under 8 C.F.R. § 108.2 (1978).[36] However, the ultimate holding in this

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[31] *Id.* Although the resolution of the jurisdictional issue obviated any decision as to the merits of the third argument, the court did note that the record contained no hint that the Director's decision was based on State Department letters. The court's uncertainty as to whether Department of State communication was considered is undoubtedly based not only on the paucity of information available to the court as to the Director's basis for his decision but also on the fact that there are two types of State Department letters which need not be revealed to a petitioner. The first type concerns the withholding of information in the interest of national security. 8 C.F.R. § 242.17(c) (1978). The second type concerns "legislative facts," general facts not specifically concerning the immediate parties, such as the view of Haitian political conditions, as opposed to "adjudicative facts" about the particular parties, and among other things, their activities, business establishments, and properties. 534 F.2d 1055, 1062 (2d Cir. 1976) (quoting K. DAVIS, ADMINISTRATIVE LAW TREATISE § 7.02 at 413 (1958)).

Furthermore, at least one writer has expressed concern that given the decisions in Paul v. Immigration & Naturalization Serv., 521 F.2d 194 (5th Cir. 1975), and Hossienmardi v. Immigration & Naturalization Serv., 405 F.2d 25 (9th Cir. 1968), which foreclosed the Service's and Board's open reliance on certain State Department recommendations without checking for corroboration, such recommendations are so crucial they will still be given weight but will be undisclosed in the future. Note, *supra* note 24, at 82 n.112.

[32] 8 U.S.C. § 1105a(a) (1976).

[33] 8 U.S.C. § 1252(b) (1976).

[34] 8 C.F.R. § 108.1 (1978). The regulation states, "[t]he district director may approve or deny the application *in the exercise of discretion.* The district director's decision shall be made in writing, and *no appeal shall lie therefrom*" (emphasis added). Furthermore,

> [i]f any decision will be based in whole or in part upon a statement furnished by the Department of State, the statement shall be made a part of the record of proceeding, and the applicant shall have an opportunity for inspection, explanation, and rebuttal thereof . . . . A denial under this part shall not preclude the alien, in a subsequent expulsion hearing, from applying for the benefits of Section 243(h) of the [Immigration and Nationality] Act.

8 C.F.R. § 108.2 (1978).

[35] Zamora v. Immigration & Naturalization Serv., 534 F.2d 1055, 1059-60 (2d Cir. 1976).

[36] 585 F.2d at 135. The INS proposed that "asylum claims" made during or after deportation hearings be considered as being 243(h) motions for withholding deportation to allow a

instance was that this court did not have jurisdiction to review a motion for remand to the district director.

The court based that decision on a United States Supreme Court case, *Cheng Fan Kwok v. Immigration & Naturalization Service*,[37] which had delineated the boundaries of the power of the court of appeals to review decisions of the Board of Immigration Appeals. *Cheng* had interpreted § 106(a) of the Immigration and Nationality Act, 8 U.S.C. § 1105a(a), as being strictly limited to final orders of deportation made pursuant to administrative proceedings under § 242(b). Judge Harlan held that "a denial by a district director of a stay of deportation is not literally 'a final order of deportation,' nor is it . . . entered in the course of administrative proceedings conducted under § 242(b)."[38]

What the Fifth Circuit in *Fleurinor* failed to take into account was that this case already concerned a final order of deportation made pursuant to administrative proceedings under section 242(b) in the appeal of the 243(h) claim. The Supreme Court in *Cheng* had specifically distinguished the type of case such as *Fleurinor* whereby a court might have *pendent* jurisdiction over the "asylum claim."[39] The issue here should have been whether the court had pendent jurisdiction over the "asylum claim" in this particular case.

Indeed, the Supreme Court had previously held in *Foti v. Immigration & Naturalization Service*[40] that "when review of the denial of discretionary relief is ancillary to the deportability issue, . . . both determinations should . . . be made by the same court at the same time."[41] The Third Circuit in *Martinez de Mendoza v. Immigration & Naturalization Service*[42] had noted in accord with *Foti* and *Cheng* that it could have asserted pendent jurisdiction on another claim via 8 U.S.C. § 1105a(a) as an appeal from a final order of deportation.[43] *Mendoza* noted that each issue concerned the same nucleus of operative facts and that when ancillary jurisdiction over a federal cause of action is involved, policies restricting the exercise of pendent jurisdiction over "state" claims are largely absent.[44] Similarly,

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"more efficient and expeditious determination of an alien's rights." *See id.* at 135 n.5. The proposal only concerns aliens who are within the United States unlawfully. While the court expresses no opinion as to how the proposed rule would affect the reviewability of the "asylum claims," it would seem on its face that this would make those claims reviewable since they would thus be subsumed within the rubric of "final orders of deportation made pursuant to 8 U.S.C. § 1252(b)." *See* notes 45-46 and accompanying text for a brief analysis of the potential effect of increased reviewability.

37 392 U.S. 206 (1968).

38 *Id.* at 216.

39 *Id.* at 216 n.16. The court stated, "[w]e intimate no views on the possibility that a court of appeals might have 'pendant jurisdiction' over the denials of discretionary relief, where it already has before it a petition for a review under § 242(b)." *Id.*

40 375 U.S. 217 (1963).

41 *Id.* at 227.

42 567 F.2d 1222 (3d Cir. 1977)(remanded on other grounds).

43 *Id.* at 1224-25 & n.5.

44 *See* Hagans v. Lavine, 415 U.S. 528, 545-50 (1974); Rosado v. Wyman, 397 U.S. 397, 402-04 (1970); Romero v. International Terminal Operating Co., 358 U.S. 354 (1959).

Fleurinor had jurisdiction over the 243(h) claim as an appeal from a final order of deportation, the "asylum claim" involved the same nucleus of operative facts as the 243(h) claim, and the "cause of action" was federal; therefore, the *Fleurinor* court could have asserted jurisdiction over the issue of the asylum petition and the request for remand to the district director and been even more consistent with *Cheng*.

The court has instead denied pendent jurisdiction in this case by implication without expressly considering the point. Arguably, allowing pendent jurisdiction would have made little difference in this case as a practical matter since the claim involves the same nucleus of operative facts, since the alien has a similar burden of proof, and since the decision of the district director is discretionary as is that of the Immigration Judge on the 243(h) claim.[45] On the other hand, the court might have remanded the case so that the district director could state more clearly the basis for his decision and also have required him to allow rebuttal if the decision were based substantially on State Department information.[46] Any further analysis on this point would be sheer speculation; the important point is that *Fleurinor* has impliedly extended the *Cheng* holding without ever addressing that fact. In so holding, the court denied the third and final claim of Fleurinor.

Although recently many courts and jurists have deplored the excessive severity of the deportation laws and have sought to give relief via more liberal interpretation of the statutues,[47] this has not been the case in all jurisdictions. The Fifth Circuit, which handles the great majority of Haitian cases due to obvious geographical reasons,[48] has exhibited significant conflicts within the jurisdiction in the interpretations espoused in recent cases. In this regard, *Fleurinor* can be viewed as a strict procedural application of the relevant statutes as compared with the interpretation exhibited by the *Coriolan* decision only a year earlier.[49]

In this case, the traditionally narrow interpretations of the relevant statutes is the strongest influence on the holding from three major analytical perspectives. First, abuse of discretion will rarely be found by an appellate court which applies a narrow interpretation of the relevant statutes to a review of immigration decisions for three major reasons: (1) the Attorney General's available discretion has been expanded significantly by Congress since 1952, thereby contracting appellate scope of review; (2) the illegal alien has a very stringent burden of proof under a strict interpretation of the statutes due to certain practical constraints

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[45] 8 C.F.R. § 108.1 (1978). *See* notes 57-58 and accompanying text for the effect of discretion in these claims.

[46] See note 34 *supra*.

[47] Gordon, *Recent Developments in Judicial Review of Immigration Cases*, 15 SAN DIEGO L. REV. 9, 24 (1977) (citing Kaufman, C.J., of the Second Circuit).

[48] Florida, the closest United States port of entry from Haiti, is included within the Fifth Circuit.

[49] *See* notes 69-81 and accompanying text for further elaboration on this difference.

peculiar to the illegal alien; (3) the appellate scope of review of the evidence presented in the administrative action will not include a "substantial evidence test" in addition to abuse of discretion under a strict interpretation of the statutes. Second, in light of the peculiarly difficult burden of proof in such cases, the interpretation as to the intent of the statutes will affect what additional evidence may be deemed material such that the case should be remanded for consideration of such evidence. Third, the interpretation of the statutes may subtly affect an appellate decision as to whether the court might take pendent jurisdiction over an additional related claim.

As has been noted, both the "asylum claim" and the 243(h) claim are subject to broad discretionary judgments. Furthermore, other than the opportunity to seek asylum in the United States by means of applying to the Attorney General through his authorized agents, the district directors, the 243(h) claim remains perhaps the only means of obtaining relief for those aliens already inside the country.[50] "An alien seeking 243(h) relief . . . is confronted with a statute which vests great discretion in the Attorney General, and the reported cases suggest that 243(h) relief is generally not readily obtained."[51]

This broad discretion was not always available, however. In the predecessor to section 243(h) in the Internal Security Act of 1950, the language was nondiscretionary; the Attorney General after making a finding of facts was required to withhold deportation if he found that the alien would be subject to physical persecution if deported.[52] Since 1952 when Congress wrote section 243(h) into the Immigration and Nationality Act, the Attorney General's discretion has been greatly increased. Instead of being required to withhold deportation, he is now merely authorized to do so; furthermore, the finding requirement was replaced by a more flexible opinion provision.[53] The courts immediately recognized that the effect of these changes was to broaden greatly the discretion available to an Immigration Judge and to limit correspondingly the appellate scope of review.[54]

In 1965 another change was made in the statutory requirements. The statute was amended, and the requirement of "physical" persecution was replaced by a provision that required a showing of a probability of persecution "on account of race, religion, or political opinion."[55] This

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[50] *See* Note, *supra* note 24, at 66.

[51] *Id.* at 60-61. Also, since Congress amended § 243(h) in 1965 to change the required showing of "physical persecution" to "persecution on account of race, religion, or political opinion," there have only been four reported cases where the Board of Immigration Appeals has granted a stay of deportation: *In re* Joseph, 13 I. & N. Dec. 70 (1968); *In re* Janus and Janek, 12 I. & N. Dec. 886 (1968); *In re* Salama, 11 I. & N. Dec. 536 (1966); *In re* Alfonzo-Bermudez, 12 I. & N. Dec. 225 (1965).

[52] Internal Security Act of 1950, ch. 1024, § 23, 64 Stat. 1010 (1950).

[53] 8 U.S.C. § 1253(h) (1976). *See* Note, *supra* note 24, at 69.

[54] United States *ex. rel.* Dolenz v. Shaughnessy, 206 F.2d 392, 394 (2d Cir. 1953).

[55] Pub. L. No. 89-236, § 11(f), 79 Stat. 918 (1965).

was a more motive oriented test which is arguably broader than "physical persecution" yet not so broad as "persecution" alone.[56] However, the effect may be to create a more narrow statute for those aliens who can prove probability of persecution but cannot prove the required motive. Since the previously enlarged scope of discretion was not altered at the time of this change, such an alien must hope for a discretionary allowance of his claim or a reversal of an Immigration Judge's negative finding by the court of appeals on the grounds of abuse of discretion.

However the term "abuse of discretion" is interpreted, a review of the cases shows that very few aliens can obtain a reversal of an INS denial of a stay of deportation on that basis.[57] This is due not only to the difficulty of proving abuse of discretion itself but also to the traditionally narrow interpretations given the statutes and the practical difficulties an alien has in proving a "probability of persecution" if he is deported.[58]

The latter two factors tie together. One of the greatest problems an alien has in meeting the statutory requirements for withholding deportation is that of fulfilling the requisite burden of proof of establishing by a preponderance of the evidence a probability of persecution in the event of deportation.[59] The test in the past has been that of demonstrating a clear probability of persecution on account of race, religion, or political opinion. Although this appears stringent on its face, in fact it need not be.

In this regard, several authors have argued that section 243(h) must be read in light of the United Nations Protocol Relating to the Status of Refugees which the United States adopted in 1968.[60] The strongest of these arguments is that because Article 1 of the Protocol requires a showing of a "well-founded fear" of persecution instead of the "clear probability" standard of section 243(h), the courts should apply a less stringent burden of proof, fear being a more subjective standard.[61] The

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[56] *See* 111 CONG. REC. H. 21, 804 (remarks of Rep. Poff).

[57] Only two section 243(h) cases have been discovered where there has been a reversal for abuse of discretion. United States *ex rel.* Fong Foo v. Shaughnessy, 234 F.2d 715 (2d Cir. 1955); Kovac v. Immigration & Nationalization Serv., 407 F.2d 102 (9th Cir. 1960).

[58] For discussion of 243(h) burden of proof problems, *see generally* Evans, *Political Refugees and the United States Immigration Laws: Further Developments*, 66 AM. J. INT'L L. 571, 574-80 (1972).

[59] Martineau v. Immigration & Nationalization Serv., 556 F.2d 306 (5th Cir. 1977); Henry v. Immigration & Nationalization Serv., 552 F.2d 130 (5th Cir. 1977) (burden is on the petitioner).

[60] 19 U.S.T. 6223, T.I.A.S. No. 6577 (entered into force respecting the United States Nov. 1, 1968). Article 33 states in part:

> No Contracting State shall expel or return (refouler) a refugee in any manner whatsoever to the frontier 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.

[61] Note, *supra* note 24, at 114-121. Another argument commonly made has been that the language of article 33 quoted in the previous footnote allows the Attorney General no discretion, emphasis being placed on "No . . . shall . . . ." This argument was rejected by the Board in *In re* Dunar, Interim Dec. No. 2192 (April 17, 1973). *See generally* Note, *Immigration Law—Persecution Claims—The Expanding Scope of Section 243(h) of the Immigration and Nationality Act: Cori-*

courts in the Fifth and Seventh Circuits have rejected this argument, however, holding that the alien must meet the same standard of proof under the Protocol as under 243(h);[62] although, in rejecting 243(h) claims recently, the Board of Immigration Appeals has changed its language to say that the alien has failed to demonstrate a "well-founded fear" of persecution.[63]

The "clear probability" standard under any name, although reasonable on its face, is very stringent as a practical matter for aliens within the United States. As a result of his flight, the refugee may have no documentation or witnesses to prove the particular facts of his case. Because he is thus usually unable to produce documentary evidence or firsthand witnesses to support his position adequately, the real issue then becomes his credibility.[64] Further, in *Zemora v. Immigration & Naturalization Service*,[65] the court took notice of the fact that the greater the likelihood of persecution in the foreign country, the less chance there is of obtaining information from relatives and friends who are still there.[66] Such factors make State Department information and reliable reports on the political climate in the target country of deportation even more relevant than they would be otherwise, yet these can add little towards demonstrating the likelihood that the particular individual will be singled out for persecution from the viewpoint of a strict statutory interpretation as applied in *Fleurinor*.

Since such evidence is not absolutely necessary from a strict statutory viewpoint, an appellate court is hardly likely to hold that the lack of consideration of such evidence that is presented is an abuse of discretion, especially in a jurisdiction such as the Fifth Circuit which does not additionally review such decisions on the basis of a "substantial evidence test."[67] However, when it is new evidence on appeal, appellate courts have regarded it as being significant from an evidentiary standpoint, if it is both "material" and there is also a reasonable excuse for the failure to adduce it before the Immigration Judge in the original hearings.[68]

The *Coriolan* court exhibited a more liberal interpretation of the statutes in holding that the evidence of Haiti's oppressive political conditions may lend credence to a wider range of claims of persecution.[69] Commentary on the case regarded this holding as a substantial step to-

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olan v. INS, 13 TEX. INT'L L.J. 327, 329-31 (1978) [hereinafter *Coriolan* Note] (further arguments on the differences between the Protocol and § 243(h)).

[62] Pierre v. United States, 547 F.2d 1281, *rehearing denied* 551 F.2d 863, *cert. granted*, 434 U.S. 962, *on remand*, 570 F.2d 95 (5th Cir. 1978); Kashani v. Immigration & Nationalization Serv., 547 F.2d 376 (7th Cir. 1977).

[63] *See e.g.* note 9 and accompanying text *supra*.

[64] Note, *Immigration Law and the Refugee—A Recommendation to Harmonize the Statutes with the Treaties*, 6 CAL. W. INT'L L.J. 129, 145 (1975).

[65] 534 F.2d 1055 (2d Cir. 1976).

[66] *Id.* at 1062.

[67] *See* note 24 *supra*.

[68] 28 U.S.C. § 2347(c); *see* note 12 and accompanying text *supra*.

[69] 559 F.2d at 1003.

wards widening the ambit of judicial review of INS proceedings.[70] (The special significance with regard to Haiti is that even though judicial notice of the repressive Haitian conditions had given such credence to aliens' claims during Francois "Poppa Doc" Duvalier's reign in 1964[71] and in 1968,[72] the Fifth Circuit had not considered such recognition appropriate since that time.)[73] Although the *Fleurinor* court based its first holding primarily on the lack of a reasonable excuse for not adducing the evidence before the Board, its additional holding that the evidence is not material to this case quite possibly marks a reversal of the trend towards more broad statutory interpretation. The court has indicated that particular evidence will still be required in such cases and that general evidence of indiscriminate persecution, given only such other evidence as presented in this case, will not be sufficiently material in this regard even though the alien has testified that he has suffered actual persecution.

The policy behind such strict statutory construction is readily apparent. Many if not most Haitian immigrants come to the United States for economic reasons.[74] Political and economic oppression have both been recognized as severe in Haiti; and, were the courts to interpret the 243(h) statute too liberally, the immigration policy based on quotas and restricted entry[75] would be undermined. This dual oppression in Haiti as well as in other countries is thus usually at the heart of the courts' dilemmas in 243(h) cases since the statute recognizes political persecution as a valid criterion for withholding deportation but does not recognize economic oppression alone as such.[76]

However, it has been observed that while "some Haitians are political neutrals whose only motive for leaving is economic, it is apparent that most of those immigrants fear for their lives if they are deported home."[77] While the courts have arguably offered the potential of some relief in this regard by recognizing that prosecution for illegal departure could equal political persecution in certain instances,[78] the probability of this event is just as difficult to prove as is that of the probability of perse-

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[70] *Coriolan* Note, *supra* note 61, at 334.

[71] United States *ex rel.* Mercer v. Esperdy, 234 F. Supp. 611, 616 (S.D.N.Y. 1964).

[72] *In re* Joseph, 13 I. & N. Dec. 70, 72 (1968).

[73] Paul v. Immigration & Nationalization Serv., 521 F.2d 194, 199 (5th Cir. 1975) (requirement of such notice would confer blanket asylum status on Haitians).

[74] In 1974 unemployment was reported as high as 30-50% and per capita wages as low as $1.30 a day. Greve, *Is It Persecution or Poverty That Makes a Haitian Flee?*, Miami Herald, March 6, 1974, § A, at 12, col. 1.

[75] *See*, note 3 *supra*; *see also* Note, *supra* note 24, at 67 n.27.

[76] However, the court in Kovac v. Immigration & Nationalization Serv., 407 F.2d 102, 106-07 (9th Cir. 1969), recognized that any denial of employment that created substantial economic disadvantage could be persecution in some instances.

[77] Dernis, *Haitian Immigrants: Political Refugees or Economic Escapees?*, 31 U. MIAMI L. REV. 27, 28 (1976).

[78] Coriolan v. Immigration & Nationalization Serv., 559 F.2d 993 (5th Cir. 1977); Berdo v. Immigration & Nationalization Serv., 432 F.2d 824 (6th Cir. 1970); Kovac v. Immigration & Nationalization Serv., 407 F.2d 102 (9th Cir. 1969); *In re* Janus & Janek, 12 I. & N. Dec. 866 (1968).

cution in the first place. It must finally be noted in this regard, that while such policy considerations are undoubtedly involved in most 243(h) cases, it is rare for the court to mention these factors expressly. When they do receive explicit notice, it is in the dissenting opinions.[79]

Finally, the strict statutory viewpoint that pervades this opinion may have subtly influenced the failure of the court to consider the pendent jurisdiction issue inherent in the third claim. The court interpreted the claim as if it were being considered alone; whereas, the issue of pendent jurisdiction would only have been considered from a broad view of the case in general. It seems, therefore, that the general viewpoint of the court in reviewing the case by interpreting the individual issues narrowly effectively precluded the court from considering the possibility of reviewing the third claim under the principles of pendent jurisdiction.

In conclusion, the most significant aspect of *Fleurinor* is that it represents a hard-line approach to 243(h) claims—an approach which emphasizes the procedural limitations of the Immigration and Nationality Act more than it does the substantive merits of individual claims for withholding of deportation. Regarding the lack of a reasonable excuse for not petitioning the Board to reopen the hearings since counsel for petitioner received the Amnesty International Report three months after the brief had been filed, it is obvious that dilatory procedures ought not be tolerated by the court of appeals; however, the emphasis given here on the lack of a reasonable excuse is emphasis on the mistake of the lawyer at the very real expense of his client, for it must be remembered that this is a potential life-or-death situation. The dictum of *Coriolan* is important in this analysis wherein Judge Tuttle stated, "if failure to utilize the provisions for reopening is fatal to a claim for relief under 2347(c), then it would seem that there could never be such relief."[80] The claimant could never bring such new evidence to the court of appeals but would always have to reopen.

In contrast, the other prong of the test, "materiality," goes to the merits of the evidence and the case. The court's finding that the Report was not "material" was granted only cursory and general treatment and was in direct contrast to that of the *Coriolan* court using the same Report under similar fact situations. The court avoided the crucial point of *Coriolan*, that the Report must be taken into account since it raises the issue of whether Haitian political conditions are so specially oppressive that a

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[79] Two of the most enlightening dissents in this regard are those of Judge Coleman in Coriolan v. Immigration & Nationalization Serv., 559 F.2d at 1004-1006 (expressing concern with the "tide" of illegal aliens taking jobs from those who complain of the lack of job opportunity which leads to increased taxes to support the jobless), and Judge Godbold in Paul v. Immigration & Nationalization Serv., 521 F.2d at 201 (emphasis on human rights). For discussion of *Paul see* note 21 *supra*.

[80] 559 F.2d at 1004. Although this statement is arguably too broad, it does express the dilemma as to where the court will draw the line on what constitutes a reasonable excuse for not reopening.

wider range of claims of persecution must be given credence.[81]

In this manner, the court has interpreted section 243(h) in a framework which excludes from even its discretionary coverage one of the most blatant forms of persecution that is random and not motive-based in the usual sense of the words "on account of race, religion, or political opinion." The application of the standards required by the statute in this manner has exhibited a regression from the bold step forward that the Fifth Circuit made in this regard in *Coriolan*.

Moreover, the court in apparently extending *Cheng* has either missed the point of *Cheng* or has shown the result of poor research. The failure of the court as well as the lawyers to consider this jurisdictional issue may cause confusion in a similar future case.

The final holding in *Fleurinor* may indeed be the proper one in this particular case even under a broad interpretation of the statutes. More important than the result of this particular case in the long run, though, is the court's renewed hard-line attitude in again narrowly construing the pertinent statutes in this claim for withholding deportation. It is certainly evident that the courts of appeals have a most difficult task in separating the economic aspects of an alien's plight from the potential political persecution on his return since the courts typically have as little information to go on as does the alien to prove his case. However, it is obvious that Congress did intend to provide relief to those aliens who would genuinely suffer persecution subsequent to deportation. Because of the recognized inherent burdens on the alien seeking to prove a clear probability of persecution, the courts do not further this legislative intent with strict literal application of the relevant statutes.

The Fifth Circuit should face the dilemma squarely by allowing evidence of the general nature of the target country to enter into the decision of whether this alien might be subject to persecution on return. Only by such broad statutory interpretation can the courts begin to get at the truth of the matter in complex cases such as those of the Haitians. Until the legislature rewrites the statutes, it is the duty of the court to interpret them so as to further their intent to provide relief where necessary.

—BENJAMIN H. FLOWE, JR.

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[81] *Id.* at 1003.