Protecting the Truly Persecuted: Restructuring the Flawed Asylum System

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A WOMAN FROM Nicaragua came to the United States with a valid visitor's visa and remained longer than the visa permitted.[1] She had never been politically active in Nicaragua, though her brother had been tortured and imprisoned because of his political activities.[2] She never personally suffered from persecution in the past.[3]

A man from Afghanistan was a member of the Mujahidin rebels, a group attempting to prevent Soviet invasion of their country.[4] The Soviets recruited Afghans to fight against their compatriots.[5] The man refused to join the Soviet army.[6] His brothers also refused, and they were arrested and kidnapped by the Soviets.[7] The Afghan man bought a fake passport to flee from the Soviets and came to the United States.[8]

Another man from Afghanistan was detained by the communist secret police after they searched his home and found an anti-communist flyer.[9] He was detained for approximately one month.[10] He was brutally beaten and deprived of food for three days.[11] He lost con-

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* Class of 2005; B.A., University of Missouri. I would like to thank Judge Anthony Murry for bringing my attention to this important issue in asylum law. I would also like to thank my parents for their constant support and my husband, Matthew M. Heebner, for taking the time to refine my ideas through challenging discussion.

1. *See* INS v. Cardoza-Fonseca, 480 U.S. 421, 424 (1987).
2. *See id.*
3. *See id.*
4. *See In re* Salim, 18 I. & N. Dec. 311, 312 (B.I.A. 1982), *departed from in In re* Pula, 19 I. & N. Dec. 467, 473 (holding that fraudulent circumvention of refugee procedure should not be the sole emphasis of a discretionary ruling).
5. *See id.* at 313.
6. *See id.*
7. *See id.* at 312–13.
8. *See id.* at 312.
9. *See In re* N-M-A-, 22 I. & N. Dec. 312, 314–15 (B.I.A. 1998).
10. *See id.* at 315.
11. *See id.*

sciousness and was hospitalized under the custody of the communist secret police.[12] When he recovered, his entire body was covered with bruises and he had a deep wound on his right leg.[13] He fled to the United States.[14]

The U.S. Government charged all three of these people with being present in the country illegally and placed them in deportation proceedings.[15] They all applied for asylum.[16]

The Nicaraguan woman was granted asylum.[17] The two Afghan men were not.[18]

Although the first Afghan man proved that it was more likely than not that he would suffer severe persecution upon returning to his home country, he was denied asylum as a matter of discretion because he used a false passport to enter the United States.[19] While the U.S. Government did not grant him asylum after his urgent attempt to flee his persecutors, the government did grant asylum to the Nicaraguan woman,[20] and many others like her, who neither suffered past persecution nor showed a likelihood of future persecution. Conversely, the second Afghan man who suffered brutal persecution was denied asylum because he could not show that he was likely to be persecuted again upon return to his home country.[21] These decisions were discretionary rulings that exemplify the illogical system of asylum law.

Under current asylum law, immigration judges have broad discretion to either grant or deny a refugee asylum.[22] The justification for this broad judicial discretion is the extraordinarily low burden of proof required in asylum cases.[23] Theoretically, only genuinely deserving applicants will be granted asylum despite this low burden of proof because the immigration judges' broad discretionary powers will keep those undeserving applicants from getting through the system. As il-

12. *See id.*

13. *See id.*

14. *See id.*

15. *See Cardoza-Fonseca*, 480 U.S. at 424; *Salim*, 18 I. & N. Dec. at 312.; *N-M-A-*, 22 I. & N. Dec. at 313.

16. *See* cases cited *supra* note 15.

17. *See Cardoza-Fonseca*, 480 U.S. at 450.

18. *See Salim*, 18 I. & N. Dec. at 312; *N-M-A-*, 22 I. & N. Dec. at 313.

19. *See Salim*, 18 I. & N. Dec. at 312–14.

20. *See Cardoza-Fonseca*, 480 U.S. at 450.

21. *N-M-A-*, 22 I. & N. Dec. at 313.

22. *See Cardoza-Fonesca*, 480 U.S. at 443.

23. *See id.* at 440. An applicant for asylum must only prove that he has a subjective fear of persecution and that this fear is "well-founded." The Court has indicated that a 10% chance of persecution could constitute a "'well-founded fear.'" *Id.*

lustrated by the examples above, however, judicial discretion has been employed in a haphazard manner and produces illogical results. Furthermore, immigration judges have rarely used their discretion in any meaningful way, essentially rubber stamping refugees' asylum applications that show a "well-founded" fear of persecution. This Comment argues that asylum law should be restructured by Congress so as to raise the burden of proof for applicants and lower the discretionary leeway of the courts.

Part I of this Comment provides background regarding asylum and restriction on removal, two remedies that prevent the U.S. Government from removing an alien from the country.[24] Part II addresses the problems with immigration judges' discretionary decisions in asylum and explains why certain discretionary factors historically considered by immigration judges are unnecessary or contrary to the purpose of asylum. Part III proposes a solution to the problems with discretionary rulings by restructuring asylum and restriction on removal. Part IV addresses the judges' new discretionary role under the proposed system.

I. The Development and Purpose of Current Asylum Jurisprudence

The United States has long imposed a strict immigration policy, which regulates and limits the number and type of persons allowed to enter and remain in the country.[25] The current law governing immigration is the Immigration and Nationality Act ("INA"), which Congress first developed in 1952 to establish the standards for immigrant admission into and removal from the United States.[26]

Although the United States had developed its own immigration policy, the law concerning refugees developed on an international scale. Following World War I, the international community first experienced the problem of relocating thousands of war refugees.[27] This problem increased with the flight of Jews from Hitler's religious perse-

24. The statutory term used to describe the U.S. Government's procedure of removing aliens from the country was formerly "deportation." As of the 1996 amendment to the Immigration and Nationality Act ("INA"), this procedure is now termed "removal." *See* Immigration and Nationality Act Amendments of 1986, Pub. L. 99-653, 100 Stat. 3655 (1986).

25. *See, e.g.*, Fong Yue Ting v. United States, 149 U.S. 698 (1893) (asserting Congress's sovereign right to exclude certain classes of people from the United States).

26. *See* Immigration and Nationality Act of 1952 (INA) (McCarran Act), ch. 477, 66 Stat. 163 (codified at 8 U.S.C. §§ 1101–1537 (2000)).

27. *See* KAREN MUSALO ET AL., REFUGEE LAW AND POLICY: A COMPARATIVE AND INTERNATIONAL APPROACH 63 (2d ed. 2002).

cution in Europe and continued to worsen after World War II.[28] The United States did not formally address this problem until 1948, when Congress established the Displaced Person Act of 1948, which allowed 400,000 eligible displaced persons to enter the United States.[29]

The international community addressed the problem with the 1951 United Nations Convention Relating to the Status of Refugees[30] ("1951 U.N. Convention"). From the 1951 U.N. Convention, the United Nations High Commissioner for Refugees developed the Handbook on Procedures and Criteria for Determining Refugee Status[31] ("UNHCR Handbook"). This effort was followed by the 1967 United Nations Protocol Relating to the Status of Refugees[32] ("U.N. Refugee Protocol"). In 1968, the United States ratified the U.N. Refugee Protocol and imposed a mandatory duty of non-refoulement, prohibiting the Attorney General from returning an alien to a country where his life or freedom would be threatened (now known as "restriction on removal").[33] In 1976, Congress also enacted a statute that authorized the Attorney General to permit "conditional entry" to a specified number of refugees fleeing their home countries because of persecution or a fear of persecution on account of race, religion, or political opinion.[34]

It was not until the Refugee Act of 1980[35] ("Refugee Act") that aliens already physically present in the United States could legalize their presence by applying for asylum, which eventually allows the alien to receive legal permanent residence status in the United States.[36] The Refugee Act implemented asylum relief and modified the existing form of restriction on removal[37] in order to conform to

28. *Id.* at 64.

29. *Id.*

30. Convention Relating to Status of Refugees, July 28, 1951, 19 U.S.T. 6223, 189 U.N.T.S. 150 (*entered into force* April 22, 1954).

31. U.N. HIGH COMM'R FOR REFUGEES, HANDBOOK ON PROCEDURES AND CRITERIA FOR DETERMINING REFUGEE STATUS UNDER THE 1951 CONVENTION AND THE 1967 PROTOCOL RELATING TO THE STATUS OF REFUGEES, U.N. Doc. HCR/IP/4/Eng/REV.1 (1992) [hereinafter UNHCR HANDBOOK].

32. Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267 (*entered into force* Oct. 4, 1967).

33. *See* INS v. Cardoza-Fonseca, 480 U.S. 421, 429 (1987); 8 U.S.C. § 1231(b)(3) (2000).

34. *See Cardoza-Fonseca*, 480 U.S. at 433.

35. Refugee Act of 1980, Pub. L. 96–212, 94 Stat. 110 (codified as amended at 8 U.S.C. §§ 1157–1159 (1980)).

36. *See id.*

37. With the 1986 amendments to the INA, the language regarding "withholding of deportation" was changed to "restriction on removal." *See* Immigration and Nationality Act

the international standards of refugee law.[38] In creating the Refugee Act, the House Judiciary Committee Report stated,

> The Committee wishes to insure a fair and workable asylum policy which is consistent with this country's tradition of welcoming the oppressed of other nations and with our obligations under international law, and feels it is both necessary and desirable that United States domestic law include the asylum provision in the instant legislation . . . .[39]

Currently, aliens may apply for asylum within one year of their arrival to the United States in order to have legal status in the country.[40] Aliens who come to the United States and who do not have legal status are removed from the country in a removal proceeding.[41] In a removal proceeding, aliens who have timely applied for asylum may also use their asylum applications as a defense to prevent the United States government from removing them from the country.[42] This Comment will only discuss asylum as it is used as a defense in a removal proceeding. In addition to asylum, restriction on removal (as the term implies) is another form of relief from removal. It prohibits the United States from returning an alien to a particular country, but does not give the alien legal status in the United States.[43] These two forms of relief, asylum and restriction on removal, have different and distinct burdens of proof, and each accords a different level of benefit to the alien.[44] In a removal proceeding, these two forms of relief are usually pled in the alternative. The following sections describe the requirements and benefits of each form of relief.

A. Asylum

Asylum involves a two-step process. When applying for asylum, the alien first must prove that he is eligible for asylum by proving that he is a refugee, in accordance with section 101(a)(42) of the INA.[45] A refugee is defined as follows:

> [A]ny person who is outside any country of such person's nationality or, in the case of a person having no nationality, is outside any

Amendments of 1986, Pub. L. 99-653, 100 Stat. 3655 (codified as amended at 8 U.S.C. § 1231(b)(3) (2000)). In cases and legal scholarship the terms are used interchangeably.

38. *See Cardoza-Fonseca*, 480 U.S. at 427–29.
39. H.R. REP. No. 96-608, at 17 (1979); *see also Cardoza-Fonseca*, 480 U.S. at 427–29.
40. *See* 8 U.S.C. § 1158 (2000).
41. *See id.* § 1229a.
42. *See id.* § 1158.
43. *See id.* § 1231(a)(3).
44. *See id.* §§ 1158, 1231(a)(3).
45. *See id.* § 1158.

> country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion . . . .[46]

To be considered a refugee, the alien must prove that he has an actual and genuinely held subjective fear of persecution.[47] The alien must further show that this fear is objectively reasonable (i.e., "well-founded").[48] If an applicant has suffered persecution in the past, he is presumed to have a well-founded fear of future persecution.[49] The applicant must not be a member of one of the classes of aliens who are statutorily barred from asylum, such as those who pose a threat to national security.[50]

Second, after an alien establishes that he is eligible for asylum, the immigration judge may either grant or deny asylum in the exercise of discretion.[51] If the court grants asylum to an alien, the alien then obtains legal status in the United States and can become a legal permanent resident in one year and, eventually, a citizen.[52] Asylum also allows aliens to legally bring their spouses and dependents to the United States.[53]

Thus, if an alien proves only that he has a reasonable fear of persecution, he may be granted asylum and ultimately citizenship in the court's exercise of discretion.

B. Restriction on Removal

In order to qualify for restriction on removal, the alien must show that his life or freedom would be threatened in a particular country on account of his race, religion, nationality, membership in a particular social group, or political opinion.[54] In a 1984 case, *INS v. Stevic*,[55] the United States Supreme Court held that the "would be threatened" language of the restriction on removal statute requires the alien to

46. *Id.* § 1101(a)(42)(A).
47. *See Cardoza-Fonseca*, 480 U.S. at 430–31.
48. *See id.*
49. *See* 8 C.F.R. § 208.13(b)(1) (2003).
50. *See* 8 U.S.C. § 1158(b)(2)(A).
51. *See Cardoza-Fonseca*, 480 U.S. at 443; 8 U.S.C. § 1158.
52. *See* 8 U.S.C. § 1158(c).
53. *See id.* § 1158(b)(3)(A).
54. *See id.* § 1231(b)(3)(A).
55. 467 U.S. 407 (1984).

prove that it is more likely than not that he will be persecuted if returned to his home country.[56]

If the alien meets the burden of proof for restriction on removal, the immigration judge must grant the relief. Thus, the judge has no discretionary leeway.[57] Restriction on removal, however, only prevents the court from sending an alien to the country where the alien fears persecution.[58] The court is permitted to remove the alien to a third country where the alien's life or freedom would not be threatened.[59] Furthermore, the court may send the alien to his home country at any time when conditions in that country change as to make future persecution unlikely.[60] As such, an alien granted restriction on removal is in "limbo" because he cannot be returned to his home country, yet he has no legal status in the United States.

Thus, in order to obtain the relief of restriction on removal, the alien must prove that the chance of being persecuted upon return to a certain country is at least fifty-one percent. Nevertheless, there is no path to legal permanent residence or citizenship via restriction on removal.

C. Difference in Burden of Proof Between Asylum and Restriction on Removal

In the landmark case of *INS v. Cardoza-Fonseca*,[61] the United States Supreme Court firmly established the distinction between the burdens of proof in these two forms of relief from removal.[62] Prior to *Cardoza-Fonseca*, the Board of Immigration Appeals ("BIA" or "Board") noted the difference in the two statutes' language, but applied the same standard in practice.[63] In *Cardoza-Fonseca*, however, the Court held that the statutory language of asylum and restriction on removal indicates that the burden of proof in asylum cases was less stringent than that of restriction on removal.[64] Although the Court did not clearly define the standard of proof for "well-founded fear," the Court said that an alien did not have to prove that the likelihood of persecution was more likely than not. The Court instead suggested that a ten per-

56. *See id.* at 429–30.
57. *See id.* at 426.
58. *See* 8 U.S.C. § 1231(b)(3)(A).
59. *See id.*
60. *See* 8 C.F.R. § 208.16(b)(1)(A) (2003).
61. 480 U.S. 421 (1987).
62. *See id* at 446.
63. *See* INS v. Stevic, 467 U.S. 407, 425 (1984).
64. *See Cardoza-Fonseca*, 480 U.S. at 440–41; *see generally* 8 U.S.C. § 1159.

cent chance of persecution would be enough to satisfy the "objectively reasonable" element of asylum.[65] The Court further held that the standard is met if the applicant shows that persecution is a reasonable possibility, which is to be determined via case-by-case adjudication.[66]

As the Immigration and Nationality Service ("INS") argued in *Cardoza-Fonseca*, however, these burdens of proof are not consistent with the benefit they accord.[67] If an alien proves he has a well-founded fear (that is, at least a ten percent chance of persecution) and the court grants asylum, the alien can then become a legal permanent resident.[68] Conversely, if the alien proves that persecution is more likely than not (that is, at least a fifty-one percent chance of persecution) and the court grants restriction on removal, the court may still remove the alien to a country other than the one from which he based his persecution claim, and he obtains no legal status in the United States.[69]

The Supreme Court rationalized this counter-intuitive system by noting that more protection is accorded to asylum grantees because the applicants not only have to establish a well-founded fear, but they also have to warrant a favorable exercise of discretion.[70] Conversely, for restriction on removal, there is no discretionary hurdle because the court is obligated to grant restriction on removal if the applicant meets his burden of proof.[71] The Court's rationale only makes sense if the discretionary hurdle actually functions as a substantial obstacle against obtaining asylum. As of the date of *Cardoza-Fonseca*, however, the discretionary factor played a deciding role in only two BIA cases.[72] Because of the infrequence with which the discretionary hurdle had been used before *Cardoza-Fonseca*, it appears as though it was cited to by the Court in a weak attempt to justify the poorly written asylum and restriction on removal statutes.

II. Problems with the Discretionary Tool

If the discretionary hurdle is, as the Court in *Cardoza-Fonseca* claimed, the justification for the low burden of proof and the high

65. *See Cardoza-Fonseca*, 480 U.S. at 440.
66. *See id.*
67. *See id.* at 443.
68. *See id.* at 428–29 n.6.
69. *See id.* at 428–30.
70. *See id.* at 443.
71. *See id.*
72. *See In re* Salim, 18 I. & N. Dec. 311 (B.I.A. 1982); *In re* Shirdel, 19 I. & N. Dec. 33 (B.I.A. 1984).

benefit asylum accords, then such discretion bears significant importance and should be used actively and properly. There are, however, no standardized factors for judges to consider in making this important discretionary decision.[73] Rather, there is only piecemeal caselaw addressing the issue, resulting in non-use and misuse of the discretionary tool.

A. Many Discretionary Factors Outlined in *Pula* are Unnecessary or Contrary to the Purpose of Asylum Law

The prevailing case in discretionary asylum, *In re Pula*, articulated the factors that judges should use in making discretionary asylum decisions.[74] According to *Pula*, a judge may deny asylum in the exercise of discretion by considering the following negative factors: whether an alien passed through any other countries before arriving in the United States (including the length of time, living conditions there, and potential for long-term residence); whether orderly refugee procedures were in fact available to him in any country he passed through; whether he made attempts to seek asylum before coming to the United States; whether he engaged in fraud to circumvent the United States immigration laws; and whether the alien has family ties to any other countries where he does not fear persecution.[75]

According to *Pula*, the courts should balance these adverse factors against countervailing equities, such as whether the alien has relatives legally in the United States and whether there exists humanitarian considerations for a favorable exercise of discretion, such as tender age or poor health.[76] In *Pula*, the Board held that when making a discretionary ruling, these factors should be viewed in the totality of the circumstances.[77] The court further held that "the danger of persecution should generally outweigh all but the most egregious of adverse factors . . . . In the absence of any adverse factors . . . asylum should be granted in the exercise of discretion."[78] The following sections address each factor.

73. *See* Kalubi v. Ashcroft, 364 F.3d 1134, 1139 (9th Cir. 2004) ("There is no definitive list of factors that the BIA must consider or may not consider.").

74. *See In re* Pula, 19 I. & N. Dec. 467, 473–74 (B.I.A. 1987).

75. *See id.*

76. *See id.*

77. *See id.* at 473.

78. *Id.* at 474.

1. Contacts with Safe Third Countries

The first few factors listed in *Pula*, requiring a judge to examine an alien's contact with third countries and the possibility of gaining asylum in a third country, have long been a valid consideration for asylum adjudicators. The idea behind these factors is that those aliens afforded protection elsewhere are not in need of United States asylum relief. For example, in *In re H-*,[79] the Board ordered the immigration judge to consider the applicant's stay at a refugee camp in Kenya and whether the applicant was provided protection against refoulement consistent with the United States commitment to non-refoulement, as embodied in the UNHCR Handbook.[80]

The safe third country consideration was first defined in 1997 in the Code of Federal Regulations,[81] which outlined the extent an immigration judge should consider an alien's contact with a third country.[82] The section provided that "[a]n asylum application may be denied in the discretion of the Attorney General if the alien can be removed to a third country which has offered resettlement and in which the alien would not face harm or persecution."[83] The Ninth Circuit later qualified this regulation in *Andriasian v. INS*,[84] which held that the time spent by a refugee in a third country before seeking asylum in the United States only warrants a denial of asylum if the refugee may feasibly return to that third country.[85]

The notion of considering safe third countries now exists as a mandatory statutory bar to eligibility for asylum. The statute reads:

> (A) Safe third country
> [Asylum relief] shall not apply to an alien if the Attorney General determines that the alien may be removed, pursuant to a bilateral or multilateral agreement, to a country (other than the country of the alien's nationality or, in the case of an alien having no nationality, the country of the alien's last habitual residence) in which the alien's life or freedom would not be threatened on account of race, religion, nationality, membership in a particular social group, or political opinion, and where the alien would have access to a full and fair procedure for determining a claim to asylum or equivalent temporary protection . . . .[86]

79. 21 I. & N. Dec. 337, 349 (B.I.A. 1996).
80. *Id.*
81. 8 C.F.R. § 208.13(d) (1999) (repealed 2000).
82. *See id.*
83. *See id.*
84. 180 F.3d 1033 (9th Cir. 1999).
85. *See id.* at 1047.
86. 8 U.S.C. § 1158(a)(2)(A)(1) (2000).

The law currently ensures that an alien would only be ineligible for asylum if that alien could feasibly seek asylum in a third country where he would not again become a victim of harm or persecution.[87] Therefore, because the safe third country exception has been incorporated into the asylum statute as a mandatory bar, it is unnecessary for judges to re-consider it as part of their discretionary ruling.

2. Fraudulent Entry and Circumvention of Immigration Laws

The Board has held that an immigration judge may exercise discretion to deny asylum if an alien fraudulently entered the United States or otherwise circumvented United States immigration laws. The first discretionary asylum case, *In re Salim*,[88] involved an alien who fraudulently purchased a passport bearing someone else's name in order to enter the United States without going through the refugee process established overseas.[89] *Salim* was the first case the Board adjudicated in which the applicant was statutorily eligible for asylum by demonstrating a high likelihood of persecution, but which the immigration judge nonetheless denied asylum in an exercise of discretion.[90] The Board asserted that "public interest requires that we do not condone this applicant's attempt to circumvent the orderly procedures that our government has provided for refugees to immigrate lawfully."[91] *Salim* established a precedent that allows immigration judges to deny asylum if aliens use false passports, misrepresent their identity, or otherwise illegally enter the United States.[92]

Although this factor was heavily relied on in *Salim*, the Board later de-emphasized the extent to which immigration judges should consider fraud and circumvention of immigration laws in asylum cases.[93] In *Pula*, the Board wrote,

> Yet while we find that an alien's manner of entry or attempted entry is a proper and relevant discretionary factor to consider in adjudicating asylum applications, we agree with the applicant that Matter of Salim places too much emphasis on the circumvention of orderly refugee procedures. This circumvention can be a serious adverse factor, but it should not be considered in such a way that the practical effect is to deny relief in virtually all cases. . . . We

87. *See id.*

88. 18 I. & N. Dec. 311 (B.I.A. 1982).

89. *See id.* at 314. In the introduction to this Comment, *In re Salim* was the first example of an Afghan man who applied for asylum.

90. *See id.*

91. *Id.* at 316.

92. *See id.*

93. *See In re* Pula, 19 I. & N. Dec. 467, 473 (B.I.A. 1987).

> therefore withdraw from Matter of Salim insofar as it suggests that the circumvention of orderly refugee procedures alone is sufficient to require the most unusual showing of countervailing equities.[94]

Neither Congress nor the BIA, however, has ever expressly prohibited judges from considering fraudulent entry and circumvention of refugee procedures, though this consideration has been criticized.[95] It has been argued that the language of the asylum statute articulating that aliens may apply for asylum "irrespective of such alien's status" indicates that the manner in which aliens arrive in the United States is irrelevant to their asylum claims.[96]

In fact, considering fraudulent entry is contrary to the entire purpose of asylum. Unlike refugee processing, in which an alien applies for refugee status overseas, asylum benefits are strictly for aliens already present in the United States, irrespective of their legal status.[97] Because refugees have a fear of persecution in their home country, they often travel in any way possible in search of a safe haven, frequently without travel documents.[98] Additionally, many aliens use false documents to enter the United States because they are unaware that they can apply for asylum at the border or port of entry.

Furthermore, if Congress did not want to protect aliens who have already arrived in the United States, it would not have established asylum. Rather, Congress would have promoted overseas refugee processing as the sole method for relief from persecution. By establishing asylum, it is clear that Congress accepted that refugees do frequently enter the United States illegally and that overseas refugee processing should not be the sole remedy for those fleeing persecution.

Some aliens may use fraudulent documents to enter the United States because even if they are aware of overseas refugee processing, it may not be a viable option for them. In order to achieve refugee status overseas, a refugee must first interview with the United Nations High Commissioner for Refugees ("UNHCR") or with one of the United States Embassies.[99] If the UNHCR or the Embassy determines that the refugee should be resettled in the United States, the applicant is re-

94. *See id.*

95. Deborah E. Anker, *Discretionary Asylum: A Protection Remedy for Refugees under the Refugee Act of 1980*, 28 VA. J. INT'L L.1, 27 (1987).

96. *See Pula*, 19 I. & N. Dec. at 472–73.

97. *See* 8 U.S.C. § 1158 (2000).

98. *See* Anker, *supra* note 95, at 27 (noting the "historical truth that refugees are often forced because of exigent circumstances of their plight to travel across boundaries without valid documents to obtain a safehaven in any way they can").

99. *See* UNHCR, COUNTRY CHAPTER USA (2004), *at* http://www.unhcr.ch/cgi-bin/texis/vtx/home/+CwwBmeW7PLswwwwnwwwwwwhFqA72ZR0gRfZNtFqrpGdBnqBAFqA

ferred to the United States Citizenship and Immigration Service ("USCIS"). The USCIS then determines if the applicant falls within the immigration requirements and laws of the United States.[100] Only upon a positive finding by the USCIS is a refugee allowed to enter the United States with refugee status.[101] It may not be feasible for many aliens fleeing imminent danger of persecution to remain in the country during this lengthy process. This is particularly true for those aliens who are in fact suffering severe persecution in their countries—the very aliens who, in fact, will be legally deserving of asylum in the United States.

Because the ideal goal of asylum should be to protect those fleeing from persecution, regardless of how they entered the United States, immigration judges should not consider fraudulent entry when making discretionary rulings.[102] To do so is, in fact, contrary to the clear purpose of asylum law.

3. Countervailing Equities

Pula requires courts to weigh the previously discussed adverse factors[103] against positive factors in the alien's case, such as strong family ties to the United States or general humanitarian considerations.[104] An alien's family ties to the United States is another factor that should not be considered in making discretionary asylum decisions because, again, it does not further the purpose of asylum law. Asylum is supposed to be a remedy for those fleeing persecution, not those seeking to be reunited with their families. This is not to say that family unity is not an important goal of immigration law. Rather, because it is an important policy concern, there are several avenues other than asylum

72ZR0gRfZNcFq5Gnh1tnnapGdqn55oDtDzmxwwwwwww1FqnN0bI/opendoc.pdf (last accessed Jan. 25, 2005) (describing the process of overseas refugee processing).

100. *See id.*

101. *See id.*

102. This is not to say that the judge should not consider the use of fraudulent documents subsequent to the alien's arrival in the United States. The judge should be able to consider fraudulent documents if the alien has presented them to the court in support of their asylum claim or used them in some way other than for emergency protection from persecution. As will be discussed later, however, the judge should consider this when making a credibility determination, not as a discretionary factor. *See infra* Part IV.A.

103. The adverse factors include the following: (1) whether the alien passed through another country before arriving in the United States; (2) whether orderly refugee procedures were available to the alien in any country he passed through; (3) whether the alien made attempts to seek asylum before entering the United States; (4) whether the alien engaged in fraud; and (5) whether the alien has family ties to any other country where he does not fear persecution. *See supra* Part II.A.

104. *See In re* Pula, 19 I. & N. Dec. 467, 474 (B.I.A. 1987).

through which an alien may immigrate to the United States if he has family members in the country.[105] If aliens do not have family members in the United States, they have fewer means to establish legal residence in the United States. As they are already disadvantaged by this, they should not be denied asylum for lack of countervailing equities to overcome the adverse discretionary factors.

Humanitarian considerations, however, are relevant, important considerations that are in accord with the purpose of asylum law. This Comment will later assert that humanitarian concerns should be the sole criteria by which an immigration judge should grant or deny asylum in the exercise of discretion.

B. If Immigration Judges Are to Consider Factors Beyond Persecution, Those Factors Should Be Outlined by Congress, Not by the Courts

As apparent from the BIA's decision in *Pula*, a judge's discretionary role is not limited to determining the validity and extent of an alien's fear of persecution. Indeed, the judge's discretion extends to allow consideration of factors beyond the scope of persecution, which effectively screen out certain undesirable or unworthy refugees from the benefits of asylum. The *Cardoza-Fonseca* and *Pula* precedents also support the idea that because restriction on removal effectively accomplishes the goal of removing persecuted aliens from harm's way, those who seek to attain permanent resident status through asylum should be screened more carefully than those seeking restriction on removal.

Although under the statute the grant of asylum is left to the court's discretion,[106] it is well established that the ultimate power to regulate immigration resides with the Legislature, not with the courts.[107] As such, if Congress intends to screen asylum applicants beyond their persecution claims, Congress should develop a clear statutory framework that the courts can use to make their discretionary decisions.[108] Congress may accomplish this by rewriting the statute to

105. *See, e.g.*, 8 U.S.C. § 1153 (2000).

106. *Id.*

107. *See* U.S. CONST. art. I, § 8 ("Congress shall have Power To . . . establish an uniform Rule of Naturalization . . . .").

108. This does not imply that the ultimate decision should not remain discretionary. As claims of persecution are often hard to assess on a mathematical continuum, it is inevitable that immigration judges determine the validity of the applicants' claims on the basis of their own discretionary evaluation. This argument simply poses that the factors judges should consider in making this evaluation be clearly outlined by Congress.

specify the factors judges are to consider in making their discretionary rulings. As will be proposed, Congress could also limit the judges' discretion to solely evaluating the severity of past persecution, the likelihood of future persecution, and the applicability of statutory bars to asylum.

1. The Danger of Limitless Discretionary Decisions

Currently, Congress has not defined factors for immigration judges to consider in their discretionary rulings. The main guidance to immigration judges has come from *Pula*. However, the factors discussed in *Pula* were not meant to be exclusive; rather, they were intended to be a part of a totality of the circumstances test.[109] Even if Congress and the BIA believe judges should consider factors beyond the scope of persecution, these factors should be limited so as to avoid the danger of judges' considering improper factors.

A good example of an improper consideration is foreign policy interests. In *Doherty v. INS*,[110] the Second Circuit held that the Attorney General's discretionary denial of asylum based on foreign policy interests was an abuse of discretion.[111] On appeal to the Supreme Court, the Attorney General's discretionary denial was affirmed on other grounds, and the Court neglected to address whether judges could consider foreign policy interests in asylum cases.[112]

Without an opinion from the Supreme Court, judges are not prohibited from making discretionary rulings on the basis of foreign policy interests or political opinion. This may lead to dangerous results, especially in the wake of the events of September 11, 2001, when Americans are particularly leery of allowing foreign nationals into the United States.

In addition to considering foreign policy interests, judges have considered factors such as the alien's demeanor while testifying and the alien's reliance on the United States welfare system.[113] The Board has also made discretionary decisions based on unsupported speculations regarding the alien's veracity.[114] In *Kalubi v. Ashcroft*, the immigration judge held, and the Board affirmed, that there was no

109. *See Pula*, 19 I. & N. Dec. at 473.

110. 908 F.2d 1108 (2nd Cir. 1990).

111. *See id.* at 1121.

112. *See* INS v. Doherty, 502 U.S. 314 (1992).

113. *See In re* Zeng, No. A 75 318 996 (Dep't of Immigration & Naturalization May 28, 1998) (on file with author) (decision of immigration judge).

114. *See* Kalubi v. Ashcroft, 364 F.3d 1134, 1137 (9th Cir. 2004).

evidence to find the alien was not credible.[115] Nevertheless, the alien was denied asylum as a matter of discretion because the courts did not *believe* the alien's story was credible.[116] The Ninth Circuit found that this was an abuse of discretion and reversed the decision.[117] As there is no definitive guidance from Congress or the Board, the courts' only limitation is the abuse of discretion standard of review, which does not always provide an adequate safeguard for ensuring that judges' decisions are focused on the purpose of asylum rather than their own moral screening of the asylum applicant. If Congress does intend for other factors to be considered, it should clearly outline what those factors are.

2. Current Coverage of Mandatory Bars to Asylum

Although Congress has not statutorily limited the factors judges should consider when making a discretionary ruling, Congress has established mandatory bars to asylum applications. Congress has determined that certain aliens should not be eligible for asylum, such as those who have been convicted of serious crimes or who pose a threat to society.[118] In addition to excluding those who could be removed to a safe third country (as discussed above), the other mandatory bars exclude aliens who fit into the following categories:

> (i) 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;
> (ii) the alien, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of the United States;
> (iii) there are serious reasons for believing that the alien has committed a serious nonpolitical crime outside the United States prior to the arrival of the alien in the United States;
> (iv) there are reasonable grounds for regarding the alien as a danger to the security of the United States;
> (v) the alien is inadmissible under subclause (I), (II), (III), (IV), or (VI) of section 1182(a)(3)(B)(i) of this title or removable under section 1227(a)(4)(B) of this title (relating to terrorist activity), unless, in the case only of an alien inadmissible under subclause (IV) of section 1182(a)(3)(B)(i) of this title, the Attorney General de-

115. *See id.* at 1135. In all asylum cases, the immigration judge must first make a threshold determination of the alien's credibility. *See In re* O-D-, 21 I. & N. Dec. 1079, 1081 (B.I.A. 1998).

116. *See Kalubi*, 364 F.3d at 1135.

117. *See id.*

118. *See* 8 U.S.C. § 1158(b)(2)(A) (2000). There is also a list of mandatory bars to restriction on removal, which is only slightly less extensive than the list of bars to asylum. *See id.* § 1231(b)(3)(B).

> termines, in the Attorney General's discretion, that there are not reasonable grounds for regarding the alien as a danger to the security of the United States; or
> (vi) the alien was firmly resettled in another country prior to arriving in United States.[119]

Because these factors have been incorporated into the statute, immigration judges already consider them in the first part of the asylum analysis, determining statutory eligibility. It is thus unnecessary for immigration judges to consider them again in their discretionary decisions and entirely illogical to expect them to actually consider these factors twice. By creating these mandatory bars, it is clear that Congress considered certain classes of aliens undesirable or unworthy of the benefits of asylum. As a matter of statutory interpretation, Congress's failure to include more statutory bars implies that it may not have intended other factors to be considered. Regardless of Congress's intent, the mandatory bar does serve as an adequate way to screen potentially dangerous or otherwise undesirable applicants without giving the courts unlimited discretion to make these decisions. If Congress intends for these bars to be the judges' only considerations beyond persecution, Congress should clearly specify that the judges' decisions should not include additional discretionary factors.

C. Judges Infrequently Employ Discretionary Decisions

The lack of a clear definition of the factors to be considered in discretionary decisions may have led judges to ignore the discretionary hurdle in many asylum cases. In *Cardoza-Fonseca*, the INS argued that the discretionary distinction in asylum cases had no practical significance.[120] The court addressed this argument by citing two cases that had employed the discretionary tool to deny asylum:[121] *In re Salim*[122] and *In re Shirdel*.[123] The court failed to mention, however, that these were the only two cases to ever address the issue in the seven years of asylum litigation prior to *Cardoza-Fonseca*. Additionally, these two cases were later criticized in *Pula*,[124] where the Board stated that in *Salim* they over-emphasized the alien's use of fraudulent documents in making their discretionary decision.[125] Since the *Cardoza-Fonseca*

119. *Id.*
120. *See* INS v. Cardoza-Fonseca, 480 U.S. 421, 444 (1987).
121. *See id.*
122. 18 I. & N. Dec. 311 (B.I.A. 1982).
123. 19 I. & N. Dec. 33 (B.I.A. 1984).
124. 19 I. & N. Dec. 467 (B.I.A. 1987).
125. *See Pula*, 19 I. & N. Dec. at 473; *infra* Part II.A.

case in 1987, there have been over sixty asylum cases decided by the Board, but only eleven of these published cases actually analyzed the discretionary element in asylum.[126] If the discretionary tool was actually used as a substantial hurdle, it seems there would be a much higher percentage of asylum cases that rest on a discretionary decision.

D. Without a Discretionary Hurdle, Asylum Is Easily Attainable and Subject to Abuse by Aliens

Although the problems with the discretionary tool are clear, there is theoretically a strong purpose for keeping the discretionary hurdle in asylum cases. Without a discretionary hurdle, asylum is one of the easiest ways for unqualified aliens to achieve legal status in the United States under the guise of protection from persecution. An asylum applicant must demonstrate an actual and genuinely held subjective fear of persecution and further show that the fear is objectively reasonable.[127] The alien's own testimony, however, without corroborative evidence, may be sufficient to prove a well-founded fear of persecution if the testimony is believable, consistent, and sufficiently detailed to provide a plausible and coherent account of the basis for the fear of persecution.[128]

Abovian v. INS[129] provides a clear example of this problem. In *Abovian*, the asylum applicant, Abovian, claimed that the President of Armenia (the head of the Armenian National Movement Party, in competition with the Communist Party) met Abovian fifteen to twenty times to try to recruit him to join the Armenian National Security Committee, which Abovian claimed was run by the Russian Communist KGB.[130] Abovian was not politically active and gave no evidence as to why the President of Armenia would individually seek him out to recruit him to join the Communist party.[131] Furthermore, Abovian had no evidence proving that the Armenian National Security Com-

126. *See* U.S. DEP'T OF JUSTICE, EXECUTIVE OFFICE FOR IMMIGRATION REVIEW, VIRTUAL LAW LIBRARY (2004), *at* http://www.usdoj.gov/eoir/vll/intdec/lib_indecitnet.html (last accessed Feb. 11, 2004) (publishing all BIA cases). For a complete listing of cases addressing a discretionary ruling in asylum, see the appendix, *infra*.

127. *See Cardoza-Fonseca*, 480 U.S. at 430–31.

128. *See In re* B-, 21 I. & N. Dec. 66, 71 (B.I.A. 1995). The alien is, however, required to explain the lack of corroborating evidence if it is reasonable to expect such evidence to be presented in court. *See In re* Dass, 20 I. & N. Dec. 120 (B.I.A. 1989).

129. 219 F.3d 972 (9th Cir. 2000).

130. *See id.* at 982 (Wallace, J., dissenting).

131. *See id.*

mittee actually existed, that it was in any way connected to the KGB, or that the democratically-elected President had any connection to the Communists.[132]

Despite the fact that Abovian's story seemed highly unlikely and he had no corroborating evidence for anything he claimed, the Ninth Circuit held that "independent corroborative evidence is not required from asylum applicants where their testimony is unrefuted."[133] Because his recitation of the events was consistent and there was no direct evidence to the contrary, the court allowed his asylum application to rest on what many think is an inconceivable story.[134]

Moreover, the objectivity of an applicant's well-founded fear does not have to be based solely on his own personal experience. Experiences of the applicant's friends, relatives, or other members of the same racial or social group, may prove that the applicant's fear of persecution is well-founded.[135] Essentially, aliens may gain asylum with no corroboration for their stories and no personal experience of persecution.

In addition to the low burden of proof, asylum is appealing to illegal aliens because they can apply for it regardless of their illegal status in the United States. As the INA currently stands, asylum is the single proactive means of obtaining lawful immigration status for an alien who is already present in the United States without a visa or green card.[136] If an alien is illegally physically present in the United States, the alien cannot simply apply for a visa while remaining in the country.[137] The alien has three options: (1) remain in the United States illegally, (2) leave the country and apply for an immigrant or nonimmigrant visa from abroad, or (3) apply for asylum while remaining in the United States. Aliens often choose to apply for asylum relief, as it is the only viable option that allows them to remain in the United States and not continue to illegally hide from immigration authorities.

132. *See id.* at 983 (Wallace, J., dissenting).

133. *See id.* at 978.

134. *See id.* at 982 (Wallace, J., dissenting).

135. *See In re* Villalta, 20 I. & N. Dec. 142, 147 (B.I.A. 1990) (holding that murder of his brother and threats of harm to immediate family supported the conclusion that the applicant had a well-founded fear of persecution); Ramos-Vasquez v. INS, 57 F.3d 857, 861 (9th Cir. 1995).

136. 8 U.S.C. § 1158(a)(1) (2000) ("Any alien who is physically present in the United States or who arrives in the United States . . . irrespective of such alien's status, may apply for asylum in accordance with this section.").

137. There are certain specialized exceptions that allow an alien present in the United States to apply for a visa, but they will not be discussed here.

The appealing nature of asylum, in addition to the low burden of proof required, often leads to fabricated or exaggerated asylum claims. It is not uncommon for immigration attorneys to prey on this system. Immigration attorneys and consultants have been criminally prosecuted for preparing false asylum applications and coaching applicants to rehearse false stories of persecution.[138] The discretionary tool helps curb this abuse by serving as an extra hurdle for applicants. The dilemma nevertheless arises because, though the discretionary tool is much needed, it is almost impossible to use properly due to the lack of a clear statutory outline, as discussed above. In order to solve this problem, Congress should restructure the entire system of asylum.

III. Restructuring Asylum Law

Because asylum and restriction on removal both protect aliens from persecution and are usually alternative forms of relief from removal, restructuring asylum necessarily includes restructuring restriction on removal. To start, the burden of proof for restriction of removal should be lowered as to give all refugees with a well-founded fear of persecution entitlement to mandatory non-refoulement. Because an alien proves he is a refugee by establishing either past persecution or a well-founded fear of future persecution,[139] either means could prevent the refugee from being removed back to a feared country. An applicant for restriction on removal should have to prove by a preponderance of the evidence that he is a refugee within the meaning of the INA with a well-founded fear of persecution.[140] Once this is accomplished, the immigration judge would be prohibited from removing him to the country of feared persecution.

As with the current form of restriction on removal, the judge would be able to remove the alien to a third country or back to his home country, should conditions change to eliminate his fear of persecution.[141] Also, like the current form of restriction on removal, the alien in this case would not achieve legal status or be able to bring family members to the United States. Under this scheme, the least amount of benefit (non-refoulement) would be awarded to an applicant who establishes only the lowest burden of proof.

138. *See In re* Ayala-Arevalo, 22 I. & N. Dec. 398, 399 (B.I.A. 1998); Plea Agreement at 3, United States v. Basi (No. CR 03-0041) (N.D. Cal. Oct. 15, 2003) (on file with author).

139. *See In re* H-, 21 I. & N. Dec. 337, 340 (B.I.A. 1996).

140. *See In re* Acosta, 19 I. & N. Dec. 211, 215 (B.I.A. 1985) (holding that an applicant must establish the truth of the facts of their claim by a preponderance of the evidence).

141. 8 C.F.R. § 208.16(b)(1)(A) (2003).

Because asylum leads to legal permanent residence in the United States, the difficulty of obtaining asylum should be higher than that for restriction on removal. Asylum applicants should have to prove by a preponderance of the evidence that they are either more likely than not to experience future persecution or that they experienced severe persecution in the past that merits asylum relief. The assessment of asylum claims should remain discretionary because it is impractical to statutorily determine how much past persecution merits asylum or how great the likelihood of future persecution must be to merit asylum.[142] As such, the standard of review to the appellate courts should remain the abuse of discretion standard. The immigration judges should not consider any factors beyond the likelihood of future persecution and the severity of past persecution. This prevents judges from considering factors that are irrelevant or that frustrate the purpose of asylum law. This new system would also clarify the judges' role in making asylum determinations and ensure that the discretionary tool does not exceed Congress's intent.

Raising the standard of proof in asylum cases would also deter abuse of asylum by aliens.[143] This system would deny asylum to applicants who prove nothing more than that they have a well-founded fear of future persecution. It would require those wishing to obtain legal permanent residence status in the United States to present truly compelling humanitarian reasons that merit permanent status. Even if an alien only proves he has a well-founded fear, however, he will not be removed back to the feared country under the restriction on removal policy.

142. *See supra* text accompanying note 108. The judges' decisions should remain discretionary because of the difficulty in assessing a persecution claim on a mathematical continuum.

143. Another possible remedy for the abuse of asylum law is to liberalize other immigration laws to provide alternatives to asylum. As mentioned above, asylum relief is the sole proactive remedy available to aliens who are physically present in the United States and who want to obtain legal status. By creating another means for aliens to obtain status, the number of frivolous and fabricated asylum claims would drop. Congress can do this, for example, by extending section 245(i) of the INA. Section 245(i) currently allows aliens who are out of status and physically present in the United States to gain lawful permanent resident status if they have an immediate family member in the United States or a labor certification and an employer who will sponsor their application. *See* Immigration and Nationality Act of 1952 § 245(1), 8 U.S.C. § 1255(i) (2000). However, the alien had to have filed the application for lawful permanent residence before April 30, 2001, an arbitrary date that the legislature set for applications. *Id.* § 1255(i)(1)(B)(i). A simple extension of this date would give aliens an alternate means to legal status, thereby eliminating some of the unwarranted asylum claims. Congress could make reforms along these lines to give aliens more viable options, other than asylum, for obtaining legal status in the United States.

IV. The Immigration Judges' Role Under the Proposed Structure

A main goal of restructuring asylum and restriction on removal is to clearly outline the judges' role so that they can perform their duties with consistency and in the manner that Congress intends. Under the proposed rubric, judges would be required to make credibility determinations, apply the mandatory bars to asylum, and then assess the likelihood of future persecution and the severity of past persecution.

A. Credibility Determinations

An important tool judges would retain is the ability to make a credibility finding at the initial stage of the case. As the law stands, in all applications for asylum and restriction on removal, the judge must make a threshold determination of the alien's credibility.[144] After the court observes the applicant's demeanor while on the witness stand, the court is to determine whether the applicant's story is believable, consistent, and sufficiently detailed to provide a plausible and coherent account of the basis of his fear.[145]

Although, as discussed, fraudulent entry into the United States should not be considered in making a discretionary ruling, fraudulent presentation of documents could be considered in assessing credibility. For example, in *In re O-D-*,[146] the Board found that the alien's presentation of a counterfeit identity card to the immigration court for the purpose of applying for asylum discredited his testimony.[147] The Board found that the use of the identity card pertained to the central element of his claim, his identity, and was therefore a relevant consideration for the Board in determining credibility.[148] The Board distinguished this circumstance from others in which the alien used a fraudulent document to escape immediate danger.[149] The Board wrote, "On the other hand, there may be reasons, fully consistent with the claim of asylum, that will cause a person to possess false documents, such as the creation and use of a false document to escape persecution by facilitating travel."[150]

144. *See In re* O-D-, 21 I. & N. Dec. 1079, 1081 (B.I.A. 1998).
145. *See In re* Dass, 20 I. & N. Dec. 120, 124 (B.I.A. 1989).
146. 21 I. & N. Dec. 1079 (B.I.A. 1998).
147. *See id.* at 1081–82.
148. *See id.* at 1082.
149. *See id.* at 1081.
150. *See id.* at 1083.

By making this distinction, the Board recognized that the presentation of fraudulent documents to facilitate travel was a common occurrence in asylum cases and therefore should not always defeat an asylum claim. But, the Board also found that it is appropriate to consider such actions in making credibility determinations when aliens present fraudulent documents to the court in support for their asylum applications.

Using this scheme, applicants who rely on fraudulent documents simply to reach the United States would not be denied asylum, but those whose continued use of fraud discredits them will be denied asylum. This is also consistent with case law that has forgiven the use of fraudulent entry, such as in the case of *In re Fauziya Kasinga.*[151] In *Kasinga,* the asylum applicant fled her native country of Togo to avoid the cultural practice of female genital mutilation.[152] The applicant bought a fraudulent passport to leave the country, but did not present it to authorities in the United States.[153] She immediately requested asylum upon her arrival at the airport.[154] As opposed to the alien in *O-D-,* Kasinga was found credible and her application was granted.[155]

B. Determining Whether a Mandatory Bar Applies

In addition to making a credibility finding, an immigration judge would retain the duty to determine if one or more of the mandatory bars to asylum apply. The judge currently has the ability to deny asylum to applicants that may be removed to a safe third countries, to applicants that were persecutors of others, those convicted of a serious crime, or those who are a danger to security.[156] The ability to make these determinations allows a judge to deny asylum to those applicants who Congress feels do not merit the benefits of asylum.

C. Determining the Likelihood of Future Persecution

In determining the likelihood of future persecution, judges would employ the same methods as those used under the previous asylum regime, such as examining country condition reports from the State Department and Human Rights Watch. Under the proposed rubric, changed country conditions would not be a discretionary consid-

151. *See In re* Fauziya Kasinga, 21 I. & N. Dec. 357, 359 (B.I.A. 1996).
152. *See id.*
153. *See id.*
154. *See id.*
155. *See id.* at 368.
156. 8 U.S.C. § 1158 (b)(2)(A) (2000).

eration, but rather would be a part of the analysis to determine if the applicant has met his burden of proof that it is more likely than not that he would suffer persecution upon return to his home country.

D. Determining the Severity of Past Persecution

As an alternative to proving a high likelihood of future persecution, the alien could also be granted asylum by showing severe past persecution. By granting asylum in cases where compelling humanitarian considerations merit asylum relief, the United States would be in compliance with prior caselaw, regulations, the UNHCR Handbook, and the ideals of human rights.[157] The idea of granting asylum for humanitarian reasons was first clearly articulated in *In re Chen.*[158]

In *Chen,* the applicant and his family suffered from past persecution in China because his father was a Christian minister.[159] During the Cultural Revolution of 1966, the Red Guards imprisoned Chen's father.[160] The elder Chen was repeatedly dragged through the streets in a humiliating fashion and pushed into a bonfire of burning Bibles, where he was severely burned.[161] During a ransacking of Chen's home when he was eight years old, he was forced to remain in a locked room with his grandmother for over six months.[162] The Red Guards attempted to "reeducate" Chen by forcing him to criticize his father.[163] They threw rocks at Chen, giving him a severe head injury.[164] Because of the severe beatings he suffered, Chen was physically debilitated and was forced to wear a hearing aid due to his head injury.[165]

In this case, the court held that if an applicant establishes that he had been persecuted in the past on account of a protected ground, he is eligible for asylum.[166] The court found, however, that due to changes in China, there was almost no likelihood of future persecution. Therefore, Chen's fear of future persecution was not well-founded.[167] The court held that there may be cases where the favorable exercise of discretion is warranted for humanitarian reasons

157. *See In re* Chen, 20 I. & N. Dec. 16 (B.I.A. 1989); 8 CFR § 208.13(b)(1)(iii) (2003).
158. 20 I. & N. Dec. 16 (B.I.A. 1989).
159. *See id.* at 19.
160. *See id.*
161. *See id.*
162. *See id.* at 20.
163. *See id.*
164. *See id.*
165. *See id.*
166. *See id.* at 18.
167. *See id.* at 21.

even if there is little likelihood of future persecution.[168] The court reached this decision by referring to the UNHCR Handbook, which states that

> [i]t is frequently recognized that a person who—or whose family—has suffered under atrocious forms of persecution should not be expected to repatriate. Even though there may have been a change of regime in his country, this may not always produce a complete change in the attitude of the population, nor, in view of his past experiences, in the mind of the refugee.[169]

Chen is an example of a case that makes logical sense under this new proposed restructure. Chen met the definition of a refugee because of the past persecution he suffered. Furthermore, because the persecution he suffered was so severe, he was granted a favorable exercise of discretion for asylum relief.

The Board has used the standard of compelling humanitarian reasons in several cases.[170] As the Board articulated in *In re N-M-A-*, "compelling reasons" to grant asylum may include the degree of harm suffered by the applicant, the length of time over which the harm was inflicted, and the evidence of severe psychological trauma stemming from the harm.[171] In making this discretionary ruling of whether past persecution merits a grant of asylum, judges should also consider the general humanitarian considerations such as tender age and health.

Conclusion

Due to the inadequate, infrequent, and inconsistent use of the discretionary hurdle in asylum cases, the low burden of proof has not justified the grant of asylum. The current system frequently has awarded asylum to non-persecuted applicants while screening out some who have been severely persecuted in the past. The scattered case law addressing the discretionary issue has not provided immigration judges with a clear standard to apply. Congress, with which Constitutional authority to determine how asylum should be granted ultimately rests, and not appointed administrative judges, should be the body that defines how asylum should be granted.

In order to ensure that asylum law fulfills its purpose of being a remedy for those fleeing persecution, it must be restructured to require more than a simple showing of a well-founded fear. This show-

168. *See id.* at 19.

169. *See id.* (citing UNHCR HANDBOOK, *supra* note 31, ¶ 136).

170. *See id.*; *In re* H-, 21 I. & N. Dec. 337 (B.I.A. 1996); *In re* N-M-A-, 22 I. & N. Dec. 312 (B.I.A. 1998).

171. *See N-M-A-*, 22 I. & N. Dec. at 326.

ing should be either severe past persecution or a high likelihood of future persecution. Immigration judges should be limited to considering only those factors. Additionally, by lowering the standards of eligibility for restriction on removal, the burdens of proof in the two forms of relief would be consistent with the benefit they award.

APPENDIX

Asylum and restriction on removal published BIA cases since 1987 not dealing with discretionary decisions, in chronological order:*

- *In re* Mogharrabi, 19 I. & N. Dec. 439 (B.I.A. 1987) (assessing the "well-founded fear of persecution" standard)
- *In re* Tomas, 19 I. & N. Dec. 464 (B.I.A. 1987) (holding that an alien is entitled to have an interpreter present at the hearing if the alien does not speak or understand English)
- *In re* A-G-, 19 I. & N. Dec. 502 (B.I.A. 1987) (holding that a requirement to serve in the military is not automatically considered persecution)
- *In re* Vigil, 19 I. & N. Dec. 572 (B.I.A. 1987) (analyzing whether a fear of persecution can result from being drafted during a nation's civil war)
- *In re* Maldonado-Cruz, 19 I. & N. Dec. 509 (B.I.A. 1988) (analyzing when a threat of death against a guerrilla organization deserter constitutes persecution)
- *In re* Balibundi, 19 I. & N. Dec. 606 (B.I.A. 1988) (holding an asylum application should be denied if the applicant fails to appear for the hearing)
- *In re* Fuentes, 19 I. & N. Dec. 658 (B.I.A. 1988) (assessing the fear of persecution from the government of a former police officer)
- *In re* Canas, 19 I. & N. Dec. 697 (B.I.A. 1988) (assessing the fear of persecution from forced military service and the legal authority of the Refugee Handbook)
- *In re* Rodriguez-Majano, 19 I. & N. Dec. 811 (B.I.A. 1988) (holding that asylum applicants who were persecutors of others are barred from asylum relief)
- *In re* Barrera, 19 I. & N. Dec 837 (B.I.A. 1988) (assessing the Marielitos' fear of persecution in attempting to escape from Cuba)

* This list does not include cases regarding adjustment of status from an asylee to a legal permanent resident, nor cases regarding relief from persecution under Article 3 of the United Nations' Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 39/46, Annex, 39 U.N. GAOR Supp. No. 51, U.N. Doc. A/39/51 (1984). The cases listed include only published opinions that address asylum and restriction on removal on the merits of the case.

- *In re* Chang, 20 I. & N. Dec. 38 (B.I.A. 1989) (holding that China's policy of "one couple, one child" does not constitute persecution)
- *In re* Fefe, 20 I. & N. Dec. 116 (B.I.A. 1989) (holding that an asylum applicant must take the stand and cannot rely solely on a written application)
- *In re* Dass, 20 I. & N. Dec. 120 (B.I.A. 1989) (holding that although background evidence is not required, an asylum applicant must explain why there are holes in the evidence upon request)
- *In re* Villalta, 20 I. & N. Dec. 142 (B.I.A. 1990) (assessing an alien's fear of persecution for his life being threatened because of his activities in a student political organization)
- *In re* B-, 20 I. & N. Dec. 427 (B.I.A. 1991) (barring an alien from asylum who has committed a particularly serious crime)
- *In re* R-O-, 20 I. & N. Dec. 455 (B.I.A. 1992) (holding that a guerrilla organization's attempt to recruit the alien does not constitute persecution)
- *In re* R-R-, 20 I. & N. Dec. 547 (B.I.A. 1992) (assessing an alien's request to reopen his case to allow the alien to apply for asylum)
- *In re* T-, 20 I. & N. Dec. 571 (B.I.A. 1992) (assessing an ethnic Tamil alien's fear of persecution because of an alleged association with a terrorist group)
- *In re* D-V-, 21 I. & N. Dec. 77 (B.I.A. 1993) (finding an alien had a well founded fear of persecution on account of her political opinion after she was raped by soldiers)
- *In re* H-M- et al., 20 I. & N. Dec. 683 (B.I.A. 1993) (assessing changed country conditions and an applicant's fear of persecution for harsh treatment by his former government after the alien violated the country's currency laws)
- *In re* K-S-, 20 I. & N. Dec. 715 (B.I.A. 1993) (finding an alien could not establish a claim of persecution based on his fear of the Indian government)
- *In re* B-, 21 I. & N. Dec. 66 (B.I.A. 1995) (rejecting the immigration judge's adverse credibility finding)
- *In re* S-S-, 21 I. & N. Dec. 121 (B.I.A. 1995) (requiring allegedly incredible statements made by the alien at an asylum interview to be presented in documentation to the court)
- *In re* M-S-, 21 I. & N. Dec. 125 (B.I.A. 1995) (assessing an asylum applicant's statements made during an asylum interview)

- *In re* S-P-, 21 I. & N. Dec. 486 (B.I.A. 1996) (finding that persecution can be based on an imputed protected characteristic as well as an actual protected characteristic)
- *In re* X-P-T-, 21 I. & N. Dec. 634 (B.I.A. 1996) (holding that forced sterilization or abortion can support a claim of persecution)
- *In re* Q-T-M-T-, 21 I. & N. Dec. 639 (B.I.A. 1996) (assessing when a conviction for an aggravated felony bars relief from withholding of removal)
- *In re* S-M-J-, 21 I. & N. Dec. 722 (B.I.A. 1997) (assessing the evidence required for asylum regarding country conditions and the alien's personal experiences)
- *In re* T-M-B-, 21 I. & N. Dec. 775 (B.I.A. 1997) (holding that the alien must prove that it is reasonable to believe that the alleged persecution was based on one of the enumerated protected grounds)
- *In re* C-A-L-, 21 I. & N. Dec. 754 (B.I.A. 1997) (finding an alien did not establish a well-founded fear of persecution from the guerrillas)
- *In re* V-T-S-, 21 I. & N. Dec. 792 (B.I.A. 1997) (holding that kidnapping is not necessarily persecution unless the alien can show it was motivated by a protected ground)
- *In re* P-L-P-, 21 I. & N. Dec. 887 (B.I.A. 1997) (finding that the immigration court has exclusive jurisdiction over the alien once the INS issued an order to show cause)
- *In re* E-P-, 21 I. & N. Dec. 860 (B.I.A. 1997) (assessing credibility of the alien and changed country conditions)
- *In re* S-S-, 21 I. & N. Dec. 900 (B.I.A. 1997) (finding the alien ineligible for asylum and withholding of deportation because he was convicted of an aggravated felony)
- *In re* C-Y-Z-, 21 I. & N. Dec. 915 (B.I.A. 1997) (finding that forced sterilization does not eliminate a fear of future persecution even though sterilization in the future is no longer likely)
- *In re* L-S-J-, 21 I. & N. Dec. 973 (B.I.A. 1997) (finding an alien convicted of an armed robbery was barred from asylum and withholding of deportation)
- *In re* O-D-, 21 I. & N. Dec. 1079 (B.I.A. 1998) (finding an asylum applicant incredible after determining the documents he presented were counterfeit)
- *In re* A-S-, 21 I. & N. Dec. 1106 (B.I.A. 1998) (holding that the B.I.A. should generally defer to the immigration judge's credi-

bility finding, as the immigration judge is in the best position to observe the applicant on the stand)

- *In re* Y-B-, 21 I. & N. Dec. 1136 (B.I.A. 1998) (holding that an applicant's claim cannot survive on weak testimony without strong corroborating evidence)
- *In re* A-E-M-, 21 I. & N. Dec. 1157 (B.I.A. 1998) (finding that an alien's fear of persecution is diminished by changed country conditions and the fact that the alien's family remained in the country unharmed)
- *In re* M-D-, 21 I. & N. Dec. 1180 (B.I.A. 1998) (finding the alien did not present adequate evidence of his identity, nationality, or claim of persecution)
- *In re* O-Z- & I-Z-, 22 I. & N. Dec. 23 (B.I.A. 1998) (upholding the alien's claim of persecution on the basis of the alien's Jewish religion)
- *In re* X-G-W-, 22 I. & N. Dec. 71 (B.I.A. 1998) (allowing the immigration courts to reopen asylum cases based on coerced population control practices), *superceded by In re* G-C-L-, 23 I. & N. Dec. 359 (B.I.A. 2002).
- *In re* G-A-C-, 22 I. & N. Dec. 83 (B.I.A. 1998) (finding an asylum applicant was properly placed in deportation proceedings after his application was denied)
- *In re* R-S-J-, 22 I. & N. Dec. 863 (B.I.A. 1999) (holding that false statements under oath to an asylum officer can constitute false testimony)
- *In re* R-A-, 22 I. & N. Dec. 906 (B.I.A. 1999) (holding that a victim of domestic violence must prove the violence was promulgated by the victim's membership in a particular social group or the victim's political opinion)
- *In re* A-N- & R-M-N-, 22 I. & N. Dec. 953 (B.I.A. 1999) (allowing aliens to reopen their case to plead asylum and withholding of deportation based on changed country conditions without explaining why they failed to appear in the original case)
- *In re* S-A-, 22 I. & N. Dec. 1328 (B.I.A. 2000) (allowing alien to establish fear of persecution from her father on the basis of their differing religious beliefs)
- *In re* U-H-, 23 I. & N. Dec. 355 (B.I.A. 2002) (holding the USA PATRIOT Act does not change the method used to determine if an asylum applicant is suspected of terrorist activity or whether the alien is a danger to society)

- *In re* G-C-L-, 23 I. & N. Dec. 359 (B.I.A. 2002) (retracting BIA's former policy of reopening asylum cases based on coercive population control)
- *In re* Y-T-L-, 23 I. & N. Dec. 601 (B.I.A. 2003) (finding that forced sterilization constituting past persecution was not rebutted by a fundamental change in circumstances)
- *In re* R-S-H-, 23 I. & N. Dec. 629 (B.I.A. 2003) (affirming the immigration judge's denial of asylum and restriction on removal because the alien did not establish a well-founded fear of persecution based on the applicants fear that he would be associated with terrorists after the events of September 11th)

Asylum and restriction on removal published BIA cases addressing discretionary decisions:

- *In re* Pula, 19 I. & N. Dec. 467 (B.I.A. 1987) (articulating factors immigration judges should use in making discretionary decisions)
- *In re* Gonzales, 19 I. & N. Dec. 682 (B.I.A. 1988) (holding that a mandatory bar to restriction on removal, being convicted of a particularly serious crime, does not also bar asylum, but can be considered in the judge's discretionary determination to grant or deny asylum)
- *In re* Chen, 20 I. & N. Dec. 16 (B.I.A. 1989) (holding that asylum can be granted in the exercise of discretion based on humanitarian reasons although there is little likelihood of future persecution)
- *In re* Soleimani, 20 I. & N. Dec. 99 (B.I.A. 1989) (holding that an alien's firm resettlement in another country can be a negative factor in the immigration judge's discretionary decision; *superceded* when the discretionary "firm resettlement" was codified into mandatory bar to asylum, 8 U.S.C. § 1158(b)(2)(A)(vi) (2000)
- *In re* Izatula, 20 I. & N. Dec. 149 (B.I.A. 1990) (assessing the fear of persecution of an alien taking part in a military coup to overthrow the former government and analyzing discretion under the *Pula* factors)
- *In re* D-L- & A-M-, 20 I. & N. 409 (B.I.A. 1991) (applying the *Pula* factors to determine that aliens from Cuba did not merit a favorable exercise of discretion)
- *In re* R-, 20 I. & N. Dec. 621 (B.I.A. 1992) (holding that past persecution did not justify a grant of asylum in the exercise of

discretion because the applicant did not show a likelihood of future persecution or that the past persecution was motivated because of his political opinion)

- *In re* Toboso-Alfonso, 20 I. & N. Dec. 819 (B.I.A. 1994) (allowing an applicant's homosexual status to constitute persecution on account of the alien's particular social group, granting withholding of deportation, but denying asylum because of the alien's criminal record)
- *In re* H-, 21 I. & N. Dec. 337 (B.I.A. 1996) (holding that a favorable exercise of discretion is warranted where humanitarian reasons indicate an applicant should not be returned to the country where he suffered past persecution)
- *In re* Fauziya Kasinga, 21 I. & N. Dec. 357 (B.I.A. 1996) (holding that the process of female genital mutilation can support a claim of persecution, analyzing discretion under the *Pula* factors)
- *In re* N-M-A-, 22 I. & N. Dec. 312 (B.I.A. 1998) (holding that if country conditions change and the original persecutor is no longer in existence, the burden is again on the applicant to show a well-founded fear of persecution)