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HAITIAN IMMIGRANTS: POLITICAL REFUGEES OR ECONOMIC ESCAPEES?

MARTIN M. DERNIS*

The article examines the recent immigration of Haitians to the United States and their claims for political asylum. Pointing to the present political situation in Haiti, the author takes issue with the United States Government's official position that these aliens are merely economic escapees, rather than refugees entitled by international agreement to political asylum. In analyzing the Haitian experience, the author also deals with the problems associated with deportation proceedings and the alien's right to counsel, employment authorization for aliens, and fraudulent marriages. While these latter problems may not be unique to Haitian immigrants, they have become particularly salient in light of the Government's contention that these aliens are economic escapees.

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I. INTRODUCTION

In the past 5 years, increasing numbers of Haitian immigrants have attempted illegal entry into the United States.¹ Contending that they face probable arrest and persecution if returned to Haiti, these aliens have sought asylum as political refugees;² but the Immi-

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1. The Haitians have frequently arrived in South Florida by way of overloaded sail and fishing boats, in one case undertaking the hazardous 800-mile voyage with 38 people crowded into a 20-foot boat. CHRISTIAN CENTURY, Feb. 27, 1974, at 219. On August 29, 1976, more than 150 Haitians sailed into Miami on a boat of only 50 feet. Miami Herald, Aug. 30, 1976, § B, at 1, col. 1.

2. Miami Herald, July 1, 1976, § B, at 2, col. 1.

gration and Naturalization Service and the United States Department of State maintain that the immigrants are actually fleeing Haiti's wretched economic conditions rather than any political repression.³ Thus, the factual question in these cases is whether the Haitian aliens are political refugees or merely economic escapees, while the accompanying legal issue is one of defining and differentiating the terms, "political refugee" and "economic escapee." Another question posed by the plight of the Haitians is whether an alien who originally leaves his country as an economic escapee can become entitled to political asylum upon his arrival in this country as a result of the possible political repercussions he would face were he to be returned to his native land.

The term "refugee," as defined in the Protocol Relating to the Status of Refugees, refers to one who

owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country. . . .⁴

An alien from a Communist-dominated country usually has no difficulty in establishing such a fear of persecution. Immigration officials appear willing to presume that he is indeed a political refugee, as in the case of the many Cubans who have entered the United States since the Castro regime came to power. Where an alien flees from a country not ruled by a Communist-controlled government, however, these officials demand greater proof of a legitimate fear of political repression. Matters are further complicated when, as in Haiti, the economic conditions are as deplorable as the political situation, so that aliens from such a country might as easily be political or economic escapees, or both.

Although license plates proclaim Haiti "The Pearl of the Antilles," the country is hopelessly impoverished, with unemployment as high as 30-50 percent and per capita wages as low as \$1.30 per day.⁵ The nation's political climate appears to be equally dismal.

3. *Id.*

4. Protocol Relating to the Status of Refugees, art. I, para. 2, *done* Jan. 31, 1967, 606 U.N.T.S. 2681 [hereinafter cited as Protocol]. This language is incorporated in the Protocol by reference to the Convention Relating to the Status of Refugees, art. 1, para. 2, *done* July 28, 1951, 189 U.N.T.S. 150, 152 [hereinafter cited as Convention].

5. Greve, *Is It Persecution or Poverty That Makes a Haitian Flee?*, Miami Herald, Mar. 6, 1974, § A, at 12, col. 1.

Affidavits of Haitian immigrants and statements of observers indicate that, notwithstanding the posture of the United States Government to the contrary, little positive change toward freedom has occurred since the 24-year-old "President for life," Jean Claude Duvalier, succeeded his father in 1971.⁶ Haitian aliens arriving in

6. Open letter by Antoine Adrien, 915 Putnam Ave., Brooklyn, N.Y., June 28, 1974.

My name is Antoine Adrien. I am Haitian and also a catholic Priest working with the Haitian Community in New York since December 1971. Through daily contacts with Haitians coming from or going to Haiti, including priests and sisters, and because I do maintain close bonds with my country, 'reading [sic] all the literature related to it, I am well aware of what is going on in the Western part of the Island. [Haiti comprises the western half of a Caribbean Island, the eastern portion of which is the Dominican Republic.]

A number of refugees are persons who have well-founded fear of persecution because of membership in a particular group or because of the expression of political opinions opposing the government. A considerable number have a well-founded fear of persecution on a political basis even though they did not belong to a particular group or express political opinions opposing the government.

Appropriation, without payment, by government officials or Tonton-Macoutes of the merchandise, land, housing and other property is widespread; and when the owners protest, they are threatened, arrested, tortured and often killed. Other arbitrary actions by the Macoutes and government officials are the arrest and torture of persons who happen to be present when destruction of, or injury to government property occurs— for example, when a ship suffers damage or sinks.

Even though the individual involved may actually not have been opposed to the government, what is decisive is that the government treats him as an opponent. In every sense, such a person is a refugee with a well-founded fear of persecution because of his opinions, actual or imputed.

The Tonton Macoutes, as well as the Leopards, are in every basic respect government instrumentalities. It is true that many actions of the Tonton-Macoutes (their seizure of the property of others, for example) are initiated without prior directives or sanction by government authorities, except where they involve other Macoutes, government officials or very influential persons. In general, under the prevailing conditions in Haiti, for the mass of people the distinction between the Macoutes or Leopards and the government is practically nil.

Some reporters do give Baby Doc rather good marks, claiming that "he is considerably less ruthless and corrupt than his notorious father." Because of my personal experience of the Duvaliers' regime, (I had been living for 12 years under its rules), I am able to understand quite well the reality which is behind the facade of the so-called "liberalization." I agree totally with this affirmation quoted from CHRISTIAN CENTURY: "No appreciable change has come about in Haiti since dictator Francois (Papa Doc) Duvalier died in 1971 and was succeeded by his playboy son, Jean-Claude (Baby Doc), as "president for life at age 19 Haiti's "tranquillity" is largely a surface phenomenon . . . repression and officially sanctioned terrorism—carried out by the dreaded Tonton-Macoutes and a newer, U.S. trained force called the Leopards— remain the order of the day." (Christian Century, Feb. 27, 1974).

/s/ Antoine Adrien c.s.sp.

this country continue to tell horror stories of the torturous results of belonging to anti-government groups,⁷ privately speaking with disfavor about the government,⁸ attempting to receive payment for services rendered to a member of the Tonton-Macoutes (secret police),⁹ or merely bumping into a Macoute on the street.¹⁰ In addition, the taking of personal property at will by the Tonton-Macoutes is a common occurrence.¹¹

7. Affidavit of Josephat Louis, Brief for Petitioner-Appellant at A-3, *Pierce v. United States*, case no. 75-1579 (5th Cir.).

On Jan. 13, 1973, at 11 a.m., I and my cousin, Germilis were walking on the Rue St. Matin. We were going to a nearby house where our group kept some of our papers hidden. My cousin had blank paper in his hand to be printed up later. We were stopped by a Macoute I knew by sight and name, Papoi Joseph. He saw the papers in my cousin's hand and accused him of belonging to a secret group. My cousin denied this and they began fighting. Papoi Joseph pulled a gun and threatened to kill my cousin if he did not confess. My cousin admitted he belonged to a group. At the time the gun was pulled I ran behind some trees and watched. After my cousin confessed Papoi Joseph shot him in the stomach and threw the body in the ocean which was nearby.

See also Affidavit of Sabito St. Armand, *id.* at A-10.

8. Affidavit of Pierre Roosevelt, *id.* at A-13.

On August 12, 1973, my father and I were talking . . . saying that the new president Duvalier is a child and that he cannot run the country. At midnight, August 13, two Tonton Macoutes . . . came to my house in Port au Prince, and took my father away. I have not seen or heard of him since then.

See also Affidavit of Francois Rilien, *id.* at A-14.

9. Affidavit of Joseph Etienne, *id.* at A-16 to -18.

I was a school teacher in a small private school . . . in Mathieu, Haiti. A Macoute . . . had his seven year old girl enrolled there, and hadn't paid for her attendance in four months. . . . I gave that girl a bill for the money owed me, and said that if it wasn't paid she wouldn't be allowed to attend any more. The next day three Macoutes . . . arrested me and took me to a prison called "Fort Dimanche."

In prison I was given dried bread, grits and water once each day, in a cell by myself. After nine months, I still had with me the equivalent of \$200 dollars, and on February 14, 1973 I paid this to the guard . . . [to] get myself released.

[In August] I re-opened the school and that morning, the same Macoute who had arrested me before . . . came in with his machine gun and threatened to kill me. At this point some of the children began to shout, and when the Macoute turned to quiet them, I picked up a chair and hit the Macoute over the head, knocking him out.

10. Affidavit of Josephat Louis, *id.* at A-2.

In June of 1972 I was arrested for accidentally bumping into a uniformed Macoute on Portaille St. Joseph in Port-au-Prince. I was taken to the Penitencier National and beaten with a stick by the man who arrested me. I was put in a cell and held for 3 months.

11. Open letter by Raymond Alcide Joseph, 808 West End Ave., New York, N.Y., June 28, 1974.

The Tonton-Macoutes, as well as the more recently organized "Leopards," are in every basic respect government instrumentalities. It is true that many

Thus, while Haitian aliens certainly stand to benefit economically by admission into the United States, they also seek to gain freedom from political and social repression. Just as the political hardships of a nation should not be used as an artificial means to justify economic motives, neither should immigration officials deny political asylum to an alien simply because he comes to this country from a situation of abject poverty. While it is no doubt true that some Haitian aliens are political neutrals whose only motive for leaving their homeland is economic, it is apparent that most of these immigrants fear for their lives if they are deported home. Such fears, as well as the incidents which give rise to them, should bring the Haitians within the protective parameters of the Protocol.¹² Accordingly, it is preferable from both the legal and moral viewpoints that no Haitian be returned to his native country unless he clearly has no basis for fearing either the Duvalier government or its local strong-arm men, who terrorize the towns and villages.

II. DEPORTATION PROCEEDINGS AND THE RIGHT TO COUNSEL

A. *Nature of Deportation Proceedings*

Proceedings to determine the deportability of a resident alien commence with the issuance of an order to show cause,¹³ which must contain a statement of the nature of the proceeding, the legal authority for the proceeding, the factual basis for the charges, and a requirement that the alien appear at a hearing to show cause why he should not be deported.¹⁴ In addition, specified officials of the Immigration and Naturalization Services (INS) are empowered to issue warrants for arrest "whenever, in [their] discretion, it appears that the arrest of the respondent is necessary or desirable."¹⁵ Warrantless arrests may be made by any officer of the INS who actually witnesses an illegal entry into the United States or has

actions of the Tontons-Macoutes (seizure of property without compensation, etc.) are initiated without prior directives or sanction by higher government officials. However, their actions are later invariably approved by the authorities, except where they involve other Macoutes, government officials or very influential persons. In general, under the prevailing conditions in Haiti, for the mass of people the distinction between the Macoutes or the Leopards and the government is practically nonexistent.

12. See note 4 *supra* and accompanying text.

13. 8 C.F.R. § 242.1(a) (1976).

14. 8 C.F.R. § 242.1(b) (1976).

15. 8 C.F.R. § 242.2(a) (1976).

reason to believe that the alien is likely to escape before a warrant can be obtained.¹⁶ In the latter case, the alien is to be taken "without unnecessary delay" to an INS officer for examination.¹⁷ Similar to criminal arrests, the arrested alien is taken to a detention facility and given *Miranda*-type warnings,¹⁸ then fingerprinted and photographed.¹⁹ Pending final determination of deportability, the arrested alien may be (1) continued in custody, (2) released on bond of not less than \$500, or (3) released on conditional parole.²⁰

By the terms of the applicable statute, "no decision of deportability shall be valid unless it is based upon reasonable, substantial, and probative evidence."²¹ The Supreme Court, however, has held that Congress has not addressed itself to the question of degree of proof required to establish deportability,²² and that the evidence must be "clear, unequivocal, and convincing."²³

B. *Right to Counsel*

Deportation proceedings are civil as opposed to criminal in nature, and the courts have generally held that fundamental fairness requires that the alien be afforded the opportunity to provide his own counsel if he wishes,²⁴ although this must be at no expense to the government.²⁵ If the opportunity to retain counsel is extended,

16. 8 U.S.C. § 1357(a)(2) (1970).

17. *Id.*

18. The alien is to be told that any statement he makes may be used against him and that he has a right to be represented by counsel of his own choosing at no expense to the Government. 8 C.F.R. § 242.2(a) (1976). To the extent that counsel will not be appointed for the indigent, the warnings differ from standard *Miranda* warnings. Furthermore, since deportation proceedings are civil in nature, rather than criminal, there is no requirement of *Miranda* warnings as to constitutional rights. *Avila-Gallegos v. INS*, 525 F.2d 666, 667 (2d Cir. 1975). An alien need not be given *Miranda* warnings in noncustodial interviews even where the INS already possesses information indicating the alien's deportability and focuses its investigation for this purpose. *Chen v. INS*, 45 U.S.L.W. 2049 (1st Cir. July 13, 1976). Statements made without warning may be used against the alien at a deportation hearing but not in a criminal matter, including a criminal charge of violating immigration laws. *Chavez-Raya v. INS*, 519 F.2d 397 (7th Cir. 1975).

19. 8 C.F.R. § 242.4 (1976).

20. 8 U.S.C. § 1252(a) (1970).

21. 8 U.S.C. § 1252(b)(4) (1970).

22. *Woodby v. INS*, 385 U.S. 276, 284 (1966).

23. *Id.* at 285. See also 8 C.F.R. § 242.14(a) (1976).

24. *Nicoli v. Briggs*, 83 F.2d 375 (10th Cir. 1936).

25. 8 C.F.R. § 242.2(a) (1975). Once the deportation hearing itself begins, the special inquiry officer is to advise the alien of his right to counsel "and require him to state then and there whether he desires representation . . ." 8 C.F.R. § 242.16(a) (1976).

but none is obtained, or counsel fails to appear, then the hearing may proceed as scheduled.²⁶ Unlike criminal proceedings it is not "the guiding hand of counsel"²⁷ which is required, only the opportunity to obtain it.

In several cases deportation orders have been contested because the alien had to proceed without counsel when he desired representation but lacked sufficient funds to obtain counsel.²⁸ Wherever the claim has been asserted that due process requires that counsel be appointed for indigents, the courts have avoided confronting this issue and have ruled that the alien was not prejudiced by the absence of counsel because the facts were undisputed, and the assistance of counsel could not have benefited him.²⁹ In other cases the courts have found that the issue of indigency was not adequately presented by the alien.³⁰ Apparently these courts chose to overlook the possibility that some facts may have been disputed or that indigency might have been shown had the alien been provided counsel to properly present his case.

The present state of the law regarding the right to counsel in deportation proceedings is analogous to that prevailing in state criminal prosecutions prior to *Gideon v. Wainwright*.³¹ Although the courts have refused to extend the absolute right to counsel guaranteed by the sixth amendment in criminal proceedings to deportation cases,³² they have been willing to examine individual cases to determine whether the proceedings meet the tests of fundamental fairness.³³ The mere fact that the alien was unrepresented is not consid-

26. See *Dengeleski ex rel. Saccardio v. Tillinghast*, 65 F.2d 440 (1st Cir. 1933); *United States ex rel. Gould v. Uhl*, 6 F. Supp. 696 (S.D.N.Y. 1934).

27. *Powell v. Alabama*, 287 U.S. 45, 69 (1932).

28. See, e.g., *Murgia-Melendrez v. INS*, 407 F.2d 207 (9th Cir. 1969). The courts have also had to scrutinize denials of the right to counsel in cases where improper influence or action was exercised by the government officials. *Bon Youn Choy v. Barber*, 279 F.2d 642 (9th Cir. 1960) (alleged intimidation); *Whitfield v. Hanges*, 222 F. 745, 749-51 (8th Cir. 1915) (refusal to permit counsel); *Roux v. Commissioner of Immigration*, 203 F. 413 (9th Cir. 1913) (misleading alien as to the need for counsel); *Barrese v. Ryan*, 189 F. Supp. 449 (D. Conn. 1960) (no reasonable opportunity to obtain counsel and inadequate comprehension of the language).

29. See, e.g., *Henriques v. INS*, 465 F.2d 119 (2d Cir. 1972), cert. denied, 410 U.S. 968 (1973); *DeBernardo v. Rogers*, 254 F.2d 81 (D.C. Cir.), cert. denied, 358 U.S. 816 (1958).

30. See, e.g., *Rosales-Caballero v. INS*, 472 F.2d 1158 (5th Cir. 1973).

31. 372 U.S. 335 (1963).

32. *Tupacyuparqui-Marin v. INS*, 447 F.2d 603 (7th Cir. 1971).

33. *Shaughnessy v. United States*, 345 U.S. 206 (1953); see *Jouras v. Allen*, 222 F. 756 (8th Cir. 1915) *Roux v. Commissioner of Immigration*, 203 F. 413 (9th Cir. 1913).

ered a denial of due process unless he can show prejudice thereby.³⁴ On the other hand, the courts have not been reticent to find unfairness where the facts warrant it.³⁵

While no case has flatly held that counsel must be provided in any specific situation, some decisions have approached that position. For instance, in *United States ex rel. Castro-Louzan v. Zimmerman*³⁶ the court stated:

Informing a prisoner with total resources of \$30.00, a stranger in a strange land with a complete lack of knowledge of the language of that country, that he had a right to counsel is almost an empty gesture. . . .

In a matter involving a person's liberty, it is my opinion that we must look to the substance rather than the form [of the proceeding, whether civil or criminal]. . . . It would in my opinion be a reflection upon the American system of jurisprudence if this impecunious alien in the light of all the circumstances were to have the legal consequences of deportation visited upon him without having a full and complete opportunity to present for the determination of the Immigration and Naturalization Service all the facts adduced in the record before me.³⁷

At what point the right to counsel has such a distinct bearing on the outcome of the case that the hearing becomes unfair is, of course, a problematical but crucial question. It is precisely the inquiry which developed in the field of criminal law after *Powell v. Alabama*,³⁸ and which the Supreme Court sought to avoid in *Gideon v. Wainwright*³⁹ when it rejected the "special circumstances" test of

34. *DeBernardo v. Rogers*, 254 F.2d 81 (D.C. Cir.), *cert. denied*, 358 U.S. 816 (1958).

35. *See, e.g., Rose v. Woolwine*, 344 F.2d 993 (4th Cir. 1965), where the court reopened a deportation proceeding in which the alien had been represented by a "Travel Agent" rather than a lawyer because the alien had not realized that the unrebutted evidence in the record could result in her being barred permanently from the country. *See also* cases cited in note 28 *supra*.

36. 94 F. Supp. 22 (E.D. Pa. 1950).

37. *Id.* at 25-26.

38. 287 U.S. 45 (1932). Writing for the Court, Mr. Justice Sutherland stated:

The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. . . . [The layman] lacks both the skill and knowledge adequately to prepare his defense, even though he have [sic] a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence.

Id. at 68-69.

39. 372 U.S. 335 (1963).

Betts v. Brady.⁴⁰ The *Gideon* court, through Mr. Justice Black, argued that:

[R]eason and reflection require us to recognize that in our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him. This seems to us to be an obvious truth.⁴¹

It would seem that the impoverished Haitian immigrant, not only too poor financially to hire counsel but also too poorly versed in the English language to present his own case, as well as unable to comprehend the legal system of the strange new land in which he finds himself, is also in obvious need of legal representation. Yet, as with the early development of right to counsel in criminal proceedings, right to counsel in immigration matters has continued to be measured by the *Betts* "special circumstances" test. In view of the ramifications of the deportation hearing and its results on the future life of the alien, it would seem that such individuals should be entitled to the benefit of counsel under the *Gideon* rationale. This is all the more so where, as in the case of the Haitians, an alien's right to remain in this country is primarily contingent on a legal technicality—whether the social conditions in Haiti are such that these people can legitimately qualify as political refugees as defined in various international agreements.⁴²

III. EMPLOYMENT AUTHORIZATION

Various classes of aliens are barred from entry into the United States because of economic factors. These include: (1) "paupers, professional beggars, or vagrants";⁴³ (2) those who "are likely at any

40. 316 U.S. 455 (1942).

41. 372 U.S. at 344. See *Argersinger v. Hamlin*, 407 U.S. 25 (1972), where the Supreme Court held that the right to counsel applies to all criminal matters including felonies, misdemeanors, or petty offenses because of the far-reaching effects of any proceeding which makes possible a loss of liberty on the part of the accused. See also *Baldwin v. New York*, 399 U.S. 66, 73 (1970).

42. See text accompanying note 3 *supra*.

43. 8 U.S.C. § 1182(a)(8) (1970). The statute does not define these terms, but they generally are thought not to apply to the Haitians. "Pauper" is defined in the case law as "one who is actually dependent upon public funds for support and who in addition is unable by reason of mental or physical infirmity to work or is unwilling to work." *In re M.*, 2 I. & N. Dec. 131, 132 (1944). A "vagrant" is one who is dependent on others for his support even though capable of self-support. See *Parshall v. State*, 62 Tex. Crim. 177, 138 S.W. 759 (Crim.

time to become public charges";⁴⁴ and (3) those seeking to enter the country for the purpose of performing skilled or unskilled labor.⁴⁵ With regard to this last class, the Secretary of Labor must certify his findings prior to the alien's entry into the country.⁴⁶ It would therefore appear that this requirement applies only to aliens coming to the United States for the sole or primary purpose of performing labor, rather than to all immigrants. Furthermore, it seems unreasonable to expect a bona fide political refugee to first make an application to the Secretary of Labor before fleeing the repressive atmosphere of his homeland.

The right of the Haitians both to enter the United States and to work once they are here hinges on the validity of their political asylum claim.⁴⁷ If they are bona fide political refugees, their rights are governed by Article 17(1) of the Convention:

The Contracting States shall accord to refugees lawfully staying in their territory the most favorable treatment accorded to nationals of a foreign country in the same circumstances, as regards the right to engage in wage-earning employment.⁴⁸

If, on the other hand, they are here for merely economic purposes,

App. 1911); *City of Huntington v. Salyer*, 135 W. Va. 397, 63 S.E.2d 575 (1951). The Haitians are frequently penniless upon arrival in the United States, and are at first dependent on support from others; but they are ready, willing, and able to take jobs and become self-supporting. In fact, it is this eagerness to work which leads to the conclusion that they are economic, rather than political, escapees.

44. 8 U.S.C. § 1182(a)(15) (1970).

45. 8 U.S.C. § 1182(a)(14) (1970).

Aliens seeking to enter the United States, for the purpose of performing skilled or unskilled labor, unless the Secretary of Labor has determined and certified to the Secretary of State and to the Attorney General that (A) there are not sufficient workers in the United States who are able, willing, qualified, and available at the time of application for a visa and admission to the United States and at the place to which the alien is destined to perform such skilled or unskilled labor, and (B) the employment of such aliens will not adversely affect the wages and working conditions of the workers in the United States similarly employed.

Thus, the Secretary of Labor must affirmatively find that a specific alien is entitled to employment under the Act. Under the original form of the Act in 1952, however, the Secretary certified those cases where an alien's entry into the country, and subsequently the job market, would have negative effects on the market. Act of June 27, 1952, ch. 477, § 212(a)(14), 66 Stat. 182, as amended 8 U.S.C. § 1182(a)(14) (1970).

46. 8 U.S.C. § 1182(a)(14) (1970).

47. See note 4 *supra*. See also Convention, art.17, para.1, which is incorporated by reference into the Protocol, art. I, para. 1.

48. Convention, art. 17, para. 1, incorporated by reference into the Protocol, art. I, para. 1.

then they are seeking entry into the United States for the purpose of performing skilled or unskilled labor and must comply with 8 U.S.C. section 1182(a)(14) (1970). In the past few years the INS has put the cart before the horse by routinely denying work authorization to all Haitians, even before their asylum claims can be raised at deportation hearings. The effect has been to place these aliens at the mercy of others for support while their right to remain in this country is determined.⁴⁹

The reason most often given for this blanket denial of work authorization is that Haitians and other aliens would be taking jobs that otherwise could be occupied by Americans.⁵⁰ While at first glance this may appear to be true, it has also been argued that such immigrants usually secure jobs which Americans would not do.⁵¹ Moreover, the Dade County Federation of Labor early took the position that such aliens should be afforded the opportunity to earn a livelihood, and that such opportunity would have no adverse effect on those already working in Dade County.⁵² As a practical matter, if these Haitians were to be authorized for employment there could be two positive results: (1) they would be self-supporting rather than having to rely on the charity of others, and (2) they could be issued social security accounts and become taxpayers, rather than illegally working for tax-free, substandard wages, as is now the case with many aliens.

49. Although various religious and civic organizations (such as the Haitian Refugee Center, the Christian Community Service Agency, and the National Council of Churches) have attempted to provide the refugees with at least the bare necessities of food and shelter, the burden is becoming too heavy. The funds available to these organizations have been steadily dwindling and may soon be exhausted, in which event the Haitian refugees would be cut off from any and all means of support.

50. Referring primarily to Haitians, Robert Woytych, District Director of the Immigration and Naturalization Service, stated: "[T]hese people (aliens) are taking jobs from American citizens and permanent residents of this country." *The Miami News*, July 8, 1974, § A, at 4, col. 1. Similarly, the District Director in Chicago, after supervising the arrests of 41 Polish cleaning women who were working without authorization, said: "[I]f I had the manpower here I could make a lot more arrests . . . I bet I could *liberate* 1,200 jobs a month for Americans." *The Miami News*, March 12, 1975, § A, at 1, col. 3 (emphasis added).

51. Donald Dierman, an attorney for many of the Haitians, has said, "It is unfortunate that this need (of the Haitians to work) should arise at a time of economic difficulty within the United States . . . However, most of the Haitians are able to accept jobs that Americans have refused." *The Miami News*, Jan. 15, 1975, § A, at 4, col. 2. One alien stated that he was working in a job which pays \$3.00 per hour, but which no American would accept for less than double that rate. *The Miami News*, July 8, 1974, § A, at 4, col. 2.

52. Open letter by E.T. Stephenson, President of Dade County Federation of Labor, Nov. 26, 1972.

When viewed from the purely legal perspective, there appears to be no compelling reason why the Haitians cannot be allowed at least a restricted form of access to gainful employment while awaiting the disposition of their political asylum claims. Indeed, viewing the situation in an objective light, the government has the Haitians in custody, and consequently, the government has the constitutional obligation of assuring them at least adequate means of subsistence in accordance with basic standards of decency.⁵³ Moreover, the Protocol and Convention prohibit harsh deprivations; and those treaties, having the force of law,⁵⁴ mandate humanitarian treatment of refugees and those persons presenting bona fide, unresolved claims to that status. Forbidding the Haitians from seeking some means of gainful employment seems to constitute such harsh treatment. The Protocol and Convention prohibit a contracting state from expelling or returning a refugee "in any manner whatsoever" to the country he has fled.⁵⁵ Indirect as well as direct means of compulsory return are prohibited by this language. Yet it would seem that the deprivations caused by the denial of employment authorization are precisely such a means of compulsory return, whether intended to be such or not. Thus, the Haitians should have the protection of the international agreements against the indirect means of compulsory return pending the final determination of their status as refugees.

If it permits denial of employment authorization at all, 8 U.S.C. section 1252 (1970) does not permit a "policy" of denying employment authorization to persons "who have not established their claim to political asylum." Subsection (a) allows for alternative dispositions of a person "in the discretion of the Attorney General and pending such determination of deportability," and subsection (c) similarly allows for alternative dispositions of a person subsequent to final orders of deportation "at the Attorney General's

53. The due process clause protects a person in the custody of the government from unconscionably severe conditions. See *Rhem v. Malcolm*, 371 F. Supp. 594, 634 (S.D.N.Y. 1974), *modified*, 507 F.2d 333 (2d Cir. 1974); *Inmates of Suffolk County Jail v. Eisenstadt*, 360 F. Supp. 676, 688 (D. Mass. 1973), *aff'd*, 494 F.2d 1196 (1st Cir. 1974). The eighth amendment's prohibition against cruel and unusual punishment may also be applicable even to persons not under criminal judgments of guilt. See *Johnson v. Lark*, 365 F. Supp. 289, 301-03 (E.D. Mo. 1973).

54. Protocol Relating to the Status of Refugees, Jan. 31, 1967, T.I.A.S. No. 6577, 606 U.N.T.S. 268, acquired the force of law by Proclamation 3822, 82 Stat. 1455 (1968).

55. Convention, art. 33, incorporated by reference in Protocol, art. I, para. 1.

discretion." If read to embrace employment authorization, the statute clearly contemplates that such authorization may and should be given in appropriate circumstances both before and after determination of deportability. Yet, the INS seems to have adopted a categorical principle of denial of employment authorization, rather than exercising the claimed statutory discretion by determining whether appropriate circumstances exist as to each Haitian.

The exercise of even discretionary power as to persons claiming protection under the Protocol and Convention must, therefore, be governed by the principles of humanitarianism and amelioration, lest the intent of the United States in subscribing to the Protocol and Convention be defeated. It seems hardly consistent with the Protocol and Convention to deny the means of subsistence and to force the Haitian refugees into dire poverty when their claims of political asylum have not yet been finally determined.

IV. FRAUDULENT MARRIAGES

In order for an alien to enter and remain in the United States by virtue of his marriage to a citizen, the marriage must be bona fide, not a mere facade.⁵⁶ The standard frequently employed is that the marriage must be both "valid" and "subsisting." In addition to meeting all the requirements for a "valid" marriage under state law, federal law disallows marriage by proxy between a United States citizen and an alien abroad unless the marriage has been consummated.⁵⁷ In order for the marriage also to be "subsisting," it must be one in which the parties at the time of the wedding actually intend to remain married and to fulfill all the marital obligations.⁵⁸ Judicial decisions have yet to delineate clearly what constitutes a

56. 8 U.S.C. § 1251(c) (1970).

57. 8 U.S.C. § 1101(a)(35) (1970) provides:

The term "spouse," "wife," or "husband" do [sic] not include a spouse, wife or husband by reason of any marriage ceremony where the contracting parties thereto are not physically present in the presence of each other, unless the marriage shall have been consummated.

However, the vast majority of Haitians are not affected by this requirement since few of them are married by proxy prior to arrival in the United States.

58. 8 U.S.C. § 1251(c)(2) (1970) provides:

(c) An alien shall be deported . . . if . . .

(2) it appears to the satisfaction of the Attorney General that he or she has failed or refused his or her marital agreement which in the opinion of the Attorney General was hereafter made for the purpose of procuring his or her entry as an immigrant.

subsisting marriage. In *Lutwak v. United States*⁵⁹ the Supreme Court defined "subsistence" only vaguely in stating that "the two parties have undertaken to establish a life together and assume certain duties and obligations."⁶⁰ In *United States v. Rubenstein*,⁶¹ the Second Circuit defined what it is not: "[A] pretense, or cover, to deceive others."⁶² The courts have uniformly expressed the opinion that a marriage entered into only for immigration purposes will not be recognized unless it achieves the social objectives of a marriage.⁶³ Thus, even though the marriage is legally valid and binding, it will not satisfy immigration requirements unless it is also subsisting.

Aliens who are financially able to procure the services of a marriage broker are carefully scrutinized by the INS, which utilizes a practical procedure for testing the genuineness of a marriage. Officials interview each husband and wife separately using a standard set of questions, covering such topics as the dinner menu, apartment furnishings, bathroom tiles, and other specifics.⁶⁴ In many cases the couples admit the sham nature of their marriages when confronted with the discrepancies in their interview answers. If they continue to maintain that they have a valid and subsisting marriage, however, further investigation then will be undertaken in order to ascertain whether they in fact live together. Proof that they do not will provide a prima facie case for deportability. Other facts which tend to indicate fraudulent intent are the involvement of a marriage broker, the partners never having met before the wedding, a great disparity in ages, and the partners never having intended to remain married.⁶⁵ Evidence which will tend to show a valid and subsisting marriage includes love letters between the spouses, testimony showing that they were actually acquainted prior to marriage, and proof of cohabitation after the wedding.⁶⁶ As in most other aspects of the deportation proceeding, the burden of proof is on the

59. 344 U.S. 604 (1953).

60. *Id.* at 611.

61. 151 F.2d 915 (2d Cir. 1945).

62. *Id.* at 919.

63. *In re Slade*, 10 I. & N. Dec. 128 (1962); *In re M—*, 8 I. & N. Dec. 217 (1958); see *United States v. Diogo*, 320 F.2d 898 (2d Cir. 1963).

64. *Miami News*, July 8, 1974, § A, at 4, col. 3. The exact list of questions is not revealed by the INS on the theory that prior knowledge would allow preparation.

65. *United States v. Rubenstein*, 151 F.2d 915 (2d Cir. 1945).

66. *In re Hayes*, I. & N. Dec. 2162 (1972).

government to show by clear, unequivocal, and convincing evidence that the marriage is a sham.⁶⁷

It is widely recognized in the south Florida area that the sham marriage has become a common device for desperate aliens to obtain permanent residence. Such marriages are sometimes arranged by marriage brokers who command high fees. INS officials in Miami report that as many as 80 percent of the marriages between United States citizens and nonresident aliens turn out to be fraudulent.⁶⁸ While, of course, the sham marriage problem is not unique to Haitian aliens, it would appear that this group's particular difficulties in procuring asylum have made this alternative method of obtaining permanent residence in the United States all the more attractive and imperative. Although few Haitians upon their arrival in this country possess sufficient resources to obtain the services of a marriage broker, many of them have been able to secure employment (without authorization) while awaiting the outcome of their asylum claims. Such individuals usually work long hours for minimal pay, and no employment records are kept. Funds thus acquired can be frequently saved to acquire a broker's services. Notwithstanding the high costs involved, the alien rarely gets what he seeks. While the marriage certificates are legal, the marriage contracts themselves are invalid since the husband and wife often never cohabit and usually meet for the first time when they go for a blood test. If caught, the alien risks not only deportation, but a prison term beforehand.

V. CONCLUSION

There are those who believe the Haitians are, for the most part, fleeing their country for reasons of extreme poverty; yet their claims of political and social persecution appear valid. It further appears that the repression is widespread throughout Haiti, and not localized in such a way that its victims could escape to other areas of their country. Thus, the political asylum issue hinges on the extent and degree of credence to be given the affidavits and other reports of repression in Haiti. Perhaps it would be wise for the United States government to undertake an extensive investigation of the actual political situation in Haiti, so that Haitian aliens can receive a fair analysis of their claims to asylum.

67. *Woodby v. INS*, 385 U.S. 276 (1966).

68. *Miami News*, July 8, 1974, § A, at 4, col. 2.