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Immigration and Naturalization Service v. Stevic: Standards of Proof in Refugee Cases Involving Political Asylum and Withholding of Deportation

Arthur C. Helton
Lawyers Committee for International Human Rights

Case Analysis

IMMIGRATION AND NATURALIZATION SERVICE v. STEVIC: STANDARDS OF PROOF IN REFUGEE CASES INVOLVING POLITICAL ASYLUM AND WITHHOLDING OF DEPORTATION

ARTHUR C. HELTON*

I. INTRODUCTION

Humanitarian concerns for the plight of refugees have caused the United States to make several provisions for them.[1] The Refugee Act of 1980[2] established a provision for asylum with the possibility of a durable solution in the form of permanent residence.[3] Refugees in the United States also have a right to protection against return to countries in which they would be persecuted.[4] Issues relating to the standard of proof of persecution necessary under the 1980 Act have only recently been addressed by the United States Supreme Court in *Immigration and Naturalization Service v. Stevic.*[5]

This article discusses both the holding and scope of the *Stevic* decision, and identifies the issues left open for further resolution. This analysis reviews prior law, and analyzes the *Stevic* decision in light of that background. Finally, this article discusses lower court decisions applying *Stevic* and the implications of those cases.

II. STATEMENT OF THE CASE

Pedrag Stevic is a Yugoslavian citizen who entered the United States in June 1976 to visit his American sister. Stevic overstayed his temporary visa. The Immigration and Naturalization Service instituted deportation proceedings against him, and he admitted to being deportable and agreed to leave voluntarily by February 1977.[6] Prior to that date, however, Stevic married a United States citizen who petitioned for a new visa on Stevic's behalf. When his wife died in an automobile accident shortly thereafter, Stevic's petition was automatically revoked, and he was ordered to surrender for deportation to Yugoslavia.[7]

In August 1977 Stevic moved to reopen the deportation proceedings, seeking relief under Section 243(h) of the Immigration and Nationality Act,[8] which at that

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*Director of the Political Asylum Project of the Lawyers Committee for International Human Rights in New York City. J.D., New York University, 1976.

[1] Anker & Posner, *The Forty Year Crisis: A Legislative History of the Refugee Act of 1980*, 19 SAN DIEGO L. REV. 9 (1981).

[2] Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102 (1980) [hereinafter cited as 1980 Act].

[3] 8 U.S.C. § 1159(b) (1982).

[4] 8 U.S.C. § 1253(h) (1970 & Supp. 1984).

[5] Immigration and Naturalization Service v. Stevic, 104 S. Ct. 2489 (1984).

[6] *Id.* at 2490.

[7] *Id.* at 2490-91.

[8] Immigration and Nationality Act, Pub. L. No. 414, 66 Stat. 163 (1952) (codified as amended

time provided that the Attorney General could withhold deportation of an alien upon a finding that the alien would be subject to persecution based on his political opinion.[9] Stevic based his claim on his activities in the United States as a member of an anticommunist organization, claiming that his father-in-law had been imprisoned in Yugoslavia because of membership in the same organization. Stevic stated that he also feared such imprisonment.[10] In October 1979, the immigration judge denied Stevic's motion to reopen, and the denial was upheld by the Board of Immigration Appeals on the ground that Stevic had not presented prima facie evidence proving that there was "a clear probability of persecution" to be directed at Stevic.[11] Stevic did not seek judicial review of the Board of Immigration Appeals decision.[12]

After Stevic received notice to surrender for deportation in February 1981, he again sought relief under Section 243(h), which had been amended by the Refugee Act of 1980.[13] The immigration judge applied the same standards as had been applied in 1979, holding that although Stevic submitted additional evidence, he had not shown the evidence had been unavailable at the time his first motion was filed. The judge further held that Stevic had once more failed to show there was a "clear probability of [his] persecution."[14] Stevic's motion to reopen was again denied, and the Board of Immigration Appeals again upheld the denial.[15]

The United States Court of Appeals for the Second Circuit reversed the decision of the Board of Immigration Appeals and remanded the case for a plenary hearing under a different standard of proof.[16] The circuit court examined the legislative history of the Refugee Act of 1980 and concluded that Congress had

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at 8 U.S.C. § 1101 (1976)) [hereinafter cited as 1952 Act].

[9] The text of the statute provided in pertinent part:

> The Attorney General is authorized to withhold deportation of any alien within the United States to any country in which in his opinion the alien would be subject to persecution on account of race, religion, or political opinion and for such period of time as he deems to be necessary for such reason.

Id. at § 1253(h).

[10] *Stevic*, 104 S. Ct. at 2491.

[11] *Id.*

[12] *Id.*

[13] The text of the statute provided:

> The Attorney General shall not deport or return any alien . . . to a country if the Attorney General determines that such alien's life or freedom would be threatened in such country on account of race, religion, nationality, membership in a particular social group, or political opinion.

1980 Act, *supra* note 2, at § 1253(h)(1).

[14] *Stevic*, 104 S. Ct. at 1291.

[15] *Id.* at 1292.

[16] Stevic v. Sava, 678 F.2d 401 (2d Cir. 1982), *rev'd sub nom*, INS v. Stevic, 104 S.Ct. 1289 (1984). *See* Comment, *Eligibility for Withholding of Deportation: The Alien's Burden Under the 1980 Refugee Act*, 49 BROOKLYN L. REV. 1193 (1983).

intended to abandon the "clear probability of persecution" standard, and substitute the more generous "well-founded fear of persecution" standard, which would be consistent with the definition of refugee contained in a United Nations Protocol.[17]

The United States Supreme Court granted certiorari and reversed the Second Circuit's decision. Noting that the "well-founded fear of persecution" standard applied only to a request for discretionary asylum, the Court held that an alien must establish a clear probability of persecution to avoid deportation under Section 243(h).[18]

III. Prior Law

For the purposes of examining the *Stevic* decision, the history of the law governing asylum for and the withholding of deportation of refugees may be divided into roughly four periods: First, the period prior to 1968, when the United States became a party to the United Nations Protocol;[19] Second, the period after accession, when the Protocol was applied and interpreted; Third, the period in which changes to the law were proposed; and Fourth, the enactment of those changes in the Refugee Act of 1980.

A. *Pre-1968 Asylum Law*

Before 1968, there were three procedures under which aliens could seek refuge in the United States. Each procedure had its own standard.

1. Withholding of Deportation

Under the Immigration and Nationality Act of 1952, the Attorney General was authorized to "withhold deportation of any alien . . . to any country in which in his opinion the alien would be subject to physical persecution."[20] Faced with this discretionary authority to decline to deport an alien from the United States, a limiting principle was developed to restrict the "favorable exercise of . . . discretion to cases of clear probability of persecution of the particular individual petitioner."[21]

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[17] *Sava*, 678 F.2d at 409.

[18] *Stevic*, 104 S. Ct. at 1292.

[19] The United States became a party to the United Nations Protocol Relating to the Status of the Refugees in 1968, *see infra* note 32. The Protocol has the legal status of a treaty, because it both incorporates and supplements the substantive provisions of the Convention relating to the Status of Refugees. The Board of Immigration Appeals applies the Protocol as it would an Act of Congress. *See In re* Dunar, 14 I. & N. Dec. 210 (1973). *See also* Griffith, *Deportation and the Refugee*, in Transnational Legal Problems of Refugees, 125 (Michigan Yearbook of International Legal Studies 1982).

[20] 1952 Act, *supra* note 8, at § 1101.

[21] *In re* Joseph, 13 I. & N. Dec. 70, 72, 73 (1968) [citation omitted]; *In re* Tan, 12 I. & N. Dec. 564, 568 (1967); Lena v. INS, 379 F.2d 536, 538 (7th Cir. 1967). The decisions of the Board of Immigration Appeals cited in this article, unless otherwise indicated, have been designated as precedents. 8 C.F.R. § 3.1(g) (1984).

This "clear probability" standard was applied stringently. In one case, for example, withholding was denied to an ethnic Chinese applicant despite voluminous documentation of abuse of ethnic Chinese in Indonesia, letters from relatives and an attack on the family business.[22] In another, an Iranian president of an anti-Shah student organization was denied withholding despite findings that the alien was "prominently involved" in political activities in the United States and that it was likely he had been so identified by the government of Iran.[23] More recently, a federal district court found evidence of systematic and extensive persecution in numerous Haitian cases, yet not one applicant had met the "clear probability" standard. These applicants included one woman whose father had been killed by the Ton Ton Macoutes, who had attempted to apprehend her just after she fled. Another applicant had been jailed after the murder of both her husband and her son.[24]

The Attorney General's application of this standard was reviewable only for abuse of discretion, a difficult standard to meet. Even where "the Attorney General's course of conduct show[ed] consistency in the various cases," his ungenerous interpretation of the law in a single case was deemed insufficient cause to hold that he had exercised his discretion in an arbitrary manner.[25]

2. Conditional Entry Status

Conditional entry was established in 1965 and concerned the admission of refugees from overseas.[26] The Immigration and Naturalization Service could grant this status to aliens

> who satisf[ied] an Immigration and Naturalization Service officer at an examination in any non-Communist or non-Communist-dominated country, (A) that (i) because of persecution on account of race, religion, or political opinion they [had] fled (I) from any Communist or Communist-dominated country or area, or (II) from any country in the Middle East, and (ii) [were] unable or unwilling to return to such country or area on account of race, religion, or political opinion, and (iii) [were] not nationals of the countries or areas in which their application for conditional entry [was] made. . . .[27]

A numerical ceiling was placed on admissions, and relief was strictly limited by the ideology and geographic location of the applicant. Judicial review was ordinarily

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[22] *Tan*, 12 I. & N. Dec. at 68.

[23] *In re* Kojoory, 12 I. & N. Dec. 215, 217 (1967).

[24] Haitian Refugee Center v. Civiletti, 503 F. Supp. 442 (S.D. Fla. 1980), *modified sub nom.* Haitian Refugee Center v. Smith, 676 F.2d 1023 (5th Cir. 1982).

[25] *Lena*, 379 F.2d at 538.

[26] Pub. L. No. 89-236, § 3, 79 Stat. 913 *repealed by* 94 Stat. 107 [hereinafter cited as 1965 Amendments].

[27] *Id. See* 8 C.F.R. § 235.9 (1984) (which limits the countries in which conditional entry visas could be processed to Austria, Belgium, France, Germany, Greece, Hong Kong, Italy, and Lebanon).

precluded, since most of the eligibility determinations were made abroad.[28] While the precedents are sparse, it is apparent that the conditional entry standard was more lenient than the withholding standard.[29]

3. Attorney General Parole Power

In 1952, the Attorney General was granted authority to "parole" aliens temporarily into the country "for emergent reasons or for reasons deemed strictly in the public interest."[30] This parole power was also used to admit refugees from overseas. In contrast to conditional entry, there were no numerical limitations. Unlike withholding, there were no ideological or geographical limitations. In practice, however, the parole power was used almost exclusively to admit those fleeing communism.[31]

B. *1968: The United Nations Protocol*

In 1968 the United States became a party to the 1967 United Nations Protocol Relating to the Status of Refugees.[32] The United States thereby adopted the provisions of the Protocol, which defines the term "refugee" as a person who:

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[28] The only reported cases prior to 1968 are: *In re* Adamska, 12 I. & N. Dec. 201 (1967) (Polish visitor); *In re* Lalian, 12 I. & N. Dec. 125 (1967) (Iranian visitor); *In re* Frisch, 12 I. & N. Dec. 40 (1967) (Yugoslavian student).

[29] *See* Cheng Fu Sheng v. Barber, 269 F.2d 497, 499 (9th Cir. 1959) (construing the term "fear of persecution" in the unrelated Refugee Relief Act of 1953 as "in sharp contrast" to the stringent withholding of deportation provision). *See also Tan*, 12 I. & N. Dec. at 569-70; *Adamska*, 12 I. & N. Dec. at 202 (holding conditional entry to be "substantially broader" than the pre-1965 withholding); *In re* Ugricic, 14 I. & N. Dec. 384, 385-86 (1972) (conditional entry found to require only "good reason to fear persecution").

[30] 1952 Act, § 212(d)(5), 66 Stat. at 188 (current version at 8 U.S.C. § 1182(d)(5) (1976)).

[31] *World Refugee Crisis: The International Community's Response, Report to the Committee on the Judiciary*, 96th Cong., 1st Sess. 213 (1979) [hereinafter cited as *World Refugee Crisis*]. The following table summarizes the pre-1968 use of the parole power.

Non-communist	Total Authorized
Europe (1965)	925
Communist	
Hungary (1957)	32,000
Cuba (1960-67)	185,487
Chinese-Hong Kong (1962)	15,000
U.S.S.R. (1963)	224
	232,711

Id.

[32] The United Nations Protocol relating to the Status of Refugees was opened for signature on January 31, 1967. 19 U.S.T. 6223, T.I.A.S. No. 6577, 606 U.N.T.S. 267. It was ratified by the United States on October 4, 1968. 114 Cong. Rec. 29,607 (1968). The Protocol incorporated the pertinent aspects of the refugee definition in article 1 and articles 2-34 of the 1951 Convention relating to the Status of Refugees. 19 U.S.T. 6260, T.I.A.S. No. 6577 [hereinafter cited as Protocol].

> [o]wing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership in 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; or who, not having nationality and being outside the country of his former habitual residence, is unable or, owing to such fear, is unwilling to return to it.[33]

As Justice Stevens explained in *Stevic*,[34] the sponsors of the Protocol and expert witnesses who appeared before the Senate Foreign Relations Committee were unequivocal in their assurances that ratification of the document "would not impinge adversely upon the federal and state laws of this country."[35] In particular, Eleanor McDowell of the Office of the Legal Advisor of the Department of State testified before the Foreign Relations Committee on the subject of the Protocol. She stated that "existing regulations which have to do with deportation would permit the Attorney General sufficient flexibility to enforce the provisions of this convention which are not presently contained in the Immigration and Nationality Act."[36] However, a large gap existed between the standard theoretically contained in the Protocol and the standard implemented in practice.[37]

1. Withholding of Deportation

The withholding of deportation provision, as amended in 1965, read:

> The Attorney General is authorized to withhold deportation of any alien within the United States to any country in which in his opinion the alien would be subject to persecution on account of his race, religion or political opinion and for such period of time as he deems to be necessary for such reason.[38]

The considerable flexibility permitted under the withholding provision could have

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[33] *Id.* at Art. I § 2.

[34] *Stevic*, 104 S. Ct. at 2494-95.

[35] 114 Cong. Rec. 29,391 (1968) (statement of Senator Mansfield); *accord* 114 Cong. Rec. 27,757 (1968) (Message from the President transmitting the Protocol); *id.* at 27,758 (letter of submittal from the Dep't of State); 114 Cong. Rec. 27,844 (1968) (statement of Laurence Dawson of the Dep't of State).

[36] S. EXEC. REP. No. 14, 90th Cong., 2d Sess. 8 (1968).

[37] The failure of the *Stevic* Court to recognize this gap between theory and practice caused the Court to misconstrue the full import of the 1980 Act.

[38] 1965 Amendments, *supra* note 26, at § 3 (amending § 243(h) of the 1952 Act (current version at 8 U.S.C. § 1253(h) (1982))). Prior to 1965, an alien had to establish that he or she would be subject to "physical persecution" to be eligible for withholding of deportation. Congress amended the withholding provision in 1965 replacing "physical persecution" with "persecution on account of race, religion or political opinion." 1965 Amendments, § 11. This change was considered by Congress to be in harmony with the 1951 United Nations Convention relating to the Status of Refugees, even though the United States had not formally acceded to the Convention. *See Tan*, 12 I. & N. Dec. 564.

accommodated the new refugee standard. However, although the Board of Immigration Appeals purported to limit negative exercises of discretion to situations in which an alien was not eligible for withholding,[39] it retained the "clear probability" standard.[40]

As Justice Stevens recognized,[41] the courts that reviewed withholding of deportation determinations after the United States became a party to the Protocol differed in their application of an appropriate refugee eligibility standard. Some used the "well-founded fear" standard.[42] Others used the "clear probability" standard,[43] while other courts used other formulations.[44]

What was clear was that the courts did not agree. The Seventh Circuit stated in 1977 that "the 'well-founded fear' standard in the Protocol and the 'clear probability' standard which this court has engrafted onto section 243(h) will in practice converge."[45] The Fifth Circuit that same year explained that the Protocol standard, as viewed by the Board, "suggest[ed] at least a slight diminution in the alien's burden of proof."[46]

2. The Parole Power

The Attorney General's parole power was also sufficiently flexible to accommodate the ideologically neutral Protocol standard. In practice, however, political ideology continued to skew decision-making.[47] Only about one percent of admis-

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[39] *Dunar*, 14 I. & N. Dec. at 322 (1973). *But see In re* Liao, 11 I. & N. Dec. 113, 117-19 (1965) (held no abuse of administrative discretion to deny withholding of deportation despite immigration judge's reference to "considerable evidence" to support respondent's claim of likelihood of persecution upon return to Formosa).

[40] *In re* Joseph, 13 I. & N. Dec. at 72.

[41] *Stevic*, 104 S. Ct. at 2495 n.12.

[42] Pereira-Diaz v. INS, 551 F.2d 1149, 1154 (9th Cir. 1977); Zamora v. INS, 534 F.2d 1055, 1058 (2d Cir. 1976); Paul v. INS, 521 F.2d 194, 200 (5th Cir. 1975).

[43] Martineau v. INS, 556 F.2d 306, 307 (5th Cir. 1977); Pierre v. United States, 547 F.2d 1281, 1289 (5th Cir. 1977), *vacated and remanded to consider mootness*, 434 U.S. 962 (1977); Cisternas-Estay v. INS, 531 F.2d 155, 159 (3d Cir.), *cert. denied*, 429 U.S. 853 (1976); Rosa v. INS, 440 F.2d 100, 102 (1st Cir. 1971).

[44] Khalil v. District Director, 457 F.2d 1276, 1277 n.3 (9th Cir. 1972) ("would be persecuted"); Henry v. INS, 552 F.2d 130, 131 (5th Cir. 1977) ("probable persecution"); Daniel v. INS, 528 F.2d 1278, 1279 (5th Cir. 1976); Shkukani v. INS, 435 F.2d 1378, 1380 (8th Cir.), *cert. denied*, 402 U.S. 920 (1971); Gena v. INS, 424 F.2d 227, 232 (5th Cir. 1970) ("likely" persecution); Kovac v. INS, 407 F.2d 102, 105 (9th Cir. 1969) ("probability of persecution").

[45] Kashani v. INS, 547 F.2d 376, 379 (7th Cir. 1977).

[46] Coriolan v. INS, 559 F.2d 993, 997 n.8 (5th Cir. 1977).

[47] *World Refugee Crisis, supra* note 31, see Section III, Part A(3) for a description of the parole power prior to 1968.

sions were from non-communist countries.[48] The admission of a few persons from non-communist countries under the parole power, on the other hand, illustrates that the Attorney General had the power to admit refugees regardless of ideology.[49]

C. *Post-1968 Calls for Legislation*

After 1968 it became increasingly apparent to legislators that the Immigration and Naturalization Service was still using practices and procedures that frustrated the implementation of the Protocol and that were inconsistent with its underlying humanitarian philosophy. In recognition of the United States' leadership in showing compassion for the persecuted, Congress called for legislation to ensure implementation of the Protocol.

As soon as the Protocol was ratified, members of Congress realized that the definition of refugee would have to be broadened.[50] This need for an expanded definition was highlighted by the so-called Kurdica Affair in 1970, in which a Soviet sailor who had jumped ship was returned to his vessel without an opportunity to seek asylum.[51]

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[48] The following table in *World Refugee Crisis, supra* note 31, summarizes the use of the parole power from 1968 to 1980.

Non-communist	Total Authorized
Latin America (excluding Cuba) (1975-78)	4,400
Uganda (1972-73)	1,750
Lebanon (1978)	1,000
	7,150
Communist	
Cuba (1968-78)	232,666
U.S.S.R. (1970-77)	17,200
U.S.S.R. and Eastern Europe (1978-79)	61,924
Czechoslovakia (1970)	6,500
Indochina (1975-79)	290,075
	608,365

[49] In 1972, the Department of State recognized that accession to the Protocol required implementing procedures and adherence to the new refugee standard. At that time, regulations were issued permitting aliens to seek sanctuary in the United States and abroad. 37 Fed. Reg. 3447 (1972). *See also* 39 Fed. Reg. 41,832 (1974) (establishing a formal asylum procedure for the INS that also recognized the applicability of the Protocol).

[50] *See, e.g.*, S. 3202, 115 Cong. Rec. 36,965-66 (1969).

[51] *See* CONGRESSIONAL RESEARCH SERVICE OF THE LIBRARY OF CONGRESS, REVIEW OF UNITED STATES REFUGEE RESETTLEMENT PROGRAMS AND POLICIES, 96th Cong., 2d Sess. 16 (1980).

Legislators introduced bills to require the Immigration and Naturalization Service to conform its standards and practices to those of the Protocol, and the pressure for change continued from 1973 until the passage of the 1980 Refugee Act.[52] Bills considered in 1976 by the House had contained the "well-founded fear" refugee standard.[53] Indeed, this standard was the subject of most of the hearings, and it is significant that representatives of the Departments of State and Justice recognized the difference between the stringent "clear probability" standard and the Protocol standard. The Justice Department, while supportive of the basic tenets of the refugee provision believed that the "well-founded fear of persecution" should be limited to the "well-founded fear of persecution in the opinion of the Attorney General." The Department believed that, otherwise, the test would be entirely subjective and left to the alien claiming refugee status to determine whether his fear of being persecuted was or was not well-founded.[54]

The refugee standard was raised specifically in hearings in 1977. Congresswoman Holtzman, ultimately the cosponsor of the 1980 legislation, stated her concern with the Services' narrow reading of the law:

> MS. HOLTZMAN. . . . I wonder if you have any concern that . . . we ought to . . . spell out—but not in an overly detailed manner—the kinds of procedures that should be used.
>
> The reason I raise this is because when Congress creates a statutory scheme and *does not really specify how that scheme is to be implemented it can be thwarted by the executive branch.* I am concerned because I think the definition of refugee in this bill is an excellent one and even though it states what person will be a refugee if he or she has a well-founded fear of persecution, *we don't specify how that well-founded fear is to be ascertained. . . .*[55]

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[52] *See* S. 2643, 93d Cong., 1st Sess. (1973); S. 2405, 94th Cong., 1st Sess. (1975). In 1973, Senator Kennedy introduced S. 2643. 119 CONG. REC. 35, 734 (1973). The definition of the term "refugee" was patterned closely on the Protocol definition. *Id.* at 35,735, 37,737. That same year in the House, very extensive hearings were held on H.R. 981. *See Western Hemisphere Immigration, Hearings before House Subcomm. No. 1 of the Comm. on the Judiciary*, 93d Cong., 1st Sess. (1973). Witnesses noted with pleasure the usage of the Protocol terminology. *Id.* at 249-50, 258, 304, 306, 326; *see also* 119 Cong. Rec. 31,360 (1973) (statement of Rep. Eilberg introducing the bill on the House floor); 119 Cong. Rec. 31,454-55 (1973).

In 1975, in introducing S. 2405, Senator Kennedy said:

> [T]he act of 1965 was only the beginning of an important task. . . . It failed to resolve a number of issues relating to immigration. . . It was generally recognized at the time that additional legislation would soon be needed. And this failure to act over the past decade has . . . been detrimental to fulfilling the intent of the 1965 Act. . . ."

121 Cong. Rec. 29,947 (1975). S. 2405 specifically proposed to excise the 1965 ideological biases and to include the U.N. refugee definition.

[53] *See Western Hemisphere Immigration, Hearings on H.R. 367, H.R. 981, and H.R. 10323, before the House Subcomm. on Immigration, Citizenship and International Law of the Comm. on the Judiciary*, 94th Cong., 1st & 2nd Sess. (1976) [hereinafter cited as 1976 House Hearings].

[54] *Id.* at 18.

[55] *Policy and Procedure for the Admission of Refugees into the United States: Hearings on H.R.*

Congresswoman Holtzman, as a lawyer, appreciated that a stringent application could eviscerate the most generous legislation.

In 1978, Congressman Eilberg, expressing Congress' growing impatience with the INS' failure to fulfill the spirit of the Protocol, stated: "For years, we have received assurances . . . from the Justice Department . . . that criteria, guidelines, and regulations would be promulgated . . . so we would not have to go through the necessity of moving legislation. Yet this has never taken place."[56] Thus, the stage was set for comprehensive legislation.

D. *The Refugee Act of 1980*

The Refugee Act of 1980 established a standard for uniform and nonideological refugee eligibility. Congress intended this new standard to be compatible with the humanitarian traditions and international obligations of the United States. Central to the Act was a statutory definition of "refugee" which conformed to that of the Protocol. A refugee was defined as

> any person who is outside any country of such person's nationality or, in the case of a person having no nationality, is outside any 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. . . .[57]

Section 203(e) of the Refugee Act amended the language of section 243(h), basically conforming it to the language of Article 33 of the United Nations Protocol.[58] Section 243(h)(1), as amended, provides in pertinent part:

> The Attorney General shall not deport or return any alien . . . to a country if the Attorney General determines that such alien's life or freedom would be threatened in such country on account of race, religion, nationality, membership in a particular social group, or political opinion.[59]

Article 33(l) of the Protocol provides:

> No Contracting State shall expel or return . . . a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on

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3056 Before the House Subcomm. on Immigration, Citizenship, and International Law of the Comm. on the Judiciary, 95th Cong., 1st Sess. at 126-27 (1977) (emphasis added). H.R. 3056 is specifically cited in the legislative history of the 1980 Act as the genesis of that law. *See* H.R. Rep. No. 608, 96th Cong., 1st Sess. 7 (1979).

[56] *Admission of Refugees into the United States, II: Hearings Before the Subcomm. on Immigration, Citizenship and International Law of the Comm. on the Judiciary,* 95th Cong., 1st & 2nd Sess. 15 (1978).

[57] 8 U.S.C. § 1101(a)(42)(A) (1982).

[58] *See Stevic,* 104 S. Ct. at 2496.

[59] 1980 Act, *supra* note 2, at § 243(h)(1).

account of his race, religion, nationality, membership of a particular social group or political opinion.[60]

As the Court observed in *Stevic*,[61] the statute does not use the term "refugee." However, Article 33, upon which it was modeled, does use the term and thereby incorporates the refugee definition.

Furthermore, it is clear that Congress intended the definition of "refugee" in the 1980 Act to conform to that in the Protocol.[62] During hearings, the derivation of the term was often mentioned and never questioned. This intent was emphasized in the report of the Senate Judiciary Committee and in the debate on the Senate floor.[63] Similarly, throughout House consideration of the bill, references were made to "the fundamental change under the legislation [which was] the replacing of the existing definition of refugee with the definition which appears in the U.N. Convention and Protocol."[64]

Congress noted that the purpose of changing the definition was not only to excise ideological bias from the law, but also to facilitate bringing refugees into the United States as only a well-founded fear of persecution would have to be established.[65] Congress also emphasized its concern over the intransigence of INS in the past and expressed its intention to monitor compliance in the future: "The Committee intends to monitor closely the Attorney General's implementation of the [asylum] section so as to insure the rights of those it seeks to protect."[66]

Despite Congressional emphasis on the uniform, nonideological standard through the enactment of the Refugee Act of 1980, INS continued to follow the "clear probability" standard.[67] In one celebrated case in 1980,[68] the Board denied withholding to a defector from the Provisional Irish Republican Army (PIRA) who

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[60] Protocol, *supra* note 32, at Art. 33(1).

[61] *Stevic*, 104 S. Ct. at 2497.

[62] *See, e.g.*, 126 Cong. Rec. 3,757 (1980) (statement of Senator Kennedy: "The new definition makes our law conform to the United Nations Convention and Protocol").

[63] S. Rep. No. 256, 96th Cong., 1st Sess. (1979).

[64] *Refugee Act of 1979: Hearings on H.R. 2816 Before the Subcomm. on Immigration, Refugees, and International Law of the House Comm. on the Judiciary*, 96th Cong., 1st Sess. 27 (1979) [hereinafter cited as 1979 House Hearings]; *see also id.* at 43, 168, 169, 248, 251, 280, 284, 291, 357, 361, 383, 393.

[65] 1979 House Hearings, *supra* note 55, at 169, 284; *Briefing on the Growing Refugee Problem, Hearing Before the Subcomm. on International Organizations of the Comm. on Foreign Affairs*, 96th Cong., 1st Sess. 4-5 (1979).

[66] H.R. Rep. No. 608, 96th Cong., 1st Sess. 18 (1979).

[67] *See, e.g., In re* McMullen, 17 I. & N. Dec. 542 (1980), *rev'd*, McMullen v. INS, 658 F.2d 1312 (9th Cir. 1981). While *Stevic* was pending, the Board announced a new hybrid formulation by which to test an applicant's claim for refuge. In re Portales, 18 I. & N. Dec. 239, 241 (1982) ("an alien must demonstrate a clear probability that he will be persecuted if returned to his country or a well-founded fear of such persecution").

[68] *McMullen*, 658 F.2d 1312.

claimed that he was likely to be persecuted upon return to Ireland. The applicant presented confirming documentary evidence of his defection from the PIRA, and the PIRA's nature and activities. The denial was based on the ground that under the "clear probability" standard the alien had not demonstrated that the Irish government could not control the PIRA. The court of appeals reversed the Board's holding, explaining that the standard applied would be virtually impossible to satisfy.[69]

In a more recent case, the Board denied withholding to a Mexican national who had been involved in a student political organization, a member of which had been killed. Additionally, the alien had been linked by the Mexican government to the killing, and three expert witnesses testified in support of his claim to a well founded fear of persecution on return to Mexico.[70]

IV. ANALYSIS

Given the adherence of the Board to the prior withholding standard, it was inevitable that the issue in *Stevic*—whether the Refugee Act of 1980 had relaxed the "clear probability" standard of proof through the adoption of the refugee definition and the "well founded fear" criterion—would reach the United States Supreme Court.

A. *The* Stevic *Rationale*

In a unanimous decision authored by Justice Stevens, the Court held in *Stevic* that the refugee standard—"well-founded fear of persecution"—did not apply to the immigration remedy of withholding of deportation.[71] Rather, the Court ruled that the prior administrative "clear probability"[72] standard applied.[73] This result was compelled, according to the Court, by the language of the statute and the legislative history.

The Court began with an analysis of the language of the withholding statute:

> [T]he text of the statute simply does not specify how great a possibility of persecution must exist to qualify the alien for withholding of deportation. To the extent such a standard can be inferred from the bare language of the provision, it appears that a likelihood of persecution is required.[74]

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[69] *Id.*

[70] Marroquin-Manriquez v. INS, 699 F.2d 129 (3d Cir. 1983), *cert. denied*, 104 S. Ct. 3553 (1984).

[71] *Stevic*, 104 S. Ct. at 2490.

[72] A "clear probability" requires a finding of "whether it is more likely than not that the alien would be subject to persecution." *Id.* at 2498.

[73] *Id.*

[74] *Id.* at 2497 (footnote omitted).

The Court found persuasive the facts that the section provided literally for withholding of deportation only if the alien's life or freedom "would" (not "might" or "could") be threatened in the home country, and that the withholding provision, both prior to and after amendment, made no mention of the term "refugee".[75]

The Court distinguished the withholding provision from "discretionary grants of refugee admission or asylum," which incorporate the refugee definition and the well-founded fear of persecution standard.[76] While expressly eschewing the opportunity to discuss the meaning of the well-founded fear standard, the Court characterized as a "moderate position" the notion "that so long as an objective situation is established by the evidence, it need not be shown that the situation will probably result in persecution, but it is enough that persecution is a reasonable possibility."[77]

The Court found its analysis consistent with the Refugee Act which was designed "to eliminate the piecemeal approach to *admission* of refugees previously existing . . . and to establish a systematic scheme for admission and resettlement of refugees."[78] As to the Protocol Relating to the Status of Refugees,[79] the Court noted that it did not require admission at all, nor did it preclude a signatory from exercising judgment among classes of refugees within the refugee definition in determining whom to admit.[80] The Court elaborated:

> [T]o the extent that domestic law was more generous than the Protocol, the Attorney General would not alter existing practice; to the extent that the Protocol was more generous than the bare text of § 243(h) would necessarily require, the Attorney General would honor the requirements of the Protocol and hence there was no need for modifying the language of § 243(h) itself.[81]

Despite the wide-ranging analysis, the Court's holding itself was quite narrow:

> We have deliberately avoided any attempt to state the governing standard beyond noting that it requires that an application be supported by evidence establishing that it is more likely than not that the alien would be subject to persecution on one of the specified grounds. This standard is a familiar one to immigration authorities and reviewing courts, and Congress did not intend to alter it in 1980.

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[75] *Id.* Of course, a different result could have been justified by focusing on the term "threatened," which also appears in the provision, as indicative of the fact that it would be necessary to show but a "reasonable possibility" that the alien would be persecuted upon return to the home country, a standard suggested by Justice Stevens in the asylum context, in order to qualify for withholding of deportation. Sometimes the "plain meaning" of statutory language is in the eye of the beholder.

[76] *Id.* at 2499.

[77] *Id.* at 2498.

[78] *Id.* at 2498-99.

[79] *See* Protocol, *supra* note 32.

[80] *Stevic*, 104 S. Ct. at 2499-2500 n.22.

[81] *Id.* at 2500-01 (footnote omitted).

> . . . We do not decide the meaning of the phrase "well-founded fear of persecution" which is applicable by the terms of the Act and regulations to requests for discretionary asylum. That issue is not presented by this case.[82]

The narrowness of the Court's holding surprised both the parties and knowledgeable observers. The narrow holding has reserved for furture decision a number of issues, including the meaning of the well-founded fear standard.

The impact of the *Stevic* decision will also be quite narrow, because all aliens can apply for asylum in addition to withholding of deportation and thereby take advantage of the possibly more liberal asylum standard.[83] Advocates are therefore likely to apply for both asylum and withholding, and will argue that the evidence shows persecution is more likely than not and, a fortiori, that there is a "reasonable possibility" of persecution.

Only those aliens who were denied asylum on grounds other than the fact that they could not show a well-founded fear of persecution would be affected. This might occur because they were firmly resettled in a third country and are thereby ineligible for asylum,[84] or because they are denied asylum as a matter of discretion.[85] Only a few asylum seekers would fall into these categories.

Of course, by emphasizing the distinction between discretionary asylum and mandatory withholding of deportation, *Stevic* invites an increasing role for discretion in asylum adjudications. Until now, discretion has played a rather circumscribed role.[86] There are, however, indications that the Board may be prepared to endorse a broader role for discretion.[87] An expansion of the exception, however, ultimately could serve to swallow the right to seek asylum.

B. *The Meaning of Well-Founded Fear*

The Court in *Stevic* declined to discuss the importance of the well-founded fear standard and expressly reserved that issue for another day. This subject will undoubtedly become the focus of administrative and judicial litigation. The "well-founded fear" standard, in contrast to the "clear probability" standard, introduces as a factor in the inquiry the character and state of mind of the individual applicant.[88]

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[82] *Id.* at 2501.

[83] 8 U.S.C. §§ 1221-30 (1982) (withholding available in exclusion proceedings); 8 U.S.C. § 1251-60 (1982) (withholding available in deportation proceedings); *see also* 8 C.F.R. § 208.11 (1984); *In re* Matelot, 18 I. & N. Dec. 334 (1982).

[84] 8 C.F.R. § 208.8(f)(ii) (1984).

[85] *In re* Salim, 18 I. & N. Dec. 311 (1982).

[86] *Id.* (in which asylum was denied to an Afghan who had intentionally circumvented the U.S. overseas refugee admission program in Pakistan).

[87] *See, e.g., In re* McMullen, 1984 Int. Dec. No. 2967 (May 25, 1984) at 13 (asylum denied in the exercise of "discretion" because of "serious adverse factor of alien's involvement in the PIRA's random violence directed against innocent civilians").

[88] *See* HANDBOOK ON PROCEDURES AND CRITERIA FOR DETERMINING REFUGEE STATUS UNDER THE

The Court also did not refer to the *Handbook on Procedures and Criteria for Determining Refugee Status Under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees.*[89] The Second Circuit, however, had characterized the *Handbook* as a distillation of the "High Commissioner's 25 years of experience, the practices of governments acceding to the Protocol and literature on the subject."[90] The Board of Immigration Appeals has treated the *Handbook* as a significant source of guidance to the meaning of the Protocol.[91] Courts have also recognized its authoritative character.[92]

According to the *Handbook*, fear must be reasonable under the circumstances, or as Justice Stevens explained it in *Stevic*, there must be a "reasonable possibility" of persecution. Generally, a claimant's fear will have external indicia. Under the Protocol standard, circumstantial evidence is relevant and admissible, and is to be evaluated in terms of "the personal and family background of the applicant, his membership of a particular racial, religious, national, social or political group, *his own interpretation of his situation*, and his personal experiences."[93]

Thus, under the "well-founded fear" standard, the determination of refugee status will "primarily require an evaluation of the applicant's statements rather than a judgment of the situation prevailing in his country of origin."[94] The conditions in the country in question, however, may be relevant as external confirming evidence of the applicant's fear.

As the post-1980 asylum cases reach the courts, the precise content of the refugee definition will become an issue of increasing importance. Perhaps the most significant aspect of the *Stevic* decision is what it did *not* decide: the meaning of well-founded fear.

V. The Response of the Board

In a recent case the Board of Immigration Appeals discussed the impact of *Stevic* on the standards of proof required in asylum and withholding of deportation cases.[95] Recognizing that the federal courts have split on the issue,[96] the Board held that the asylum and withholding standards are congruent.

1951 Convention and the 1967 Protocol relating to the Status of Refugees 11-13, ¶¶ 37-41, 45 (1979) [hereinafter cited as Handbook].

[89] *Id.*

[90] *Sava*, 678 F.2d at 406.

[91] *In re* Frentescu, 18 I. & N. Dec. 244 (1982); *In re* Rodriguez-Palma, 17 I. & N. Dec. 465 (1980).

[92] Zavala-Bonilla v. INS, 730 F.2d 562, n.7 (9th Cir. 1984); Hotel & Restaurant Employees Union, Local 25 v. William French Smith, 594 F. Supp. 502, 512 (D.D.C. 1984).

[93] Handbook, *supra* note 88, at 12, ¶ 41 (emphasis added).

[94] *Id.* at 11, ¶ 37.

[95] *In re* Acosta-Solorzano, Int. Dec. No. 2986, slip op. (BIA March 1, 1985). Prior to the decision in *Acosta-Solorzano*, the Board had cited *Stevic* in over 100 unpublished decisions without differentiating between the standards for asylum and withholding of deportation. Research memorandum in author's files.

[96] *Id.* at 3.

> As we construe them, both the well-founded-fear standard for asylum and the clear-probability standard for withholding of deportation require an alien's facts to show that the alien possesses a characteristic a persecutor seeks to overcome by punishing the individuals who possess it, that a persecutor is aware or could easily become aware that the alien possesses this characteristic, that a persecutor has the capacity of punishing the alien, and that a persecutor has the inclination to punish the alien. Accordingly, withholding of deportation are not meaningfully different and, in practical application, converge.[97]

It found that formulations of the asylum standard such as "good reason" or "valid reason" to fear persecution "do not adequately describe the well-founded fear standard."[98]

VI. The Response of the Courts

Several courts have also had occasion to respond to the *Stevic* decision.[99] Circuit courts have addressed both the "clear probability" and "well-founded fear" standards. Unfortunately, they do not agree as to the amount and nature of proof needed to meet each standard, or even the application of the standards. There is a continuing split in the circuits regarding the standards, with the Sixth, Seventh, and Ninth Circuits lining up together, and with the Third Circuit in opposition.[100]

The Third Circuit stands alone in its post-*Stevic* contention that there is no difference between the two standards. In *Sotto v. Immigration and Naturalization Service*,[101] the court restated its holding from *Rejaie v. Immigration and Naturalization Service*[102] that the withholding and asylum claims are equivalent:

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[97] *Id.* at 19-20. The Immigration and Naturalization Service apparently is considering the issuance of regulations which adopt the approach in *Acosta-Solorzano* by equating the asylum and withholding standards. N.Y. Times, March 17, 1985, A, at 28, col. 1.

[98] *Acosta-Solorzano*, at 18. The Board did recognize, however, that an alien's testimony should not be rejected "solely because it is self-service." *Id.* at 6.

[99] The circuits are also split on a related issue—the appropriate standard of judicial review of administrative action in asylum cases. The Third Circuit has held that the abuse of discretion standard is appropriate. *Marroquin-Manriquez*, 699 F.2d at 133 n.5. The Second, Seventh and Ninth Circuits, however, have held that the refugee status determination should be supported by substantial evidence. Espinoza-Martinez v. INS, No. 83-7916; slip op. (9th Cir. March 8, 1985); Bolanos-Hernandez v. INS, 749 F.2d 1316 (9th Cir. 1984); Carvajal-Munoz v. INS, 743 F.2d 562, 567 (7th Cir. 1984); Yiu Sing Chun v. Sava, 708 F.2d 869, 876 (2d Cir. 1983); Sarkis v. Nelson, 585 F. Supp. 235, 237, 238 (E.D.N.Y. 1984).

[100] Sotto v INS, 748 F.2d 832 (3d Cir. 1984); *see also* Sankar v. INS, No. 84-3341, slip op. (3d Cir. Jan. 29, 1985).

[101] Rejaie v. INS, 691 F.2d 139 (3d Cir. 1982).

[102] *Sotto*, 748 F.2d at 832. The issue was not necessary to the resolution of *Sotto*, which involved a citizen of the Philippines who claimed that he had been harassed and intimidated for political reasons. Despite the strict standard applied, the Third Circuit remanded the case so that a corroborative affidavit could be considered by the administrative authorities. The affidavit, written by a former general

> Although that issue remains open in the Supreme Court, it is not open in this court. In *Rejaie*, which for all practical purposes involved both a claim for withholding of deportation and an application for asylum, we held that "there is no difference" between the two standards, and that a "well-founded fear" . . . equates with "clear probability". . . . We read nothing in *Stevic* to undermine the *Rejaie* holding. Since a request to withhold deportation is frequently joined with a request for asylum in the context of deportation proceedings, it is fitting to apply congruent standards.[103]

The Sixth, Seventh, and Ninth Circuits, however, differentiate between the "well-founded fear" and "clear probability" standards.

The Sixth Circuit in *Youkhanna v. Immigration and Naturalization Service* has differentiated the standards by holding that review of a request for asylum requires a separate analysis.[104] The court noted that the "well-founded fear" standard required a lesser showing than the "clear probability" standard, but found that neither standard had been satisfied in that case.

However, the difference between the two standards has not been explained in terms of the evidence required to support either claim. The Sixth Circuit has indicated that "objective" evidence is needed to meet both standards. In *Dally v. Immigration and Naturalization Service*,[105] the court denied applications for asylum and withholding of deportation by several Iraqi nationals who claimed that they faced persecution, harassment, and detention upon return to Iraq as Chaldean Catholics.[106] The Sixth Circuit resolved the asylum and withholding issues together without differentiation, explaining:

> As we read *Stevic* and the earlier cases dealing with deportation, we conclude that the "clear probability" test requires at least that an alien show that it is more likely than not that *he as an individual* will be subject to persecution if forced to return to his native land. A "clear probability" of persecution cannot be proven by the introduction of documentary evidence, not pertaining to the applicant individually, that depicts a general lack of freedom or the probability of human rights abuses in the alien's native land.[107]

In view of the absence of "objective" evidence, the court felt compelled to reject the claims. Acknowledging the seriousness of the allegation, the court nonetheless

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and Philippine Assemblyman, stated that Sotto was wanted in the Philippines because of political activities, that Sotto's father had been persecuted and tortured in his stead, and opined that Sotto would be imprisoned and mistreated upon return to the Philippines.

[103] Youkhanna v. INS, 749 F.2d 360 (6th Cir. 1984).

[104] *Id.* at 362.

[105] Dally v. INS, 744 F.2d 1191 (6th Cir. 1984).

[106] *Id.*

[107] *Id.* at 1195. *See also* Shamon v. INS, 735 F.2d 1015 (6th Cir. 1984) (decided after but not mentioning *Stevic*), Reyes v. INS, 747 F.2d 1045 (6th Cir. 1984). *Cf.* Lemus v. INS, 741 F.2d 765 (5th Cir. 1984); Perwolf v. INS, 741 F.2d 1109 (8th Cir. 1984).

stated that the immigration laws did not permit relief "based on a petitioner's self-serving statements."[108]

Dally was cited by the Sixth Circuit in *Nasser v. Immigration and Naturalization Service*,[109] where asylum and withholding claims by an Iraqi national were rejected despite testimony by the alien of his imprisonment on several occasions, a beating by Baath officials, and the killing of his father by such a beating.[110] The court noted that "[o]utside of these subjective claims, no other evidence or affidavits were introduced which corroborated any of Nasser's individualized claims."[111]

In contrast to the Sixth Circuit's reticence on the issue, the Seventh Circuit has addressed the difference in the evidence required for asylum and withholding of deportation. The elaborate discussion in *Carvajal-Munoz v. Immigration and Naturalization Service*[112] indicates that the "clear probability" standard requires objective evidence to corroborate the applicant's testimony, while "sometimes" the applicant's testimony alone will be sufficient to meet the "well-founded fear" standard.

Carvajal involved a man who was a native of Chile and a former citizen of Argentina. He claimed he would be persecuted upon his return to Argentina because of his birth in Chile, his past political activities, and his renunciation of his Argentine citizenship. He testified in particular that he had been harassed and detained previously in Argentina.[113] Citing a prior decision,[114] the Seventh Circuit noted that under the "clear probability" standard, held applicable to withholding of deportation in *Stevic*, "objective evidence that the alien will be persecuted is necessary. The alien's own assertions, without corroboration, will not suffice."[115] The court further explained that it recognized the burden was not an easy one. However the court maintained (1) that the applicant must provide specific facts regarding his or her conduct and contentions; (2) that statements of the applicant's belief were insufficient; and (3) that the evidence must establish the particular applicant would "more likely than not" be singled out for persecution.[116]

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[108] *Id.* at 1194.

[109] Nasser v. INS, 744 F.2d 542 (6th Cir. 1984).

[110] *Id.* at 545.

[111] *Id.*

[112] *Carvajal-Munoz*, 743 F.2d at 562.

[113] *Id.* at 563.

[114] *Kashani*, 547 F.2d 376.

[115] *Carvajal-Munoz*, 743 F.2d at 573 (citing and quoting *Kashani*, 547 F.2d 376).

[116] The Seventh Circuit explained that "[t]his view [differentiating the two standards] comports well with the structure of the Immigration Act: establishing an entitlement to withholding of deportation under section 243(h) should require a greater evidentiary burden than establishing 'refugee' status so as to be eligible for a discretionary grant of asylum under section 208." *Id.* at 575. On the other hand, it might appear to be anomalous to require a greater showing in order to achieve the lesser status of temporary withholding of deportation from a specific country.

Again citing its prior decision, the Seventh Circuit differentiated the "clear probability" withholding standard from the less stringent "well-founded fear" asylum test.[117] As to the latter test, it explained:

> The applicant must present specific facts establishing that he or she has actually been the victim of persecution or has some other good reason to fear that he or she will be singled out for persecution on account of race, religion, nationality, membership in a particular social group or political opinion. Ordinarily, this must be done through objective evidence supporting the applicant's contentions. Sometimes, however, the applicant's own testimony will be all that is available regarding past persecution or the reasonable possibility of persecution. In these situations, the applicant's uncorroborated testimony will be insufficient to meet the evidentiary burden unless it is credible, persuasive, and points to specific facts that give rise to an inference that the applicant has been or has a good reason to fear that he or she will be singled out for persecution on one of the specified grounds, or . . . must show through testimony and corroborative objective evidence that he or she has good reason to fear persecution on one of the specified grounds.[118]

The Seventh Circuit in *Carvajal-Munoz* concluded, however, that the alien had satisfied neither burden.[119]

The Ninth Circuit recently addressed *Stevic* in *Bolanos-Hernandez*,[120] which involved the review of a denial of withholding and asylum to a Salvadoran national who had reported a specific death threat by the guerrillas as a result of his refusal to join them. The court stated that the difference in language between section 243(h), withholding of deportation, and section 208(a), asylum, supported their conclusion that the asylum standard was more liberal.[121]

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[117] *Id.* at 572-575. The Seventh Circuit noted that while it had predicted that the two standards "will in practice converge," that "was only a prediction made before the passage of the Refugee Act and does not express our view of the effect of that statute." *Id.* at 574.

[118] *Id.* at 574 (footnote omitted).

[119] In view of the difference in the nature and scope of review, the court suggested that in the future immigration judges "make asylum decision, whenever possible, on a separate record and before the deportation hearing itself, and not along with a withholding of deportation decision, which is to take place after deportability has been determined and a country of deportation designated." *Id.* at 570.

[120] *Bolanos-Hernandez*, 749 F.2d at 1316. *See also* Espinoza-Martinez v. INS, No. 83-7916, slip op. (9th Cir. March 8, 1985) (necessary for alien to introduce some specific evidence to show that persecution would be directed to him as an individual); Saballo-Cortez v. INS, 749 F.2d 1354 (9th Cir. 1984) (not necessary for court to "determine the proper standard of proof necessary to make a prima facie showing of a "well-founded fear of persecution" because of administrative finding that alien's testimony not "credible.")

[121] *Bolanos-Hernandez*, 749 F.2d at 1321. The court also suggested a procedure for reviewing the administration determinations.

> When the Board has disposed of the . . . [asylum and withholding] claims in this combined fashion, we believe the proper approach for the reviewing court is first to consider the section 243(h) claim under the more stringent clear-probability standard. Then, if it concludes that the alien's 243(h) petition was properly denied, it should review the 208(a) claim under the more generous well-founded fear standard. However, if the court concludes that the alien

The Ninth Circuit found both asylum and withholding warranted in this case, without finding corroborative testimony necessary:

> We recognize that omitting a corroboration requirement may invite those whose lives or freedom are not threatened to manufacture evidence of specific danger. But the imposition of such a requirement would result in the deportation of many people whose lives genuinely are in jeopardy. Authentic refugees rarely are able to offer direct corroboration of specific threats. . . . Persecutors are hardly likely to provide their victims with affidavits attesting to their acts of persecution.[122]

The court noted that if an alien's own testimony about a threat, when "unrefuted and credible," was insufficient to establish the fact that the threat was made, it would be "close to impossible [for any political refugee] to make out a Sec. 243(h) case."[123]

The Ninth Circuit also addressed the role of documentary evidence, stating that because the mere fact a threat was made could be insufficient to establish a clear probability of persecution, substantiation of the threat's seriousness was important. "What matters is whether the group making the threat has the will or the ability to carry it out. It is here that general corroborative evidence, such as documentary evidence, may be most useful."[124] The court found the threat reported by Mr. Bolanos-Hernandez to be a serious one supported by general documentary evidence, and ruled that withholding and asylum were warranted.[125]

Even prior to the decision in *Bolanos-Hernandez*, the Ninth Circuit had discussed the evidence needed to prove eligibility for asylum when it reversed a Board of Immigration denial of asylum in *Zavala-Bonilla v. Immigration and Naturalization Service*.[126] In *Zavala-Bonilla*, the asylum applicant was an active, high-level trade union member in El Salvador, who was known to the Salvadoran authorities. After coming to the United States, Ms. Zavala-Bonilla applied for political asylum and supported her application with four letters from friends in El Salvador, a letter from her union, and numerous press and international organization accounts of oppressive conditions in El Salvador. The State Department issued a positive advisory opinion. The Board of Immigration Appeals, however, concluded that the asylum claim was deficient because it was not supported by "objective evidence."[127]

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met the clear probability standard, it need go no farther since the well-founded fear standard will, *a fortiori*, also have been met.

Id. at 1322.

[122] *Id.* at 1324 [citations omitted].

[123] *Id.* at 1324 (citing and quoting *McMullen*, 658 F.2d at 1319).

[124] *Id.* at 1324.

[125] *Id.* at 1326. The court also determined that the Board of Immigration Appeals had erred "as a matter of law" in concluding that "specific threats are insufficient to establish a threat of persecution if they are representative of a general level of violence in a foreign country," and that "neutrality does not constitute a political opinion." *Id.* at 1328.

[126] *Zavala-Bonilla*, 730 F.2d 562. *See also Sotto*, 748 F.2d 832.

[127] *Zavala-Bonilla*, 730 F.2d at 563.

The Board had "denigrated" the letters as "gratuitous speculations." The court, however, disagreed: "[I]t is difficult to imagine, given her circumstances, what other forms of testimony Zavala-Bonilla could readily present."[128] The court remanded the matter directing the Board to "fully consider the letters."[129]

The decisions of the Ninth Circuit in *Zavala-Bonilla* and *Bolanos-Hernandez* take a common sense approach. In the asylum context, it is important to distinguish between the individual's subjective state of mind and so-called "objective" evidence. A fear of persecution may well be confirmed by external actions and behavior on the part of the applicant for asylum and others. Such "objective" evidence may be established through the testimony of the asylum applicant, or it may be corroborated by the testimony of others or by circumstantial evidence.

The question is what evidence reasonably can be expected to be available. [130] If it is reasonable under the circumstances to expect that only the testimony of the applicant would be forthcoming, then that testimony should be sufficient to establish the claim, assuming that it is facially plausible.[131] If it were reasonable to anticipate corroboration (for example, a diplomatic passport held by a former embassy official stationed abroad at the time of a change of government), then its unexplained absence would be significant. These are the kinds of issues fact-finders face constantly in other contexts. As immigration asylum officers and judges become more familiar with these principles, the quality of decision-making should be enhanced.[132]

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[128] *Id.* at 565.

[129] *Id.* at 567.

[130] The Immigration and Naturalization Service has taken a similar position in the context of written guidelines for those who are to adjudicate overseas refugee applications under the same legal standards.

> A statement by the applicant must not be disregarded solely because it is self-serving in that it supports his own claim. Testimony by the applicant is frequently all that is available, and if that testimony is credible, it is sufficient to establish a claim to refugee status. An overall assessment of credibility should be made by the adjudicator, in which the interest of the testifying party in the outcome of the case is one factor to be considered. Other factors to be considered are: (1) the demeanor of the applicant; (2) the knowledge which the adjudicator possesses, from the State Department or from other sources, regarding conditions in the applicant's country and whether the applicant's account is supported by, consistent or inconsistent with, that knowledge; (3) whether any lack of corroborating documentary evidence or witnesses is reasonable under all the circumstances of the case; and (4) the internal consistency of the applicant's account. In close cases, where the applicant's account appears to be credible, but the adjudicator is unsure as to whether a valid claim to refugee status has been established, the adjudicator may grant the claim, if the account is believable in light of the officer's knowledge of country conditions.

IMMIGRATION AND NATURALIZATION SERVICE, WORLDWIDE GUIDELINES FOR OVERSEAS REFUGEE PROCESSING 21, 22 (1983).

[131] *See* HANDBOOK, *supra* note 88, at 48, ¶¶ 203, 204.

[132] While it is beyond the scope of this article, aspects of international law can also provide sources of interpretation for the meaning and application of the refugee standard. *See, e.g.*, Rodriquez-Fernandez v. Wilkinson, 654 F.2d 1382, 1388 (10th Cir. 1981). References could include the intent of the drafters of the 1951 Convention relating to the Status of Refugees, and current state practice. The United Nations

VI. CONCLUSION

By differentiating the standard of proof in withholding of deportation cases from the refugee standard in asylum cases the Supreme Court has acted contrary to a general object of the Refugee Act—to unify standards and procedures in the area.[133] *Stevic* reintroduces complications in an area which Congress sought to regularize through the enactment of the Refugee Act. The *Stevic* decision would seem to invite legislation specifically stating that the refugee definition applies to individuals seeking withholding as well as to those seeking asylum in order to achieve the uniformity sought by Congress in the Refugee Act.

Such legislation would accord with the obligations of the United States under the United Nations Protocol. Under the Court's analysis in *Stevic*, a person who meets the definition of refugee under the Protocol could be deported to face persecution in violation of Article 33.[134] While any such action would presumably constitute an abuse of discretion under *Stevic*, there is reason to foreclose any ambiguity and make it clear that the refugee standard of well-founded fear of persecution applies.

Such legislative change will not solve all the problems. The circuit courts do not agree on the meaning of "well-founded fear," nor do they agree on the quantum and nature of evidence necessary to satisfy that standard. So long as the circuits remain split on the refugee standard, basic questions about its application in the asylum context will remain open. It is likely that the Supreme Court will soon need to reexamine these issues.

High Commissioner for Refugees, that entity which is responsible for the interpretation and supervision of the application of the provisions of the Convention and Protocol, has taken the position that the drafters' unambiguous inent was that the term "well-founded fear of being persecuted" in the 1951 Convention means that in order for a person to qualify for refugee status it must be shown that his subjective fear of persecution is based upon "objective" facts which make the fear reasonable under the circumstances, but not necessarily that he would be more likely than not to become the victim of persecution. (Brief of the Office of the United Nations High Commissioner for Refugees as Amicus Curiae in Support of Respondent, INS v. Stevic, No. 82-973). As to the latter, translation and nuance of language sometimes tend to obscure the comparison. In certain instances, however, guidance is possible. *See, e.g.*, Khera and Khawaja [1983] 2 W.L.R. 321, in which the House of Lords, according to the Immigration Appeal Tribunal in 1984 in *Enninful and Secretary* (3423), indicated that it is not necessary for a person applying for asylum to prove that on the balance of probabilities he would be persecuted, but rather that it is sufficient to show that th fear of persecution is well-founded, even though the person faces a less than even chance of persecution.

In THE REFUGEE IN INTERNATIONAL LAW (Oxford 1983), Guy S. Goodwin-Gill points out that a balance of probabilities standard fails to recognize that a refugee is involved in an effort to predict future occurrences upon return to his or her home country. He cites Fernandez v. Government of Singapore, [1971] 1 W.L.R. 987, an opinion of the House of Lords in an extraadition case. In that case, Lord Diplock concluded that the individual need not show that it was more likely than not that he would be detained if returned to the requesting country, but that a lessor degree of likelihood sufficed such as "a reasonable chance," "substantial grounds for thinking," or "a serious possibility." Goodwin-Gill argues that a refugee should be accorded no less benevolent a standard. *Id.* at 24.

[133] *See Yiu Sing Chun*, 708 F.2d 869 (stowaway held entitled to evidentiary hearing on asylum claim even though a hearing is otherwise precluded by exclusion statute).

[134] 104 S. Ct. at 2500-01, n.22.