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# **We Don't Need To See Them Cry: Eliminating the Subjective Apprehension Element of the Well-Founded Fear Analysis for Child Refugee Applicants**

Bridgette A. Carr \*

- I. INTRODUCTION
- II. THE WELL-FOUNDED FEAR REQUIREMENT OF THE REFUGEE  
DEFINITION
  - A. *The Origins of the Well-Founded Fear Analysis*
  - B. *The Adoption of the Objective Risk Plus Subjective Apprehension Approach*
- III. ANALYZING THE SUBJECTIVE APPREHENSION ELEMENT OF  
WELL-FOUNDED FEAR
  - A. *Potential Benefits*
  - B. *A Possible Barrier to Refugee Protection*
    - 1. Difficulties in Identifying and Articulating State of Mind
    - 2. Potential for Decision Maker Abuse
- IV. CHILDREN AND THE SUBJECTIVE APPREHENSION ELEMENT OF  
WELL-FOUNDED FEAR
  - A. *The Vulnerability of Children During Refugee Status Determinations*
  - B. *The Hurdle That Children Often Cannot Surmount*

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- V. THE PROCEDURAL “EXEMPTION” FOR CHILDREN FROM THE SUBJECTIVE APPREHENSION ELEMENT
  - A. *Administrative Guidelines: Canada, the United States and the UNHCR*
  - B. *Decision Maker Discretion*
- VI. THE NEED TO FORMALIZE A SINGULAR OBJECTIVE RISK APPROACH FOR CHILDREN
  - A. *The Failure of the Procedural Exemption Approach*
  - B. *Hidden Dangers Within the Current Procedural Exemption Approach*
- VII. BENEFITS OF A SINGULAR OBJECTIVE RISK APPROACH FOR CHILDREN
- VIII. CONCLUSION

## I. INTRODUCTION

The 1951 Convention Relating to the Status of Refugees (Convention)<sup>1</sup> and the 1967 Protocol Relating to the Status of Refugees (Protocol)<sup>2</sup> were designed to protect persons whose need to remain abroad is a result of fear of persecution based on civil or political status.<sup>3</sup> The language of the Convention is broad.<sup>4</sup> It was designed to protect a person who:

owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.<sup>5</sup>

1. U.N. Convention Relating to the Status of Refugees, July 28, 1951, 19 U.S.T. 6577, 189 U.N.T.S. 2545 [hereinafter Convention].

2. U.N. Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 8791 [hereinafter Protocol].

3. See JAMES C. HATHAWAY, *THE LAW OF REFUGEE STATUS* 10 (1991) [hereinafter HATHAWAY, *REFUGEE STATUS*] (observing that “only persons whose migration is prompted by a fear of persecution on the ground of civil or political status come within the scope of the Convention-based protection system.”).

4. See *Minister for Immigration & Multicultural Affairs v. Abdi* [1999] F.C.A. 299, ¶ 39 (26 March 1999) (explaining that in light of the purpose of the Convention, it is a “well-settled principle that a broad, liberal and purposive interpretation must be given to the language” of the refugee definition). See generally Convention, *supra* note 1, pmb1., art. 1 (noting that the “the term ‘refugee’ shall apply to *any person*” who fulfills the refugee criteria) (emphasis added).

5. Convention, *supra* note 1, at art. 1, § (A)(2).

At first glance, this language seems potentially to encompass all persons, regardless of age<sup>6</sup>, sex,<sup>7</sup> or cognitive level. However, the dominant international interpretation of the phrase “well-founded fear” has restricted the Convention in such a way as to require, at a minimum, an expression of fear by the refugee applicant.<sup>8</sup> The United Nations High Commissioner for Refugees (UNHCR) Handbook<sup>9</sup> and numerous jurisdictions including Canada, Australia, the United Kingdom, the United States of America, Hong Kong, and Ireland have restricted the ability of the Convention to be applied universally by requiring persons seeking refugee protection to fulfill both an objective risk plus a subjective apprehension element under the well-founded fear analysis.<sup>10</sup> By forcing an applicant to prove his or her state of

6. There is no lower age limit to the right to claim asylum. Jacqueline Bhabha, “*More Than Their Share of Sorrows*”: *International Migration Law and The Rights of Children*, 22 ST. LOUIS U. PUB. L. REV. 253, 266 (2003) [hereinafter Bhabha, *Rights of Children*] (citing Universal Declaration of Human Rights, pmb., G.A. Res. 217A(III), U.N. GAOR, 3d Sess., at 71, U.N. Doc. A/810 (1948); Convention, *supra* note 1, arts. 32-33; International Covenant on Civil and Political Rights, pmb., Dec. 19, 1966, 999 U.N.T.S. 171, 173; Convention Against Torture and other Cruel, Inhuman, or Degrading Treatment or Punishment art. 3(1), Dec. 10, 1984, 1465 U.N.T.S. 85, 114; OAU Convention Governing the Specific Aspects of Refugee Problems in Africa art. 1, ¶¶ 1-2, Sept. 10, 1969, 1001 U.N.T.S. 45, 47; Cartagena Declaration on Refugees, Colloquium on the International Protection of Refugees in Central America, Mexico and Panama art. III, ¶ 3, Inter-Am. C.H.R., OAS/Ser.L/V/II.66, doc. 10, rev. 1 (1984)).

7. Julie R. Hess, *United States and Africa on FGM: Cultural Comparatives, Resolutions, and Rights*, 10 ILSA J. INT'L. & COMP. L. 581, 593 (2004) (explaining that the “U.N. Convention Relating to the Status of Refugees[] affords a broad interpretation of women’s rights so as to provide women the same protections as men.”). See UNHCR, SEXUAL AND GENDER BASED VIOLENCE AGAINST REFUGEES, RETURNEES AND INTERNALLY DISPLACED PERSONS: GUIDELINES FOR PREVENTION AND RESPONSE 109 (2003) (noting that the “1951 Refugee Convention caters to all persons fleeing persecution, without any distinction premised on their socially defined gender roles.”).

8. James Hathaway, *Is There a Subjective Element in the Refugee Convention’s Requirement of “Well-Founded Fear?”*, 26 MICH. J. INT’L. L. 505, 510 (2005) [hereinafter Hathaway, *Well-Founded Fear*] (“The dominant view worldwide is that the test for well-founded fear is comprised of two essential elements. This bipartite approach requires the applicant to demonstrate a significant, actual risk of being persecuted . . . as well as an emotional state of trepidation with respect to that risk . . .”).

9. OFFICE OF THE 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. HCP/IP/4/Eng/Rev.1 (1979) (reedited 1992) [hereinafter UNHCR HANDBOOK]. The UNHCR is the body charged with overseeing the implementation of the Convention. Convention, *supra* note 1, art. 35.

10. Saleh v. U.S. Dep’t of Justice, 962 F.2d 234, 239 (2d Cir. 1992); Canada (Att’y Gen.) v. Ward, [1993] 2 S.C.R. 689, 691; Regina v. Sec’y of State for the Home Dep’t, [1988] A.C. 958 (H.L.) (appeal taken from Q.B.) (U.K.); Re Minister for Immigration & Multicultural Affairs, [2001] H.C.A. 22 (Austl.); Zgnat’ev v. Minister for Justice, Equality & Law Reform, [2001] I.E.H.C. 70 (Ir.); Luu the Truong v. Chairman of the Refugee Status Review Bd., [2001] H.C.A.L. 3261, ¶ 45 (H.K.), available at <http://legalref.judiciary.gov.hk/lrs/common/ju/judgment.jsp>.

mind, the protections of the Convention are thus restricted to those applicants who have the ability to conceive a subjective apprehension and who are able to consistently and credibly articulate their state of mind.

While all applicants face difficulties in establishing their subjective apprehension,<sup>11</sup> the harm of requiring a subjective apprehension element within the well-founded fear analysis is exacerbated in the case of child refugee applicants. Requiring children, including infants, to demonstrate their subjective apprehension to a decision maker creates a barrier to effective protection that many children are unable to surmount.<sup>12</sup> The difficulties and sometimes the inability of child refugee applicants to satisfy the subjective apprehension element of the well-founded fear analysis has been recognized implicitly and explicitly through administrative guidelines in Canada,<sup>13</sup> the United States,<sup>14</sup> the UNHCR,<sup>15</sup> and through the actions of decision makers. This recognition has given child refugee applicants a procedural exemption from the subjective apprehension requirement.<sup>16</sup> However, this procedural exemption is not sufficient. In order to guarantee that child refugee applicants are not denied refugee protection because of their inability to conceive or to articulate their subjective apprehension, this Article argues that the procedural exemption be strengthened and formalized

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11. See Hathaway, *Well-Founded Fear*, *supra* note 8, at 517. Hathaway explains that: it is generally difficult, if not impossible, for decisionmakers to determine in a formal hearing process whether an applicant is genuinely fearful or not. The bipartite approach clearly assumes the ability of decisionmakers accurately and reliably to ascertain whether an applicant is subjectively fearful. The crude investigative tools available to decisionmakers, however, are often ill-suited to unraveling the mysteries of an applicant's psyche. The analysis of a person's emotional state—an inherently problematic exercise even in the best of circumstances—is especially difficult in the context of refugee law. Indeed, the subjective fear inquiry is so difficult and fraught with uncertainty that erroneous determinations are virtually assured. This is especially true where an effort is made to assess subjective fear based on an applicant's outward demeanor and the content of his or her testimony.

*Id.* (citing *Andjongo v. Sec'y of State for the Home Dep't*, No. 12341, HX 7491/94 (Immigr. App. Trib. 1995) (U.K.)); see also Elizabeth Adjin-Tettey, *Reconsidering the Criteria for Assessing Well-Founded Fear in Refugee Law*, 25 MAN. L.J. 127, 131 (1997) (arguing that some applicants "may not 'appear fearful' enough for . . . decision-makers [who are] measuring [their] emotional reaction against a Western male standard . . .").

12. See *infra* notes 13-15 and accompanying text.

13. Immigration and Refugee Board of Canada, *Guidelines Concerning Child Refugee Claimants: Procedural and Evidentiary Issues* (Sept. 30, 1996), available at [http://www.irb-cisr.gc.ca/en/about/guidelines/child\\_e.htm](http://www.irb-cisr.gc.ca/en/about/guidelines/child_e.htm) [hereinafter *Child Refugee Guidelines*].

14. Memorandum from Jeff Weiss, Acting Director, Office of International Affairs, U.S. Dep't of Justice Immigration & Naturalization Service, to Asylum Officers, Immigration Officers, & Headquarters Coordinators, *Guidelines for Children's Asylum Claims* [File No. 120/11.26] (Dec. 10, 1998), available at [http://uscis.gov/graphics/lawsregs/handbook/10a\\_ChldrnGdlns.pdf](http://uscis.gov/graphics/lawsregs/handbook/10a_ChldrnGdlns.pdf) [hereinafter *INS Guidelines*].

15. UNHCR HANDBOOK, *supra* note 9.

16. See *supra* notes 13-15 and accompanying text.

into a singular objective risk test by the UNHCR and across all jurisdictions that are signatories to the Convention and Protocol.

Part II of this Article describes the origins of the well-founded fear analysis and the adoption of the objective risk plus subjective apprehension approach.<sup>17</sup> Part III examines the effect of the subjective apprehension requirement on all refugees.<sup>18</sup> Part IV focuses on the impact that the subjective apprehension requirement has on child refugee applicants.<sup>19</sup> Part V examines the procedural exemption that currently exists for child refugee applicants.<sup>20</sup> Part VI illustrates the failure of the procedural exemption approach and discusses the need to formalize the singular objective risk test for child refugee applicants.<sup>21</sup> Part VII highlights the benefits of the singular objective risk approach.<sup>22</sup> Finally, this Article concludes that formalizing the procedural exemption approach into a singular objective risk test for child refugee applicants under the well-founded fear analysis is necessary in order to ensure effective protection under the Convention and Protocol. This modification is actually consistent with what the UNHCR, Canada, the United States, and many decision makers are currently doing in their refugee status determinations.<sup>23</sup> Under the current well-founded fear analysis framework, the risk facing child refugee applicants of denial of effective protection simply because decision makers did not “see” their subjective fear despite the objective risk element is just too great.

## II. THE WELL-FOUNDED FEAR REQUIREMENT OF THE REFUGEE DEFINITION

In order to understand why the subjective apprehension element should be eliminated for child refugee applicants, it is necessary to review briefly why the subjective apprehension element is even part of the well-founded fear analysis in the first place.

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17. See discussion *infra* notes 24-49 and accompanying text.

18. See discussion *infra* notes 50-96 and accompanying text.

19. See discussion *infra* notes 97-131 and accompanying text.

20. See discussion *infra* notes 132-77 and accompanying text.

21. See discussion *infra* notes 178-226 and accompanying text.

22. See discussion *infra* notes 227-32 and accompanying text.

23. See discussion *infra* Part V.

### A. *The Origins of the Well-Founded Fear Analysis*

The focus of many refugee status determinations is on the phrase “well-founded fear.”<sup>24</sup> Generally, well-founded fear has been interpreted to contain two parts: objective risk plus subjective apprehension.<sup>25</sup> Therefore, in most jurisdictions, in order to have a well-founded fear under the Convention, applicants for refugee status must establish that an objective risk based on their civil or political status exists in the country from which they fled,<sup>26</sup> and that they subjectively have this fear in their minds.

This dualistic interpretation of well-founded fear can be traced back to the predecessor of the Convention: the Constitution of the International Refugee Organization (IRO).<sup>27</sup> Like its modern counterpart, the IRO definition of a refugee contained two parts.<sup>28</sup> The first part, which had a more objective focus, included persons who expressed “valid reasons” for not wanting to return to their country of origin, including “[p]ersecution, or fear, based on reasonable grounds of persecution . . . .”<sup>29</sup> The second part of the IRO definition included a subjective element in that it recognized “factors in the attitude of the individual himself.”<sup>30</sup>

The dualistic approach used in the IRO for the definition of a refugee was the starting point for the drafters of the refugee definition in the Convention.<sup>31</sup> The phrase well-founded fear is “a technical term, evolved by the drafters of the Refugee Convention from the clumsy phrase ‘persecution, or fear based on reasonable grounds of persecution’ employed in Part I, section C, of Annex I to the IRO Constitution.”<sup>32</sup> From this starting point, and also from a very normative and definitional understanding of the word

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24. UNHCR HANDBOOK, *supra* note 9, part 1, ch. 2(B)(2)(a)(37) (“The phrase ‘well-founded fear of being persecuted’ is the key phrase of the [refugee] definition.”).

25. See sources cited *supra* note 10 and accompanying text.

26. See Hathaway, *Well-Founded Fear*, *supra* note 8, at 511.

27. Constitution of the International Refugee Organization, Dec. 15, 1946, 18 U.N.T.S. 3 [hereinafter IRO Constitution].

28. See discussion *supra* notes 25-26 and accompanying text.

29. IRO Constitution, *supra* note 27, annex 1, pt. 1, sec. C(1)(a)(i). See generally HATHAWAY, REFUGEE STATUS, *supra* note 3, at 66 (explaining that the IRO “had competence over persons who had *already* suffered persecution in their home state, as well as over persons judged by the administering authorities to face a *prospective risk* of persecution were they to be returned to their own country.”).

30. HATHAWAY, REFUGEE STATUS, *supra* note 3, at 67 (citing Statement of Secretary-General, U.N. Doc. A/C.3/527 at 7 (1949)).

31. Louis Henkin, *Statement to the Ad Hoc Committee on Statelessness and Related Problems*, U.N. Doc. E/AC.32/SR.5 (Jan. 19, 1950) (“The General Assembly had envisaged a definition of refugees corresponding to that contained in the Constitution of the IRO, on the understanding that that definition must be static . . .”).

32. I ATLE GRAHL-MADSEN, THE STATUS OF REFUGEES IN INTERNATIONAL LAW 173 (1966).

“fear,”<sup>33</sup> decision makers in jurisdictions all over the world began to evaluate refugee applicants from an objective risk plus subjective apprehension approach when analyzing an applicant’s well-founded fear.<sup>34</sup>

### B. *The Adoption of the Objective Risk Plus Subjective Apprehension Approach*

The use of the objective risk plus subjective apprehension analysis is common across many jurisdictions, including the United States, Canada, the United Kingdom, Australia, Ireland, and Hong Kong.<sup>35</sup> In United States jurisprudence, the objective risk plus subjective apprehension approach slipped in through the back door in *INS v. Cardoza-Fonseca*.<sup>36</sup> In that case, the Supreme Court debated whether the standard of proof governing asylum applications was the same as the standard of proof for withholding of deportation.<sup>37</sup> The focus of *Cardoza-Fonseca* was not on the elements

33. See Hathaway, *Well-Founded Fear*, *supra* note 8, at 506 (noting that “[d]iscussions related to the subjective element [of well-founded fear] frequently resort to indefinite language, itself susceptible to multiple interpretations.”).

34. See, e.g., sources cited *supra* note 10.

35. See sources cited *supra* note 10.

36. 480 U.S. 421 (1987).

37. *Cardoza-Fonseca*, 480 U.S. at 423-24. The Court’s argument went as follows:

Since 1980, the Immigration and Nationality Act has provided two methods through which an otherwise deportable alien who claims that he will be persecuted if deported can seek relief. Section 243(h) of the Act, 8 U.S.C. § 1253(h), requires the Attorney General to withhold deportation of an alien who demonstrates that his “life or freedom would be threatened” on account of one of the listed factors if he is deported. In *INS v. Stevic*, 467 U.S. 407 (1984), we held that to qualify for this entitlement to withholding of deportation, an alien must demonstrate that ‘it is more likely than not that the alien would be subject to persecution’ in the country to which he would be returned. The Refugee Act of 1980 also established a second type of broader relief. Section 208(a) of the Act authorizes the Attorney General, in his discretion, to grant asylum to an alien who is unable or unwilling to return to his home 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.’

In *Stevic*, we rejected an alien’s contention that the § 208(a) ‘well-founded fear’ standard governs applications for withholding of deportation under § 243(h). Similarly today we reject the Government’s contention that the §243(h) standard, which requires an alien to show that he is more likely than not to be subject to persecution, governs applications for asylum under §208(a). Congress used different, broader language to define the term ‘refugee’ as used in §208(a) than it used to describe the class of aliens who have a right to withholding of deportation under §243(h). The Act’s establishment of a broad class of refugees who are eligible for a discretionary grant of asylum, and a narrower class of aliens who are given a statutory right not to be deported to the country where they are in danger, mirrors the provisions of the United Nations Protocol Relating to the Status of Refugees, which provided the motivation for the enactment of the



defining well-founded fear itself.<sup>38</sup> Since the elements of well-founded fear were not the focus of the case, the Supreme Court did not do an in-depth analysis regarding the requirements of well-founded fear.<sup>39</sup> Unfortunately, this cursory approach resulted in the Supreme Court simply focusing on the plain meaning or dictionary definition of the word “fear.”<sup>40</sup> As Justice Blackmun stated in his concurrence, “the very language of the term ‘well-founded fear’ demands a particular type of analysis—an examination of the subjective feelings of an applicant for asylum coupled with an inquiry into the objective nature of the articulated reasons for the fear.”<sup>41</sup> This objective risk plus subjective apprehension approach was soon fully adopted and relied upon by United States decision makers after its initial appearance in *Cardoza-Fonseca*.<sup>42</sup>

Around the same time, Canada’s highest court adopted a similar objective risk plus subjective apprehension approach in *Canada (Attorney General) v. Ward*.<sup>43</sup> In *Ward*, the Canadian Supreme Court defined well-founded fear as a bipartite test: “(1) the claimant must subjectively fear persecution; and (2) this fear must be well-founded in an objective sense.”<sup>44</sup> The *Ward* court was adopting a test from an earlier case, *Rajudeen v. Canada (Minister of Employment and Immigration)*,<sup>45</sup> in which the Court observed that “[t]he subjective component relates to the existence of the fear of persecution in the mind of the refugee. The objective component requires

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Refugee Act of 1980. In addition, the legislative history of the 1980 Act makes it perfectly clear that Congress did not intend the class of aliens who qualify as refugees to be coextensive with the class who qualify for §243(h) relief.

*Id.* (footnote and citations omitted).

38. *Id.*

39. See *infra* note 40.

40. *Cardoza-Fonseca*, 480 U.S. at 430-31 (stating that “the reference to ‘fear’ in the § 208(a) standard [the well-founded fear standard] obviously makes the eligibility determination turn to some extent on the subjective mental state of the alien.”). In making this statement, the Supreme Court looked to a decision of the Board of Immigration Appeals, noting that “[t]he BIA agrees that the term ‘fear,’ as used in this statute, refers to ‘a subjective condition, an emotion characterized by the anticipation or awareness of danger.’” *Id.* at 431 n.11 (citation omitted).

41. *Id.* at 450 (Blackmun, J., concurring).

42. See, e.g., *Saleh v. U.S. Dep’t of Justice*, 962 F.2d 234, 239 (2d Cir. 1992) (finding that a well-founded fear must be both subjectively and objectively reasonable, and that “[t]he applicant must show that he has a subjective fear of persecution, and that the fear is grounded in objective facts”); *Blanco-Comarribas v. INS*, 830 F.2d 1039, 1042 (9th Cir. 1987) (holding that the well-founded fear standard requires that the fear be “subjectively genuine” and have a sufficient basis in reality to be “objectively reasonable”); *Figeroa v. INS*, 886 F.2d 76, 79-80 (4th Cir. 1989) (finding that “[i]t is only after objective evidence sufficient to suggest a risk of persecution has been introduced that the alien’s subjective fears and desire to avoid the risk-laden situation in his or her native land become relevant”) (citations omitted).

43. [1993] 2 S.C.R. 689 (Can.).

44. *Ward*, [1993] 2 S.C.R. at 723.

45. [1985] 55 N.R. 129 (Can.).

that the refugee's fear be evaluated objectively to determine if there is a valid basis for that fear."<sup>46</sup>

In addition to the jurisdictions that use the objective risk plus subjective apprehension approach, the UNHCR also advocates the use of the two part test in the well-founded fear analysis.<sup>47</sup> Like the United States Supreme Court, the UNHCR also analyzes well-founded fear by focusing on the word "fear" itself.<sup>48</sup> From this definitional understanding of the word fear, the UNHCR directs the signatories to the Convention to use the objective risk plus subjective apprehension approach:

[t]o the element of fear—a state of mind and a subjective condition—is added the qualification 'well-founded'. This implies that it is not only the frame of mind of the person concerned that determines his refugee status, but that this frame of mind must be supported by an objective situation. The term 'well-founded fear' therefore contains a subjective and an objective element, and in determining whether well-founded fear exists, both elements must be taken into consideration.<sup>49</sup>

By relying on a definitional analysis to reach the objective risk plus subjective apprehension approach, the UNHCR is consistent with the bipartite approach used in most countries.

### III. ANALYZING THE SUBJECTIVE APPREHENSION ELEMENT OF WELL-FOUNDED FEAR

#### A. *Potential Benefits*

The inclusion of a subjective apprehension element within well-founded fear may have some potential benefits. The existence of a subjective element within the well-founded fear analysis may allow the refugee status determination process to be more personal and individualized, by allowing the refugee applicant a venue for conveying his or her reaction to the persecution that he or she faced. More importantly, the use of subjective

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46. *Rajudeen*, [1985] 55 N.R. at 134.

47. See *supra* notes 9-10 and accompanying text.

48. See UNHCR HANDBOOK, *supra* note 9, ¶ 37 ("Since fear is subjective, the definition involves a subjective element in the person applying for recognition as a refugee.")

49. *Id.* ¶ 38.

apprehension may also give decision makers the discretion they need to grant asylum to refugees who are fleeing from situations in which the existence of objective evidence is minimal, although subjective apprehension alone is generally not enough to satisfy the well-founded fear analysis.<sup>50</sup>

### *B. A Possible Barrier to Refugee Protection*

Unfortunately, the potential benefits of including subjective apprehension within the well-founded fear analysis do not outweigh the serious harm that can occur. The subjective apprehension element creates difficulties and possibly even a barrier to protection for all refugees, but especially for children.

#### 1. Difficulties in Identifying and Articulating State of Mind

All refugees are faced with the inherent difficulty of defining, identifying, and articulating their subjective apprehension. To have subjective apprehension requires not only capacity to know and actual knowledge of an objective risk, but also the ability to articulate coherently and credibly these feelings of fear about the objective risk to the decision maker.<sup>51</sup> This articulation is often extremely difficult due to cultural,<sup>52</sup>

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50. See Hathaway, *Well-Founded Fear*, *supra* note 8, at 510-11 (noting that “most courts require evidence of objective risk as well, and therefore decline to find that trepidation [subjective apprehension] alone is sufficient to engage the Convention obligations of States”); see also *Chan v. Canada*, [1995] 3 S.C.R. 593, 664 (noting that “the existence of a subjective fear of persecutory treatment is not sufficient to meet the statutory definition of a Convention refugee. . . . the Board [must be able to] conclude not only that the fear existed in the mind of the claimant but also that it was objectively well-founded”); *Gonahasa v. INS*, 181 F.3d 538, 541 (4th Cir. 1999) (noting that “mere irrational apprehension is insufficient” to satisfy the well-founded fear analysis).

51. See generally Hathaway, *Well-Founded Fear*, *supra* note 8, at 510-11; see also discussion *supra* note 50 and accompanying text.

52. See Janet Bauer, *Speaking of Culture: Immigrants in the American Legal System*, in IMMIGRANTS IN COURT 17 (1999) (“In legal proceedings, difference in narrative styles can affect the credibility of immigrants. Across cultures, patterns of storytelling, preference for the importance of different attributes, sequencing order, and ways of connecting events or features differ. Most Americans favor linear plots in storytelling or construction of narratives. In many other cultures, the main points may be obscured or arrived at in a more circular fashion after connecting what appear to be inconsistent or unrelated elements”) (citing MICHAEL COLE & SYLVIA SCRIBNER, *CULTURE AND THOUGHT: ITS PSYCHOLOGICAL INTRODUCTION* (1974)); Beate Anna Ort, *International and U.S. Obligations Toward Stowaway Asylum Seekers*, 140 U. PA. L. REV. 285, 308-10 (1991) (explaining how cultural differences with regard to concepts of time, geography, family units, “common sense,” and “verbal behavioral clues” affect credibility determinations of asylum seekers). See generally Walter Kälin, *Troubled Communication: Cross-Cultural Misunderstandings in the Asylum Hearing*, 20 INT’L. MIGRATION REV. 230 (1986) (demonstrating “how [cultural] misunderstandings . . . between the asylum-seeker[] and the [decision maker] . . . can seriously distort the process of communication” during the refugee status determination and “impair the ability of refugees . . . [to be found] credible.”).

educational,<sup>53</sup> and language differences<sup>54</sup> between the refugee applicant and the decision maker. Applicants, especially those who are suffering from Post-Traumatic Stress Disorder (PTSD) may also struggle to convey their subjective apprehension to decision makers due to the psychological effects of previous persecution that they have suffered.<sup>55</sup>

In addition to the inherent difficulties of establishing a subjective apprehension, the complete subjectivity and discretionary nature in identifying subjective apprehension makes all refugee applicants vulnerable to decision maker abuse during the well-founded fear analysis.<sup>56</sup> Requiring subjective apprehension to be a part of the well-founded fear analysis opens the door to the possibility for decision makers to use a lack of subjective apprehension as a reason for denial when objective risk has been established.<sup>57</sup> In other words, a refugee applicant could prove that he or she is objectively at risk of persecution, but, if he or she fails to display a subjective apprehension, protection would be denied.<sup>58</sup>

53. See Adjin-Tetty, *supra* note 11, at 133 (explaining that “in societies where gender discrimination is systemic and sustained through the process of socialisation, women’s exposure to formal education, and hence their ability to clearly articulate a subjective fear of persecution, may be very limited.”).

54. Hathaway, *Well-Founded Fear*, *supra* note 8, at 518-19 (explaining that “fearful applicants forced to communicate through an interpreter may be seen to lack fear where their words and expressions are translated in ways that fail fully to convey the extent of their trepidation”); Regina v. Sec’y of State for the Home Dep’t, Ex Parte Patel, [1986] Imm. A.R. 208 (Q.B.) (Eng.) (Op. of Webster, J.) (“Although the [doubts cast on demeanor evidence by MacKenna J.] . . . overstate the difficulty of assessing the demeanour of a witness in an ordinary case, when the witness is English speaking, they do not, I feel, overstate the difficulty and may even understate it . . . when most, if not all, of the witnesses would have to give evidence through an interpreter.”); Adjin-Tetty, *supra* note 11, at 133 (stating that “language barriers may have a negative impact on a claimant’s ability to testify about her subjective fear.”).

55. See Hathaway, *Well-Founded Fear*, *supra* note 8, at 519-20 (“Persons suffering from PTSD often do not exhibit outward signs of trepidation, but rather ‘dissociate’ themselves from their reality . . . . All told, individuals suffering from PTSD may be among the most fearful asylum applicants, yet they are acutely disadvantaged in their ability to communicate that trepidation to decisionmakers.”); Michael Kagan, *Is Truth in the Eye of the Beholder? Objective Credibility Assessment in Refugee Status Determination*, 17 GEO. IMMIGR. L.J. 367, 396 (2003) (“The psychological effects of traumatic events can hamper a refugee’s ability to communicate why he or she is afraid to return home, and make it difficult for some of the most vulnerable refugees to establish claims that would give them legal protection.”); see also Adjin-Tetty, *supra* note 11, at 132 (explaining that PTSD can affect applicants’ ability to testify).

56. See Hathaway, *Well-Founded Fear*, *supra* note 8, at 534 (explaining that the mechanisms designed by decision makers to validate subjective apprehension are in the best cases unreliable and in the worst cases violate established protection principles).

57. See *id.* at 514.

58. *Id.* (“The inescapable, and deeply unsatisfying, consequence of the insistence on proof of trepidation is that an applicant found not to be fearful must be denied refugee status, *despite a*

Identifying and analyzing subjective apprehension is difficult in refugee status determinations because it refers to a state of mind, and it is not common vernacular to speak in terms of “fear of persecution.” There is an added difficulty in that many refugee applicants have been persecuted by figures of authority and may be reluctant to enunciate their fears to authorities in the asylum country.<sup>59</sup> The UNHCR has acknowledged this difficulty in refugee status determinations, admitting that

[t]he expressions “fear of persecution” or even “persecution” are usually foreign to a refugee’s normal vocabulary. A refugee will indeed only rarely invoke “fear of persecution” in these terms, though it will often be implicit in his story. Again, while a refugee may have very definite opinions for which he has had to suffer, he may not, for psychological reasons, be able to describe his experiences and situation in political terms.<sup>60</sup>

Later in the handbook, the UNHCR further cautions decision makers that, “[a] person who, because of his experiences, was in fear of the authorities in his own country may still feel apprehensive vis-à-vis any authority. He may therefore be afraid to speak freely and give a full and accurate account of his case.”<sup>61</sup> Decision makers have also recognized these difficulties.<sup>62</sup> In Spain, the Supreme Tribunal has stated that “the subjective situation of fear [is] difficult to establish since it refers to a state of mind.”<sup>63</sup> Similarly, in *Chan v. Canada (Minister of Employment and Immigration)*,<sup>64</sup> the Supreme Court of Canada acknowledged that determining an applicant’s subjective fear is an “intricate task,” especially when the evidence is ambiguous.<sup>65</sup>

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*finding that he or she faces a real chance of being persecuted if returned to the country of origin.”* (emphasis added).

59. See Philip G. Schrag & Michele R. Pistone, *The New Asylum Rule: Not Yet a Model of Fair Procedure*, 11 GEO. IMMIGR. L.J. 267, 287 (1997) (“Many arriving refugees are very reluctant to reveal the truth about why they fled their home countries, particularly to a uniformed INS officer. Victims of human rights abuses do not understand the American legal system and are afraid to talk about the fact that they were persecuted by their government to officials of another government.”).

60. UNHCR HANDBOOK, *supra* note 9, ¶ 46.

61. *Id.* ¶ 198.

62. See discussion *infra* notes 63-65 and accompanying text.

63. Carlos Peña Galiano, *Spain, in WHO IS A REFUGEE?* 351 (Jean-Yves Carlier et al. eds., 1997) (quoting STS, Jan. 29, 1988 (R.J., No. 514, p. 520)). Despite acknowledging the inherent difficulty in ruling on a person’s state of mind, the same Spanish court in a later case increased the reliance it placed on the subjective element of well-founded fear. *Id.* at 353.

64. [1995] 3 S.C.R. 593.

65. *Chan*, [1995] 3 S.C.R. at 637.

## 2. Potential for Decision Maker Abuse

Due to the difficulties in identifying subjective apprehension, requiring that it be part of the well-founded fear analysis opens the door to possible abuse (or, at the very least, misapplication) by decision makers. Since the existence of a particular state of mind is difficult to ascertain and may be hard for refugee applicants to enunciate, the subjective apprehension element is an area where decision makers often find doubt about the veracity of the refugee applicant's claim.<sup>66</sup> Absent an affirmative declaration by the applicant of a subjective apprehension of persecution, decision makers can isolate and parse out the refugee applicant's statements in order to create doubt about whether the applicant has a subjective apprehension, even when sufficient objective risk evidence exists.<sup>67</sup>

The applicant in *Chan* faced this exact dilemma.<sup>68</sup> He was a male from China who claimed he feared he would be forcibly sterilized if returned to China.<sup>69</sup> The applicant lost his appeal, and a significant portion of both the majority and dissenting opinion is focused on the existence or absence of subjective fear.<sup>70</sup> The majority did not find sufficient evidence to support a finding of subjective apprehension.<sup>71</sup> However, in his dissent, Justice La Forest found enough evidence on the record to support a finding of subjective apprehension, specifically:

appellant twice noticeably constrained his testimony in regard to the anger and abuse of the PSB [Public Security Bureau] directed at the appellant and his family for violating the birth control policy, stating that it "would be very difficult for me to tell you in detail" and that "for me it's very hard to say out loud." The appellant's reluctance to speak at such a crucial stage of his testimony—and the lack of intervention on the part of the Board, when faced with the appellant's hesitation, to invite him to articulate his experiences fully—would, if one gives credence to the UNHCR Handbook, appear not uncommon in a refugee hearing.<sup>72</sup>

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66. *See generally id.*

67. *See id.*

68. *See id.* at 605

69. *Id.*

70. *See id.* at 594-95, 638.

71. *Id.* at 664 (finding that "the evidence of the appellant with respect to his subjective fear . . . is equivocal at best.")

72. *Id.* at 638.

Justice La Forest further stated that, in light of the realities of refugee hearings<sup>73</sup> and given the problems with the translation record, he saw

little merit in isolating portions of the appellant's responses in order to highlight possible prevarication. The appellant's testimony must, as the [UNHCR] Handbook instructs us, be read in context in its entirety with some allowance for the translation errors that certainly occurred in the appellant's answers and quite possibly in the translation of the Board questions. Viewed in this light, the appellant's testimony does not seem to be particularly equivocal.<sup>74</sup>

The majority opinion, however, rejects the approach advocated by the *UNHCR Handbook* and found merit in doing exactly what Justice La Forest rejected: isolating portions of the appellant's response in order to cast doubt on whether the applicant had a subjective apprehension of persecution.<sup>75</sup> In the majority opinion, Justice Major stated that "appellant's testimony, even with respect to his own fear of forced sterilization, was equivocal and inconsistent at times,"<sup>76</sup> and then proceeded to isolate a portion of appellant's responses.<sup>77</sup> Justice Major was particularly focused on the fact that the applicant did not specifically mention fear of forced sterilization when asked what would happen if appellant were returned to China.<sup>78</sup> The testimony of applicant Chan that Justice Major found to be equivocal on subjective apprehension was: "[i]f I going back to China, the most possible thing would be arrest, put in jail. Could also be unemployed for the rest of my whole life, and could not earn a living. If talking something more serious, then I probably will be murdered."<sup>79</sup> Admittedly, Chan did not explicitly state that he feared persecution through the use of forced sterilization or even that he feared forced sterilization;<sup>80</sup> however, the

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73. *Id.* at 637-38 (noting that "[a]dding to the obstacles preventing a rapid determination of the appellant's subjective fear is the evidence, apparent upon an examination of the written record, that in at least two instances, the appellant was unwilling to state or elaborate upon certain information, a phenomenon not at all uncommon to refugee claimants from other cultures.").

74. *Id.* at 638-39.

75. *Id.* at 664. The majority did not rule on whether the applicant had a subjective apprehension of forced sterilization, stating that:

the evidence of the appellant with respect to his subjective fear of forced sterilization is equivocal at best. However, in the absence of an explicit finding by the Board on this point, it would not be appropriate for this Court to determine that the appellant did not have a subjective fear of forced sterilization.

*Id.*

76. *Id.* at 663.

77. *Id.* at 663-64.

78. *Id.* at 663 (noting that "[w]hen asked specifically what would happen if he were to return to China, the appellant made no mention of forced sterilization.").

79. *Id.* at 664.

80. *See* discussion *supra* notes 76-79 and accompanying text.

reasons he may not have mentioned this fear are numerous, including language, accuracy of translation, educational, and cultural barriers. Alternatively, the applicant may not have mentioned that he feared sterilization specifically if returned because he did mention fearing things that are equally serious or even more serious, such as murder.<sup>81</sup> Or perhaps he simply failed to mention his fear because he thought that the outcome was obvious to the court.<sup>82</sup> Regardless of the motivations behind the applicant's answer, the dissection of the answer by Justice Major shows one of the many problems of using subjective apprehension as a part of the well-founded fear analysis. Determining a person's state of mind is an arduous task even when that person speaks the same language, shares the same culture, and has a similar educational background as the decision maker. It can be practically impossible when, as is the case in many refugee status determinations, the applicant comes from a different cultural background and speaks a different language than the decision maker.<sup>83</sup>

One of the intriguing aspects of *Chan* is the polar opposite approaches taken by Justice La Forest and Justice Major.<sup>84</sup> Both of them rely on similar portions of the transcripts from the lower courts, but Justice La Forest, recognizing the difficulty in identifying and analyzing subjective apprehension, found in favor of the applicant, while Justice Major made an adverse finding, seemingly not taking these difficulties into account.<sup>85</sup> The ability of Justice Major to simply ignore the cultural and language differences possessed by the refugee applicant in *Chan* raises the issue of whether Justice Major was using the difficulties within the subjective apprehension element of well-founded fear as a way to deny protection to someone who faced an objective risk of persecution.

Even if it did not occur in the *Chan* case, there is a real possibility of decision makers using subjective apprehension as a barrier to refugee protection when evidence of objective risk exists but subjective apprehension is not as clear. This is one of the most disturbing ways decision makers can abuse their judicial discretion in the well-founded fear

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81. See discussion *supra* note 79 and accompanying text.

82. *Chan*, [1995] 3 S.C.R. at 640 (noting that “[g]iven the considerable testimony the appellant had already given concerning the mounting pressure upon him to submit to sterilization that resulted in his ensuing flight from China, it is not really surprising that he did not again mention that he could be sterilized if returned to that country.”).

83. See *supra* note 54.

84. See *supra* notes 71-83 (displaying the disagreement between Justices La Forest and Major on whether to isolate portions of appellant's responses in order to make a subjective fear determination).

85. See *id.*



analysis. Sadly, this scenario occurred in another Canadian case: that of a refugee applicant named Osman.<sup>86</sup> Osman fled to Canada from Somalia.<sup>87</sup> His father, mother, and three sisters had been killed as a result of government action.<sup>88</sup> He himself had been imprisoned and maltreated for five months, and was released only through the payment of a bribe.<sup>89</sup> The Convention Refugee Determination Division of the Immigration and Refugee Board (Refugee Board) denied Osman's refugee application.<sup>90</sup> The Refugee Board found that "the essential subjective element of fear of persecution is missing, even though there is the substantial objective evidence which would support the claimant's story."<sup>91</sup> The Refugee Board came to this conclusion because Osman, after being maltreated and imprisoned, continued his government employment.<sup>92</sup> In setting aside the decision of the Refugee Board, the Canadian Federal Court of Appeal noted that the Refugee Board seemed to ignore the fact that Osman only returned to government employment after he was released from prison "because he was *ordered to do so*."<sup>93</sup>

Thankfully, the Canadian Federal Court of Appeal recognized that Osman was incorrectly denied protection as a result of the Refugee Board misunderstanding and mischaracterizing the evidence of Osman's subjective apprehension.<sup>94</sup> Specifically, the Canadian Federal Court of Appeal found it troublesome that the Refugee Board denied refugee protection to Osman due to a lack of subjective apprehension, despite finding that substantial objective evidence of risk existed.<sup>95</sup> This finding was especially troubling because the Refugee Board held that Osman lacked a subjective apprehension simply because Osman returned to his job; when in fact, he was forced to return by the government.<sup>96</sup> Even though Osman was granted relief at the appellate level, the initial findings of the Refugee Board illustrate that decision makers can, and do, abuse their discretion and undermine the protection goals of the Convention in situations where there is no specific declaration by the applicant of a subjective fear of persecution, despite the existence of substantial objective evidence to support an applicant's claim of well-founded fear. Unfortunately, the inclusion of

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86. *Osman v. Minister of Employment & Immigration*, No. A-300-91, 39 A.C.W.S. (3d) (F.C. April 6, 1993), available at 1993 A.C.W.S.J. LEXIS 45911 (Can.).

87. *See id.*

88. *Id.* at \*\*2.

89. *Id.*

90. *Id.* at \*\*1.

91. *Id.*

92. *Id.* at \*\*2.

93. *Id.* (emphasis added).

94. *Id.* at \*\*3.

95. *Id.* at \*\*1.

96. *Id.* at \*\*2.

subjective apprehension in the well-founded fear analysis allows decision makers (like the Refugee Board in *Osman*) to thwart the goals of the Convention and to deny applicants the protection to which they are entitled.

#### IV. CHILDREN AND THE SUBJECTIVE APPREHENSION ELEMENT OF WELL-FOUNDED FEAR

The need for refugee protection knows no age limit,<sup>97</sup> and children constitute at least fifty percent of the total refugee population.<sup>98</sup> Sadly, children are uniquely vulnerable to being victims of human rights abuses.<sup>99</sup> The international community has recognized this unique vulnerability, citing situations such as sexual exploitation and underage military recruitment.<sup>100</sup>

97. See *supra* note 6.

98. Women's Commission for Refugee Women & Children, *Annual Report*, at 15 (2004), <http://www.womenscommission.org/pdf/annrep04.pdf> [hereinafter Women's Commission, *Annual Report*].

99. The international community has recognized this vulnerability. See generally Convention on the Rights of the Child, G.A. Res. 44/25, ¶¶ 23-26, U.N. A/RES/44/25 (Nov. 20, 1989) [hereinafter Convention on the Rights of the Child]. The Convention on the Rights of the Child states in part that:

the need to extend particular care to the child has been stated in the Geneva Declaration of the Rights of the Child of 1924 and in the Declaration of the Rights of the Child adopted by the General Assembly on 20 November 1959 and recognized in the Universal Declaration of Human Rights, in the International Covenant on Civil and Political Rights (in particular in articles 23 and 24), in the International Covenant on Economic, Social and Cultural Rights (in particular in article 10) and in the statutes and relevant instruments of specialized agencies and international organizations concerned with the welfare of children,

Bearing in mind that, as indicated in the Declaration of the Rights of the Child, 'the child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, before as well as after birth',

Recalling the provisions of the Declaration on Social and Legal Principles relating to the Protection and Welfare of Children, with Special Reference to Foster Placement and Adoption Nationally and Internationally; the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (The Beijing Rules); and the Declaration on the Protection of Women and Children in Emergency and Armed Conflict,

Recognizing that, in all countries in the world, there are children living in exceptionally difficult conditions, and that such children need special consideration.

*Id.* (citations omitted). See generally UNHCR HANDBOOK, *supra* note 9; INS Guidelines, *supra* note 14.

100. Global Consultations on International Protection, *Refugee Children*, U.N. Doc. EC/GC/02/9, ¶ 4 (Apr. 25, 2002) ("Separated children . . . face a greater risk of sexual exploitation and abuse, military recruitment, child labour, denial of access to education and basic assistance, and detention."). Sexual exploitation "includes female infanticide; child marriage; female genital mutilation; sexual abuse by family members and acquaintances; rape; sexual harassment and sexual exploitation for access to protection, goods and services." *Id.* ¶ 10 n.11.

The UNHCR has specifically highlighted the particular vulnerability of separated<sup>101</sup> and disabled refugee children.<sup>102</sup>

### A. *The Vulnerability of Children During Refugee Status Determinations*

Unfortunately, a child's unique vulnerability does not end when he or she applies for refugee status and appears before a decision maker. Child refugee applicants, especially separated children, suffer the most in legal systems, such as the United States, in which they are not entitled to legal representation.<sup>103</sup> In the United States, separated children may be detained indefinitely by immigration authorities, "in some cases for more than two years, while their immigration status is resolved."<sup>104</sup> While in detention, they may be housed with juvenile offenders,<sup>105</sup> and are often shackled or handcuffed when transported or produced in court.<sup>106</sup> Currently, over 5,000 separated minors are detained in the United States by the Department of Homeland Security (DHS) every year.<sup>107</sup> Less than half of the detained

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101. The term "separated children" refers to children "who are separated from both parents and are not being cared for by any adult who, by law or custom, is responsible for doing so." *Id.* ¶ 4 n.4. These children are also sometimes referred to as "unaccompanied children," but the use of that term has recently declined. *Id.*

102. See UNHCR Policy on Refugee Children, ¶ 19, U.N. Doc. EC/SCP/82 (Aug. 6, 1993).

103. See Amnesty International USA, *United States of America: Unaccompanied Children in Immigration Detention*, at 74 (2003), [http://www.amnestyusa.org/refugee/pdfs/children\\_detention.pdf](http://www.amnestyusa.org/refugee/pdfs/children_detention.pdf) [hereinafter *Unaccompanied Children in Immigration Detention*]. This report explains that

unaccompanied children in the United States are not provided with a lawyer or a guardian ad litem (or FOC, "Friend of the Child") to help guide them through the complex U.S. immigration system. This is of grave concern to Amnesty International. The legal community within the U.S. has responded admirably to the need for pro bono representation for unaccompanied children, creating networks of pro bono legal representatives willing to represent these children. However, the networks are often overwhelmed and underfunded, and in the event that a pro bono lawyer is not available there is no guarantee that a child will be appointed an attorney.

*Id.* Compare the situation in the United States to Canada and the United Kingdom, where legal representation is provided to unaccompanied minors either at government expense or through a pro bono attorney. Sarah Maloney, *TransAtlantic Workshop on Unaccompanied/Separated Children: Comparative Policies & Practices in North America and Europe*, 15 J. REFUGEE STUD. 102, 112-13 (2002).

104. Women's Commission for Refugee Women & Children, *Prison Guard or Parent?: INS Treatment of Unaccompanied Refugee Children*, at 9 (May 2002), available at [http://www.womenscommission.org/pdf/ins\\_det.pdf](http://www.womenscommission.org/pdf/ins_det.pdf) [hereinafter Women's Commission, *Prison Guard or Parent?*].

105. *Unaccompanied Children in Immigration Detention*, *supra* note 103, at 23-24.

106. *Id.* at 35-36. See generally HUMAN RIGHTS FIRST, IN LIBERTY'S SHADOW: U.S. DETENTION OF ASYLUM SEEKERS IN THE ERA OF HOMELAND SECURITY 33-40 (2004) [hereinafter IN LIBERTY'S SHADOW] (highlighting the conditions of detention in the United States and its detrimental impact on asylum seekers).

107. See IN LIBERTY'S SHADOW, *supra* note 106, at 37.

children in the United States have legal representation.<sup>108</sup> This combination of no legal representation and prolonged detention does not foster an environment in which separated child refugee applicants feel safe to fully articulate their asylum claims, let alone any subjective apprehension they may possess.<sup>109</sup> In fact, because of these factors, separated children face an uphill battle to gain refugee protection.<sup>110</sup>

Unlike separated children, child refugee applicants who arrive with a parent or close family member do not have to face the asylum process alone. However, they may face an even greater danger: that of being rendered invisible.<sup>111</sup> Often, independent claims of children are not even articulated.<sup>112</sup> In the United States, when a parent accompanies a child refugee applicant, the child's claim is typically "subsumed under that of the parent and [is] not considered separately."<sup>113</sup> Subsuming the child's refugee application makes the child applicant extremely vulnerable. Such an approach fails to recognize that the child may be facing persecution that is different from the parents, or that the parents may be participating in, or at least condoning, the persecution experienced by the child. Nor does it

108. Women's Commission, *Prison Guard or Parent?*, *supra* note 104, at 30.

109. See Jacqueline Bhabha, *Lone Travelers: Rights, Criminalization, and the Transnational Migration of Unaccompanied Children*, 7 U. CHI. L. SCH. ROUNDTABLE 269, 282 (2000) ("Where unaccompanied minors are subject to harsh immigration control measures, such as threats of removal, indefinite detention, or legal proceedings without access to professional representation, their ability to articulate their views or bring best interest considerations to the attention of decision makers is compromised.")

110. Jacqueline Bhabha, *Demography and Rights: Women, Children, and Access To Asylum*, 16 INT'L J. REFUGEE L. 227, 238-39 (2004) [hereinafter Bhabha, *Demography and Rights*] (finding that separated children are disadvantaged in being accorded the security of refugee status).

111. See Bhabha, *Rights of Children*, *supra* note 6, at 254 ("Whereas considerable attention had been paid to the social welfare and tracing needs of child refugees living in camps or found internally displaced and separated from their families, the legal and procedural obstacles facing child asylum seekers were generally unacknowledged. It was assumed that children could be dealt with under the procedures directed at families—that where the head of household or parent was eligible for refugee protection, the child would be too; and that if protection was refused, arrangements for the family would include the children. This set of assumptions was based on two largely unquestioned premises: first, that child asylum seekers traveled within their families and could be subsumed with the family asylum application, and second, that children could have no independent claim to asylum in their own right over and above the family's claim."). See generally Executive Committee of the High Commissioner's Programme, *Refugee Children and Adolescents: A Progress Report*, U.N. Doc. EC/47/SC/CRP.19 (Oct. 1, 2001) (explaining that refugee children are often "invisible" in policy making because refugees are often thought of as a uniform group and that there is a tendency to think of refugee children simply as dependants of adults).

112. See, e.g., *Alexandrova v. INS*, No. 97-3932, 1998 U.S. App. LEXIS 20612, at \*3 (6th Cir. Aug. 11, 1998) (per curiam) (noting that, despite independent claims by his wife and child, the father "was the sole witness to testify. His testimony related solely to his own eligibility for asylum.")

113. Women's Commission, *Prison Guard or Parent?*, *supra* note 104, at 5.

account for the fact that the child's claim may in fact be the strongest one for asylum.<sup>114</sup>

### B. *The Hurdle That Children Often Cannot Surmount*

Both accompanied and separated child refugee applicants, like all other refugee applicants, are required to establish subjective apprehension in order to receive refugee protection.<sup>115</sup> Unfortunately, the problems of articulating subjective apprehension and the possibility of judicial abuse as highlighted in *Osman*<sup>116</sup> and *Chan*<sup>117</sup> above are only heightened in the context of child refugee applicants. On top of the language, cultural, and educational barriers present in almost all refugee status determinations,<sup>118</sup> children are saddled with the additional burden of possibly being too young to conceive of or to articulate a subjective apprehension, or too scared to express their subjective apprehension to either their advocates or their decision makers.<sup>119</sup> Unlike adult refugee applicants, children may not understand the purpose or goal of the refugee status determination and may therefore be reluctant to testify to their subjective apprehension.

The difficulties child refugee applicants face in establishing subjective apprehension are most apparent in the case of infants who are applying for refugee status. In *Chen Shi Hai v. Minister for Immigration and Multicultural Affairs*, the applicant was a male infant, only three and a half years old.<sup>120</sup> He was a Chinese national born in Australia to Chinese parents.<sup>121</sup> The infant applicant first applied for a protection visa as a refugee (Australia's version of asylum) to the Minister for Immigration and Multicultural Affairs, then to the Refugee Review Tribunal (Tribunal), then to the Full Court of the Federal Court (Full Court), and finally to the High Court of Australia (High Court).<sup>122</sup> The Tribunal found that the infant

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114. *Id.*

115. United Nations High Commissioner for Refugees, *Guidelines on Policies and Procedures in dealing with Unaccompanied Children Seeking Asylum* § 8.6 (Feb. 1997), available at <http://www.unhcr.ch/cgi-bin/texis/vtx/publ/opendoc.pdf?tbl=PUBL&id=3d4f91cf4> [hereinafter UNHCR, *Guidelines on Unaccompanied Children*] (explaining that "the same definition of a refugee applies to all individuals regardless of their age . . .").

116. See discussion *supra* notes 86-96 and accompanying text.

117. See discussion *supra* notes 68-85 and accompanying text.

118. See discussion *supra* notes 52-54 and accompanying text.

119. See, e.g., *Feng Chai Li v. Minister of Citizenship & Immigration*, No. IMM-6303-99, 2001 Fed. Ct. Trial LEXIS 1182, at \*6 (Can. Nov. 14, 2001) (finding that a "child claimant may not be able to express a subjective fear of persecution in the same manner as an adult claimant.").

120. *Chen Shi Hai v. Minister for Immigration and Multicultural Affairs* (2000) 170 A.L.R. 553 (Austl.).

121. *Id.* ¶ 1. The applicant did not acquire Australian citizenship by reason of being born in Australia. See Australian Citizenship Act, 1948, § 10(2).

122. *Chen Shi Hai*, 170 A.L.R. ¶¶ 1, 9-10.

applicant faced a real chance of persecution in China because of his membership in a particular social group known as children “born outside the parameters of [China’s] One Child Policy . . . [and] born of an unauthorised marriage.”<sup>123</sup> The Tribunal and the Full Court realized the impossibility of having the infant applicant articulate a subjective apprehension, so instead, both the Tribunal and the Full Court imputed the fears of the applicant’s parents to him.<sup>124</sup> On its face, this approach of imputing a parent’s fear to a child applicant seems reasonable; however, it can have disastrous consequences for the child applicant, as it did for the applicant in *Chen Shi Hai*, who lost his case before the Tribunal and the Full Court simply because his parents’ cases failed.<sup>125</sup> However, on appeal, the High Court recognized the error of the Tribunal and Full Court:

[t]he Tribunal correctly recognised the separate entitlement of the appellant, although an infant, under the Convention and Australian law. So did the primary judge and the dissenting judge in the Full Court. Although the majority in the Full Court appear to have accepted that it was appropriate and necessary to attribute the fears of the parents to those of the child for refugee law purposes, somewhat inconsistently, their Honours proceeded from this “very obvious attitude to adopt” to remark that because the parents had failed, so must the child.<sup>126</sup>

*Chen Shi Hai* demonstrates that if a child or infant refugee applicant is forced to accept the imputation of his or her parents’ fears as his or her own, there is a strong likelihood that the child’s refugee status determination will have the same outcome as the parents’, even if this outcome impinges on the child’s rights under the Convention.

In *Chen Shi Hai*, the High Court was aware that children are often the ones who need refugee protection the most, as Justice Kirby noted:

for the purposes of international refugee law, children are often amongst the most vulnerable groups of refugees in special need of the protection of the Convention. They sometimes arrive in a country of refuge without parents or guardians. They are entitled to

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123. *Id.* ¶ 6.

124. *Id.* ¶ 4 (holding that “it is accepted that [the infant applicant’s] parents’ fears on his behalf are sufficient.”).

125. *Id.* ¶¶ 6-10.

126. *Id.* ¶ 77.

the determination of their legal right, that fact notwithstanding. It would be astonishing if the Convention did not apply to them according to its plain language.<sup>127</sup>

However, it is almost impossible to think of how the plain language of the Convention could apply to child refugee applicants if decision makers and the UNHCR impute a subjective apprehension component to the language of well-founded fear for child refugee applicants. Interestingly, Justice Kirby declared that children are covered under the plain language of the Convention, and criticized the decision made in both the Tribunal and the Full Court where the subjective apprehension of the parents was imputed to the infant applicant.<sup>128</sup> Nevertheless, Justice Kirby admitted that “[i]n order to make the Convention operate in the case of an infant, ‘fear’, twice referred to in the definition, had to be attributed from the parents to the child.”<sup>129</sup> Although Justice Kirby seemed to recognize the difficulty in reconciling the objective risk plus subjective apprehension approach when applying the Convention to children, he failed to offer an alternative method of determining well-founded fear for child refugee applicants that *is* consistent with the plain language of the Convention.<sup>130</sup> Justice Kirby seemed satisfied in using the fear of the parents, as long as decision makers do not, based on that imputation, deny the child applicant refugee status simply because the parents’ application fails.<sup>131</sup>

#### V. THE PROCEDURAL “EXEMPTION” FOR CHILDREN FROM THE SUBJECTIVE APPREHENSION ELEMENT

Thankfully, the reality for child refugee applicants is currently not as grim as it could be. The reality for most children is that the subjective apprehension element is given a procedural nod while being substantively ignored in many countries during refugee status determinations for children.<sup>132</sup> By advocating for the weight of the analysis to be placed on objective risk or by imputing the fear of the child’s parent or caregiver,<sup>133</sup> the UNHCR and the governments of the United States and Canada have implicitly (and arguably explicitly) given decision makers permission to substantively ignore subjective apprehension during the status determination

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127. *Chen Shi Hai*, 170 A.L.R. ¶ 76.

128. *Id.* ¶ 70.

129. *Id.* ¶ 53.

130. *See id.* ¶¶ 75-81.

131. *See id.*

132. *See* INS Guidelines, *supra* note 14; *see also* UNHCR HANDBOOK, *supra* note 9; UNHCR, *Guidelines on Unaccompanied Children*, *supra* note 115, at § 8.6.

133. *See* discussion *infra* Part V.A.

of child refugee applicants.<sup>134</sup> This elimination or extreme marginalization of the subjective apprehension element of well-founded fear occurs through both governmental guidelines and decision maker discretion.

*A. Administrative Guidelines: Canada, the United States and the UNHCR*

In 1996, the Canadian Immigration and Refugee Board issued groundbreaking guidelines called *Child Refugee Claimants: Procedural and Evidentiary Issues*.<sup>135</sup> These guidelines recognized that refugee claims of children needed to be treated with special concern because of the unique vulnerability of children as applicants.<sup>136</sup> Canada was the first government to issue such guidelines for child refugee applicants.

Guideline three states that, “[a] child claimant may not be able to express a subjective fear of persecution in the same manner as an adult claimant. Therefore, it may be necessary to put more weight on the objective rather than the subjective elements of the claim.”<sup>137</sup> The Canadian position is supported by a UNHCR document entitled *Refugee Children: Guidelines on Protection and Care*, which “provides that where a child is not mature enough to establish a well-founded fear of persecution in the same way as an adult ‘it is necessary to examine in more detail objective factors, such as the characteristics of the group the child left with[,] the situation prevailing in the country of origin and the circumstances of family members, inside or outside the country of origin.’”<sup>138</sup>

Two years later, in 1998, the United States followed in the footsteps of the Canadian Government when the Immigration and Naturalization Service (INS)<sup>139</sup> issued its *Guidelines for Children's Asylum Claims (INS Guidelines)*.<sup>140</sup> The *INS Guidelines* acknowledge that “[f]or child asylum seekers . . . the balance between subjective fear and objective circumstances may be more difficult for an adjudicator to assess” than in cases for adult asylum seekers.<sup>141</sup> The *INS Guidelines* recognize that child refugee

134. *See id.*

135. *See* Child Refugee Guidelines, *supra* note 13.

136. *Id.*

137. *Id.* at Guideline 3(B)(II)(2).

138. *See id.* at n.27 (quoting U.N. HIGH COMM’R FOR REFUGEES, *Preface to REFUGEE CHILDREN: GUIDELINES ON PROTECTION AND CARE* (1994)).

139. On March 1, 2003, The Homeland Security Act abolished the INS and all of its services and functions were transferred to the Department of Homeland Security (DHS). *See* 6 U.S.C.A. § 291(a) (West Supp. 2005); Homeland Security Act, H.R. Res. 5005, 107th Cong. § 471 (2002).

140. *INS Guidelines, supra* note 14.

141. *Id.* at 19.



applicants “may be less forthcoming than adults, and may hesitate to talk about past experiences in order not to relive their trauma.”<sup>142</sup> In light of these difficulties, the *INS Guidelines* encourage decision makers to rely on the guidance found in the *UNHCR Handbook* regarding child refugee applicants.<sup>143</sup> The *INS Guidelines* quote the *UNHCR Handbook* and “suggest[] that children under the age of [sixteen] may lack the maturity to form a well-founded fear of persecution, thus requiring the [decision maker] to give more weight to [the] objective factors.”<sup>144</sup> In fact, both the *INS Guidelines* and the *UNHCR Handbook* recognize that, in trying to evaluate subjective apprehension, there really cannot be a bright line rule; also, they note that “a minor’s mental maturity must normally be determined in the light of his [or her] personal, family and cultural background.”<sup>145</sup>

When decision makers are trying to identify whether a child refugee applicant has a subjective apprehension, the *INS Guidelines* encourage them to look beyond what the child refugee applicant has expressed.<sup>146</sup> The *INS Guidelines* tell decision makers to look at “the circumstance[] of [the] child’s arrival in the United States . . . [for] clues [as] to whether the child has a well-founded fear of persecution.”<sup>147</sup> The *INS Guidelines* further state that “[i]f the child arrives in the company of other asylum seekers who have been found to have a well-founded fear of persecution, this may, depending on the circumstances, help to establish that the child’s fear is well-founded.”<sup>148</sup>

In analyzing the subjective apprehension in child refugee applicants, United States decision makers are also told “to look [at] the circumstance[] of the parents and other family members, including their situation in the child’s country of origin.”<sup>149</sup> The mistreatment of a child’s family, for example, can thus support a well-founded fear.<sup>150</sup> The *UNHCR Handbook* also advocates this approach.<sup>151</sup>

Both the *INS Guidelines* and the *UNHCR Handbook* are even willing to accept a parent’s desire to send the child outside the country of origin in

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142. *Id.* at 5.

143. *Id.* at 2-4, 19.

144. *Id.* at 19 (citing UNHCR HANDBOOK, *supra* note 9, ¶¶ 215, 217) (“Minors under 16 years of age . . . may have fear and a will of their own, but these may not have the same significance as in the case of an adult.”)

145. *INS Guidelines*, *supra* note 14, at 19 (citing UNHCR HANDBOOK, *supra* note 9, ¶ 216).

146. *Id.* at 19-20.

147. *Id.* at 20.

148. *Id.*; UNHCR HANDBOOK, *supra* note 9, ¶ 218; 8 C.F.R. § 208.13(b)(2)(B) (2005).

149. *INS Guidelines*, *supra* note 14, at 20 (citing UNHCR HANDBOOK, *supra* note 9, ¶ 218).

150. *Ananeh-Firempong v. INS*, 766 F.2d 621, 626-27 (1st Cir. 1985) (concluding that evidence of mistreatment of one’s family is probative of a threat to the applicant).

151. UNHCR HANDBOOK, *supra* note 9, ¶ 218.

place of a child's ability to articulate a subjective apprehension.<sup>152</sup> The *UNHCR Handbook* states that "[i]f there is reason to believe that the parents wish their child to be outside the country of origin on grounds of well-founded fear of persecution, the child himself may be presumed to have such fear."<sup>153</sup> However, it continues,

[i]f the will of the parents cannot be ascertained or if [the] will [of the parents] . . . [is] in conflict with the will of the child," the decision maker "will have to come to a decision as to the well-foundedness of the minor's fear on the basis of all the known circumstances, which may call for a liberal application of the benefit of the doubt."<sup>154</sup>

In addition to the guidance found in the *UNHCR Handbook*, the UNHCR has reiterated its position on the difficulty children have in establishing well-founded fear; specifically the subjective apprehension element and the need to focus predominantly on objective factors in its *Guidelines on Policies and Procedures in dealing with Unaccompanied Children Seeking Asylum*.<sup>155</sup> Specifically, the UNHCR states that

[a]lthough the same definition of a refugee applies to all individuals regardless of their age, in the examination of the factual elements of the claim of an unaccompanied child, particular regard should be given to circumstances such as the child's stage of development, his/her possibly limited knowledge of conditions in the country of origin, and their significance to the legal concept of refugee status, as well as his/her special vulnerability. Children may manifest their fears in ways different from adults. Therefore, in the examination of their claims, it may be necessary to have greater regard to certain objective factors, and to determine, based upon these factors, whether a child may be presumed to have a well-founded fear of persecution.<sup>156</sup>

In summary, the above approaches advocated by governmental guidelines and the UNHCR include: (1) putting more weight on objective factors, (2) using the circumstances of the child's arrival, (3) using the

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152. See *id.*; INS Guidelines, *supra* note 14, at 20.

153. UNHCR HANDBOOK, *supra* note 9, ¶ 218.

154. *Id.* ¶ 219. See INS Guidelines, *supra* note 14, at 20.

155. UNHCR, *Guidelines on Unaccompanied Children*, *supra* note 115.

156. *Id.* ¶ 8.6.

circumstance of the child's parents or other family members in the country of origin, (4) using the outcomes of other applicants refugee status determinations, (5) imputing the parent's desire to send the child outside the country of origin as the child's subjective apprehension, and (6) applying a liberal benefit of the doubt for child refugee applicants. These factors, taken together, effectively eliminate the subjective apprehension element requirement for children.

### *B. Decision Maker Discretion*

Governmental agencies and the UNHCR are not the only entities that are effectively exempting children from the subjective apprehension requirement of the well-founded fear analysis.<sup>157</sup> Subjective apprehension is also being done away with through the discretion of decision makers.<sup>158</sup> Arguably, decision makers quietly use their discretion to ignore the subjective apprehension requirement in this manner frequently, with no mention of it in their decisions. However, a few courts in Canada,<sup>159</sup> Australia,<sup>160</sup> and the United Kingdom<sup>161</sup> have explicitly declared that children should be exempted from the subjective apprehension element of well-founded fear.

In *Yusuf v. Canada*, the Canadian Federal Court of Appeals noted the irrationality of using the absence of the subjective apprehension element of well-founded fear as a reason to deny protection to a child refugee applicant who establishes objective risk.<sup>162</sup> Justice Hugessen, writing for the court, stated that

I am loath to believe that a refugee status claim could be dismissed solely on the ground that as the claimant is a young child or a person suffering from a mental disability, he or she was incapable of experiencing fear the reasons for which clearly exist in objective terms.<sup>163</sup>

In *Yusuf*, the court granted a re-hearing on the appeal from the applicant, finding it "hard to see in what circumstances it could be said that a person who, we must not forget, is by definition claiming refugee status could be

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157. See discussion *infra* notes 158-171 and accompanying text.

158. See *id.*

159. E.g., *Yusuf v. Canada*, [1992] F.C. 629 (Can.).

160. E.g., *Raza v. Minister for Immigration and Multicultural Affairs* (2002) F.C.A. 350 (Austl.).

161. E.g., *R (on the application of Osmani) v. An Immigration Adjudicator & Another*, [2001] EWHC (Admin) 1087, [1]-[15] (Eng.).

162. *Yusuf*, [1992] F.C. at 632.

163. *Id.*

right in fearing persecution and still be rejected because it is said that fear does not actually exist in his conscience.”<sup>164</sup>

Similarly, in *Raza v. Minister for Immigration and Multicultural Affairs*, the Federal Court of Australia discussed the findings a Tribunal must make when analyzing well-founded fear.<sup>165</sup> In an unreported judgment, the court stated that “[t]his [analysis] requires the Tribunal to be satisfied that there is a subjective fear and an objective basis for [the well-founded fear]. Absent any subjective fear then (infants and incapable persons apart) there can be no question whether there is a well-founded fear.”<sup>166</sup> By making this statement, the *Raza* court acknowledged the reality that infants and incapable persons cannot enunciate or perhaps may not even have the capacity to form a subjective apprehension; therefore the *Raza* court explicitly exempted those individuals from the subjective apprehension requirement.<sup>167</sup>

In *R (on the application of Osmani) v. An Immigration Adjudicator and Another*, a decision from the United Kingdom, the court reviewed a claim from a separated minor from Yugoslavia.<sup>168</sup> While the United Kingdom does not have specific guidelines for claims of refugee children like Canada and the United States do,<sup>169</sup> the court handled the case in a manner which reflected that it was aware of the unique issues that child refugee applicants face, especially regarding establishing the subjective apprehension element of well-founded fear. The court acknowledged that a person at any age may qualify for refugee status, but then added:

however, account should be taken of the applicant's maturity and in assessing the claim of a child more weight should be given to the objective indications of risk than to the child's state of mind and understanding of the situation. *Further that [the asylum claim] should not be refused solely because the child is too young to understand the situation to have formed a well-founded fear of persecution.*<sup>170</sup>

Even when decision makers are not trying to be as explicit as those in *Raza*, *Yusuf*, and *Osmani*, the absence of discussion regarding capacity in

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164. *Id.*

165. *Raza* (2002) F.C.A. 350, ¶ 7.

166. *Id.* at 7.

167. *See id.*

168. *R (on the application of Osmani) v. An Immigration Adjudicator & Another*, [2001] EWHC (Admin) 1087, [1]-[15] (Eng.).

169. *See discussion supra* Part V.A.

170. *Osmani*, [2001] EWHC (Admin), ¶ 4 (emphasis added).

asylum decisions speaks volumes regarding the implicit exemption being given to child refugee applicants. If decision makers were truly requiring all child refugee applicants to establish a subjective apprehension, presumably the issue of whether the child refugee applicant has the capacity to form or articulate a subjective apprehension would be written about in numerous decisions; however, it is not. This lack of discussion regarding capacity is further evidence that in the majority of cases, child refugee applicants are being given a free pass on the subjective apprehension element of the well-founded fear analysis.

Much ink was spilled in early 2000 in the United States regarding the capacity of a six-year-old child to apply for asylum.<sup>171</sup> In *Gonzalez v. Reno*,<sup>172</sup> the Eleventh Circuit Court of Appeals upheld the governmental policy that six-year-old children lack the capacity to assert an asylum claim on their own.<sup>173</sup> Ironically, despite both the national and international coverage and the role of the United States government in *Gonzalez*, child refugee applicants of all ages, including infants, are still presumed to have the capacity both to have and to articulate a subjective apprehension.<sup>174</sup> It seems, at least in the Eleventh Circuit, that young children do not have the capacity to assert their own asylum claim,<sup>175</sup> but if somehow that claim is asserted for them or arguably if the applicant is at least seven years old and asserts his or her own claim, then the young child must be able to know and articulate his or her subjective apprehension in order to prevail on his or her asylum claim.<sup>176</sup> This result is absurd, and illustrates that this is not the reality for children in refugee status determinations. Decision makers are not writing about or considering whether a child refugee applicant has the capacity to formulate or enunciate a subjective apprehension, because whether it is through the imputation of parental fears, evaluating the actions of similarly situated persons, or only giving weight to the objective risk

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171. *Gonzalez v. Reno*, 212 F.3d 1338 (11th Cir. 2000).

172. *Id.*

173. *Id.* at 1351.

174. This can be seen by the fact that no government nor the UNHCR has explicitly exempted a child of any age from the subjective apprehension requirement. See discussion *infra* notes 221-22 and accompanying text.

175. *Gonzalez*, 212 F.3d at 1349-50. The court affirmed the INS policy, which stated that:

(1) six-year-old children lack the capacity to sign and to submit personally an application for asylum; (2) instead, six-year-old children must be represented by an adult in immigration matters; (3) absent special circumstances, the only proper adult to represent a six-year-old child is the child's parent, even when the parent is not in this country; and, (4) that the parent lives in a communist-totalitarian state (such as Cuba), in and of itself, does not constitute a special circumstance requiring the selection of a non-parental representative.

*Id.*

176. This can be inferred by the six-year-old limit articulated in the INS policy as paraphrased in the *Gonzalez* case. See *id.*

faced by the child,<sup>177</sup> in most cases decision makers are not requiring child refugee applicants to formulate and articulate a subjective apprehension.

Through guidance issued by the UNHCR, guidelines issued by the United States and Canada, and through decision maker discretion in numerous jurisdictions, children have been procedurally exempted from the subjective apprehension element of the well-founded fear analysis. Why the UNHCR, governments, and decision makers have not simply announced that subjective apprehension should not be a part of the well-founded fear analysis, at least in the case of child refugee applicants, is simply because they have elevated form over substance. Unfortunately, for vulnerable child refugee applicants, this elevation of form is no longer enough.

#### VI. THE NEED TO FORMALIZE A SINGULAR OBJECTIVE RISK APPROACH FOR CHILDREN

The shift to a singular objective test must be formalized in order to effectively protect the needs of child refugee applicants in the future. Formalization will reduce the number of cases in which decision makers abuse their discretion and will help to ensure that a child's independent legal rights under the Convention are respected.

Through guidelines and judicial discretion, the reality for most child applicants is that the objective risk plus subjective apprehension approach has been transformed into a singular objective risk test.<sup>178</sup> However, this procedural approach of informally exempting child refugee applicants from the subjective apprehension element is not enough, because the harm of denying protection to a child who faces objective risk but cannot enunciate his or her subjective apprehension regarding that risk is too great. There must be a formal and substantive recognition that, at minimum, child refugee applications should only be analyzed under an objective risk test.<sup>179</sup> Since the unique vulnerability of child refugee applicants has been recognized over and over,<sup>180</sup> and due to the difficulties and potential impossibility child refugee applicants face in conceiving or articulating their

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177. See discussion *supra* Part V.A.

178. See discussion *supra* Part V.

179. James Hathaway has argued that the subjective apprehension element should not be a part of the well-founded fear analysis at all, and therefore, no refugee claim should be analyzed in a bipartite fashion. See Hathaway, *Well-Founded Fear*, *supra* note 8, at 507, 509. However, that argument is beyond the scope of this article. For an excellent discussion and analysis regarding whether the subjective apprehension element should be required for any refugee applicant, see *id.*

180. See *supra* note 100 and accompanying text.

subjective apprehension,<sup>181</sup> it is a denial of effective protection if child refugee applicants are forced to be solely at the mercy of a procedural exemption or the “sensitivity”<sup>182</sup> of decision makers.

#### A. *The Failure of the Procedural Exemption Approach*

The failure of the procedural exemption from the subjective apprehension element of the well-founded fear analysis can be seen most clearly in a recent case in the United States.<sup>183</sup> In *Abay v. Ashcroft*, Yayeshwork Abay and her minor daughter, Burhan Amare, citizens of Ethiopia, appealed an immigration judge’s denial of their claims for asylum.<sup>184</sup> Amare’s claim for asylum was based on her fear that if she were returned to Ethiopia she would become the victim of forced genital mutilation.<sup>185</sup> At the time of her appearance before an immigration judge for her asylum claim, Amare was nine-years old and she suffered from a profound hearing impairment.<sup>186</sup> At the immigration hearing, Amare testified through a sign language interpreter that: “[s]he knew about circumcision, did not want to be subjected to it because she feared it would cause pain and bleeding, and was afraid to go back to Ethiopia because she feared her relatives or future husband or husband’s relatives would force her to be circumcised.”<sup>187</sup> Despite the content of this testimony, and the fact that the applicant was a nine-year-old hearing impaired child, “[t]he immigration judge denied Amare’s claim for asylum because she has ‘no imminent fear [of female genital mutilation], but rather a general ambiguous fear’ if she is deported.”<sup>188</sup> The Board of Immigration Appeals (BIA) affirmed the ruling of the immigration judge in this case without opinion.<sup>189</sup>

The irrationality of denying refugee protection to a nine-year-old child who testified about her subjective apprehension in the best manner she could (especially when, as was the case in *Abay*, ample objective risk evidence

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181. See discussion *supra* Part IV.B.

182. See Hathaway, *Well-Founded Fear*, *supra* note 8, at 512. Hathaway discusses the concern of a denial of refugee status for applicants like children who may be unable to experience or articulate their fear: “[m]ost courts have been sensitive to such cases, and have exempted children and mentally disabled persons from the duty to demonstrate trepidation as a precondition for refugee status.” *Id.*

183. *Abay v. Ashcroft*, 368 F.3d 634 (6th Cir. 2004).

184. *Id.* at 635-36.

185. *Id.* at 636.

186. *Id.* at 639.

187. *Id.*

188. *Id.* at 639-40.

189. *Id.* at 635-36.

was on the record)<sup>190</sup> was not lost on the Sixth Circuit Court of Appeals.<sup>191</sup> In reversing the immigration judge's decision on Amare's asylum claim, the Sixth Circuit pointed out that the immigration judge's analysis on the subjective apprehension element of well-founded fear "[does] not take the full picture into account."<sup>192</sup> In other words, the immigration judge's analysis did not give the child refugee applicant the procedural exemption to which she was entitled. The Sixth Circuit explained that:

[a]t the time of the hearing, Amare was a nine-year-old child testifying in court about an extremely personal matter. Although her expression of fear in that context may have come across as "general" or "ambiguous," we note that the Immigration and Naturalization Service's guidelines for children's asylum claims, following the recommendations of the United Nations High Commissioner for Refugees, Handbook on Procedures and Criteria for Determining Refugee Status (1992), advises adjudicators to assess an asylum claim keeping in mind that very young children may be incapable of expressing fear to the same degree or with the same level of detail as an adult. In recommending a course of action for evaluating a child's fear, the Children's Guidelines note that the adjudicator must take the child's statements into account, but that "*children under the age of 16 may lack the maturity to form a well-founded fear of persecution, thus requiring the adjudicator to give more weight to objective factors.*" Further, the Guidelines suggest that "children's testimony should be given liberal 'benefit of the doubt' with respect to evaluating a child's alleged fear of persecution."<sup>193</sup>

The Sixth Circuit then employed the analysis outlined in both the *INS Guidelines* and the *UNHCR Handbook* and discussed the objective risk factors in Amare's case.<sup>194</sup> The Sixth Circuit took note of the "nearly universal" practice of female genital mutilation in Ethiopia, and surmised

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190. See *id.* at 640 (If deported, Amare would have been returned to Ethiopia, a country where the practice of female genital mutilation "is 'nearly universal' with 90% of females having been subjected to some form of it.>").

191. *Id.* It should be noted that where the Sixth Circuit Court of Appeals points out the failure of the immigration judge to take the "full picture into account," the BIA, in affirming the case, also failed Amare in the same manner. *Id.*

192. *Id.* at 640.

193. *Id.* (emphasis added) (citations omitted).

194. *Id.*



that even if Amare's mother protected her from female genital mutilation in the short term, in the future Amare would be "forced to choose between marriage and likely mutilation on the one hand, and social ostracism on the other."<sup>195</sup> These objective risk factors, at least for the Sixth Circuit, resulted in a finding that Amare did have a legitimate well-founded fear of persecution.<sup>196</sup>

Admittedly, at the end of the day the Sixth Circuit applied the procedural exemption in Amare's case.<sup>197</sup> However, this case actually exemplifies the failure of the procedural exemption approach. This is because under the procedural exemption approach, decision makers must at least engage in a cursory analysis of subjective apprehension, making it too easy for them to use the subjective apprehension element to deny protection to child refugee applicants who face documented objective risk simply because the children articulate their own fears in a non-adult fashion, or, in the words of the immigration judge in *Abay*, in a "general" or "ambiguous" fashion.<sup>198</sup> If a nine-year-old hearing impaired child who faces a "nearly universal" risk of persecution is denied protection because of a lack of subjective apprehension, one wonders just who is supposed to benefit from the procedural exemption.

While the child in *Abay* ultimately won asylum through her appeal to the federal courts,<sup>199</sup> it is unrealistic to think that appeals to the federal courts will always be a safety net to fix the errors of the Board of Immigration Appeals and immigration judges on the subjective apprehension element of well-founded fear for child refugee applicants.<sup>200</sup> In the United States in 2004, fifty-five percent of all individuals in removal proceedings did not have legal representation.<sup>201</sup> Without the aid of legal counsel, appeals to the federal courts can be impossible for pro se applicants due to the expense and process involved with filing the federal appeal. The child in *Abay* was one of the lucky refugee applicants: her mother had obtained legal counsel for their case and she was not in detention waiting for the outcome of her case.<sup>202</sup> The fact that the applicants in *Abay* were not detained and had legal

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195. *Id.*

196. *Id.*

197. *Id.*

198. *Id.*

199. *Id.* at 642-43.

200. See generally Claire Cooper, *Immigration Appeals Swamp Federal Courts*, SACRAMENTO BEE, Sept. 5, 2004, at A1 ("Because of changes in the way the U.S. Department of Justice handles immigration cases, federal circuit courts are being buried under a 600 percent increase in deportation and asylum appeals, leading some judges to worry whether they can deliver justice.").

201. EXECUTIVE OFFICE FOR IMMIGRATION REVIEW, U. S. DEP'T OF JUSTICE, FY 2004 STATISTICAL YEAR BOOK, FIGURE 9, G-1 (2005), available at <http://www.usdoj.gov/eoir/statspub/fy04syb.pdf>.

202. See *Abay*, 368 F.3d at 636.

representation, and therefore could more easily pursue their federal appeal cannot be underestimated. Detained asylum seekers, especially children, are more likely to simply abandon their claims rather than sit in detention for years on end.<sup>203</sup>

Relying on the federal courts to ensure protection for child refugee applicants who are not given the procedural exemption is even more difficult after the passage of the REAL ID Act (REAL ID).<sup>204</sup> The *Abay* case was decided before REAL ID was enacted.<sup>205</sup> REAL ID contains provisions that will negatively impact all asylum seekers, but especially children.<sup>206</sup> Under REAL ID, decision makers can now in their discretion base an adverse credibility determination on “demeanor, candor, or responsiveness of the applicant”<sup>207</sup> and on inaccuracies or falsehoods of statements that do not go to the heart of the applicant’s claim, even if such statements were not made under oath.<sup>208</sup> In light of the difficulties already identified regarding the cultural, language, and educational barriers between asylum seekers and decision makers,<sup>209</sup> the fact that REAL ID allows decision makers to make adverse credibility decisions based on demeanor could be disastrous. Federal appeals courts may struggle to overcome such adverse findings, since they will never see the child refugee applicant and must therefore rely heavily on the immigration judge’s findings regarding demeanor.

203. *Unaccompanied Children in Immigration Detention*, *supra* note 103, at 59 (“Detention may have the effect of inducing children to abandon their claims, especially when detention is prolonged and conditions are poor”). See Michele R. Pistone, *Justice Delayed is Justice Denied: A Proposal for Ending the Unnecessary Detention of Asylum Seekers*, 12 HARV. HUM. RTS. J. 197, 224 (1999) (noting that prolonged detention induces “genuine asylum seekers to abandon their claims in the hope of facilitating an earlier release from detention, in spite of the fact that they may suffer further persecution if returned to their home country”); see also Women’s Commission, *Prison Guard or Parent?*, *supra* note 104, at 2 (noting that because of a lack of legal representation, “many children asylum seekers give up hope and agree to deportation; in some cases, these children had earlier expressed a fear of return to their homelands.”).

204. REAL ID Act of 2005, Pub. L. No. 109-13, Division B, 119 Stat. 302 (2005) [hereinafter REAL ID].

205. *Abay* was decided on May 19, 2004. *Abay*, 368 F.3d at 364. REAL ID was signed into law on May 11, 2005. REAL ID.

206. See generally Lutheran Immigration and Refugee Serv., *Pending Legislation Would Hurt the Most Vulnerable Immigrants and Violate American Values*, 2005, [http://tnumc.org/index.cfm?PAGE\\_ID=1134&EXPAND=119](http://tnumc.org/index.cfm?PAGE_ID=1134&EXPAND=119) (discussing that child refugee applicants will have a hard time understanding and meeting the new burdens of proof required under REAL ID).

207. REAL ID § 101(a)(3)(B)(iii).

208. *Id.*

209. See discussion *supra* Part III.B.1.

## B. *Hidden Dangers Within the Current Procedural Exemption Approach*

Not only should cases like *Abay* serve as a warning bell to the vulnerability child refugee applicants face in refugee determination processes, but a closer look at the procedural exemption approaches used by the UNHCR, the United States, and Canada also triggers an alarm. In many situations, the approaches taken by the UNHCR, the United States, and Canada<sup>210</sup> are helpful, but do not go far enough. In fact, if applied in certain situations, they could even be a barrier to effective protection for child refugee applicants. For example, in the United States, the *INS Guidelines* are only binding on asylum officers.<sup>211</sup> The *INS Guidelines* are not binding on immigration judges, the BIA, or the federal courts.<sup>212</sup> The ability for these decision makers to simply and legally ignore the *INS Guidelines* can lead to a loss of effective protection for child refugee applicants.

Even when the procedural exemption is applied, protection is not guaranteed. In some cases, the procedural approaches taken to exempt child refugee applicants from the subjective apprehension element look like an effective solution on their face, but can have tragic consequences. The *INS Guidelines*, *Canadian Guidelines*, *UNHCR Handbook*, and various decision makers<sup>213</sup> impute the will or the subjective apprehension of the parents rather than require that the child articulate his or her own subjective apprehension.<sup>214</sup> Under this imputed apprehension approach, a child refugee applicant, as discussed in *Chen Shi Hai* above, may not get an individualized determination of his or her claim.<sup>215</sup>

A second problem with the imputation approach arises when the parents do not have the subjective apprehension necessary for the child refugee applicant's claim. To illustrate how this situation could occur, the facts of the *Abay* case only need to be modified slightly. In that case, the written application for asylum did not mention female genital mutilation.<sup>216</sup> The focus of the written application was on a political opinion claim by the mother.<sup>217</sup> In the *Abay* case, the mother actually testified about her fear that

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210. See discussion *supra* Part V.A.

211. Caroline J. O'Neill, *Health Is a Human Right: Why the U.S. Immigration Law Response to Gender-Based Asylum Claims Requires More Attention to International Human Rights Norms*, 17 J. CONTEMP. HEALTH L. & POL'Y, 241, 244 (2000).

212. *Id.* at 244 n.19.

213. See, e.g., *Chen Shi Hai v. Minister for Immigration and Multicultural Affairs* (2000) 170 A.L.R. 553 (Austl.).

214. See *id.*; *INS Guidelines*, *supra* note 14, at § (III)(C); *Child Refugee Guidelines*, *supra* note 13, § (B)(1); *UNHCR HANDBOOK*, *supra* note 9, ¶ 218.

215. See discussion *supra* Part IV.B.

216. Final Brief of Respondent at 21 n.8, *Abay v. Ashcroft*, 368 F.3d 634 (6th Cir. 2004) (No. 02-3795).

217. See *id.* at 20-21.

her daughter would be subjected to female genital mutilation.<sup>218</sup> However, imagine the quite plausible scenario that Amare's mother was either not opposed to female genital mutilation or did not testify regarding her feelings on female genital mutilation. Under those facts, there would have been no evidence on the record regarding a subjective apprehension of female genital mutilation. Even if Amare's mother was opposed to female genital mutilation, it is reasonable to think that she might not volunteer her feelings about female genital mutilation, considering that it had happened to her many years ago and that her asylum claim was based on political opinion. In such a case, imputing the "fear" of the parent would have been quite detrimental to the child refugee applicant, and could have resulted in the child being denied protection.

Even if we assume that the approach of imputing a parent or other adult's fears to a child refugee applicant would not result in the unwarranted denial of refugee protection, this solution does not solve the problem of requiring a subjective apprehension for all child refugee applicants. Separated children do not arrive with a parent or caregiver, so, under the current well-founded fear analysis, decision makers must still require the child to demonstrate his or her own subjective apprehension.

One of the greatest dangers in continuing to accept the "form over substance" dance of the procedural exemption approach is that none of the guidance issued by either governments or the UNHCR truly addresses the core issue of whether and when a child refugee applicant has the capacity to have a subjective apprehension. As the language of the *Chen Shi Hai* case reminds us,<sup>219</sup> because governments and the UNHCR are not focusing on capacity, the possibility exists for disturbing abuses to occur in the future. In *Chen Shi Hai* the court notes that "[n]o point has been taken that, by reason of his age and circumstances, the appellant, himself, lacks the fear necessary to bring him within the Convention definition of 'refugee.'"<sup>220</sup> This remark implies that although this court did not deny refugee protection to the child refugee applicant because of a failure to articulate subjective apprehension, other courts could easily have done so. In fact, none of the guidelines or guidance issued by the UNHCR draws a bright line exemption rule, even for infants. While acknowledging that children under the age of sixteen may lack the maturity to form a well-founded fear of persecution,<sup>221</sup>

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218. *Abay v. Ashcroft*, 368 F.3d 634, 640-41 (6th Cir. 2004).

219. See discussion *supra* Part IV.B.

220. *Chen Shi Hai*, 170 A.L.R. at ¶ 4.

221. See discussion *supra* note 12 and accompanying text.

neither the United States, Canada, nor the UNHCR encourage or require decision makers to formally exempt any child refugee applicant from articulating subjective apprehension.<sup>222</sup>

The issue of whether a child has capacity to know of the objective risk in order to form a subjective apprehension exists in the cases of both separated and accompanied child refugee applicants. For example, imagine that in 1994, a two-year-old female Tutsi child arrives alone in the United States from Rwanda. This child does not have the capacity to know she faced an objective risk of genocide despite the ample existence of such evidence.<sup>223</sup> It is difficult to reconcile how returning her to Rwanda because of her inability to conceive of a subjective apprehension would satisfy the refugee definition or would comply with the protection goals of the Convention.<sup>224</sup> However, this outcome is entirely possible under the current procedural exemption approach.

Unfortunately, for a child who arrives with a caregiver or parent, capacity can still be an issue. To demonstrate, we once again need only to modify slightly the facts of *Abay*. In the real case, the child refugee applicant was aware of her risk of female genital mutilation.<sup>225</sup> However, imagine the realistic scenario that because her parents had protected her from female genital mutilation, she had no knowledge of it. Without the knowledge of female genital mutilation, Amare could not testify regarding any type of subjective apprehension of female genital mutilation. The fact that Amare was protected from the horrors of female genital mutilation and, therefore, would not have the capacity to form a subjective apprehension does not change the objective risk that she faces. However, since the current guidance from Canada, the United States, and the UNHCR, subjective apprehension still requires children to demonstrate subjective apprehension.<sup>226</sup> Under these facts, Amare could easily lose her refugee claim because she does not have the capacity to know of the risk of persecution that she faces and therefore can not articulate an apprehension of that risk.

Cases like *Abay* show that the UNHCR and signatories to the Convention and Protocol cannot keep doing the “form over substance” dance regarding the subjective apprehension element for child refugee applicants. By continuing to promote the fallacy that well-founded fear contains a subjective apprehension element for child refugee applicants

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222. See discussion *supra* Part V.A.

223. The history of genocide in Rwanda has been well documented. See generally Organization for African Unity, *Rwanda: The Preventable Genocide*, GA Res. 47/1, UN GAOR, 47th Sess., Supp. No. 49, at 12, UN Doc. A/47/49 (May 7, 2000).

224. See discussion *supra* Part I.

225. *Abay*, 368 F.3d at 639-40.

226. See discussion *supra* Part V.A.

(despite their handbooks, guidelines, procedures and the decisions of their adjudicators implicitly and explicitly stating the opposite) the UNHCR, the United States, and Canada are putting vulnerable children at risk. The stakes are simply too high to continue down this road.

## VII. BENEFITS OF A SINGULAR OBJECTIVE RISK APPROACH FOR CHILDREN

Eliminating the subjective apprehension element and relying on a singular objective risk test for child refugee applicants has advantages for both children and decision makers. A singular objective test for the well-founded fear analysis would mean that the decision maker would focus solely on whether a child has a forward-looking expectation of risk and if that risk is well-founded.<sup>227</sup>

One advantage for children is that they will not be forced to attempt to testify to their fears. Focusing on the objective risk evidence should eliminate the amount of time children will either have to be interviewed or testify, reducing the stress placed on children during their refugee status determination.

Reducing the amount of evidence that must come from the child also saves adjudicative resources. Interviewers will not need to spend as much time trying to pull together a story that unequivocally demonstrates subjective apprehension; consequently, less time means less money needed to pay both court officials and interpreters. Relying on objective risk

227. See James Hathaway, *Third Colloquium on Challenges in International Refugee Law: The Michigan Guidelines on Well-Founded Fear*, 26 MICH. J. INT'L L. 491, 497 (2005). Hathaway explains that:

In contrast to the question of whether an applicant is unable or unwilling to avail himself or herself of the country of origin's protection, the assessment of well-founded fear does not comprise any evaluation of an applicant's state of mind.

Most critically, the protection of the Refugee Convention is not predicated on the existence of 'fear' in the sense of trepidation. It requires instead the demonstration of 'fear' understood as a forward-looking expectation of risk. Once fear so conceived is voiced by the act of seeking protection, it falls to the state party assessing refugee status to determine whether that expectation is borne out by the actual circumstances of the case. If it is, then the applicant's fear (that is, his or her expectation) of being persecuted should be adjudged well-founded.

...  
The determination of whether an applicant's 'fear'—in the sense of forward-looking expectation of risk—is, or is not, 'well-founded' is thus purely evidentiary in nature. It requires the state party assessing refugee status to determine whether there is a significant risk that the applicant may be persecuted. While the mere chance or remote possibility of being persecuted is insufficient to establish a well-founded fear, the applicant need not show that there is a clear probability that he or she will be persecuted.

*Id.*

evidence will save decision makers from the inconvenience of creating innovative ways of circumventing the subjective apprehension element. It should also reduce the number of appeals because there should no longer be cases where applications are rejected due to lack of subjective apprehension where objective risk evidence does exist, such as in *Abay*.<sup>228</sup> Many of the difficulties inherent in child refugee applications, such as inability to express fear and reluctance to disclose fear to authorities, will be eliminated or at least greatly reduced by using a singular objective test rather than the objective risk plus subjective apprehension approach.

In addition, implementing a singular objective test ensures that children will not be denied protection because of an inability to conceive of a fear or to communicate their personal fear, especially in countries where guidelines have not yet been adopted. Plus, although decision maker discretion has at times in the past been favorable to child refugee applicants, the climate towards refugees changes over time, and a child's claim should not hinge on whether a decision maker is going to ignore or can create a way to circumvent the subjective element of the objective risk plus subjective apprehension approach.

Adopting a singular objective test does not eliminate the ability of decision makers to take into account particularized vulnerabilities of the refugee applicant.<sup>229</sup> When analyzing well-founded fear under the singular objective risk approach, "evidence of an applicant's susceptibility to increased harm is appropriately considered as part of the analysis of whether the substantive harm feared amounts to a risk of 'being persecuted.'"<sup>230</sup> Focusing on the particularized vulnerability of the refugee applicant during the analysis of "being persecuted" also allows for the incorporation of the views of the child as required under the Convention of the Rights of the Child.<sup>231</sup>

By protecting children more effectively, the singular objective test approach furthers the protection goals of the Convention and is more consistent with the Convention than the objective risk plus subjective apprehension approach for child refugee applicants.

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228. See *Abay*, 368 F.3d at 634.

229. See Hathaway, *Well-Founded Fear*, *supra* note 8, at 551.

230. *Id.*

231. See Convention on the Rights of the Child, *supra* note 99, at art. 12(1) (explaining that "States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.").

## VIII. CONCLUSION

This Article discusses the failure and irrationality of the current approach taken by the UNHCR and most governments regarding the subjective apprehension element of the well-founded fear analysis as it applies to child refugee applicants. Currently, Canada, the United States, the UNHCR and numerous decision makers informally, through a procedural exemption, eliminate the requirement of subjective apprehension for child refugee applicants.<sup>232</sup> This elevation of form over substance is failing. It can result in a denial of effective protection to child refugee applicants, especially young children.

The UNHCR and all of the signatories to the Convention and the Protocol should modify their current approaches to well-founded fear and formally exempt all child refugee applicants from the subjective apprehension element. Transforming the well-founded fear analysis into a singular objective risk test for child refugee applicants should not be a huge shift for the UNHCR, governments, or decision makers. As seen throughout this Article, through different guidelines and decision maker discretion, this modification has already been occurring incrementally in some jurisdictions. Now is the time to put form and substance on the same level to help ensure that child refugee applicants can truly access the promise of protection held out by the Convention and the Protocol.

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232. See discussion *supra* Part V.B.



