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NOTES

Political Asylum for the Haitians?

by Michael C.P. Ryan*

I. INTRODUCTION

Perhaps thirty thousand Haitians have flocked to the shores of South Florida during the past twenty years.¹ Since January 1980, Haitian nationals have been arriving at the rate of more than 1,000 per month.² Very few of these individuals have been granted permission to remain in the United States.³ Thus, in recent years, a significant amount of litigation in federal courts has concerned attempts by Haitian aliens to obtain political asylum.

The recent district court decision, *Haitian Refugee Center v. Civiletti*,⁴ held that the processing of Haitian asylum claims by the Immigration and Naturalization Service (INS) deprived the petitioners of due process of law, and constituted unlawful discrimination on the basis of national origin.⁵ In so holding, the court examined a tremendous amount of evidence concerning conditions in Haiti.⁶ The reported opinion, which

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¹ See *Haitian Refugee Center v. Civiletti*, 503 F. Supp. 442, 450 (S.D. Fla. 1980), appeal docketed, No. 80-5683 (5th Cir. Sept. 2, 1980)[hereinafter cited as *Haitian Refugee Center*]; see also, *Refugee Act of 1979: Hearings Before the Subcomm. on Immigration, Refugees and International Law, House Comm. on Judiciary*, 96th Cong., 1st Sess. 325 (1979)(statement of Virginia Dominquez).

² N.Y. Times, Apr. 28, 1981, at 1, col. 5.

³ Precise figures as to the number of claims granted are not available. See, 1979 IMMIGRATION AND NATURALIZATION SERVICE, ANN. REP. The Board of Immigration Appeals (BIA) reported that between 1972 and March 1979 the Department of State issued positive recommendations of asylum in only 240 cases. See, *In re Williams*, 16 I. & N. Dec. 697, 703 (1979). *Haitian Refugee Center* was a class action by over 5,000 plaintiffs, all of whom had had their asylum claims denied.

⁴ 503 F. Supp. 442.

⁵ *Id.* at 511.

⁶ The Government's appeal brief notes that the case produced a 29 volume record, a 3 volume supplemental record on appeal, a 2 volume appendix, and a 14 volume trial tran-

covers over one hundred pages, includes an exhaustive review of the power structure, legal systems, political climate, and prevailing social and economic conditions in Haiti.

These findings are relevant, however, only in the context of plaintiff's challenges to the Haitian Program, since the court was not reviewing the action of the INS with respect to any particular individual.⁷ The plaintiff-appellees acknowledged this in their appeals brief stating:

It [the court] did not *decide* any of the asylum claims involved in the case. Instead, the court focused on the *manner* in which the agency had considered these claims, and concluded that the procedures were defective. The court did not grant or deny asylum to anyone, but only ordered the INS District Director to *reprocess* all plaintiff's asylum applications in accordance with a plan to be submitted by INS⁸

Since *Haitian Refugee Center* is limited in this respect, the question of what materials may properly be accepted into evidence by the official considering an individual asylum application remains unanswered.

In order to determine how much of the *Haitian Refugee Center* discussion of general conditions in the applicant's home nation is relevant in making an asylum decision, it is necessary: 1) to understand the statutory framework established for processing the asylum claim of an alien subject to deportation proceedings;⁹ 2) to examine the case law relevant to this framework; and 3) to consider the standard of appellate review of individual asylum claims. Only after these topics are analyzed can conclusions be drawn about the usefulness of *Haitian Refugee Center* in future adjudication of asylum claims at the INS level.

II. STATUTORY FRAMEWORK

An alien who enters the United States without presenting himself to an Immigration Officer is deportable under the Immigration and Nation-

script. Brief for Appellants at 3 n.1.

⁷ Plaintiffs alleged, and the district court found, the program was established by the INS to facilitate the rapid process of deportation proceedings involving Haitian asylum claims. 503 F. Supp. at 510.

⁸ Brief for Appellees at 39 (emphasis in the original).

⁹ This paper does not specifically address the issue of claims by aliens not subject to deportation proceedings. An alien may seek asylum and the claim will be processed as a request for relief under the Immigration and Nationality Act, 8 U.S.C. §1101 *et seq.* (1976) *as amended* by Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102 (codified in scattered sections of 8 U.S.C.A. §1101 *et seq.*)(West Supp. 1981). Asylum may be granted in the discretion of the Attorney General. *Id.* at §1158 (West Supp. 1981) (emphasis added).

The status of a political asylum claim by an alien in an exclusion proceeding is unclear. See *Pierre v. United States*, 547 F.2d 1281 (5th Cir. 1977), *vacated & remanded for consideration of mootness*, 434 U.S. 962 (1977).

ality Act (INA) section 241(a)(2).¹⁰ Once the deportation process has been initiated by the issuance of a cause order, a request for political asylum is treated as a request for withholding of deportation under section 243(h) of the INA.¹¹ To better understand the necessary elements of a successful political asylum claim, the legislative history of section 243(h) must be examined.

Section 243(h) was first enacted in section 23 of the Internal Security Act of 1950, which provided: "No alien shall be deported under any provision of this Act to any country in which the Attorney General shall find that such alien would be subject to physical persecution."¹² Three aspects of this provision are notable. First, the Attorney General was required to suspend deportation; his was not a discretionary function. Second, the burden of proof was on the alien. Third, proof of *physical* persecution was required.

In 1952, a revised version of section 23 of the Immigration and Nationality Act¹³ granted broad discretion to the Attorney General. The burden of proving physical persecution, however, remained with the alien.¹⁴ The enacted provision read: "The Attorney General is authorized to withhold deportation of any alien within the United States to any country in which in his opinion the alien would be subject to physical persecution and for such period of time as he deems to be necessary for such reasons."¹⁵

Although Presidents Truman, Eisenhower, Kennedy, and Johnson

¹⁰ This section provides: "Any alien in the United States . . . shall, upon the order of the Attorney General, be deported who—entered the United States without inspection or at any time or place other than as designated by the Attorney General . . ." 8 U.S.C. §1251(a)(2) (1976).

¹¹ 8 U.S.C.A. §1253(h) (West Supp. 1981). This claim is treated as a request for the benefits of the Convention Relating to the Status of Refugees, *done* July 28, 1951, 19 U.S.T. 6259, T.I.A.S. No. 6577, 189 U.N.T.S. 150 (*entered into force*, United States, Nov. 1, 1968)[hereinafter cited as Convention]. Articles 2 through 34 of the Convention, and a revised Article 1, were made applicable to the United States via article 1 of the United Nations Protocol Relating to the Status of Refugees, *done* Jan. 31, 1967, 19 U.S.T. 6223, T.I.A.S. No. 6577, 606 U.N.T.S. 267 (*effective* Nov. 1, 1968)[hereinafter cited as Protocol]. The applicability, if any, of the Convention and Protocol to the claims of the Haitian nationals is beyond the scope of this note.

¹² The Internal Security Act of 1950, ch. 1024, §23, 64 Stat. 987, 1010 (amending Immigration Act of 1917, ch. 29 §20, 39 Stat. 874, 890-91)(Title I of the Internal Security Act of 1950 is commonly referred to as the Subversive Activities Control Act of 1950).

¹³ Immigration and Nationality Act, ch. 477, 66 Stat. 163 (1952).

¹⁴ This burden was not insignificant given the tenor of the times. *See, e.g.*, United States *ex rel.* Camezon v. District Director, 105 F. Supp. 32 (S.D.N.Y. 1952). "It is apparent that the amendment of Title 8 U.S.C.A. §156 by §23 of the Internal Security Act of 1950 was made with the internal security of the nation in mind and not with any solicitude for the objectionable alien's welfare." *Id.* at 38.

¹⁵ Immigration and Nationality Act, ch. 477, §243(h), 66 Stat. 163, 214 (1952).

voiced dissatisfaction with the stringent terms of the 1952 Act,¹⁶ the INA remained substantially intact until 1965.¹⁷

Amendments made in that year materially altered section 243(h) by deleting the words "physical persecution" and substituting the phrase "persecution on account of race, religion or political opinion."¹⁸ This substitution did not alter either the discretionary nature of the Attorney General's function, or the alien's burden of proof. It is clear, however, that by removing the adjective 'physical', Congress effectively broadened the class of aliens qualifying for relief under section 243(h). Congressional intent in making the change has been interpreted as an attempt to "shift . . . the emphasis from the consequences of the oppressive conduct to the motivation behind it."¹⁹

Two major interpretational problems have emerged since the 1965 amendments. First, without Congressional guidance, the meaning of 'persecution' has caused arduous debate. Some courts have interpreted it according to its ordinary dictionary definition—"the infliction of suffering or harm upon those who differ (in race, religion, or political opinion) in a way regarded as offensive."²⁰ The Board of Immigration Appeals (BIA), on the other hand, stated that Article 33 of the Protocol²¹ required a "threat to life or freedom" to avoid expulsion.²² The dispute was resolved with the Refugee Act of 1980, an amendment to section 243(h) in which Congress adopted the BIA position by requiring the Attorney General to make a finding "that such alien's life or freedom would be threatened" before relief from deportation could be provided.²³

The second interpretational problem concerns the alien's burden of proof under the 1965 Amendments. One interpretation is that the Amendments reduced an alien's burden from proving a "clear probability" of persecution, to proving a "well founded fear." This argu-

¹⁶ See Note, *Coriolan v. Immigration and Naturalization Service: A Closer Look at Immigration Law and the Political Refugee*, 6 SYRACUSE J. INT'L L. & COM. 133, 154 (1978) and sources cited therein.

¹⁷ See Act of Oct. 3, 1965, Pub. L. No. 89-236, 79 Stat. 911.

¹⁸ *Id.* at §11(f).

¹⁹ *Kovac v. INS*, 407 F.2d 102, 107 (9th Cir. 1969). When offering the language which was eventually adopted, Congressman Poff stated: "The clause 'physical persecution' is entirely too narrow. It is almost impossible for the alien under an order of deportation to assemble the quantum of evidence necessary to discharge his burden of proof." 111 CONG. REC. 21,804 (1965).

²⁰ *Kovac*, 407 F.2d at 107 (citing Webster's Third New International Dictionary (1965))(reaffirmed in *Moghianian v. Dep't of Justice*, 577 F.2d 141, 142 (9th Cir. 1978)).

²¹ Protocol, *supra* note 11, at art. 33.

²² *In re Dunar*, 14 I. & N. Dec. 310, 320 (1973).

²³ Pub. L. No. 96-212, §203(e), 94 Stat. 102, 107 (codified at 8 U.S.C.A. §1253(h)(West Supp. 1981)). The Refugee Act of 1980 is generally viewed as an attempt to bring the INA more into harmony with the Geneva Convention.

ment gained support when the United States ratified the 1967 Protocol Relating to the Status of Refugees.²⁴ The Protocol defined a refugee as one who "owing to a well-founded fear of being persecuted . . . is outside the country of his nationality"²⁵ It also prohibited the expulsion or return of a "refugee" whose "life or freedom would be threatened"²⁶ The 1980 Refugee Act, in amending section 243(h), did not specifically address the issue of the alien's burden of proof,²⁷ thus leaving this issue unsettled.

The initial pronouncement by the BIA on this question was the 1973 decision, *In re Dunar*.²⁸ The BIA established the requirement that the alien show a "clear probability of persecution."²⁹ The Board argued that the "well-founded fear" language in the Protocol made no alteration in U.S. immigration law in this area.³⁰ A number of cases have subsequently upheld the "clear probability" standard in appeals involving the withholding of section 243(h) relief,³¹ although very few decisions have seriously analyzed the issue to any great extent.³² The credibility of the BIA argument was eroded, however, because the BIA opinions lacked con-

²⁴ Protocol, *supra* note 11.

²⁵ Protocol, *supra* note 11, at art. 1(2)(adopting the definition of refugee contained in Article 1 of the Convention). The United States originally did not adhere to the Convention, but substantially adopted it in the Protocol.

²⁶ Protocol, *supra* note 11, at art. 1(1)(adopting articles 2-34 of the Convention); Convention, *supra* note 11, at art. 33 (prohibiting *refoulement*).

²⁷ See Refugee Act of 1980, Pub. L. No. 96-212, §203(e), 94 Stat. 107, (codified at 8 U.S.C.A. §1253(h)(West Supp. 1981)); S. REP. 96-256, 96th Cong., 1st Sess. 9, reprinted in 1980 U.S. CODE CONG. & AD. NEWS 141, 149-50.

The court in *Haitian Refugee Center* did not address this issue. It may become, however, a crucial issue in future asylum claims.

²⁸ 14 I. & N. Dec. 310.

²⁹ *Id.* at 318-19.

³⁰ *Id.* at 314-18. The BIA employed recognized canons of construction to determine whether the treaty repealed or modified pre-existing statutes. The Board relied on canons such as the "purpose of the treaty [to do so] must appear clearly and distinctly" and "an attempt must be made to give effect to both, if that can be done without violating the language of either." *Id.* at 313.

³¹ See Brief for Appellants, at 59-60 and cases cited therein.

³² For example, the main authority in the appellants' brief on this point is *Pierre v. United States*, 547 F.2d 1281 (5th Cir. 1977). See Brief for Appellants' at 59-60 n.17. *Pierre* is an exclusion proceeding appeal, thus the standard may be different, especially in view of section 208(a) of the Refugee Act of 1980. One of the two authorities cited by the *Pierre* court is *Gena v. INS*, 424 F.2d 227, 229-30 (5th Cir. 1979). The *Gena* decision never mentions a specific standard, but it does quote from the special inquiry officer's explanation of denial of section 243(h) relief. The officer wrote: "I find [Gena] has failed to establish that he would suffer or has reasonable ground to believe he would suffer persecution. . . ." *Id.* at 230. It appears that the "reasonable ground to believe" standard is more analogous to "well-founded fear" than "clear probability." The "clear probability" standard, however, was recently upheld in *Martineau v. INS*, 556 F.2d 306, 307 (5th Cir. 1977).

tinuity. For example, in *Dunar*, the BIA vaguely determined the standard was not a “merely conjectural possibility” but rather “a realistic likelihood.”³³ In a later case,³⁴ the BIA cited *Dunar* for the proposition that an alien has the “burden of proving probable persecution by a preponderance of the evidence.”³⁵

In *Coriolan v. INS*³⁶ the Fifth Circuit Court of Appeals seized upon the BIA’s sloppy phraseology and held that aliens must show only a “well-founded fear that their lives or freedom would be threatened.”³⁷ In a footnote, the court stated that the decision in *Dunar*, and the BIA’s “subsequent use of the Protocol’s terminology . . . suggest at least a slight diminution in the alien’s burden of proof before the Board.”³⁸ The same court was later faced with a section 243(h) case where the Immigration Judge had again used the “well-founded fear” standard.³⁹ Upholding the deportation ruling of the lower court, the Fifth Circuit agreed that the alien had not proven “probable political persecution.”⁴⁰

Following the recent line of authorities, one might believe that indeed the alien’s burden of proof had been lessened. In its latest pronouncement on the subject, however, the BIA stated: “To meet his burden of proof, an alien must demonstrate a clear probability that he will be persecuted if returned to his country.”⁴¹ This statement was made in the context of overturning an Immigration Judge’s decision, thereby *refusing* section 243(h) relief. Thus, it appears that the INS will continue to require a higher threshold of alien proof—that a “clear probability” of a “threat to life or freedom” exists—before relief will be granted.

Two further points should be made concerning the 1980 Refugee Act amendment to section 243(h). First, the section still *requires* the Attorney General to withhold deporting an alien if the given conditions are met.⁴²

³³ 14 I. & N. Dec. 310, 319.

³⁴ *Williams*, 16 I. & N. Dec. 697.

³⁵ *Id.* at 700.

³⁶ 559 F.2d 993 (5th Cir. 1977).

³⁷ *Id.* at 997-98.

³⁸ *Id.* at 997 n.8.

³⁹ *Fleurinor v. INS*, 585 F.2d 129, 132 (5th Cir. 1978). Other cases have upheld the “well-founded fear” standard. *See, e.g.*, *Paul v. INS*, 521 F.2d 194 (5th Cir. 1975). Although this was a 2-1 decision upholding the denial of section 243(h) relief, all the members of the court accepted the “well-founded fear” standard used by the Immigration Judge and the BIA. *Id.* at 200, 204. *See also*, *Zamora v. INS*, 534 F.2d 1055, 1058 (2d Cir. 1976).

⁴⁰ 585 F.2d at 135.

⁴¹ *In re McMullen*, Interim Dec. No. 2831 at 4 (Oct. 1, 1980), *rev'd on other grounds*, No. 80-7580 (9th Cir. Oct. 13, 1981) (discussed at 50 U.S.L.W. 2253 (1981)).

⁴² As amended, section 243(h) now reads:

(1) The Attorney General shall not deport or return any alien (other than an alien described in section 1251(a)(19) of this title) to a country if the Attorney General determines that such alien’s life or freedom would be threatened in such country

Second, an alien may still present a claim of persecution, not by a foreign government, but by an individual or organization in the country to which the alien faces deportation. To succeed on such a claim, there must be "a showing that the government in power is either unable or unwilling to protect the alien."⁴³ Presumably, the 'showing' must satisfy the restrictive INS standards set forth above.

III. SOURCES AND SCOPE OF THE EVIDENCE

Judge James L. King, in the *Haitian Refugee Center* opinion, stated: "No asylum claim can be examined without an understanding of the conditions in the applicant's homeland. Similarly, the uniform rejection of the claims of the present 5,000 member class cannot be reviewed, regardless how lenient the standard of review, without inquiring into the conditions in Haiti."⁴⁴ This passage was followed by 36 pages of "Findings of Fact: Conditions in Haiti". Included in these findings were discussions about the treatment of returning refugees, conditions in Haitian prisons, the power structure, the legal systems, politics, and social and economic conditions in Haiti.⁴⁵ Judge King failed to discuss, however, what level of review of conditions in the applicant's homeland is necessary either in a single INS deportation hearing, or even in a review of claims of a significantly smaller class.

An examination of relevant court decisions and BIA opinions shows that the decision-maker in these hypothesized situations must consider a wide range of materials to determine the general conditions in the nation

on account of race, religion, nationality, membership in a particular social group, or political opinion.

(2) Paragraph (1) shall not apply to any alien if the Attorney General determines that—

(A) the alien ordered, incited, assisted, or otherwise participated in the persecution of any person on account of race, religion, nationality, membership in a particular social group, or political opinion;

(B) the alien, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of the United States;

(C) There are serious reasons for considering that the alien has committed a serious nonpolitical crime outside the United States prior to the arrival of the alien in the United States; or

(D) there are reasonable grounds for regarding the alien as a danger to the security of the United States.

Refugee Act of 1980, Pub. L. No. 96-212, §203(e), 94 Stat. 107, (codified at 8 U.S.C.A. §1253(h) (West Supp. 1981)). There is some disagreement over whether the Attorney General has ever refused to withhold deportation where an alien had made the proper showing. See *Coriolan*, 559 F.2d 993, 997 n.7.

⁴³ *McMullen*, Interim Dec. No. 2831 at 5.

⁴⁴ 503 F. Supp. at 475.

⁴⁵ *Id.* at 449. See the Table of Contents of the opinion.

to which the alien will be deported. The weight to be given the various sources of information is largely left to the discretion of the individual decision-maker. This broad discretion, however, renders useless any conclusions reached as a result of the review about general conditions in a nation in the context of an *individual* decision.

An Immigration Judge, in evaluating a section 243(h) application for deportation relief is bound to consider background evidence on conditions in the applicant's country if evidence is offered by the INS or the applicant.⁴⁶ The leading decision on this issue, *Coriolan*,⁴⁷ required reconsideration of the petitioner's claims in light of an Amnesty International Report on human rights conditions in Haiti. The Fifth Circuit stated: "[w]e do not believe that the immigration authorities could properly decide an alien's fate without taking note of conditions in the alien's country"⁴⁸ The court held that the report was "relevant to the broad-gauge judgment of Haitian conditions which *needs* to be made."⁴⁹

The INS has acceded to the standards and procedures desired by the appellate courts in its decision to consider the totality of conditions in the applicant's homeland. Indeed, in the *Haitian Refugee Center* litigation, the District Director of the INS conceded that he should consider the general political and social conditions in Haiti when evaluating an asylum application by a Haitian refugee.⁵⁰ In more recent proceedings the BIA held that an Amnesty International report "was clearly admissible as background material regarding the conditions (or alleged conditions) in the country to which the withholding claim was directed."⁵¹

The policy of accepting information about background conditions from a wide range of sources developed as a result of practical realities of most section 243(h) claims for relief. The applicants themselves are often "unlettered persons" who "typically have available to them no better methods for ascertaining current political conditions abroad than does the average American citizen"⁵² In fact, the applicant may be less able to ascertain conditions in his native country than his U.S. counter-

⁴⁶ Neither the courts nor the BIA have addressed whether background conditions must be considered despite the absence of an offer of proof by the applicant.

⁴⁷ 559 F.2d 993.

⁴⁸ *Id.* at 1002.

⁴⁹ *Id.* (emphasis added).

⁵⁰ 503 F. Supp. at 472. *But see* Brief for Appellants at 52 (claiming that the trial court's findings about general conditions in Haiti were gratuitous in the context of that litigation, and should not be binding on the INS in the processing of Haitian applications for section 243(h) relief).

⁵¹ *Williams*, 16 I. & N. Dec. at 701; *see also In re Vardjan*, 10 I. & N. Dec. 567, 573 (1964) (suggesting that the BIA would take a liberal stance on the admissibility of background information on conditions in the asylum claimant's home country).

⁵² *Sovich v. Esperdy*, 319 F.2d 21, 29 (2d Cir. 1963).

part in that "the greater the likelihood of persecution in the foreign country, the less will be the possibility of obtaining information from relatives or friends who are still there."⁵³ It is also unrealistic to expect the applicant to produce an expert on conditions in the foreign country,⁵⁴ although such experts have been found in certain cases.⁵⁵

The obvious difficulty in requiring the applicant, the INS, or the Department of Justice to provide information on general background conditions in the applicant's native land have led several courts to take judicial notice of these conditions,⁵⁶ as was done in *United States ex rel. Fong Foo v. Shaughnessy*,⁵⁷ which was one of the first appellate court decisions based on section 243(h). In this case, the petitioner had been ordered deported to "Communist China." Claiming he would be subjected to physical persecution if forced to return, he requested a stay of the order. Commenting on the propriety of judicial notice in this situation, Judge Frank wrote:

I think we can and should take judicial notice of the notorious and virtually indisputable fact—almost uniformly reported in all pertinent accounts—of the ruthless behavior of the Communist governments in China and Russia, so that almost surely a Chinese, known to have allied himself with the Formosa Government, will be tortured and exterminated if found on the mainland of China. Illegal entry into this country should not be punished by death.

The Supreme Court has taken judicial notice of the date when the yachting season ends in our northern waters. Surely the cruel habits of the Chinese government are not less notorious.⁵⁸

Judicial notice of conditions in the homeland has been taken in cases of Haitian nationals also. In *United States ex rel. Mercer v. Esperdy*,⁵⁹ the district court declared that "the present regime in Haiti may well represent a danger of physical persecution to persons such as [Mercer]."⁶⁰ The court's discussion of Haitian conditions cited extensively to the *New York Times*. The court held that these accounts, "widely known and reported in the press," were sufficient to justify a request to reopen the INS

⁵³ *Zamora*, 534 F.2d at 1062.

⁵⁴ *Id.*

⁵⁵ See *Berdo v. INS*, 432 F.2d 824 (6th Cir. 1970)(expert testified on conditions in Hungary between 1955 and 1970).

⁵⁶ Not all courts believe they are in a proper position to engage in this sort of analysis. See e.g., *Coriolan*, 559 F.2d at 1001-02 ("the evaluation of persecution claims involves the evaluation of the political conditions of a nation—a task for which courts are not well-suited").

⁵⁷ 234 F.2d 715 (2d Cir. 1955).

⁵⁸ *Id.* at 718 (footnotes and citations omitted).

⁵⁹ 234 F. Supp. 611 (S.D.N.Y. 1964).

⁶⁰ *Id.* at 616.

hearing.⁶¹

The INS used a similar approach to Haitian persecution claims before it was deluged with the recent volume of asylum requests. The BIA also invoked the judicial notice concept.⁶²

Of course, if a court takes judicial notice of conditions in the applicant's homeland which would qualify him for relief, the court may also take judicial notice of factors which would disqualify him. For example, the petitioners in *Paul v. INS*,⁶³ claimed that the failure of the Immigration Judge to take judicial notice of conditions in Haiti was prejudicial to their case. The court held that this failure did not deny them a fair hearing, because "[m]any Haitians seek refuge in this country, not for political reasons, but for economic ones."⁶⁴ The court based this finding on an article in *The New Yorker*.⁶⁵

When a decision-maker takes judicial notice of conditions in a country, or accepts into evidence materials submitted by either side, the source of information is almost unlimited. In recent cases, courts have accepted statements from a local priest,⁶⁶ Amnesty International reports,⁶⁷ letters from the applicant's townspeople,⁶⁸ letters from the applicant's relatives⁶⁹ (or the failure to receive the same),⁷⁰ newspaper articles,⁷¹ Congressional resolutions,⁷² Presidential messages,⁷³ and books.⁷⁴ The BIA also follows this practice in its review of Immigration Judge de-

⁶¹ *Id.*

⁶² See, e.g., *In re Joseph*, 13 I. & N. Dec. 70, 72 (1968) (invoking the judicial notice taken by the Court in United States *ex rel. Mercer v. Esperdy*, 234 F. Supp. 611); see also *Hyppolite v. INS*, 382 F.2d 98 (7th Cir. 1967). In a 1966 deportation proceeding which included a petition for section 243(h) relief, the special inquiry officer "took judicial notice of the suppression of human rights and nonexistence of any rule of law under the current government in Haiti." *Id.* at 100. The officer nonetheless found that the petitioner would not be persecuted for her political opinions, a finding upheld by the BIA and the court.

⁶³ 521 F.2d 194.

⁶⁴ *Id.* at 199. The court relied on *Kovac*, 407 F.2d 102, and held that given the large number of economic refugees from Haiti, "[t]he suicide of one and attempted suicide of another is not . . . evidence of their fear or indicative that their fear is well-founded or politically motivated." 521 F.2d at 201. A careful examination of the *Kovac* reference, however, reveals that the cited passage is irrelevant to the issue faced by the *Paul* court.

⁶⁵ 521 F.2d at 199 (citing Anderson, *A Reporter at Large, the Haitians of New York*, NEW YORKER, Mar. 31, 1975, at 50).

⁶⁶ *Haitian Refugee Center*, 503 F. Supp. at 518-19.

⁶⁷ *Coriolan*, 559 F.2d 993.

⁶⁸ *Id.*

⁶⁹ *Fleurionor*, 585 F.2d 129.

⁷⁰ *Zamora*, 534 F.2d 1055.

⁷¹ *Id.*

⁷² *Berdo*, 432 F.2d 824.

⁷³ *Id.*

⁷⁴ Brief for Appellees at 45 n.27.

cisions. Recent BIA opinions have dealt with Amnesty International reports,⁷⁵ newspaper articles,⁷⁶ and a report by the International Commission of Jurists.⁷⁷

Another obvious source of information on conditions in the applicant's homeland is the U.S. Department of State. The current regulations allow the INS to request information from the Bureau of Human Rights and Humanitarian Affairs (BHRHA) of the State Department.⁷⁸ Any request for political asylum made after the commencement of deportation proceedings is treated as a request for relief under section 243(h) and requires a BHRHA advisory opinion.⁷⁹ Therefore, it seems likely in view of the prior procedures and practice that the INS will seek the State Department's views in most of these proceedings.

Under previous law, a request for asylum made by an alien at any time before the completion of deportation proceedings, resulted in a stay of the proceedings and a referral of the case to the INS District Director.⁸⁰ The District Director would "request the views of the Department of State before making his decision unless . . . the application is clearly meritorious or clearly lacking in substance."⁸¹ The Department of State would then make a specific recommendation to the District Director through its Office of Refugee and Migration Affairs (ORMA). If the District Director denies asylum, the alien could still request relief from deportation under INA section 243(h). As a result of this procedure, the issue of the propriety of admitting the ORMA letter in the section 243(h) proceeding arose.

The courts have dealt with the broader issue of the admissibility and character of State Department information regarding general conditions in the alien's homeland. ORMA letters were held admissible in *Asghari v. INS*⁸² on the grounds that the "advice came from a knowledgeable and competent source," citing *Hosseinmardi v. INS*.⁸³ The panel *Hos-*

⁷⁵ *McMullen*, Interim Dec. No. 2831.

⁷⁶ *Id.*

⁷⁷ *Williams*, 16 I. & N. Dec. 697. The ICJ report was cited as compiled by "an international human rights organization." *Id.* at 701.

⁷⁸ 8 C.F.R. §208.7 (1981).

⁷⁹ 8 C.F.R. § 208.10 (1981).

⁸⁰ 8 C.F.R. §108.2 (1978). Regulations adopted in 1979 added section 108.3 which applies to asylum requests made after commencement of deportation proceedings. Part 108, however, was removed after enactment of the Refugee Act of 1980. 46 Fed. Reg. 45,116 (1981). Asylum requests are processed currently under the procedures outlined in 8 C.F.R. § 208 (1981).

⁸¹ 8 C.F.R. §108.2 (1978).

⁸² 396 F.2d 391 (9th Cir. 1968).

⁸³ *Id.* at 392. The Ninth Circuit's decision in *Hosseinmardi v. INS* was published in the advance sheets of the *Federal Reporter* at 391 F.2d 914, but the court's opinion was withdrawn before publication in the bound volume.

seinmardi opinion was withdrawn, however, and did not reappear until the denial of rehearing.⁸⁴ Meanwhile, the same circuit, in deciding *Kasravi v. INS*,⁸⁵ questioned the competency of ORMA letters, stating:

Such letters from the State Department do not carry the guarantees of reliability which the law demands of admissible evidence. A frank, but official, discussion of the political shortcomings of a friendly nation is not always compatible with the high duty to maintain advantageous diplomatic relations with nations throughout the world. The traditional foundation required of expert testimony is lacking, nor can official position be said to supply an acceptable substitute. No hearing officer or court has the means to know the diplomatic necessities of the moment, in the light of which the statements must be weighed.⁸⁶

In the per curiam decision on rehearing in *Hosseinmardi*, the majority, after taking note of the above quoted statement in *Kasravi*, justified the use of the ORMA letter in this case by noting that "The generalities regarding conditions in [the foreign state] which appear in the letter were severely challenged by petitioner's expert witnesses. It might well have been improper had the Board given substantial weight to these generalities without corroboration or further inquiry."⁸⁷

These Ninth Circuit cases indeed contain some very strong statements against placing substantial weight upon information supplied by the State Department. This position did not receive unanimous backing on that circuit, however. The judge who authored the original opinion in *Hosseinmardi* reiterated his belief in the admissibility of the ORMA letter,⁸⁸ citing the Ninth Circuit's earlier decision in *Namkung v. Boyd*.⁸⁹ That decision upheld the admissibility of a letter from a foreign Consul General, who was a diplomat from the same country from which the alien

⁸⁴ *Hosseinmardi v. INS*, 405 F.2d 25 (9th Cir. 1969)(rehearing denied).

⁸⁵ 400 F.2d 675 (9th Cir. 1968).

⁸⁶ *Id.* at 677, n.1. The case concerned the deportation of an Iranian student. He offered testimony, including two distinguished experts, on repressive conditions under the Shah. The court noted that the "only evidence offered in opposition to *Kasravi's* position is rather a perfunctory letter written by a State Department official concluding generally that an Iranian student would not in all likelihood be persecuted for activities in the United States." *Id.* at 676-77. The court denied the appeal, though, on the grounds that there was no abuse of the Attorney General's discretion. *Id.* at 677-78.

⁸⁷ 405 F.2d at 28.

⁸⁸ *Id.* (Byrne, J., concurring).

⁸⁹ 226 F.2d 385 (9th Cir. 1955). This case is also cited in the *Kasravi* opinion, 400 F.2d at 677. It is interesting to note that the *Namkung* court was adopting the rule set out by the Second Circuit in, *United States ex rel. Dolenz v. Shaughnessy*, 206 F.2d 392, 394 (2d Cir. 1953), that "the very nature of the decision [the Attorney General] must make [in a section 243(h) decision] concerning what the foreign country is likely to do is a political issue into which the courts should not intrude." *Id.* at 395. The Second Circuit no longer adheres to such a narrow standard in reviewing decision under section 243(h) claims.

was resisting deportation.⁹⁰

The Fifth Circuit took a position on the admissibility of ORMA letters in *Paul v. INS*.⁹¹ In that case the letter was shown to be totally unresponsive to the plaintiff's claims.⁹² Since the letter had not influenced the Immigration Judge or the BIA, the court, citing the Hosseinmardi rehearing opinion, held it was unnecessary to consider the alien's arguments on the issue.⁹³

The dissent in *Paul* was correct in arguing that the alien's arguments should have been addressed. With respect to the ORMA letter, the BIA held that "the Immigration Judge properly relied on this evidence. The advice came from a reliable, knowledgeable and competent source [citations omitted]."⁹⁴ The dissent notes that "regardless of how good the source, the report was wrong."⁹⁵ While this characterization of the factual situation in *Paul* is accurate, it allows one to infer that ORMA letters would be admissible only if "accurate." A more satisfactory solution would have been for the dissent to follow up on the majority's citation to *Hosseinmardi*.

The compromise position on the admissibility of State Department information was reached by the Second Circuit in *Zamora v. INS*.⁹⁶ Recognizing the need for background information on conditions in a foreign nation, yet realizing the possibility that the State Department might be "tempering the wind in comments concerning internal affairs of a foreign nation,"⁹⁷ the court held admissible:

statements of the Department of State or its officials abroad which inform the I[m]migration J[udge] and the [BIA] of the extent to which the nation of prospective deportation engages in 'persecution . . .' of the class of persons to whom [sic] an applicant under [243(h)] claims to belong, and reveal, so far as feasible, the basis for the views expressed, but do not attempt to apply this knowledge to the particular case⁹⁸

This "compromise" is still in effect.

Allowing the INS to introduce these statements concerning general conditions in the alien's home country prepared by the State Depart-

⁹⁰ 226 F.2d 385.

⁹¹ 521 F.2d 194.

⁹² *Id.* at 200. Not only was the letter unresponsive to plaintiff's claims, it was factually incorrect. *Id.*

⁹³ *Id.*

⁹⁴ *Id.* at 205 (Godbold, J., dissenting)(quoting the BIA decision).

⁹⁵ *Id.* (Godbold, J., dissenting).

⁹⁶ 534 F.2d 1055.

⁹⁷ *Id.* at 1062. The court noted that this difficulty could be mitigated by admitting such evidence, but not entering it on the record. *Id.* See 8 C.F.R. §242.17(c)(1981) which provides for receipt of "non-record" information.

⁹⁸ 534 F.2d at 1062.

ment, however, greatly exacerbates the alien's burden in establishing eligibility for relief. For example, in *In re Williams*,⁹⁹ the INS introduced a 1978 letter from the Deputy Assistant Secretary for Refugee and Migration Affairs written to the INS District Director in Miami. The letter quoted from a March 1977 State Department document that the "more extreme charges of human rights abuse described in the 1976 Amnesty International Report [were] basically dated, being more descriptive of conditions as they were at times in the 1960's in Haiti . . ." ¹⁰⁰ The Deputy Assistant Secretary also stated in the letter that the "Embassy in Port-au-Prince ha[d] reported that to the best of its knowledge the Haitian government had not in recent years punished returning nationals because they may have left the country without proper documentation."¹⁰¹ The BIA, as one might expect, found the State Department material quite credible and probative. It did not even discuss the possible weaknesses inherent in such evidence which were noted in the circuit court opinions of *Kasravi*, *Hosséinmardi*, and *Zamora*.¹⁰² The decision in *Williams* was typical of BIA decisionmaking in this context.¹⁰³

While the Immigration Judges and the BIA readily believe and apply general State Department background information to the individual claimant, they carefully scrutinize general information obtained from other sources.¹⁰⁴ Thus, an alien who wishes to support his claim with an

⁹⁹ 16 I. & N. Dec. 697.

¹⁰⁰ *Id.* at 702.

¹⁰¹ *Id.* The government in *Haitian Refugee Center* relied on a State Department study concluding that Haitian returnees were not being persecuted, 503 F. Supp. at 482. In analyzing the due process claims, Judge King devoted twelve pages to an examination of the State Department study. He considered the composition of the study team, the statistical sample, the interviews, and assurances made to the interviewers. *Id.* at 482-93. It is difficult to imagine a similarly detailed, in-depth analysis occurring in an individual case. For example, in *Williams* the BIA simply concluded: "We find this evidence significantly more credible and probative regarding the current treatment of returning Haitian nationals by the government of that country than the information and allegations reflected in the 1976 Amnesty International Report." 16 I. & N. Dec. at 703.

¹⁰² *Williams*, 16 I. & N. Dec. at 703. The BIA held it was not reversible error for the Immigration Judge to make the "overstatement" that "Haitians leave their country not because of political conditions, but because of economic conditions." *Id.*

¹⁰³ See *Haitian Refugee Center*, 503 F. Supp. 442; *Coriolon*, 559 F.2d 993; *Zamora*, 534 F.2d 1055; *Paul*, 521 F.2d 195; *In re Chumpitazi*, 16 I. & N. Dec. 629 (1978) (admitting a letter from the Vice Consul of the nation to which the alien would be deported); *In re Cenatice*, 16 I. & N. Dec. 162 (1977); *In re Francois*, 15 I. & N. Dec. 534 (1975); *In re Chukumerije*, 15 I. & N. Dec. 520 (1975). *But cf. In re Smith*, 16 I. & N. Dec. 146 (1977). In *Smith* the State Department allowed the Ethiopian national to remain in the United States for 12 to 18 months. Two months later, the District Director wrote back asking for a more definitive statement on Smith's eligibility for refugee status. The Department of State responded by deciding that a "reasonable case" for granting asylum had not been made out. The District Director ultimately denied asylum.

¹⁰⁴ So obvious that it barely merits mention is the fact that State Department informa-

Amnesty International report, for example, will probably find the decision-maker unpersuaded. A typical example of this attitude appears in the opinion in *Fleurinor*:

We have read the Amnesty International Report, and while we are repulsed by the wholesale disregard of fundamental human rights by Jean Claude (Baby Doc) Duvalier's government, we do not see how the Report adds anything to Fleurinor's claim that *he* will be subject to persecution upon his return to Haiti.¹⁰⁵

The BIA has recently voiced a similar conclusion in considering evidence submitted by an alien, a member of the Provisional Irish Republican Army, who claimed persecution if deported to Ireland.

We do not give much weight to those articles submitted by the respondent which are of a general nature and do not in any way relate to the respondent himself. Such evidence is not probative on the issue of the likelihood of this alien being subject to persecution if deported¹⁰⁶

Consequently, unless the alien can produce official documents or a qualified expert to testify to the likelihood that the individual will be subject to persecution,¹⁰⁷ the only evidence left for the Immigration Judge or BIA to balance against the State Department materials is the statement of the alien himself, and possibly the statement of a relative. The chance of obtaining relief in this situation is obviously remote.¹⁰⁸

The court has intimated, however, that if the totality of conditions is sufficiently oppressive as demonstrated by the general evidence, a more benign view will be taken of an alien's petition for relief.¹⁰⁹ That is, the

tion usually works against relief. That from other sources usually works for it.

¹⁰⁵ 585 F.2d at 133 (emphasis in the original).

¹⁰⁶ *McMullen*, Interim Dec. No. 2831 at 7.

¹⁰⁷ Being able to produce such an expert is no guarantee of obtaining relief from either the Immigration Judge or the BIA. See *Berdo*, 432 F.2d 824.

¹⁰⁸ *McMullen*, Interim Dec. No. 2831. "There is no evidence in the record, other than the respondent's own statements, to show . . . he would be mistreated or subject to undue coercion. The respondent has failed to meet his burden of establishing that he would be persecuted . . . if deported" *Id.* at 8. See also *Henry v. INS*, 552 F.2d 130 (5th Cir. 1977). "Petitioners, however, supported this allegation only by conclusory statements from personal knowledge . . ." *Id.* at 131. Cf. *Hyppolite*, 382 F.2d 98 (finding that there was no evidence that the alien would be persecuted for her political opinions, despite testimony of advice from relatives and friends implying the contrary).

¹⁰⁹ A court may consider a variety of factors including rule of law, existence of torture, and functioning press, to determine the oppressiveness of the totality of conditions. A review of the cases leads one to the cynical conclusion, however, that conditions of Communist nations are assumed to be horrendous while those of our allies are not closely examined. Compare *Berdo*, 432 F.2d 824 (Hungarian claimant fleeing Communist domination) with *Asghari*, 396 F.2d 391 (Iranian student seeking asylum).

general evidence may not have to be *specifically* related to the alien.¹¹⁰ This is the "intimation" which pervades the *Haitian Refugee Center* opinion.

Building on the premise that the general conditions in the alien's nation must be examined, Judge King gave strong consideration to reports by the State Department and others which described Haiti as "the most ruthless and oppressive regime" in the hemisphere.¹¹¹ This enabled the court to conclude that: "The treatment of returnees in Haiti is part of a systematic and pervasive oppression of political opposition which uses prisons as its torture chambers and 'Tonton Macoutes' as its enforcers."¹¹²

Judge King's approach in *Haitian Refugee Center* had been developed in earlier cases such as *Coriolan*. In that case, the appeals court held that with "the presentation of the Amnesty International report, petitioners have clearly 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."¹¹³ As a result, the court remanded the case and ordered the Amnesty International Report received. Yet, a year later, when the same circuit was faced with another case involving almost identical facts, it held the Amnesty International Report not "material" and refused to overturn the denial of relief.¹¹⁴ Thus, in the context of the individual hearing, unless the evidence is derived from the State Department, the Immigration Judge or the BIA may still require general evidence to be specifically related to the individual alien. Therefore, the net effect of permitting the Immigration Judge and BIA to examine evidence on the general conditions in the alien's homeland is to give disproportionate weight to State Department opinions, and augment the burden placed on the alien seeking 243(h) relief.

IV. SPECIFIC FACT PATTERNS

An examination of the recent decisions on Haitian requests for sec-

¹¹⁰ This appears to be the only position reconcilable with the practice of taking judicial notice of general conditions in the country. When the oppressive conditions are shown with demonstrable evidence the force of this argument becomes even stronger.

¹¹¹ *Haitian Refugee Center*, 503 F. Supp. at 475, 503.

¹¹² *Id.* at 475.

¹¹³ 559 F.2d at 1003.

¹¹⁴ *Fleurinor*, 585 F.2d at 133. In order to remand for new evidence, the evidence must be material and there must exist reasonable grounds for the failure to adduce the evidence before the agency. 28 U.S.C. §2347(c)(1976). The court held that neither test was satisfied. "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." 585 F.2d at 133 (emphasis in the original). The court thus eviscerated the *Coriolan* holding.

tion 243(h) relief reveals that the INS and reviewing courts consider a strikingly narrow list of factors. Perhaps the single most determinative factor influencing a political asylum decision in the view of the INS is the alien's membership in a political organization or participation in a political activity not sanctioned by the State. Immigration Judge Opinions and BIA reports denying alien asylum claims often contain a passage which reads: "nothing in the record suggests any past or present political activity or affiliations on the part of [the alien] or his Haitian family that might form the basis of a fear of persecution."¹¹⁵ It is almost impossible to over-emphasize the ethnocentric gloss placed by the INS upon the concept of "political opinion."¹¹⁶

A second factor which has a strong impact on the INS is aliens' treatment while residing in the homeland, or during a return visit. The Immigration Judge inquires whether the alien was arrested, imprisoned, or harassed by the governmental authorities.¹¹⁷ One might cynically conclude that if a refugee successfully evades physical abuse, he will have a difficult time demonstrating his need for relief.

A third factor considered crucial by the INS is the treatment received by the alien's friends and family in the homeland, in light of the alien's alleged political activity, or request for asylum. The inability to show that one's relatives are being harassed, arrested, or imprisoned seriously undermines the claim for relief.¹¹⁸

Two other factors also seem to be somewhat important in accessing the probability of proving political persecution. First, the INS will readily consider whether the alien had any formal ties to the State's official apparatus, for example, whether the alien was a government or military employee.¹¹⁹ Proof of such ties constitutes a vehicle toward the award of relief, but, admittedly, this argument will be available to few Haitian refugees. The second and more time-conscious consideration inquires when the alien was politically active or subject to persecution. The more remote the underlying political activity, the less likely the chances of ob-

¹¹⁵ *Henry*, 552 F.2d at 131; see *Coriolan*, 559 F.2d at 998, 1005; *Martineau*, 556 F.2d at 307; *Gena*, 424 F.2d at 233; *Williams*, 16 I. & N. Dec. at 700; *Francois*, 15 I. & N. Dec. at 538-39.

¹¹⁶ See Note, *The Right of Asylum Under United States Law*, 80 COLUM. L. REV. 1125, 1139-47 (1980).

¹¹⁷ See *Coriolan*, 559 F.2d at 998, 1005; *Henry*, 552 F.2d at 131; *Paul*, 521 F.2d at 203; *Gena*, 424 F.2d at 233; *Hyppolite*, 382 F.2d at 98; *Williams*, 16 I. & N. Dec. at 700.

¹¹⁸ See *Fleurinor*, 585 F.2d at 134 ("family remains unmolested by the Duvalier regime"); *Coriolan*, 559 F.2d at 998, 1005; *Zamora*, 534 F.2d at 1059 (alien's children resided in Haiti); *Paul*, 521 F.2d at 203 (dissent would grant relief because relatives were molested); *Gena*, 424 F.2d at 233 (alien's wife, children, brothers, and sisters continued to reside in Haiti); *Williams*, 16 I. & N. Dec. at 700 (alien "made no claim that repercussions resulted to her family in Haiti because of her opinions, her actions, or her departure . . .").

¹¹⁹ See *Coriolan*, 559 F.2d at 998, 1005; *Martineau*, 556 F.2d at 307.

taining relief. The INS assumes that political actions taken by or political persecution visited upon the alien more than six to eight years prior to the asylum claim will not support a well-founded fear of persecution.¹²⁰ The Immigration Judge or the BIA will simply find that: "Nothing presented establishes that the [home government] . . . now is aware of respondents or has any interest, any adverse interest, in them."¹²¹ When the INS passes judgment on this basis, it generally does not undertake a complete appraisal of conditions in the alien's country.

As mentioned above,¹²² some courts have suggested that if conditions reach a certain level of intolerable oppression, a broader conception of "political opposition" should be employed. This suggestion related directly to the prime consideration of the INS: membership in a political organization or participation in a political activity not sanctioned by the State.¹²³ This expanded framework for analyzing an alien's claim is not contrary to the current INS criteria, but rather interprets the elements of that criteria more broadly.

The Fifth Circuit opinion in *Coriolan*¹²⁴ is an example of this expansion. The Immigration Judge had considered the alien's request for relief by examining only the standard items enumerated above. The court held that in the Haitian context, it may be necessary to take a broader view of the alien's claims.¹²⁵ Concerning the INS' views of Haitian political conditions, the court stated:

Many—though certainly not all—of the factual conclusions of the [immigration] judge suggest unstated assumptions about the nature of Haitian political life. For example, his opinion observed that there was no evidence that [the aliens] had ever belonged to any political organizations in Haiti. Similarly, the judge was not convinced that their political opinions differed from those of the vast majority of Haitians. These observations imply a premise: that people without overt political activity, or minority political opinions, are unlikely to be the victims of political persecution.

Solid as it sounds, this proposition is not graven in stone. It may be, in fact, that Haitian citizens can become the focus of government persecution without ever taking any conventionally "political" action at all.¹²⁶

¹²⁰ See *Fleurinor*, 585 F.2d at 134 (events 8 years ago); *Zamora*, 534 F.2d at 1058 (events 6 years ago); *Williams*, 16 I. & N. Dec. at 698 (events 8 years ago, but alien did not leave until 18 months after the events); *Francois*, 15 I. & N. Dec. at 538-39 (father murdered 15 years ago and step-father murdered 7 years ago).

¹²¹ *Zamora*, 534 F.2d at 1058.

¹²² See *supra* notes 113-18 and accompanying text.

¹²³ See *supra* note 119 and accompanying text.

¹²⁴ 559 F.2d 993.

¹²⁵ *Id.* at 1003-04.

¹²⁶ *Id.* at 1000-01. The court also noted,

[i]t could be argued that although [the aliens] are likely victims of government persecution, what they face is not persecution for their "political

If the Haitian national can convince the Immigration Judge, BIA, or appeals court to adopt this broader perspective in considering his claim for section 243(h) relief, he has at his disposal a potentially very strong argument. Illegal departure *alone*¹²⁷ may constitute sufficient "political" activity to pose a threat to one's life or freedom if deported.

This argument is frequently invoked on behalf of "escapees" from Communist countries. The INS, indeed the U.S. government and most of its citizenry, often lauds the bravery of individuals endeavoring to extricate themselves from "Communist domination." Such acts are considered political statements by their very nature.¹²⁸ When the homeland, like Haiti, is an American ally, however, the alien's position is much more tenuous.

A Fifth Circuit panel, in *Henry*,¹²⁹ was the first court to be receptive to this argument on behalf of a Haitian. The court reviewed the denial of section 243(h) relief under a "narrow mandate" for arbitrariness or abuse of discretion. It first noted that the aliens had failed to show that they *specifically* had reason to fear persecution in Haiti, according to the standard checklist of items. As regards the allegations by the aliens that *anyone* who left the regime of "Papa Doc" Duvalier, as they had in 1958, would be received with hostility by the "Baby Doc" government, the court acknowledged its relevance¹³⁰ but held that the aliens had not proven it by "a preponderance of the evidence."¹³¹

The same circuit, in *Coriolan*, while not reaching the factual problem of applying the argument to Haiti, made clear its view that if illegal departure was punishable for political reasons, the alien would qualify for a stay of deportation under section 243(h).¹³²

Thus, the stage was set for the *Haitian Refugee Center* opinion. The court examined the general conditions in the alien's homeland and found the conditions characteristic of a brutal "tyranny." As a consequence, the

opinion" as the statute requires. We cannot believe, however, that Congress would have refused sanctuary to people whose misfortune it was to be the victims of a government which did not require political activity or opinion to trigger its oppression.

Id. at 1004.

Under this analysis, if we assume a mythical government which once a month selected one person from each town to be publicly executed, as a means of ensuring a docile populace, one who found out in advance his or her execution date, and who came to the United States, should be granted asylum.

¹²⁷ See *supra* note 9 regarding the scope of this paper.

¹²⁸ See *Berdo*, 432 F.2d 824 at 833, 845; cf. *Kovac*, 407 F.2d 102.

¹²⁹ 552 F.2d 130.

¹³⁰ The court stated: [i]f proved, such an allegation might form a sound basis for fear of persecution regardless of the placidity of an individual's political past. *Id.* at 131.

¹³¹ *Id.* at 132.

¹³² 559 F.2d at 1000.

traditional indicators of political opinion lost their impact, and a more general examination of the alien's probable predicament if deportation was required. The court concluded that illegal departure and a plea for asylum may be sufficient to provoke persecution by the Haitian regime.

To the [State Department Study] Team, only the intellectuals and the leaders of political parties would be . . . classified [as participants in "political resistance"]. The fallacy of this presumption is abundantly clear. The uncontradicted evidence at trial, evidence which the State Department has often recognized, demonstrates that the "political opposition" is quite broadly defined. Moreover, the Team's conclusion fails to consider the possibility that the claim of asylum itself may cause one to be classified among the political opposition. The Haitian government conceded that an asylum claim may be regarded as defamation of the nation. The evidence is clear that returnees are regarded as traitors, and that asylum claims are regarded as an insult to the Duvalier government.¹³³

Although the *Haitian Refugee Center* litigation is still on appeal, the INS has begun to prepare itself for whatever decision the Appeals Court might reach on review. In *In re Williams*, decided shortly after the *Haitian Refugee Center* class-action litigation was filed,¹³⁴ the alien expressed fear that she would be killed if deported as the Haitian government knew of her request for asylum. The BIA responded by citing a State Department letter indicating that to the best of its knowledge, the Haitian government had not punished returning nationals in recent years. The letter suggested that the Haitian government "unofficially recognized" the economic benefits of the illegal departures.¹³⁵ In support of its position, the State Department noted three instances of follow-up inquiries finding no persecution of returnees. Furthermore, after reviewing 175 cases, the United Nations High Commissioner for Refugees had concluded that "merely departing Haiti and requesting political asylum in the United States [was] insufficient grounds to establish a prima facie claim to such asylum."¹³⁶ All of the points raised in the State Department's letter have been rebutted.¹³⁷ Notwithstanding, the basic problem remains: the INS is not inclined to grant section 243(h) relief to Haitian nationals. It is unwilling to accept the argument that Haiti is an oppres-

¹³³ 503 F. Supp. at 480. As previously observed, the *Haitian Refugee Center* litigation did not involve the review of specific claims. Thus, the problems involved in determining the likelihood of an individual being persecuted (or, seen another way, the probability of all being persecuted) were not resolved.

¹³⁴ *Williams* was decided on March 30, 1979 by the BIA. 16 I. & N. Dec. 697. The original complaint leading to the *Haitian Refugee Center* decision was filed on May 9, 1979.

¹³⁵ 16 I. & N. Dec. at 702.

¹³⁶ *Id.* (quoting a State Department letter to Congressman Fraser).

¹³⁷ See *Haitian Refugee Center*, 503 F. Supp. 442; Brief for Appellees at 10-11, 67.

sive and totalitarian regime such that merely fleeing the country and "embarrassing" it abroad with a request for political asylum may subject one to persecution.¹³⁸

V. THE STANDARD OF REVIEW

Until the Refugee Act of 1980 amended section 243(h), the granting of relief under that provision was a discretionary act of the Attorney General.¹³⁹ As such, the review of the Attorney General's decision, as made by the Immigration Judge and BIA, was very restricted. As stated by the court in *Fleurinor*:

Our authority to review the determination of petitioner's failure to meet his burden of proof is limited: "Judicial review of discretionary administrative action is limited to the questions of whether the applicant has been accorded procedural due process and whether the decision has been reached in accordance with the applicable rules of law. Furthermore, the inquiry goes to the question whether or not there has been an exercise of administrative discretion and, if so, whether the manner of exercise has been arbitrary or capricious."¹⁴⁰

It is in the context of this deferential standard of judicial review that one should consider the courts' affirmances of INS determinations denying relief on grounds of insufficient facts. While the court's examination of decisions on persecution claims is not altogether perfunctory in these cases, it is clear that no searching review was contemplated or undertaken. Particularly salient is the *Henry*¹⁴¹ decision where the aliens alleged that anyone who had fled from the "Papa Doc" regime would be persecuted under "Baby Doc" upon return to Haiti. Noting its "narrow mandate," and applying the standard of review quoted above, the court characterized the alien's evidence as "conclusory statements from personal knowledge and unauthenticated reports purporting to describe the Haitian political atmosphere."¹⁴² The Immigration Judge and BIA decision were affirmed, "because a fair and reasonable assessment of the record fail[ed] to disclose that its decision was arbitrary, capricious or an abuse of discretion."¹⁴³ It can be assumed that the aliens had not proved their allegations. This is not to say that no significant or substantial evidence existed on the record to support the alien's contention. In concluding merely that the evidence was insufficient, perhaps the court is expres-

¹³⁸ See *Haitian Refugee Center*, 503 F. Supp. at 507.

¹³⁹ See *supra* notes 14-22 and accompanying text.

¹⁴⁰ 585 F.2d at 133 (quoting *Henry*, 552 F.2d at 131).

¹⁴¹ 552 F.2d 130.

¹⁴² *Id.* at 131-32.

¹⁴³ *Id.* at 132.

sing a willingness to accept alien claims and to be somewhat less deferential to the BIA, and the INS.

The Second Circuit and the D.C. Circuit have pioneered the argument that the facts forming the basis for the Attorney General's decision, although subject to administrative discretion, must be supported by substantial evidence.¹⁴⁴ They held that "the determination of whether or not persecution, within the meaning of section 243(h), would actually occur in the event of deportation was a finding of fact—distinct from the exercise of administrative discretion to stay deportation—and had to pass the substantial evidence test."¹⁴⁵ The 1980 Refugee Act amendment removed the Attorney General's discretion in this matter. As the theory of the Second Circuit becomes more viable,¹⁴⁶ future findings of fact under section 243(h) may have to pass the substantial evidence test upon review. If that is the case, more court decisions requiring the Attorney General to withhold deportation under section 243(h) may soon follow.¹⁴⁷

VI. SUMMARY

This note has attempted to examine the problems of relating the district court opinion in *Haitian Refugee Center v. Civiletti* to an individual asylum application, when seeking or granting relief under the recently amended section 243(h). It has been observed that the INS continues to adhere to as strict an interpretation of this section as possible, despite the trend toward liberalization in appellate court opinions. While many sources of evidence of general homeland conditions are now admissible in deportation-withholding proceedings, the admissibility of this evidence does not often result in successful claims for relief. A few courts have stated that in an extreme situation "political opposition" should be broadly interpreted. The INS, however, has refused to follow this suggestion in deciding individual Haitian claims. Whether the appellate courts will uphold the INS position in light of the amendment to section 243(h) is a question which can be answered only by future decisions.

¹⁴⁴ See *United States ex rel. Kordic v. Esperdy*, 386 F.2d 232, 238-39 (2d Cir. 1967) cert. denied 392 U.S. 935 (1968); *Wing Wong v. INS*, 360 F.2d 715, 717 (2d Cir. 1966); *Hamad v. INS*, 420 F.2d 645 (D.C. Cir. 1969); cf. *Zamora*, 534 F.2d at 1060.

¹⁴⁵ *Zamora*, 534 F.2d at 1060.

¹⁴⁶ See *McMullen v. INS*, No. 80-7580 (9th Cir. Oct. 13, 1981) (discussed at 50 U.S.L.W. 2253 (1981)) (adopting the "substantial evidence" test in light of the Refugee Act of 1980 amendment to section 243(h)).

¹⁴⁷ The issues raised in *Haitian Refugee Center* occurred before the passage of the Act and, hence, the plaintiffs did not come within its scope. See *Haitian Refugee Center*, 503 F. Supp. 453.