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The Torch Dims: The Ambiguity of Asylum and the Well-Founded Fear of Persecution Standard in Sadeghi v. INS

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I. Introduction

The Statue of Liberty stands tall on Liberty Island in New York Harbor as a beacon of refuge for immigrants: "Give me your tired, your poor, your huddled masses yearning to breathe free," the Statue reads. However, for those most in need of protection today, the dream is strangled in the U.S. system of justice. Immigrants seeking to escape persecution in their homeland and attain asylum in the United States encounter difficulty in establishing their claim due to inconsistent court interpretations of what constitutes persecution. In *Sadeghi v. INS*,[1] the Court of Appeals for the Tenth Circuit granted a petition for review of the Board of Immigration Appeals' (BIA) final deportation order and denial of application of asylum for Ebrahim Sadeghi The court focused on the deferential "substantial evidence" standard of review of BIA decisions as it evaluated whether Sadeghi had established sufficient proof of a "well-founded fear of persecution" in his homeland of Iran.[2]

The Tenth Circuit, in a two to one decision, affirmed the BIA's denial of Sadeghi's asylum claim.[3] The court determined that substantial evidence supported the BIA's finding that Sadeghi had failed to prove his status as a refugee for purposes of asylum.[4] In the majority opinion, Judge Tacha deferred to the factual findings of the BIA in affirming that Sadeghi had failed to meet the burden of proving that he had a "well-founded fear" of persecution.[5] Judge Tacha specifically relied on BIA and case law distinctions between political persecution and legitimate criminal prosecution in concluding that the BIA "reasonably could have inferred" that the Iranian government's attempted arrest and its placement of Sadeghi on a "wanted" list was based on a legitimate criminal prosecution for illegal activity in Iran.[6]

Judge Kane, Senior District Judge of the U.S. District Court for the

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[1] 40 F.3d 1139 (10th Cir. 1994).
[2] *Id.* at 1142-43.
[3] *Id.* at 1143.
[4] *Id.*
[5] *Id.* at 1142.
[6] *Id.*

District of Colorado, sitting by designation, dissented from the majority opinion.[7] Judge Kane, using the same substantial evidence standard of review, found the BIA's determination that Sadeghi had failed to establish a "well-founded fear of persecution" to be unreasonable and unsupported by the evidence.[8] The dissent focused on the BIA's assumptions regarding the law of Iran, which served as the basis for its determination that Sadeghi's only fear was of a legitimate criminal prosecution by the Iranian government.[9]

This Note will explore the Tenth Circuit's treatment of the "well-founded fear" standard and its deferential review of the BIA decision. Part II will discuss the facts and holding of *Sadeghi v. INS.* The background law will be examined in Part III, and Part IV will provide an analysis of the court's opinion. Finally this Note will conclude that the court's deference to the BIA's decision impedes its own analysis of asylum requirements, leaving future asylum applicants with a vague interpretation of persecution and an unprotected Ebrahim Sadeghi in fear for his life.

II. The Facts of *Sadeghi* and the Tenth Circuit's Decision

Ebrahim Sadeghi is an Iranian national who returned to Iran in August 1982 after furthering his education in France for several years.[10] Sadeghi discovered upon his return that Iran was being governed under Islamic principles.[11] Despite his anti-Islamic views, he obtained a teaching job through a former student who worked with the Islamic government.[12] Sadeghi neither advocated nor fully concealed his anti-Islamic views from his students, and only vocalized his true sentiments when a fourteen-year-old student told him he was going to fight in the Iraqi war to become a "martyr for God."[13] Sadeghi believes that after he begged the student not to enlist, the student reported him to the government authorities.[14] In April 1983, four armed members of the national guard came to the school to arrest Sadeghi "because he was against the government and the Islamic revolution."[15] Sadeghi escaped through a side door, did not return home, and fled to France.[16] He entered the United States as a visitor on April 8, 1988, and overstayed his visa.[17] In June of 1989, Sadeghi was served with an

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7 *Id.* at 1140, 1143.
8 *Id.* at 1144 (Kane, J., dissenting).
9 *Id.* at 1145 (Kane, J., dissenting).
10 *Id.* at 1140-41.
11 *Id.* at 1141.
12 *Id.*
13 *Id.*
14 *Id.*
15 *Id.* at 1144.
16 *Id.*
17 *Id.* at 1140.

order to show cause alleging his deportability.[18] Conceding deportability, Sadeghi requested asylum and withholding of deportation.[19]

The case was heard before an immigration judge.[20] The evidence provided by Sadeghi to establish his "well-founded fear of persecution" included the following: his own testimony that he is a member of an anti-government group called the National Movement of the Iranian Resistance (NAMIR); evidence presented by two former members of the Iranian military that Sadeghi's name appeared on a list of individuals wanted by the Iranian government; a letter submitted from a former Iranian military officer, corroborating that Sadeghi's name was on a list of wanted persons; an affidavit from a former student verifying the April 1983 incident and current presence of Sadeghi's name on a wanted list, definitively stating that Sadeghi would be subjected to persecution because of his political beliefs if he were to return to Iran; and a letter from NAMIR stating that all Iranians fleeing the country because of their anti-governmental activities would face imprisonment or death upon return and that such treatment was a serious possibility if Sadeghi returned to Iran.[21] Although the immigration judge found Sadeghi's evidence to be credible, and believed that he had a legitimate fear of returning to Iran, the judge determined that Sadeghi's fear was a fear of prosecution for opposing his student's service in the Iraqi war, rather than a fear of persecution.[22] The immigration judge therefore denied the application for asylum and withholding of deportation.[23]

The BIA denied Sadeghi's appeal on two grounds. First, it agreed that Sadeghi had failed to prove that the Iranian government's attempt to arrest him was based on an intent to persecute.[24] In the alternative, the BIA based its denial of appeal on its finding, contrary to the affirmative credibility holding of the immigration judge, that Sadeghi's evidence establishing a fear of persecution was weak and not fully credible.[25]

The Tenth Circuit Court of Appeals reviewed the BIA's findings to determine whether they were "supported by reasonable, substantial and probative evidence on the record considered as a whole."[26] The majority concluded that Sadeghi's placement on a government "wanted" list resulted from the counseling of his student not to fight in the Iraqi war, an "act which the BIA reasonably could have inferred was

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18 *Id.*
19 *Id.*
20 *Id.*
21 *Id.* at 1141.
22 *Id.*
23 *Id.* at 1141-42.
24 *Id.* at 1142.
25 *Id.*
26 *Id.*; 8 U.S.C. § 1105a(a)(4) (1988).

illegal in Iran."[27] Judge Tacha rejected BIA precedent in holding that the burden to prove the content and interpretation of foreign law was on the petitioner.[28] Therefore, because Sadeghi had failed to prove that counseling against conscription in the Iranian armed forces was a legal activity in Iran, the majority upheld the BIA's conclusion that the government authorities who arrived at Sadeghi's school in 1983 were attempting to effect a legitimate arrest.[29] Based on this determination, the majority deferred to the BIA's denial of Sadeghi's application for asylum.[30] Judge Tacha found it unnecessary to address whether the BIA properly reversed the immigration judge's determination of the credibility of Sadeghi's evidence, or whether Sadeghi had met the tougher standard for withholding of deportation.[31]

Although Judge Kane's dissenting opinion applied the same substantial evidence standard to evaluate the BIA's denial of refugee status for Sadeghi, the dissent's review of the BIA decision substantially differed from that of the majority.[32] Judge Kane found the BIA decision to be "conspicuously flawed" and "utterly lacking in justice."[33] Judge Kane criticized the BIA's "presuppositionless conclusion" that the Iranian government's attempt to arrest Sadeghi represented a legitimate criminal prosecution.[34] The dissent further criticized the majority and the BIA for violating its own precedent, which placed the burden of proof of foreign law on the party who relies on it.[35] Judge Kane would have held the Immigration and Naturalization Service (INS) responsible for proving the existence of Iranian laws that make counseling against conscription illegal.[36] The dissent then attacked the second ground of the BIA decision, which found weaknesses in Sadeghi's evidence.[37] Judge Kane denounced this BIA determination as "fundamentally unfair" in light of the fact that the immigration judge cut off Sadeghi's testimony, satisfied that he faced persecution upon return to Iran.[38] Judge Kane would have reversed the BIA's denial of asylum eligibility and would have held that Sadeghi met the requirements for asylum and the more stringent standard for withholding of deportation.[39]

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27 *Sadeghi*, 40 F.3d at 1142.

28 *Id.* at 1143.

29 *Id.* at 1142.

30 *Id.*

31 *Id.* at 1143.

32 *See id.* at 1144.

33 *Id.* at 1143.

34 *Id.* at 1146 (Kane, J., dissenting).

35 *Id.* at 1145 (Kane, J., dissenting).

36 *Id.* at 1146 (Kane, J., dissenting).

37 *Id.* at 1147 (Kane, J., dissenting).

38 *Id.* (Kane, J., dissenting).

39 *Id.* at 1147-48 (Kane, J., dissenting).

III. Background Law

A. U.S. Refugee Law Changes to Conform with International Law

In 1980, Congress amended the Immigration and Nationality Act of 1952.[40] "[O]ne of Congress' primary purposes was to bring United States refugee law into conformance with the 1967 United Nations Protocol Relating to the Status of Refugees,[41] . . . to which the United States acceded in 1968."[42] Compliance with substantive provisions of the United Nations Protocol mandates that contracting States not return an alien to a country "where his life or freedom would be threatened."[43] The 1967 Protocol also imposed a more discretionary duty to "facilitate the assimilation and naturalization of refugees."[44] Congressional interpretation of the 1967 Protocol provisions resulted in two methods of relief for an alien, who, within U.S. boundaries, claims persecution upon return to his home country.[45] These two methods of relief are withholding of deportation and asylum.[46]

Prior to 1980, the Attorney General had discretion to withhold deportation under section 243(h) of the Immigration and Nationality Act.[47] To comply with the United Nations Protocol, the 1980 Act removed the Attorney General's discretion in section 243(h) withholding of deportation proceedings and created a mandatory entitlement to relief for an alien who demonstrates that his "life or freedom would be threatened" due to race, religion, nationality, membership in a particular social group, or political opinion.[48] In *INS v. Stevic*,[49] the Supreme Court interpreted the "would be threatened" language as

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[40] Immigration and Nationality Act of 1952, 8 U.S.C. § 1158(a) (1988).

[41] United Nations Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 268.

[42] INS v. Cardoza-Fonseca, 480 U.S. 421, 436-37 (1987) (citing H.R. REP. NO. 608, 96th Cong., 1st Sess. 9 (1979); S. REP. NO. 256, 96th Cong., 1st Sess. 4 (1979); H.R. CONF. REP. NO. 781, 96th Cong., 2d Sess. 19 (1980)).

[43] *Id.* at 429 n.7 (quoting 189 U.N.T.S. 150, 176 (1954), 19 U.S.T. 6259, 6278, T.I.A.S. No. 6577 (1968)).

[44] *Id.* at 441 (quoting United Nations Convention Relating to the Status of Refugees, July 28, 1951, art. 34, 189 U.N.T.S. 150).

[45] *See id.* at 424.

> The Act's establishment of a broad class of refugees who are eligible for a discretionary grant of asylum, and a narrower class of aliens who are given a statutory right not to be deported to the country where they are in danger, mirrors the provisions of the United Nations Protocol Relating to the Status of Refugees, which provided the motivation for the enactment of the Refugee Act of 1980.

Id.

[46] *See id.*

[47] *Id.* at 429.

[48] *Id.* Section 243(h) provides: "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." Immigration and Nationality Act, Pub. L. No. 414, § 243(h), 66 Stat. 166, 213 (1952) (codified as amended at 8 U.S.C. § 1253(h)(1) (1988 & Supp. V 1993)).

[49] 467 U.S. 407 (1987).

providing a purely objective standard with no subjective component. Therefore, the alien must demonstrate a "clear probability of persecution" through objective evidence that persecution is "more likely than not" in order to be entitled to relief under withholding of deportation section 243(h).[50]

The Refugee Act of 1980 also established the procedure for asylum under section 208(a).[51] Asylum itself is a two-step process.[52] First, the alien must establish his status as a "refugee," as defined in section 1101(a)(42) of the 1980 Refugee Act.[53] Once the Attorney General determines that the alien meets that statutory definition of refugee, then the "alien may be granted asylum in the discretion of the Attorney General."[54] Since this second step to the asylum process is purely discretionary, even if an alien meets the statutory definition of refugee, the Attorney General may still deny asylum.[55]

The determination of refugee status for the process of asylum under section 208(a) of the Refugee Act carries a less stringent test than the "clear probability of persecution" standard for mandatory relief of withholding of deportation under section 243(h) of the Immigration and Nationality Act.[56] A "refugee" for asylum purposes is defined as an alien unable to return to his 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 . . . ."[57] The Supreme Court in *Stevic* labeled this statutory

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[50] INS v. Cardoza-Fonseca, 480 U.S. 421, 430 (1987). The 1967 Protocol applies a liberal construction of "refugee," emphasizing the individual statement of the applicant. Theodore N. Cox, *Well-Founded Fear of Being Persecuted: The Sources and Application of a Criterion of Refugee Status*, 10 BROOK. J. INT'L L. 333, 375-76 (1984). Accordingly, the "clear probability standard . . . is fundamentally inconsistent with the Protocol definition of refugee both in its formulation and application." *Id.*

[51] *Cardoza-Fonseca*, 480 U.S. at 427. Section 208(a), introduced in the 1980 Act, provides:

> 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.

Refugee Act of 1980, Pub. L. No. 96-212, § 208(a), 94 Stat. 102, 105 (codified as amended at 8 U.S.C. § 1158(a) (1988)).

[52] *Cardoza-Fonseca*, 480 U.S. at 427-28.

[53] *Id.* at 428.

[54] 8 U.S.C. § 1101(a)(42)(A) (1988).

[55] *Cardoza-Fonseca*, 480 U.S. at 428 n.5.

[56] *Id.* at 443-50. *Accord* INS v. Stevic, 467 U.S. 407, 428-30 (1984).

[57] 8 U.S.C. § 1101(a)(42)(A) (1988). This statutory definition of the term "refugee" that Congress adopted is "virtually identical" to the definition provided in the 1967 United Nations Protocol Relating to the Status of Refugees. *Cardoza-Fonseca*, 480 U.S. at 437. Indeed, the legislative history demonstrates "that the definition was accepted 'with the understanding that it is based directly upon the language of the Protocol and it is intended that the provision be construed consistent with the Protocol.' " *Id.* (quoting S. REP. NO. 590, 96th Cong., 2d Sess. 20 (1980); *see also* H.R. CONF. REP. NO. 781, 96th Cong., 2d Sess. 9 (1980)).

definition as the "well-founded fear" test for asylum.[58] However, in *INS v. Cardoza-Fonseca*, the Court declined to develop further that test, leaving it to future case-by-case adjudication to give the term "well-founded fear" concrete meaning.[59] The courts of appeals "have interpreted the well-founded fear of persecution standard to require a subjective 'fear' component and an objective 'well-founded' component."[60]

The objective part of the test is satisfied by direct and specific evidence in the record "of facts that would support a reasonable fear that the petitioner faces persecution."[61] The alien is required to make an "individualized showing" that he is directly threatened by the government in his home country.[62] "[C]ourts have consistently rejected applications for political asylum based on fear grounded in general violence or unrest in one's native country."[63] For example, in *M.A. v. INS*,[64] the petitioner claimed that his refusal to serve in the El Salvadoran military would subject him to persecution upon return. However, the Fourth Circuit disagreed, finding "no evidence whatsoever that either the government or the guerrillas have a *particular* interest in him," but rather a state of general violence "incidental to the civil war in El Salvador."[65] However, it is not necessary to establish that the alien would be singled out for persecution if "there is a pattern or practice of persecution of groups similarly situated . . . ."[66] General information on conditions in a country can be relevant when used to support specific information relating to the alien's well-founded fear.[67]

The principal issue for the court's determination "is whether th[e] subjective fear has a sufficient objective basis."[68] Documentary evidence is not necessary, but rather the alien's own testimony, if credible, can be sufficient to support an application for asylum.[69] Once such an objective showing is made, the alien must only show his fear to

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[58] *Stevic*, 467 U.S. at 408. The *Stevic* case only addressed the "clear probability" standard for withholding of deportation. *Id.* at 429. The Court did "not decide the meaning of the phrase 'well-founded fear of persecution.' " *Id.*

[59] *Cardoza-Fonseca*, 480 U.S. at 448. This "well-founded fear of being persecuted" standard is the key criterion to obtaining refugee status under the 1967 Protocol. Cox, *supra* note 50, at 333-34.

[60] Kapcia v. INS, 944 F.2d 702, 706 (10th Cir. 1991).

[61] *Id.* (quoting Aguilera-Cota v. INS, 914 F.2d 1375, 1378 (9th Cir. 1990)); *accord* M.A. v. INS, 899 F.2d 304, 311 (4th Cir. 1990) (en banc).

[62] Refahiyat v. INS, 29 F.3d 553, 557 (10th Cir. 1994); *accord* Estrada v. INS, 775 F.2d 1018, 1021 (9th Cir. 1985).

[63] *M.A.*, 899 F.2d at 315.

[64] 899 F.2d 304 (4th Cir. 1990) (en banc).

[65] *Id.* (emphasis added).

[66] Osorio v. INS, 18 F.3d 1017, 1031 (2d Cir. 1994); 8 C.F.R. § 208.13(b)(2)(i)(A)-(B) (1994).

[67] Ganjour v. INS, 796 F.2d 832, 837 (5th Cir. 1986).

[68] Aguilera-Cota v. INS, 914 F.2d 1375, 1378 (9th Cir. 1990).

[69] Blanco-Lopez v. INS, 858 F.2d 531, 533 (9th Cir. 1988). "Persecutors are hardly likely to provide their victims with affidavits attesting to their acts of persecution." *Aguilera-Cota*, 914 F.2d at 1380 (quoting Bolanos-Hernandez v. INS, 767 F.2d 1277, 1285 (9th Cir. 1984)); *accord* Perkovic v. INS, 33 F.3d 615, 621 (3d Cir. 1994).

be genuine in order to satisfy the subjective component.[70] For example, in *Aguilera-Cota v. INS*,[71] the petitioner worked as a government employee in El Salvador during the 1983-84 elections.[72] Aguilera received a threatening note and a few days later a stranger came to his house looking for him, questioning Aguilera's sister about Aguilera's government employment.[73] Soon thereafter, Aguilera fled to the United States.[74] The Ninth Circuit reversed the BIA holding that the petitioner was ineligible for asylum, holding that "Aguilera's testimony concerning the threatening note and the visit by a stranger shortly thereafter constitute[d] 'specific evidence' sufficient to 'support a reasonable fear that the petitioner faces persecution.' "[75] The Court stated that if an alien's testimony regarding a threat, when unrefuted and credible, was insufficient because of a lack of direct corroborative evidence, it "would be close to impossible for any political refugee to make out a case for asylum."[76]

B. Circuit Court Standard of Review of Agency Decisions

The Immigration and Nationality Act declares that BIA "findings of facts, if supported by reasonable, substantial, and probative evidence on the record considered as a whole, shall be conclusive."[77] Therefore, the courts of appeals must uphold BIA factual findings regarding asylum eligibility under section 208(a), or withholding of deportation under section 243(h), if supported by reasonable and substantial evidence.[78] Although the courts review only BIA conclusions, and not those of the immigration judge, the courts of appeals "should accord the findings of the trial examiner the relevance that they reasonably command in answering the comprehensive question whether the evidence supporting the Board's order is substantial."[79]

The substantial evidence standard specifically applies to the BIA determination of whether the alien has established refugee status.[80] The asylum applicant bears the burden of presenting specific evidence "to prove either past persecution or 'good reason' to fear future persecution."[81] The courts of appeals do not weigh the evidence or evaluate

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[70] Kapcia v. INS, 944 F.2d 702, 706 (10th Cir. 1991).

[71] 914 F.2d 1375 (9th Cir. 1990).

[72] *Id.* at 1378.

[73] *Id.*

[74] *Id.*

[75] *Id.* at 1379 (quoting Rodriguez-Rivera v. INS, 848 F.2d 998, 1002 (9th Cir. 1988).

[76] *Id.*

[77] 8 U.S.C. § 1105a(a)(4) (1988).

[78] Osorio v. INS, 18 F.3d 1017, 1022 (2d Cir. 1994).

[79] Universal Camera Corp. v. NLRB, 340 U.S. 474, 497 (1951); *accord* Cardoza-Fonseca v. INS, 767 F.2d 1448, 1455 (9th Cir. 1985), *aff'd on other grounds*, 480 U.S. 421 (1987).

[80] Kapcia v. INS, 944 F.2d 702, 707 (10th Cir. 1991).

[81] *Id.* (quoting Aguilera-Cota v. INS, 914 F.2d 1375, 1378-79 (9th Cir. 1990)).

witness credibility.[82] Even had the court disagreed with the BIA's conclusions, the BIA's determination that Sadeghi was not eligible for asylum could have been reversed only if the evidence would have compelled a reasonable factfinder to conclude that the requisite fear of persecution existed.[83]

The courts of appeals review de novo BIA legal interpretations.[84] Nevertheless, the Supreme Court decision in *Chevron v. Natural Resources Defense Council*[85] established the principle of substantial deference to agency interpretations of statutory law. Court review of an agency's construction of a statute depends on whether Congress directly addresses the issue in question.[86] According to *Chevron*, if congressional intent is clear, the agency, as well as the reviewing court, "must give effect to the unambiguously expressed intent of Congress."[87] However, even if the court determines that the issue has not been directly addressed by Congress, "the court does not simply impose its own construction on the statute."[88] Because of the express delegation of congressional authority to the agency, the Supreme Court held that administrative interpretations of statutory law are "accorded controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute."[89] However, "[t]he judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to congressional intent."[90] Therefore, the courts of appeals will reverse only an unreasonable BIA interpretation of the Immigration and Nationality Act.[91]

Just nine months before the Tenth Circuit deferred to the BIA conclusions in *Sadeghi*, the Second Circuit exercised its final authority on both factual and statutory interpretation issues in *Osorio v. INS*.[92] In that case, Vincente Osorio, a citizen of Guatemala, was a leader of the Central Municipal Workers Union.[93] In that capacity, Osorio negotiated with the municipal government and organized demonstrations and strikes.[94] The union protests resulted in several acts of violence against union members, including assassinations and kidnappings.[95] Osorio also organized a mass media campaign, in which he accused

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82 *Id.* (following the standard of the Administrative Procedure Act, 5 U.S.C. § 706 (1992)).

83 INS v. Elias-Zacarias, 502 U.S. 478, 481 (1992); *accord Kapcia*, 944 F.2d at 707.

84 *Kapcia*, 944 F.2d at 705.

85 467 U.S. 837 (1984).

86 *Id.* at 842.

87 *Id.* at 843.

88 *Id.*

89 *Id.* at 843-44.

90 *Id.* at 843 n.9.

91 INS v. Cardoza-Fonseca, 480 U.S. 421, 446-48 (1987).

92 18 F.3d 1017 (2d Cir. 1994).

93 *Id.* at 1023.

94 *Id.*

95 *Id.* at 1023-24.

the government of human rights abuses, including the violence against union members.[96] Osorio then received two anonymous notes containing threats of violence and death against him and his family.[97] Osorio and his wife then fled Guatemala.[98] The BIA dismissed Osorio's plea for asylum because it found that he had failed to demonstrate that his fear of persecution was based on one of the enumerated statutory grounds.[99] Specifically, the BIA found that because "the fundamental nature of their dispute was economic, concerning wages and the reinstatement of workers," there was no political motive underlying the government's actions.[100]

Despite the court's application of the deferential review standard, the Second Circuit rejected both the BIA's factual findings regarding persecution and its interpretation of "political asylum."[101] The court determined that "the BIA must have assumed that if a dispute is properly characterized as economic, it cannot be characterized as political."[102] The court found such an assumption to be erroneous because "where an applicant fears persecution for both his political and economic beliefs, nothing . . . precludes a finding that the applicant is eligible for political asylum."[103] Therefore, the court held that the BIA's factual conclusions regarding Osorio's persecution were not "reasonably supported by substantial evidence" and that its "interpretation of political asylum contradicts the plain language and congressional intent of the Act."[104]

C. *The Issue of Persecution v. Prosecution*

Whether the standard of proof is a "clear probability" or a "well-founded fear," the Refugee Act defines the parameters of persecution for purposes of asylum and withholding of deportation.[105] Such persecution must be based on the alien's "race, religion, nationality, membership in a particular social group, or political opinion."[106] It is a well-settled tenet of international law that the enforcement of the internal laws of a nation remains a sovereign right of that nation's gov-

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96 *Id.*

97 *Id.* at 1025.

98 *Id.*

99 *Id.* at 1028.

100 *Id.*

101 *Id.*

102 *Id.*

103 *Id.* "The plain meaning of the phrase 'persecution on account of the victim's political opinion,' does not mean persecution solely on account of the victim's political opinion." *Id.* To demonstrate the Board of Immigration Appeal's erroneous view, the court used the example of Alexander Solzhenitsyn, who would not have been eligible for asylum since his dispute with the former Soviet Union was properly characterized as literary, rather than political. *Id.* at 1028-29.

104 *Id.* at 1031.

105 M.A. v. INS, 899 F.2d 304, 311 (4th Cir. 1990) (en banc).

106 8 U.S.C. § 1101(a)(42)(A) (1988).

ernment.[107] Therefore, prosecution for activities that have been declared illegal by a sovereign government "is not persecution and 'does not implicate any grounds for asylum.' "[108] Therefore, an alien seeking asylum, who has committed crimes in his home country, cannot introduce the punishment he may receive for those acts as evidence of persecution.[109]

This principle is uncontroverted among the courts of appeals' holdings.[110] The Third Circuit applied this principle in its rejection of a Polish alien's claim that his violation of Poland's passport law would subject him to persecution if returned.[111] The court held that prosecution for a criminal violation of fairly administered laws by the Polish government does not constitute one of the five statutory bases for eligibility of asylum.[112] The Tenth Circuit similarly relied on this tenet to affirm a BIA conclusion that conviction and fine for distribution of illegal material "is a legitimate government act and not persecution as contemplated by the [Immigration and Nationality] Act."[113] The Fourth Circuit specifically applied this distinction between political persecution and legitimate prosecution to laws of conscription in *M.A. v. INS*.[114] In that case, the asylum applicant, who had resisted the draft into the Salvadoran military, claimed that his refusal to serve would result in his persecution if he returned to El Salvador.[115] The court declared that "[i]nternational law and BIA precedent are very clear that a sovereign nation enjoys the right to enforce its laws of conscription and that penalties for evasion are not considered persecution."[116]

However, government prosecutions can constitute persecution when they serve only as a pretext for politically motivated harassment.[117] In *Ramirez-Rivas v. INS*,[118] the petitioner, who had never directly participated in any subversive activity against the El Salvadoran government, based her claim of fear of persecution on her family members' participation in the guerrilla movement and their subse-

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107 *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS § 431(1), (3) (1992); *see also* Perkovic v. INS, 33 F.3d 615, 622 (6th Cir. 1994) ("international law allows sovereign countries to protect themselves from criminals and revolutionaries").

108 Huan v. INS, 852 F. Supp. 460, 467 (E.D. Va. 1994) (quoting El Balguiti v. INS, 5 F.3d 1135, 1136 (8th Cir. 1993)); *accord* Kapcia v. INS, 944 F.2d 702, 708 (10th Cir. 1991).

109 *Perkovic*, 33 F.3d at 621; *see infra* notes 110-16 and accompanying text.

110 *See infra* notes 111-13 and accompanying text.

111 Janusiak v. INS, 947 F.2d 46, 47 (3d Cir. 1991).

112 *Id.*

113 Kapcia v. INS, 944 F.2d 702, 708 (10th Cir. 1991).

114 899 F.2d 304 (4th Cir. 1990).

115 *Id.* at 305.

116 *Id.* at 312 (citing Selective Draft Law Cases, 245 U.S. 366 (1918) and UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES, HANDBOOK ON PROCEDURES AND CRITERIA FOR DETERMINING REFUGEE STATUS ¶ 167 (Geneva 1979)) [hereinafter U.N. HANDBOOK].

117 Ramirez-Rivas v. INS, 899 F.2d 864, 867-68 (9th Cir. 1990). *See infra* notes 118-23 and accompanying text.

118 899 F.2d 864 (9th Cir. 1990).

quent incarceration as political prisoners.[119] The INS argued that because Ramirez's family members were legitimately being punished for their opposition to the El Salvadoran government, any action taken against petitioner upon return would not constitute persecution. The INS reasoned that the slightest suspicion of a person's involvement in criminal activity would legitimate any governmental response.[120] The Ninth Circuit rejected this argument, stating that "whenever there is no evidence of a legitimate, prosecutorial purpose for a government's harassment of a person or group, there arises a presumption that the motive for the harassment is political."[121] Therefore, punishment imposed without formal prosecutorial measures constitutes persecution and not a legitimate government prosecution.[122] The court declared that even prosecution of one who is guilty of criminal acts can still constitute persecution on the basis of political opinion if the punishment is excessive or arbitrary.[123]

D. The Effect of International Law

International law can also play an important role in distinguishing between a legitimate prosecution as punishment for crimes that the alien had committed in his home country and unreasonable prosecution that constitutes persecution under U.S. asylum law.[124] The courts have applied this distinction in their determination of whether an alien meets the "well-founded fear" standard.[125] In *Perkovic v. INS*,[126] the Sixth Circuit reversed a BIA holding denying two Yugoslavian citizens' asylum claim.[127] The BIA concluded that petitioners' activities promoting civil rights in Yugoslavia for ethnic Albanians violated Yugoslavian laws, and therefore the aliens did not establish themselves as refugees.[128] The laws that the aliens violated prohibited "peaceful expression of dissenting political opinion, . . . the exercise of citizens' rights to petition their government, and the association of individuals in political groups with objectives of which the [Yugoslav] government does not approve."[129] The court recognized that international law's deference to sovereign countries to protect themselves does not extend to permitting the prohibition and punishment of peaceful political expression and activity.[130] Therefore, while the aliens' activities

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119 *Id.* at 865.
120 *Id.* at 867-68.
121 *Id.* at 868.
122 *Id.*
123 *Id.*
124 *See infra* notes 125-38 and accompanying text.
125 *See infra* notes 126-34 and accompanying text.
126 33 F.3d 615 (6th Cir. 1994).
127 *Id.* at 616.
128 *Id.* at 621-22.
129 *Id.* at 622.
130 *Id.*

were considered political crimes in their homeland, they were protected under international human rights law.[131] Furthermore, the 1967 Protocol addresses the protection of aliens from punishment for such activities[132] and the Protocol is deemed to have been incorporated into U.S. law.[133] Therefore, the court determined that because "international law and the U.S. asylum statute explicitly seek to shelter [petitioners'] activities, the BIA's construction . . . conflicts with the statute and must be reversed."[134]

International law pertinent to the *Sadeghi* asylum case deals with issues of conscription and children. The recruitment of children under the age of fifteen into the armed forces is prohibited by Article 38 of the United Nations Convention on the Rights of the Child.[135] These prohibitions against underage conscription have "attained the status of customary international law."[136] Indeed, Iran has been cited by the United Nations as providing "one of the few recognized instances of a Protocol violation against children."[137] In 1983, a special report to the United Nations cited Iran's use of children as soldiers in the war against Iraq.[138]

E. The Burden of Proof in International Law

While the Immigration and Nationality Act specifically allocates the responsibility for establishing prima facie eligibility for political asylum to the applicant, when foreign law becomes a factor the issue of who has the burden of proof has been left to BIA interpretation.[139]

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131 *Id.*

132 *Id. See* United Nations Convention Relating to the Status of Refugees, July 28, 1951, 19 U.S.T. 6259, 189 U.N.T.S. 137.

133 INS v. Cardoza-Fonseca, 480 U.S. 421, 436-37 (1987).

134 *Perkovic*, 33 F.3d at 622.

135 Sadeghi v. INS, 40 F.3d 1139, 1146 (10th Cir. 1994) (Kane, J., dissenting) (citing Convention on the Rights of the Child, U.N. Doc. 1/44/736 (1989), *reprinted in* 28 I.L.M. 1457 (1989)). Article 38 states:

> 1) States Parties undertake to respect and to ensure respect for rules of international humanitarian law applicable to them in armed conflicts which are relevant to the child. 2) States Parties shall take all feasible measures to ensure that persons who have not attained the age of fifteen years do not take a direct part in the hostilities. 3) States Parties shall refrain from recruiting any person who has not attained the age of fifteen years into their armed forces . . . . 4) In accordance with their obligations under international humanitarian law to protect the civilian population in armed conflicts, States Parties shall take all feasible measures to ensure protection and care of children who are affected by an armed conflict.

Id. at 1146-47. (Kane, J., dissenting). Iran recently became one of the 166 nations to ratify the Convention on the Rights of the Child. *Id.* at 1147. (Kane, J., dissenting).

136 *Id.* (Kane, J., dissenting).

137 Colleen C. Maher, Note, *The Protection of Children in Armed Conflict: A Human Rights Analysis of the Protection Afforded to Children in Welfare*, 9 B.C. THIRD WORLD L.J. 297, 315 (1989).

138 *Id.*

139 8 C.F.R. § 208.13(a) (1994). *See supra* notes 85-91 and accompanying text.

The BIA first addressed this issue in *Matter of Annang*[140] in 1973. The BIA concluded that "the law of a foreign country is a question of fact which must be proved by the petitioner if he relies on it to establish eligibility for an immigration benefit."[141] The BIA recently developed this burden of proof standard in *Matter of Soleimani.*[142] In that case, the BIA reversed the decision of the immigration judge, which relied on Israel's Law of Return to deny a Jewish Iranian's asylum application.[143] The BIA noted that except for a "perfunctory reference to its existence," the immigration judge had failed to address the Israeli law.[144] The BIA determined that the lack of evidence as to the petitioner's eligibility or "the extent of the restrictions or conditions that may be placed on offers of resettlement under that law" precluded the INS from relying on the issue of resettlement as a basis to deny the petitioner's asylum claim.[145] The BIA therefore held that "foreign law is a matter to be proven by the party seeking to rely on it."[146]

IV. The Significance of the Case

A. *Deference Misplaced*

By affirming the BIA's denial of asylum, the *Sadeghi* court leads the Supreme Court's vision of case-by-case clarification of the "well-founded fear" test into murky waters. The Tenth Circuit relies on the substantial evidence standard of review to uphold the BIA's finding that Sadeghi did not establish a well-founded fear of persecution for purposes of asylum.[147] The majority's use of the substantial evidence standard of review, however, ignores a key component of that standard—the reasonableness of the BIA's findings.[148] Closer scrutiny of the BIA decision reveals that it is based on erroneous or unsubstantiated factual findings and legal interpretations.

The majority opinion bases its decision to affirm the denial of Sadeghi's asylum application on its deference to the BIA's holding that the Iranian government sought Sadeghi for purposes of a legitimate criminal prosecution rather than for persecution.[149] The majority does endeavor to analyze the issue, but its analysis is conclusory. The

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140 Matter of Annang, 14 I. & N. Dec. 502 (BIA 1973).

141 *Id.* at 503.

142 Int. Dec. 3118 (BIA 1989).

143 *Id.* Israel's Law of Return represents an outstanding offer of permanent residence or citizenship to all Jews who arrive in Israel. *Id.* An alien's firm resettlement in another country is "a factor to be evaluated in determining whether asylum should be granted as a matter of discretion. . . ." *Id.*

144 *Id.*

145 *Id.*

146 *Id.*

147 Sadeghi v. INS, 40 F.3d 1139, 1143 (10th Cir. 1994).

148 *See* Kapcia v. INS, 944 F.2d 702, 707 (10th Cir. 1991) (Under the substantial evidence standard, the court will not reverse if the Board's conclusions "are supported by substantial evidence *and are substantially reasonable.*"). *Id.* (emphasis added).

149 *Sadeghi*, 40 F.3d at 1143.

court declares the substantial evidence standard to be satisfied because the BIA "reasonably could have inferred [that counseling against conscription] was illegal in Iran."[150] The dissenting opinion demonstrates how such an inference regarding Iranian laws relies on several, unsupported assumptions:

> First, the BIA assumed Iran has a conscription law mandating that a fourteen-year-old serve in the Iranian army. The second assumption is that Iran has a law which makes it a criminal offense to counsel a fourteen-year-old not to serve in the army. The third assumption is that we recognize every law, even one that forces children to act as mine sweepers or one that punishes a person who counsels a child to refrain from doing so. There has been no evidence produced in support of these assumptions.[151]

The BIA's inference also relies on the "presuppositionless conclusion that Iran's governmental forces attempt to limit arrests to the bounds of legitimacy."[152] The dissent declares that "[s]uch statements at best are aspirational, not rational."[153]

Furthermore, the *Sadeghi* case is distinguishable from those cases that have reaffirmed the principle that legitimate prosecution does not constitute persecution for asylum purposes.[154] In all of those cases, the alien raised the issue of his prosecution or conviction, and the punishment he would receive if returned, as a specific example of persecution in order to meet the objective part of the "well-founded fear" standard.[155] The court in each case determined that the petitioner could not rely on government prosecution as evidence of a "well-founded fear" of persecution because each petitioner had in fact definitively violated a legitimate law in their home country.[156] Sadeghi never relied on a fear of prosecution as a basis for his asylum claim.[157] The evidence regarding Sadeghi's attempted arrest was presented to meet the requirement that he was subject to individualized persecution.[158] Sadeghi made no mention of any prosecution by the Iranian

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150 *Id.* at 1142.

151 *Id.* at 1145 (Kane, J., dissenting). The immigration judge noted that this incident occurred "during the period of time when the Iranian authorities were using their people, particularly the younger citizens, to clear mine fields with their bodies and sacrificing [sic] themselves." *Id.* at 1145 n.2 (Kane, J., dissenting).

152 *Id.* at 1146 (Kane, J., dissenting).

153 *Id.* (Kane, J., dissenting).

154 *See infra* notes 157-63 and accompanying text.

155 *See* Janusiak v. INS, 947 F.2d 46 (3d Cir. 1991) (alien contended that he would be prosecuted for bribing a passport official if returned to his country); M.A. v. INS, 899 F.2d 304 (4th Cir. 1990) (en banc) (basis of the petitioner's asylum claim was that he failed to comply with his country's conscription laws); Rodriguez-Rivera v. INS, 848 F.2d 998 (9th Cir. 1988) (part of alien's evidence of persecution by the government included his country's enforcement of a law requiring citizens to carry identification cards).

156 *See Rodriguez-Rivera*, 848 F.2d 998.

157 *Sadeghi*, 40 F.3d at 1141-42, 1144-45.

158 *Id.* at 1141. Showing that one has been directly threatened and "singled out" by the persecutor is a basis for meeting the objective component of the "well-founded fear" standard of asylum. *See supra* notes 61-67 and accompanying text.

government.[159] Furthermore, there was no evidence that any formal, criminal prosecution had in fact been initiated against Sadeghi.[160] Rather, it was the INS that introduced the contention that the incident of the attempted arrest of Sadeghi could have constituted a prosecution for illegal activity and a fair administration of Iranian law.[161]

B. Deference Denied: The Court Rejects the Soleimani *Standard*

The *Sadeghi* court's strong adherence to the principle of deference to BIA decisions wavers when the majority rejects BIA precedent in order to support its favorable evaluation of the BIA's assumptions regarding Iranian law.[162] *Matter of Soleimani* allocated the burden of proof of foreign law to the party who relies on it.[163] The BIA decision in *Soleimani* placed the affirmative duty on the party that utilized foreign law to support their case.[164] Therefore, because it is the INS's contention that Sadeghi fears prosecution for an allegedly illegal act, counseling against army service, *Soleimani* would place the burden of proof on the INS.[165]

According to the rules of statutory construction imposed by the Supreme Court in *Chevron*, "a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency."[166] The majority in *Sadeghi* makes no inquiry into the reasonableness of the BIA's construction of the burden of proof of foreign law.[167] Judge Tacha states that because the Refugee Act of 1980 requires the alien to carry "the burden of proof [that he is a refugee], he [also] had the burden of proving that the Iranian government sought him for purposes of persecution, rather than for the legitimate purpose of criminal prosecution."[168] The majority then summarily rejects *Soleimani*, claiming that it would "impermissibly shift the petitioner's burden of proving a well-founded fear of persecution to the INS to disprove the claim."[169] This conclusion is irrational. First of all, the INS raised the prosecution issue for the spe-

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159 *Sadeghi*, 40 F.3d at 1141.

160 *Id.* at 1146. *See* Blanco-Lopez v. INS, 858 F.2d 531, 534 (9th Cir. 1988). In *Blanco-Lopez*, the court rejected an INS argument that Salvadoran police apprehended Blanco-Lopez to investigate criminal charges, which therefore fell under the country's right to prosecute individuals accused of criminal activity. *Id.* The court declared that there was no evidence "that an actual, legitimate, criminal prosecution was initiated against Blanco-Lopez." *Id.*

161 *Sadeghi*, 40 F.3d at 1142.

162 *Id.* at 1143.

163 Matter of Soleimani, Int. Dec. 3118, at 10-11 (BIA 1989); *see supra* notes 142-46 and accompanying text.

164 *See Soleimani*, Int. Dec. 3118 at 10-11.

165 *See Sadeghi*, 40 F.3d at 1143.

166 Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 844 (1984).

167 *Sadeghi*, 40 F.3d at 1143.

168 *Id.*

169 *Id.*

cific purpose of disproving Sadeghi's evidence of persecution.[170] Sadeghi still retains the statutory burden of proving a well-founded fear of persecution.[171] Even if the INS assumptions on Iranian law were true, requiring Sadeghi to prove foreign law upon which the INS relies forces him to anticipate INS rebuttal arguments and prove "not only his own contentions but those of the INS."[172]

Moreover, because Sadeghi can meet that evidentiary burden through only his own credible testimony, it would be unreasonable for the INS to require Sadeghi to continue beyond that point and prove issues of the case that he never relied upon and that actually work to negate the evidentiary standards of proof of persecution that he has already met. Aliens do not have to provide information that will incriminate them during deportation proceedings,[173] in which the INS carries the burden of proof.[174] Therefore, Sadeghi should be afforded the same protection in asylum claims, for those issues where the INS would carry the burden of proof.[175]

Furthermore, the majority's refusal to place the burden of proof on the INS implies that it is not normal to do so. On the contrary, while the alien retains the primary burden of establishing refugee status, the INS has the burden of proof concerning affirmative defenses that it raises.[176] For example, the INS may rebut an alien's persecution claim by showing a change in circumstances in the alien's home country that do not warrant a future fear of persecution.[177] The INS bears the burden to show these changed conditions.[178] Therefore, it is not unreasonable to require the INS to prove foreign law that it raises as a defense to an alien's claim of persecution.

Furthermore, the majority's rejection of the *Soleimani* standard would return the state of BIA legal interpretation to the *Annang* standard, which places the burden of proof of foreign law on the applicant only when "he relies on it."[179] Since Sadeghi did not rely on foreign law, neither statutory law nor BIA precedent would address the issue in this case. Given the deference accorded rational agency interpretations and the "long-standing principle of construing any lingering ambiguities in deportation statutes in favor of the alien,"[180] it is

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170 *Id.*

171 *Id.* at 1146 (Kane, J., dissenting).

172 *Id.* (Kane, J., dissenting).

173 Jack Wasserman, *Practical Aspects of Representing an Alien at a Deportation Hearing*, 14 SAN DIEGO L. REV. 111, 120 (1976).

174 Woodby v. INS, 384 U.S. 904 (1966).

175 *See supra* notes 163-74, *infra* notes 176-80 and accompanying text.

176 *See infra* notes 179-80 and accompanying text.

177 Kapcia v. INS, 944 F.2d 702, 705 (10th Cir. 1991).

178 Dhine v. Slattery, 3 F.3d 613, 619 (2d Cir. 1993); *accord Kapcia*, 944 F.2d at 705.

179 Matter of Annang, 14 I. & N. Dec. 502 (BIA 1973).

180 INS v. Cardoza-Fonseca, 480 U.S. 421, 449 (1987).

unreasonable for Sadeghi to be penalized for failing to meet a burden of proof that he had no affirmative duty to meet.

C. *Conflicts with International Law*

Even if the majority had upheld the *Soleimani* standard and the INS successfully proved that Iranian law mandates fourteen-year-old conscription and prohibits counseling against such military service, the court's denial of asylum remains dubious under international law. In the same year as Sadeghi's encounter with Iranian authorities at his school, Iran was condemned by the United Nations for violating the U.N. Protocol and customary international law regarding the use of children in combat.[181] The immigration judge acknowledged that Sadeghi's incidents occurred "during the period of time when the Iranian authorities were using their people, particularly the younger citizens, to clear the mine fields with their bodies and sacrificing themselves."[182]

Similar to the *Perkovic* case, Sadeghi's advice to his student represented a peaceful political expression.[183] Even if his act was considered to be a crime in Iran, it was protected under international human rights law, which prohibits the recruitment of children under the age of fifteen into the military.[184] "Therefore, even assuming the existence of the supposed Iranian laws, to recognize prosecution thereunder as a legitimate exercise of governmental authority would conflict with fundamental human rights under both the Geneva Convention and customary international law."[185]

The Sixth Circuit's holding in *Perkovic* is not the only appellate court precedent to support the *Sadeghi* dissent's position that asylum should not be denied when the actions of the alien's home government violate international law. The Fourth Circuit, in *M.A. v. INS*, recognized one exception to the rule that governmental penalties enforcing conscription are not considered to be persecution.[186] That exception allows an alien to be considered eligible for asylum when "the alien would be associated with a military whose acts are condemned by the international community as contrary to the basic rules of human conduct."[187] The BIA's assumption that Iranian conscription laws include a prohibition against counseling against military ser-

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181 *See supra* note 137 and accompanying text.

182 Sadeghi v. INS, 40 F.3d 1139, 1145 n.2 (10th Cir. 1994).

183 *See supra* notes 126-34 and accompanying text.

184 *See supra* notes 135-38 and accompanying text.

185 *Sadeghi*, 40 F.3d at 1147 (Kane, J., dissenting).

186 M.A. v. INS, 899 F.2d 304, 312 (4th Cir. 1990) (en banc).

187 *Id.* at 312. (quoting U.N. HANDBOOK, *supra* note 116, ¶ 171 (1979)). The U.N. HANDBOOK recommends granting refugee status upon a showing that the alien's conscription would associate him with a military that has been condemned by the international community. *Id.* Although the U.N. HANDBOOK does not carry binding force of law, it does provide "significant guidance in construing the [1967] Protocol," to which Congress sought to con-

vice logically allows the *M.A.* exception to extend to an alien who *counsels* another against enlistment. Therefore, in the Fourth and Sixth Circuits, Sadeghi would be eligible for asylum for counseling his fourteen-year-old student not to join the Iranian military, which has in fact been cited for violating international law. Indeed, the United Nations actually recommends refugee status in such a situation.[188]

D. The Sadeghi *Court's Restrictive Interpretation of Persecution*

The *Sadeghi* court seems to "ignor[e] the very purpose of our immigration laws"[189] in fear that accepting the alien's claim for asylum based on a well-founded fear of persecution "would transform the political asylum process . . . into a vehicle for foreign policy debates in the courts . . . ."[190] However, courts have reversed BIA decisions that restrictively interpreted the refugee requirements as contravening the language and intent of the statute.[191] In *Osorio v. INS*, the Second Circuit reversed a BIA decision that held that the alien's leadership of a labor union constituted an "economic" dispute between the alien and his home country, and therefore his fear of persecution was not premised on any enumerated ground.[192] The court criticized the BIA for assuming that a dispute, properly characterized as economic, could not also be characterized as political.[193] The alien is not required to show that his persecutors were motivated only by one of the enumerated reasons of the Act.[194] Rather, the alien is only required to show that one of the enumerated factors, such as political opinion, was one of the reasons for his persecution.[195] Therefore, the Second Circuit held that the BIA's dismissal of the underlying political motives of Osorio's persecutors as irrelevant unreasonably restricted the definition of "political opinion" under the Act.[196]

Similarly, the *Sadeghi* court's restrictive definition of "well-founded fear of persecution" is also unreasonable. In an Islamic Republic like Iran, "in which 'religion is almost inseparable from government,' "[197] Sadeghi's anti-Islamic views reflect inherently political beliefs that serve as motives for government persecution. Sadeghi presents additional

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form in the Immigration and Nationality Act of 1980. Cardoza-Fonseca v. INS, 480 U.S. 421, 436 (1987).

188 *See supra* note 187 and accompanying text.

189 Sadeghi v. INS, 40 F.3d 1139, 1148 (10th Cir. 1994) (Kane, J., dissenting).

190 M.A. v. INS, 899 F.2d 304, 313-14 (4th Cir. 1990) (en banc).

191 Perkovic v. INS, 33 F.3d 615, 622 n.6 (6th Cir. 1994); *accord* Osorio v. INS, 18 F.3d 1017, 1028-31 (2d Cir. 1994); Maldonado-Cruz v. INS, 883 F.2d 788, 791 (9th Cir. 1989).

192 *Osorio*, 18 F.3d at 1029.

193 *Id.*

194 *Id.*; *accord* Singh v. Ilchert, No. C-93-1680 MHP, 1993 WL 483188, at *6 (N.D. Cal. Nov. 12, 1993).

195 *Osorio*, 18 F.3d at 1028.

196 *Id.* at 1030-31.

197 Hartooni v. INS, 21 F.3d 336, 341 (9th Cir. 1994) (quoting Country Reports on Human Rights Practices for 1992 (Washington, D.C. GPO, 1993)).

evidence that demonstrates strong grounds to find the Iranian government's attempted arrest to be politically motivated. Not only was he a member of an antigovernment group, and anti-Islamic, but Sadeghi also counseled a youth not to follow Islamic teachings in a country dominated by Islamic principles. The Iranian authorities specifically stated that they wanted to arrest Sadeghi "because he was against the government and the Islamic revolution."[198] "One cannot have a more compelling example of a political opinion generating political persecution than the opinion that is held by a subversive in opposition to the government."[199]

Furthermore, "documentary evidence establishing past persecution or threat of future persecution is usually sufficient to satisfy the objective component of the well-founded fear standard."[200]

In *Aguilera-Cota*, direct corroborative evidence was not necessary to establish asylum eligibility, and the petitioner's testimony regarding a threatening note and a suspicious visit by a stranger was sufficient to constitute a "well-founded fear of persecution."[201] Sadeghi did provide direct corroborative evidence to substantiate his testimony of individualized persecution.[202] Therefore, when combined with the immigration judge's affirmative finding of credibility, Sadeghi's evidence of his well-founded fear of persecution surpassed the level found sufficient by the Ninth Circuit in *Aguilera-Cota*.

Judge Tacha's majority opinion does not focus on how Sadeghi's specific, factual evidence of his fear of persecution relates to the objective and subjective components of the well-founded fear standard. Instead, the majority rejects Sadeghi's persecution claim by relying on unsubstantiated BIA assumptions regarding the legality of Sadeghi's activities, supported by an arbitrary rejection of the BIA's prior allocation of the burden of proof. However, the majority's denial of asylum based on a "legitimate" prosecution is conclusory. First, under international law, prosecution for counseling a youth against military service is not "legitimate."[203] There was also no evidence of any formal prosecution against Sadeghi.[204] When a government "punishes someone without undertaking any formal prosecutorial measures and acts with a political motive, or there are grounds to presume such a motive, it engages in persecution, not legitimate prosecution."[205] The Ninth Circuit has declared that a BIA finding that an arrest is not politically

198 Sadeghi v. INS, 40 F.3d 1139, 1144 (10th Cir. 1994) (Kane, J., dissenting).

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

200 Aguilera-Cota v. INS, 914 F.2d 1375, 1378 (9th Cir. 1990) (citing INS v. Cardoza-Fonseca, 767 F.2d 1448, 1453 (9th Cir. 1985), *aff'd*, 480 U.S. 421 (1987)).

201 *Id.*

202 *Sadeghi*, 40 F.3d at 1144.

203 *See supra* notes 124-38, 181-88 and accompanying text.

204 *Sadeghi*, 40 F.3d at 1145.

205 Singh v. Ilchert, No. C-93-1680 MHP, 1993 WL 483188, at *5 (N.D. Cal. Nov. 12, 1993); *accord* Ramirez-Rivas v. INS, 899 F.2d 864, 868 (9th Cir. 1990).

motivated is "highly dubious" when there is no evidence demonstrating legitimate detention.[206] There is no evidence that the attempted arrest of Sadeghi represented a "legitimate detention" and given Iran's track record in the area of human rights, the BIA's conclusion that Iran was simply fairly administering a law, is unwarranted.

E. The BIA's Credibility Holding

The BIA did nothing to redeem its credibility in its alternative ground for denying Sadeghi asylum. The BIA found weaknesses in the testimony of Sadeghi and his two witnesses, and therefore concluded that Sadeghi had failed to establish a well-founded fear of persecution.[207] This finding directly contradicted the immigration judge's evaluation of Sadeghi's testimony as credible.[208] "Because the immigration judge is in the best position to evaluate an alien's testimony, his or her credibility determinations are to be given 'much weight.' "[209] The BIA also reviews the immigration judge's credibility findings under the substantial evidence standard.[210] In this case, the immigration judge "cut short Sadeghi's presentation of his case at various intervals, indicating his satisfaction with the credibility of Sadeghi and his witnesses."[211] The judge also prevented Sadeghi from calling other witnesses with corroborating testimony.[212] The immigration judge even stated in his oral decision that he had been impressed with Sadeghi's testimony.[213] However, the BIA noted weakness in Sadeghi's testimony based on discrepancies that it claimed were "not explained."[214] To condemn Sadeghi for discrepancies in testimony that he was prevented from clarifying through corroborative witnesses, because the hearing officer was sufficiently persuaded on the issue, is clearly unreasonable and even implicates a procedural due process violation.[215]

The *Sadeghi* court did not address this second BIA holding, finding sufficient reason to deny Sadeghi asylum in the BIA's distinction between persecution and prosecution.[216] However, the two grounds are not mutually exclusive. The alternative holding on Sadeghi's wit-

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206 *Singh*, 1993 WL 483188 at *5.

207 *Sadeghi*, 40 F.3d at 1143.

208 *Id.* at 1141-42.

209 Estrada v. INS, 775 F.2d 1018, 1021 (9th Cir. 1985) (citing Phinpathya v. INS, 673 F.2d 1013, 1019 (9th Cir. 1981), *rev'd on other grounds*, 464 U.S. 183 (1984)).

210 *Id.*

211 *Sadeghi*, 40 F.3d at 1147.

212 *Id.*

213 *Id.*

214 *Id.* (citing Cert. Admin R. at 6-7).

215 *Id.* at 1148 (Kane, J., dissenting). *See* Kapcia v. INS, 944 F.2d 702, 705 (10th Cir. 1994) ("[P]etitioners in deportation proceedings must be 'afforded a full and fair hearing that comports with due process.' " (quoting Vissian v. INS, 548 F.2d 325, 329 (10th Cir. 1977))). *See also* Matthews v. Eldridge, 424 U.S. 319, 348 (1976).

216 *Sadeghi*, 40 F.3d at 1143.

ness credibility colors the BIA's primary finding, that Sadeghi failed to establish a well-founded fear of persecution, as even more precarious. "[W]here, as here, the BIA and IJ [Immigration Judge] disagree on a factual question, especially one involving a credibility determination, the appellate court should give substantial weight to the IJ's finding of the facts."[217] The court's failure is highlighted by the fact that the alien's testimony alone can be sufficient to establish asylum eligibility.[218]

V. Conclusion

Sadeghi v. INS represents the ambiguous state of the courts of appeals' case-by-case interpretation of "well-founded fear of persecution." The inconsistent application of the "well-founded fear" standard between the circuits turns the asylum process into a game of venue roulette, where the interpretation of federal law depends on the circuit in which the asylum claim is heard. While the substantial evidence standard of review does create a strong presumption in favor of factual findings and legal interpretations by the BIA, the *Sadeghi* case seems to give license to the application of that standard of review in an unreasonable manner. Furthermore, Judge Tacha's failure to address the conflicting and unsubstantiated bases for the BIA's decision renders the majority opinion analytically weak. The majority's high regard for BIA precedent then falls flat when it proves inconvenient.

The effect of such arbitrary deference to the BIA is to make the interpretation of U.S. immigration laws subject to the whim of the BIA and the courts. The Supreme Court's decision to leave it to the lower courts to define what constitutes a "well-founded fear of persecution" fails when courts blindly defer to BIA legal and factual holdings which amount to unjustified violations of U.S. and international law. The Supreme Court's purpose was to provide immigration laws with the flexibility necessary to a case-by-case analysis.[219] Therefore, a concrete definition of "well-founded fear" would prove too rigid. However, the Supreme Court needs to provide some illumination to the asylum standards in order to live up to our national and international obligations under the 1980 Refugee Act and the U.N. Protocol. The ones who suffer when the courts take short cuts in asylum proceedings are the very ones the Refugee Act of 1980 intended to help, clearly endangering the safety and even the lives of individuals subject to persecution abroad.

CYNTHIA A. ISAACS

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[217] Gonzalez-Rivera v. INS, 22 F.3d 1441, 1445 (9th Cir. 1994) (citing Universal Camera Corp v. NLRB, 340 U.S. 474 (1951)).

[218] *See supra* notes 68-75 and accompanying text.

[219] INS v. Cardoza-Fonseca, 480 U.S. 421, 449 (1987).