

Review Essay

Judicial Abdication Before the Golden Door¹

IMMIGRATION AND THE JUDICIARY: LAW AND POLITICS IN BRITAIN AND AMERICA. By Stephen H. Legomsky.† *New York: Clarendon Press, Oxford University Press, 1987. Pp. xxxix, 345. \$68.00 (hardbound).*

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Why are courts generally reluctant to vindicate the claims of aliens seeking to come to or remain in a foreign country? What makes immigration unique as a subject for judicial intervention in terms of deference to the prerogatives of the other branches of government, to the detriment of individual rights? These questions, which have long puzzled practitioners, are addressed by Professor Legomsky in *Immigration and the Judiciary*. His method is to examine and compare judicial review of immigration cases in the United Kingdom and the United States.

Legomsky finds a nearly uniform reluctance on the part of these two judiciaries to uphold the claims of aliens:

Generally, the results in the immigration cases have been distinctively conservative, a term used here to mean favouring the government over the immigrant on issues that could reasonably have been decided either way. In addition, both the results and ordinarily the rhetoric illustrate the courts' own perceptions that their role requires exceptional deference to the governmental entities whose decisions are being reviewed.²

This conclusion is based on Legomsky's meticulous and scholarly examination of the availability and scope of judicial review in the United Kingdom and the United States, including review of findings of fact, administrative rules, and exercises of discretion, as well as principles of statutory interpretation and application of required procedural safe-

1. See E. LAZARUS, THE POEMS OF EMMA LAZARUS 202-03 (1888) ("The New Colossus").

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2. S. LEGOMSKY, IMMIGRATION AND THE JUDICIARY: LAW AND POLITICS IN BRITAIN AND AMERICA 325 (1987) [hereinafter cited by page number only].

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guards in administrative determinations.³ The jurisprudence of the Immigration Appeal Tribunal and the Board of Immigration Appeals (BIA), the highest administrative review fora for immigration cases in Britain and America, respectively, is also specifically discussed.⁴

The techniques of judicial abdication chronicled in *Immigration and the Judiciary* are varied. Under certain circumstances, the courts decline review altogether. In the United Kingdom, this approach is exemplified by the nonreviewable character of the royal prerogative, a residual discretionary determination not considered susceptible to judicial review with reference to articulable statutory standards.⁵ In the United States, the doctrine of consular nonreviewability—the principle that precludes judicial review of adverse visa decisions made abroad by consular officers—provides another example.⁶ Legomsky presses beyond mere description. After questioning the logic in the origins of consular nonreviewability, he criticizes the doctrine as fundamentally incompatible with the presumption of reviewability under the Administrative Procedure Act.⁷

Yet another illustration of abdication is the so called “plenary power” doctrine, which insulates from review under the Constitution the criteria and procedures for the exclusion and deportation of aliens from the United States.⁸ The plenary power doctrine provides an even more extreme example of the tyranny of unprincipled precedent. Legomsky attributes this categorical preclusion to an accretion of precedent unrelated to the origins of the doctrine and without ascertainable foundation in logic or policy.⁹ The doctrine was derived from early cases dealing with the relationship of the federal and the state governments concerning immigration. In a leap of logic, it was extended to provide a barrier to judicial review against the assertion of individual rights of aliens.¹⁰ Even though periodically identified as a jurisprudential curiosity, the doctrine has remained immune from overruling. As Justice Frankfurter explained over thirty years ago,

3. Pp. 12-106, 143-76.

4. Pp. 111-24, 155-70, 282-90.

5. Pp. 87-92; *but cf.* pp. 92-93 (modern British cases eroding the unreviewability of prerogative acts).

6. Pp. 145-51.

7. Pp. 177-222. The only incursion into this broad preclusion is the application of procedural due process to aliens who have entered the United States and who are subject to deportation proceedings. *See* *The Japanese Immigrant Case (Yamataya v. United States)*, 189 U.S. 86 (1903).

8. Pp. 147-51. *See* 5 U.S.C. §§ 701-06 (1982).

9. Pp. 217-19.

10. *Id.* (citing *The Chinese Exclusion Case*, 130 U.S. 581 (1889); *Head Money Cases*, 112 U.S. 580 (1884); *The Passenger Cases*, 48 U.S. (7 How.) 283 (1849)).

[M]uch could be said for the view, were we writing on a clean slate, that the Due Process Clause qualifies the scope of political discretion heretofore recognized as belonging to Congress in regulating the entry and deportation of aliens. . . .

. . . .

But the slate is not clean. . . . [T]hat the formulation of these policies is entrusted exclusively to Congress has become about as firmly imbedded in the legislative and judicial tissues of our body politic as any aspect of our government.¹¹

The weight of precedent seems to have overwhelmed reason.

Even where review is undertaken, the conservative approach of the courts is reflected in the manipulation of the applicable standards of review. Issues presented may be characterized as questions of "fact" or "discretion" for which a diminished level of review is available.¹² In those instances where plausible issues are presented for review, especially under diminished standards, the results are generally antagonistic to the interests of the individual alien.¹³

But the restrictive approach is not monolithic. Legomsky identifies a departure from judicial abdication in the relatively assertive approach taken by United States courts on issues of statutory interpretation—a subject on which the courts are presumed to be experts.¹⁴ He looks specifically to the development of the ameliorative *Fleuti* doctrine, which is designed to protect returning aliens from forfeitures of status occasioned by brief, casual, and innocent departures from the country,¹⁵ as well as to the extension of discretionary relief to alien criminals who had never left the United States, despite statutory language which purports to restrict the relief to returning residents who have gone abroad.¹⁶ Statutory provisions are interpreted broadly and purposively in order to sustain claims by aliens. But note a recent interruption in this progressive development in the United States Supreme Court's 1984 decision in the *Phinpathya* case,¹⁷ which interpreted statutory language literally in determining that an alien had not satisfied the "continuous physical presence" requirement for suspension of deportation,¹⁸ depriving her of the benefit of the *Fleuti* doctrine.¹⁹ *Phinpathya*, however, might be explained as an

11. *Galvan v. Press*, 347 U.S. 522, 530-31 (1954). See p. 204.

12. Pp. 19-21.

13. Pp. 80-81.

14. Pp. 155-70.

15. Pp. 159-66. See *Rosenberg v. Fleuti*, 374 U.S. 449 (1963).

16. Pp. 166-70. See *Francis v. INS*, 532 F.2d 268 (2d Cir. 1976).

17. Pp. 165-66. See *INS v. Phinpathya*, 464 U.S. 183 (1984).

18. *Phinpathya*, 464 U.S. at 196 & n.13. See 8 U.S.C. § 1254(a)(1) (1982).

19. P. 165.

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informed judicial response to the perceived need to enhance immigration control at a time prior to the enactment of legislation designed to curb undocumented migration.²⁰

Legomsky examines several possible theories to explain the conservatism of the courts.²¹ Is it due to the presence of weighty governmental interests and political questions, such as national security or foreign policy? Is it due to the absence of significant individual interests, on the part of visitors or aliens who arrive at the border without having established ties to the national community? But these and several related theories fail to account for the generally restrictive approaches taken by the courts. Legomsky is led to consider other "external" factors, such as the personal background and attitudes of the judges, which he describes as "homogeneous" and "conservative," and the self-perceived role of the courts in both the United Kingdom and the United States, with United States courts perceiving their role to be somewhat more assertive.²²

The thesis of inexplicable judicial conservatism in *Immigration and the Judiciary* can be usefully viewed in connection with recent developments in refugee jurisprudence in both the United Kingdom and the United States. The refugee cases, which are not treated in the book, provide a useful test of Legomsky's thesis. The governmental interests are typical, i.e. administrative, and the individual interests jeopardized by an erroneous decision and return are the weightiest possible—freedom or even life itself.²³ Moreover, the international law principles involved provide additional sources of relief for refugees.²⁴ Such cases, therefore, would be expected to favor judicial intervention on behalf of the individuals and pose the greatest dilemma for a judiciary predisposed to restriction.

Recent decisions of the United States Supreme Court and the British House of Lords, on the substantive standard for refugee protection²⁵ and on judicial review of agency rules concerning the circumstances under which aliens, including asylum applicants, may present claims for relief,²⁶ will be examined to test Legomsky's thesis. The results of the examination are consistent with Legomsky's point, in that, in statutory interpretation, a liberal trend is identified.

20. Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, 100 Stat. 3359 (codified in scattered sections of 8 U.S.C., 42 U.S.C., 5 U.S.C.).

21. Pp. 273-324.

22. Pp. 223-53.

23. Martin, *Due Process and Membership in the National Community: Political Asylum and Beyond*, 44 U. PITT. L. REV. 165, 189-90 (1983).

24. See *infra* notes 37, 40, 59-60 and accompanying text.

25. See *infra* notes 29-31 and 48-54 and accompanying text.

26. See *infra* note 58 and accompanying text.

The first recent development concerns the standard of proof for asylum applicants. On March 9, 1987, the United States Supreme Court, in *Immigration and Naturalization Service v. Cardoza-Fonseca*,²⁷ decided only the second case under the Refugee Act of 1980.²⁸ The first case, *Immigration and Naturalization Service v. Stevic*,²⁹ held that for an alien to be eligible for the immigration remedy of withholding of deportation,³⁰ he or she must demonstrate that "it is more likely than not that [he or she] would be subject to persecution" in the country to which return was proposed.³¹ The *Stevic* Court deliberately left open the question of the appropriate standard of proof in asylum cases.³² In *Cardoza-Fonseca*, the Court answered that question by holding that the more liberal "well-founded fear" standard, rather than the "probability" standard articulated in *Stevic*, governed asylum.³³

The Court in *Cardoza-Fonseca* looked first, as it had in *Stevic*, to the language and structure of the applicable statute.³⁴ The Refugee Act established a new statutory procedure for granting asylum to refugees who are physically present in the United States. The statute provides:

The Attorney General shall establish a procedure for an alien physically present in the United States or at a land border or port of entry, irrespective of such alien's status, to apply for asylum, and the alien may be granted asylum in the discretion of the Attorney General if the Attorney General determines that such alien is a refugee within the meaning of section 1101(a)(42) of this title.³⁵

The term "refugee" here means:

[A]ny person who is outside any country of such person's nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion³⁶

27. 107 S. Ct. 1207 (1987).

28. Pub. L. No. 96-212, 94 Stat. 102 (1980) (codified in scattered sections of 8 U.S.C.).

29. 467 U.S. 407 (1984).

30. See 8 U.S.C. § 1253(h) (1982).

31. 467 U.S. at 429-30.

32. *Id.*

33. 107 S. Ct. at 1222.

34. *Id.* at 1212-13; see *Stevic*, 467 U.S. at 421-24.

35. 8 U.S.C. § 1158(a) (1982).

36. 8 U.S.C. § 1101(a)(42)(A) (1982).

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This definition is derived from the 1951 Convention and the 1967 Protocol relating to the Status of Refugees, to which the United States acceded in 1968.³⁷

When the asylum provision was added to the immigration statute in 1980, the withholding of deportation provision was also amended.³⁸ The Attorney General previously had had the discretion to grant withholding of deportation to aliens. The statutory language was adjusted in 1980 to remove this discretion and to make withholding mandatory.³⁹ Congress took this action in recognition of the obligation the United States had assumed when it acceded to Article 33(1) of the 1951 Convention, which prohibits the return of refugees to situations that threaten life or freedom.⁴⁰ The Court in *Stevic* found it significant that Congress in the Refugee Act had not incorporated the term “refugee” and the concomitant “well-founded fear” standard into the withholding provision.⁴¹ It thus held that the prior administrative “clear probability” standard for withholding deportation remained in force.⁴² That was not the case, however, with the asylum standard, which incorporates the “refugee” definition, and the Court in *Cardoza-Fonseca* looked to a textual analysis:

To begin with, the language Congress used to describe the two standards conveys very different meanings. The “would be threatened” language of § 243(h) [withholding] has no subjective component, but instead requires the alien to establish by objective evidence that it is more likely than not that he or she will be subject to persecution upon deportation. See *Stevic, supra*. In contrast, the reference to “fear” in the § 208(a) [asylum] standard obviously makes the eligibility determination turn to some extent on the subjective mental state of the alien.⁴³

Congress’ act in simultaneously adding the asylum provision with a new standard, and amending the withholding provision, presumably retaining the old standard, dictated the result in *Cardoza-Fonseca*: “The

37. The United Nations Protocol relating to the Status of Refugees, *opened for signature* Jan. 31, 1967, 19 U.S.T. 6223, T.I.A.S. No. 6577, 606 U.N.T.S. 268 [hereinafter 1967 Protocol]. It was ratified by the United States on October 4, 1968. 114 CONG. REC. 29,607 (1968). The Protocol incorporated the pertinent aspects of the refugee definition in article 1 and articles 2-34 of the 1951 Convention relating to the Status of Refugees. 19 U.S.T. 6225, 6261-64, 6264-76, T.I.A.S. No. 6577 (quoting Convention relating to the Status of Refugees, 189 U.N.T.S. 150, 152-56, 156-75 (1951) [hereinafter 1951 Convention]).

38. See *Stevic*, 467 U.S. at 421 n.15; see also 8 U.S.C. § 1253(h) (1982).

39. *Cardoza-Fonseca*, 107 S. Ct. at 1212.

40. 1951 Convention, *supra* note 37, at 176. Article 33(1) provides that “[n]o Contracting State shall expel or return (‘refouler’) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.”

41. 467 U.S. at 422-24.

42. *Id.* at 430.

43. 107 S. Ct. at 1212-13 (footnotes omitted).

contrast between the language used in the two standards, and the fact that Congress used a new standard to define the term 'refugee,' certainly indicate that Congress intended the two standards to differ."⁴⁴

The decision, however, contains much more than a bare textual analysis. Unlike *Stevic*, the Court in *Cardoza-Fonseca* was more purposive, in that it went beyond the plain language of the statute to examine whether there is a "clearly expressed legislative intention' contrary to that language."⁴⁵ The Court found that the language of the Refugee Act was confirmed by pre-1980 experience under a predecessor to the asylum provision, the intent to conform the definition of "refugee" to that contained in the 1967 Protocol, and the fact that Congress had specifically declined to enact a version of the Act that would have rendered a refugee ineligible for asylum unless "his deportation or return would be prohibited" by the withholding provision.⁴⁶

The liberal approach to statutory interpretation was then repeated in the United Kingdom, which has also incorporated the Convention's "well-founded fear of persecution" standard into its laws regarding political asylum and the determination of refugee status.⁴⁷ Notwithstanding the narrow scope of judicial review of administrative decisions available in the United Kingdom, a generous interpretation of the Convention's definition of political refugees and the well-founded fear standard has been adopted.

A very recent decision of the House of Lords is on point.⁴⁸ The case involved six Tamil asylum applicants who claimed to be refugees from Sri Lanka. The Secretary of State for the Home Department refused the claims and leave to apply for judicial review was granted.⁴⁹ The court of first instance dismissed the applications, but the Court of Appeal reversed.⁵⁰ Citing the United States Supreme Court in *Cardoza-Fonseca*, the Court of Appeal held that:

"[W]ell-founded fear" is demonstrated by providing (a) actual fear and (b) good reason for this fear, looking at the situation from the point of view of one of reasonable courage. . . . Fear is clearly an entirely subjective state

44. *Id.* at 1213. See Helton, *Immigration and Naturalization Service v. Stevic: Standards of Proof in Refugee Cases Involving Political Asylum and Withholding of Deportation*, 87 W. VA. L. REV. 787 (1985).

45. 107 S. Ct. at 1213 n.12 (quoting *Consumer Product Safety Comm'n v. GTE Sylvania*, 447 U.S. 102, 108 (1980)).

46. *Id.* at 1213-14.

47. *Regina v. Secretary of State for the Home Department ex parte Sivakumaran*, [1988] 1 All E.R. 193, slip op. at 2-3 (H.L. 1987).

48. *Id.*

49. *Id.* at 1-2.

50. [1987] 3 W.L.R. 1047 (C.A.).

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experienced by the person who is afraid. The adjectival phrase “well-founded” qualifies, but cannot transform, the subjective nature of the emotion.⁵¹

But the House of Lords found that the Court of Appeal had gone too far in stating the principle. Lord Keith explained:

It is a reasonable inference that the question whether the fear of persecution held by an applicant for refugee status is well-founded is . . . intended to be objectively determined by reference to the circumstances at the time prevailing in the country of the applicant’s nationality. This inference is fortified by reflection that the general purpose of the [Refugee] Convention is surely to afford protection and fair treatment to those for whom neither is available in their own country, and does not extend to the allaying of fears not objectively justified, however reasonable those fears may appear from the point of view of the individual in question.⁵²

In finding that the circumstances justifying the fear must be real, Lord Keith also cited *Cardoza-Fonseca* with approval, stating:

It would . . . appear that Stevens J. was of opinion [sic] that it was appropriate to weigh up upon the basis of an objective situation established by evidence whether or not there was a reasonable chance or serious possibility of persecution. There is no suggestion that the matter should be looked at only from the point of view of the individual claiming to have well-founded fear.⁵³

Notwithstanding the qualification, the decision is clearly in the liberal vein.⁵⁴

On reviewing issues of discretion, refugees have not fared nearly as well. On March 1, 1988, in *Immigration and Naturalization Service v. Abudu*,⁵⁵ the United States Supreme Court held that a reviewing court can set aside the denial of an administrative motion to reopen a final administrative order to apply for substantive relief from deportation or exclusion only if it concludes there was an abuse of discretion. The Court explained:

That is, in a given case the BIA may determine, either as a sufficient ground for denying relief or as a necessary step toward granting relief, whether the alien has produced previously unavailable, material evidence [8 C.F.R. § 3.2 (1987)], and, in asylum cases, whether the alien has reasonably

51. *Id.* at 1052-53, quoted in *Sivakumaran*, slip op. at 3.

52. *Sivakumaran*, slip op. at 4.

53. *Id.* at 6.

54. Such an outcome is particularly noteworthy given the proclivity of the courts in the United Kingdom to interpret treaty obligations narrowly. See p. 80.

55. 108 S. Ct. 904 (1988).

explained his or her failure to request asylum initially [8 C.F.R. § 208.11 (1987)].⁵⁶

The Court in *Abudu* disfavored motions to reopen in deportation or exclusion proceedings even when the reopening is sought, as in *Abudu's* case, to assert a claim based on fear of persecution upon return to the home country.⁵⁷

The *Abudu* Court's approach is restrictive and incompatible with the unique situation of refugees and the purpose of the Refugee Act. Decisions whether to reopen deportation or exclusion proceedings to seek asylum, if they are to be rational and not arbitrary, must take these factors into account. Refugees frequently seek protection only after it becomes clear that they have little hope of a safe, unmolested return to their homelands. Often, because of their reluctance to sever ties with their homelands and out of fear of reprisals to family and others, refugees apply for asylum as a last resort. The Court's decision in *Abudu* failed to recognize this reality and takes an overly conservative approach.

Unfortunately, the Court's instructions regarding deference to agency decisions went even further:

[A]lthough all adjudications by administrative agencies are to some degree judicial and to some degree political . . . INS officials must exercise especially sensitive political functions that implicate questions of foreign relations, and therefore the reasons for giving deference to agency decisions on petitions for reopening or reconsideration in other administrative contexts apply with even greater force in the INS context.⁵⁸

This statement provides another chilling omen of an abdication of judicial responsibility. No tenet is more fundamental to American refugee law than the notion that individual asylum adjudications are to be free from the influence of foreign relations. Congress intended individual refugee claims to be determined evenhandedly, without regard to political ideology. When the United States became a party to the 1967 Protocol, it agreed to apply the Protocol's definition of "refugee": anyone with a "well-founded fear of being persecuted" based on "race, religion, nationality, membership in a particular social group or political opinion."⁵⁹ This standard was meant to be nonideological, and the situation of each

56. *Id.* at 913.

57. *Id.*

58. *Id.* at 914-15 (footnotes omitted).

59. 1967 Protocol, art. 1, § 2, 19 U.S.T. at 6225, T.I.A.S. No. 6577, 606 U.N.T.S. at 268; 1951 Convention, art. 1, § A(2), 189 U.N.T.S. at 152, 154.

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person was to be assessed on its own merits.⁶⁰ The Refugee Act of 1980⁶¹ established neutral eligibility criteria in accordance with the international obligations of the United States.⁶² By injecting notions of foreign relations into asylum cases, the *Abudu* decision invites the continuation of an inappropriately restrictive approach in contravention to international humanitarian principles.⁶³

The basic premise of *Immigration and the Judiciary* is unassailable—the courts have not been very solicitous of the interests of aliens in immigration cases. The courts decline to review whole categories of cases, and frequently exercise review under unnecessarily restricted standards. Even when review is full, as on questions of law, the results are generally inimical to the interests of aliens. Such a conservative approach defies logic or policy. As Legomsky suggests, courts may indeed be influenced by external factors such as judges' personal attitudes.⁶⁴ Judges, after all, are also citizens who may wish to pay homage to the sometimes arbitrary prerogatives of sovereignty and national identity. Some support for this proposition is provided in the rulings of the European Court, by judges who, in owing allegiance to an international legal regime, are presumably liberated from such nationalistic constraints. Legomsky characterizes the European Court's decisions as "liberal" and favoring the freedom of movement of migrant workers.⁶⁵ This jurisprudence clearly reflects the absence of conservatism inspired by concepts of sovereignty.

In any event, at least in the context of refugees, developments in international law might inspire greater solicitude from the courts. Those in need of refugee protection may be able to invoke an evolving international law of human rights in order to overcome the narrow approach so frequently taken in the application of a nation's municipal immigration law. While the results are currently mixed, the infusion of these human rights principles into national jurisprudence might ultimately result in a fundamental transformation of immigration law.

60. UNITED NATIONS HIGH COMMISSIONER 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* para. 43, U.N. Doc. HCR/IP/4/Eng. (1979).

61. Pub. L. No. 96-212, 94 Stat. 102 (1980).

62. See Helton, *Political Asylum Under the 1980 Refugee Act: An Unfulfilled Promise*, 17 U. MICH. J.L. REF. 243, 251 (1984).

63. See *supra* notes 37, 40, 59-60 and accompanying text.

64. Pp. 226-35.

65. Pp. 125-42, 132, 134.

