INS V. CARDOZA-FONSECA: THE DECISION AND ITS IMPLICATIONS

ARTHUR C. HELTON*

INTRODUCTION

On March 9, 1987, the United States Supreme Court announced a new standard of proof governing asylum applications under § 208(a) of the Immigration and Nationality Act (INA)[1] in *INS v. Cardoza-Fonseca*.[2] *Cardoza-Fonseca* is only the second case decided under the Refugee Act of 1980.[3] The first case, *INS v. Stevic*,[4] held that an alien is eligible for the immigration remedy of the withholding of deportation,[5] only if she demonstrates that "it is more likely than not that she would be subject to persecution" in the country to which return was proposed.[6] However, the *Stevic* Court deliberately left unanswered the question of what the appropriate standard of proof should be in asylum cases. In *Cardoza-Fonseca*, the Court answered that question by holding that the well-founded fear standard which governed asylum was more liberal than the *Stevic* "probability" standard.[7] While the Court did not definitively define well-founded fear,[8] its rationale in *Cardoza-Fonseca* provides useful guidance on the criteria to be applied in future refugee status

* Director, Political Asylum Project, Lawyers Committee for Human Rights. A.B., Columbia University, 1971. J.D., New York University School of Law, 1976.

1. Immigration and Nationality Act of 1952, § 208(a), 8 U.S.C. § 1158(a) (1982).

2. 480 U.S. 421 (1987).

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

4. 467 U.S. 407 (1984).

5. *See* Immigration and Nationality Act of 1952, § 243(h), 8 U.S.C. § 1253(h) (1982), *amended by* Refugee Act of 1980, Pub. L. No. 96-212, § 203(e), 94 Stat. 102, 107 (1980).

6. 467 U.S. at 429-30.

7. *Id.* at 430.

8. INS v. Cardoza-Fonseca, 480 U.S. 421, 438 (1987).

determinations. This rationale and its implications are the subjects of this article.

I.
STATEMENT OF THE CASE

Luz Marina Cardoza-Fonseca, a 38-year-old Nicaraguan woman, entered the United States with a visitor's visa in 1979.[9] Having overstayed her permitted stay, immigration authorities initiated deportation proceedings against Ms. Cardoza-Fonseca. During the deportation proceedings, she conceded that she had entered the United States illegally but requested both asylum as a refugee and withholding of deportation.[10] Ms. Cardoza-Fonseca alleged a fear of abuse and mistreatment by the Nicaraguan authorities should she be returned to Nicaragua. She believed Nicaraguan officials would identify her with her brother, whom they had tortured and imprisoned because of his political activities.[11]

The immigration judge applied the same standard of proof to evaluate both the asylum and the withholding claims. Finding that she had not established "a clear probability of persecution," the judge ruled that Ms. Cardoza-Fonseca was not entitled to either form of relief under either claim.[12] On review, the Board of Immigration Appeals affirmed the immigration judge's ruling.[13]

Ms. Cardoza-Fonseca sought judicial review in the Ninth Circuit Court of Appeals on the sole question of whether she was entitled to the application of a more generous well-founded fear standard with respect to the asylum determination.[14] Agreeing with her contention that she was entitled to the well-founded fear standard for her asylum application, the circuit court remanded the case to the Board. The court ruled that the well-founded fear standard which governs asylum requests is different and more generous than the clear probability standard which governs withholding requests.[15]

The Supreme Court granted certiorari to resolve a conflict in the circuits on the question of the appropriate standard of proof in asylum proceedings.[16] Prior to *Cardoza-Fonseca*, the Second and Fifth Circuits followed the well-founded fear standard as applied by the Ninth Circuit,[17] while the Sixth and

9. *Id.* at 424.

10. *Id.* at 424-26. "Asylum" is a discretionary remedy that leads to permanent resident status for a refugee. 8 U.S.C. § 1158(a) (1982). "Withholding" is a mandatory remedy that temporarily protects a refugee against return to a particular country. 8 U.S.C. § 1253(h) (1982).

11. 480 U.S. at 424-25.

12. *Id.* at 425.

13. *Id.*

14. *Id.*

15. *Id.* at 426.

16. *Id.* at n.2.

17. Carcamo-Flores v. INS, 805 F.2d 60 (2d Cir. 1986); Guevara-Flores v. INS, 786 F.2d 1242 (5th Cir. 1986); Cardoza-Fonseca v. INS, 767 F.2d 1448 (9th Cir. 1985).

the Seventh Circuits applied the clear probability standard.[18] And the Third Circuit had affirmed a Board holding equating the well-founded fear and clear probability standards.[19]

II.
THE DECISION AND ITS RATIONALE

The Court in *Cardoza-Fonseca* looked first, as it had in *Stevic*, to the language and structure of the applicable statute.[20] The Refugee Act of 1980 established a new statutory procedure for granting asylum to refugees 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)(A) of this title.[21]

The statute defines "refugee" as:

> [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 opinion. . . .[22]

When Congress amended the Immigration and Nationality Act of 1952 with the asylum provision of the Refugee Act of 1980, it also amended the withholding of deportation provision.[23] Although the Attorney General previously had the discretion to grant withholding of deportation to aliens, the 1980 Act made withholding mandatory.[24]

In making withholding mandatory, Congress recognized the United States' obligation under the 1967 United Nations Protocol Relating to the Status of Refugees (the "Protocol").[25] Article 33(1) of the Protocol prohibits the

18. *See* Youkhanna v. INS, 749 F.2d 360 (6th Cir. 1984); Carvajal-Munoz v. INS, 743 F.2d 562 (7th Cir. 1984).

19. Sankar v. INS, 757 F.2d 532 (3d Cir. 1985).

20. 480 U.S. 421, 427 (1987).

21. 8 U.S.C. § 1158(a) (1982).

22. 8 U.S.C. § 1101(a)(42)(A) (1982).

23. *See* INS v. Stevic, 467 U.S. 407, 421 n.15 (1984). *See also* 8 U.S.C. § 1253(h) (1982).

24. 8 U.S.C. § 1253(h)(1) (1982).

25. U.N. Protocol Relating to the Status of Refugees, *done* January 31, 1967, 19 U.S.T. 6223, T.I.A.S. No. 6577, 606 U.N.T.S. 267 [hereinafter Protocol]. The United States ratified the Protocol on October 4, 1968. 114 CONG. REC. 29,607 (1968). Article 1 of the Protocol incorporated the pertinent aspects of the definition of refugee in the 1951 Convention Relating

return of refugees to situations that threaten the refugee's life or freedom.[26] The Court in *Stevic* observed that Congress, in the Refugee Act, did not incorporate the term "refugee" and the concomitant well-founded fear standard into the withholding provision.[27] *Stevic* held that the prior, administrative clear probability standard for withholding requests remained in force.[28] The asylum standard, however, does incorporate the "refugee" definition. Employing a textual analysis, the *Cardoza-Fonseca* Court noted:

> 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. . . . 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.[29]

The Court also pointed out that requiring that the "fear" of persecution be "well-founded" does not transform the standard into a "more likely than not" one:

> One can certainly have a well-founded fear of an event happening when there is less than a 50% chance of the occurrence taking place. As one leading authority has pointed out: "Let us . . . presume that it is known that in the applicant's country of origin every tenth adult male person is either put to death or sent to some remote labor camp . . . In such a case it would be only too apparent that anyone who has managed to escape from the country in question will have 'well-founded fear of being persecuted' upon his eventual return."[30]

Congress simultaneously added the asylum provision, with a new standard, and amended the withholding provision while presumably retaining its old standard. These actions dictated the *Cardoza-Fonseca* result. The Court noted "[t]he contrast between the language used in the two standards, and the fact that Congress used a new standard to define the term 'refugee,' certainly

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to the Status of Refugees. *See* U.N. Convention Relating to the Status of Refugees, *done* July 28, 1951, 189 U.N.T.S. 137 [hereinafter Convention]. The Protocol also incorporated articles 2 to 34 of the Convention. Protocol, *supra*.

26. "No 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." Convention, *supra* note 25, at 176, *quoted in* INS v. Cardoza-Fonseca, 480 U.S. 421, 430 n.7 (1987).

27. 467 U.S. at 422.

28. *Id.* at 430.

29. 480 U.S. 421, 430-31 (1987).

30. *Id.* at 431 (quoting A. GRAHL-MADSEN, THE STATUS OF REFUGEES IN INTERNATIONAL LAW 180 (1966)).

indicate that Congress intended the two standards to differ."[31]

Cardoza-Fonseca does not, however, rest on a bare textual analysis of the statute. Unlike *Stevic*, in *Cardoza-Fonseca* the Court went considerably beyond the plain language of the statute to examine whether there is a "clearly expressed legislative intention" contrary to the language.[32]

> Three aspects of that history are particularly compelling: The pre-1980 experience under § 203(a)(7), the only prior statute dealing with asylum; the abundant evidence of an intent to conform the definition of "refugee" and our asylum law to the United Nations Protocol to which the United States has been bound since 1968; and the fact that Congress declined to enact the Senate version of the bill that would have made a refugee ineligible for asylum unless "his deportation or return would be prohibited by § 243(h)".[33]

These factors provide important insights into the significance of *Cardoza-Fonseca*.

Prior to 1980, section 203(a)(7) of the statute authorized the Attorney General to permit "conditional entry" to a certain number of refugees fleeing from communist-dominated areas or the Middle East "because of persecution or a well-founded fear of persecution on account of race, religion or political opinion."[34] The Board of Immigration Appeals had long found the "well-founded fear" standard under section 203(a)(7) to be significantly more generous than the withholding standard.[35]

Given the legislative history of the new definition of "refugee" in the 1980 Act, the Court determined that Congress, in enacting the 1980 Refugee Act, did not seek to restrict the standards for the admission of refugees. Instead, Congress sought to eliminate the ideological and geographical limitations of the previous standard and to conform United States domestic law to the standards of the U.N. Protocol to which the United States acceded in 1968.[36]

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31. *Id.* at 432. The legislative history of the Refugee Act, however, is silent as to any *express* recognition by Congress of differing standards to be applied to asylum and withholding requests. Such silence is hardly surprising. All parties to the legislative process assumed that one uniform standard would obtain for the purpose of recognizing and protecting refugees in the United States. *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, 797 (1985). The Court's failure to take this assumption by Congress into account in deciding *Stevic* prompted, in significant part, its dilemma in *Cardoza-Fonseca*. 480 U.S. at 432.

32. 480 U.S. at 432 n.12. Justice Scalia's concurring opinion criticized the majority's approach to ascertaining the intent of Congress by reference to the legislative history of the Refugee Act. In his view, the plain meaning of the statutory language and structure of the Immigration and Nationality Act were dispositive. *Id.* at 452-53. Justice Scalia also criticized what he saw as the majority's effort to controvert the holding in Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984), which mandated that courts defer to an agency's reasonable interpretation of a statute. 480 U.S. at 453-54 (Scalia, J., concurring).

33. 480 U.S. at 432-33.

34. 8 U.S.C. § 1153(a)(7)(A) (1976), *amended by* 8 U.S.C. § 1153(a)(7) (1982).

35. 480 U.S. at 434.

36. *Id.* at 436-37. *See* Protocol, *supra* note 25.

Thus, Congress adopted a definition of "refugee" that proved to be virtually identical to the one prescribed by international law. According to this definition a "refugee" is an individual 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, is unable or, owing to such fear, is unwilling to return to it.[37]

The interpretation both of the Protocol and its definition of "refugee" rendered by the Office of the United Nations High Commissioner for Refugees provides further support for the Court's analysis of the correct standard. The High Commissioner has stated that an applicant for asylum demonstrates a well-founded fear where she establishes, to a reasonable degree, that her return to or continued stay in her country of origin would become intolerable.[38]

The legislative history of the 1980 Act gave the Court additional support for its analysis. The original version of the House bill gave the Attorney General the discretion to grant asylum to any refugee,[39] while the Senate bill limited asylum to refugees whose deportation would be prohibited by the withholding provision.[40] Under the Senate bill, only refugees meeting the clear probability standard qualified for asylum.[41] Enactment of the House bill, according to the Court, indicated that Congress had declined to restrict asylum eligibility only to refugees who met the stricter withholding standard.[42]

Cardoza-Fonseca is also significant for the two restrictive asylum arguments it explicitly rejects. First, the government argued that it is anomalous for the asylum provision, which affords the possibility of permanent residence and ultimate membership in the political community, to have a less stringent standard for eligibility than the withholding provision, which protects only temporarily against return to a specified country.[43] The Court, however, found no merit in this contention because it fails to recognize that an alien who satisfies the applicable standard under § 208(a) has no absolute *right* to remain in the United States but is simply *eligible* for asylum. The Attorney General has the discretion to grant or deny that alien's application. By contrast, an alien satisfying the stricter withholding standard of § 243(h) is auto-

37. 480 U.S. at 437.

38. *Id.* at 439. *See generally,* OFFICE OF THE UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES, HANDBOOK ON PROCEDURES AND CRITERIA FOR REFUGEES (1979) [hereinafter HANDBOOK].

39. H.R. REP. NO. 781, 96th Cong., 2d Sess. (1980).

40. S. REP. NO. 256, 96th Cong., 1st Sess. (1979).

41. *Id.* at 26.

42. 480 U.S. at 442. Drawing this inference from such "circumstantial evidence" of Congressional intent is necessarily strained. *See supra* note 31.

43. 480 U.S. at 443.

matically entitled to the withholding of deportation.[44]

The Court also dismissed the government's second contention that the "well-founded fear" and "clear probability" standards are equivalent insofar as they are so construed by the Board of Immigration Appeals.[45] The Court found that because the Board of Immigration Appeals had taken inconsistent positions on this matter in the past and because the issue was one of pure statutory construction, the Court declined to give substantial deference to the agency's interpretation of the correct standard.[46] The Court concluded:

> Deportation is always a harsh measure; it is all the more replete with danger when the alien makes a claim that he or she will be subject to death or persecution if forced to return to his or her home country. In enacting the Refugee Act of 1980 Congress sought to "give the United States sufficient flexibility to respond to situations involving political or religious dissidents and detainees throughout the world." H.R. Rep. 9. Our holding today increases that flexibility by rejecting the government's contention that the Attorney General may not even consider granting asylum to one who fails to satisfy the strict § 243(h) standard. Whether or not a "refugee" is eventually granted asylum is a matter which Congress has left for the Attorney General to decide. But it is clear that Congress did not intend to restrict eligibility for that relief to those who could provide that it is more likely than not that they will be persecuted if deported.[47]

III.
ANALYSIS

The myriad of obstacles asylum seekers and their counsel face in developing a documentary record demonstrating a "well-founded fear of persecution" within the meaning of the Refugee Act of 1980 warrants a liberal standard for establishing asylum eligibility. Thus, the Court's decision in *Cardoza-Fonseca*, to the extent that it declares a generous standard of proof to be applicable to asylum applicants, is clearly justified in view of these inherent difficulties of proof. Congress clearly intended the Refugee Act to address "the tragedy of countless men, women, and children forced to leave their homes . . . [w]hether they be 'boat people' fleeing the upheavals in Indochina, refugees in southern Africa fleeing racism or guerilla war, or Soviet Jews and Eastern Europeans

44. *Id.*

45. *Id.* at 445-48. This aspect of the Court's holding prompted Justice Scalia's concern with the apparent modification of the rule of deference to agency interpretations of a statute. *See supra* note 32.

Justice Powell, writing for the dissent, argued that the majority failed to give due deference to the agency's position that there was no practical difference between the standards for asylum and withholding. Justice Powell also pointed out that a lower standard had been applied in the administrative determinations in this case. *Id.* at 459-60, 465-66 (Powell, J., dissenting).

46. *Id.* at 446 n.30.

47. *Id.* at 449-50.

seeking the promise of the Helsinki Accords. . . ."[48]

The purpose of liberalizing the Act was "to respond to the urgent needs of persons subject to persecution in their homelands."[49] Congress realized the vast majority of asylum applicants would be from diverse cultures, without a command of the English language and without the opportunity or resources to document their persecution. Aliens fleeing persecution often are unable to gather documentary evidence to prove, to the satisfaction of the courts, either past persecution or the threat of future persecution.[50] Indeed, many asylum seekers reach the United States physically and emotionally exhausted, with nothing more than the clothing they are wearing.[51]

The majority of asylum applicants have little to offer other than their own testimony that specific, concrete reasons exist for fearing persecution. Their persecutors are not likely to accommodate them by providing documentary evidence of past or contemplated future persecution. Therefore, the applicant's counsel must assemble evidence of general conditions in the refugee's country of origin in an effort to corroborate the asylum seeker's testimony. Indigenous refugee groups in the United States and abroad and organizations including the United States Department of State, Amnesty International, the United Nations High Commissioner for Refugees, the Americas Watch Committee, and the Helsinki Watch Committee frequently aid in compiling this evidence. Courts and the Board of Immigration Appeals are receptive to this type of evidence.[52]

In addition to the problems of obtaining documentation to support the applicant's claim, many asylum seekers do not speak English. Consequently, they must communicate through interpreters. The use of a third-party interpreter increases the potential for misunderstanding and inhibits the growth of trust between applicants and their counsel. The courts have recognized the obstacles encountered by asylum applicants and their need for counsel to represent their interests.[53] One court has specifically noted the added difficulties in obtaining information from applicants when the interviewer has a totally

48. 125 CONG. REC. 23,232 (1979) (statement of Sen. Kennedy).

49. Refugee Act of 1980, Pub. L. No. 96-212, § 101, 94 Stat. 102.

50. *See* Cardoza-Fonseca v. INS, 767 F.2d 1448, 1453 (9th Cir. 1985); Carvajal-Munoz v. INS, 743 F.2d 562, 574 (7th Cir. 1984).

51. *See* Jean v. Nelson, 711 F.2d 1455, 1507 (11th Cir. 1983), *modified on other grounds*, 727 F.2d 957 (11th Cir. 1984) (en banc), *appeal dismissed*, 472 U.S. 846 (1985); Haitian Refugee Center v. Civiletti, 503 F. Supp. 442, 474-510 (S.D. Fla. 1980), *appeal dismissed*, 614 F.2d 92 (5th Cir. 1980), *modified sub nom.* Haitian Refugee Center v. Smith, 676 F.2d 1023 (5th Cir. 1982).

52. *See, e.g.*, *Haitian Refugee Center*, 676 F.2d at 1042 (indicating the relevance of evidence concerning general conditions); *Civiletti*, 503 F. Supp. at 475 ("No asylum claim can be examined without an understanding of the conditions in the applicant's homeland."). *See In re* Exame, 18 I. & N. Dec. 303, 304-05 (B.I.A. 1982) (immigration judge improperly excluded evidence including "various reports by Amnesty International and the Lawyers Committee for International Human Rights, Country Reports on Human Rights Practices from the United States Department of State").

53. *See* Rios-Berrios v. INS, 776 F.2d 859, 862-63 (9th Cir. 1985).

dissimilar cultural background from the applicant.[54] Even more alarming is the situation where the interpreter relays incorrect information.[55] The Second Circuit, in reversing the denial of a petition for a writ of habeas corpus which sought review of an exclusion and deportation order, has gone as far as to state that if the asylum applicant had understood English, "he would have realized that his asylum application did not state his true claim."[56]

Applicants also are frequently afraid to disclose sensitive information. They believe such information could place them in jeopardy if they are returned home or could jeopardize the safety of their families or friends who remain in the home country. The courts have recognized this additional obstacle to establishing an asylum claim.[57]

Asylum applicants able to corroborate their claims with independent documented evidence are, indeed, rare exceptions. The Haitian or Cuban boat people, South African refugees, or displaced men, women and children from Central America, in contrast to more prominent asylum seekers, often lack documented evidence of specific past persecution or of the threat of future persecution. However, their cases may be no less compelling than those extraordinary asylum applications for which documentation can be produced. For that reason, the "well-founded fear" standard requires only that the applicant's fear be genuine and reasonable under the circumstances.[58] By adopting a generous standard of proof, the Supreme Court rightfully acknowledged the practical difficulties faced by asylum seekers in obtaining documentary evidence independent of their own testimony.

Even before Congress enacted § 208(a) of the Refugee Act, the Board of Immigration Appeals recognized an applicant's "own testimony may be the best — in fact the only — evidence available."[59] Consequently, the Board applied a generous standard of proof in asylum claims adjudicated under a predecessor provision.[60]

The Office of the United Nations High Commissioner for Refugees has also emphasized the inherent difficulties refugees face in proving asylum claims. In its Handbook on Procedure and Criteria for Determining Refugee Status Under the 1951 Convention and the 1967 Protocol, the Office recom-

54. *Civiletti*, 503 F. Supp. at 486.

55. Augustin v. Sava, 735 F.2d 32 (2d Cir. 1984). *See also* Jean v. Nelson, 711 F.2d at 1463 ("translators were so inadequate that Haitians could not understand the proceedings nor be informed of their rights"); Gonzales v. Zubrick, 45 F.2d 934, 937 (6th Cir. 1930) (inadequate translation in deportation hearing).

56. *Augustin*, 735 F.2d at 38.

57. *See Civiletti*, 503 F. Supp. at 483 (noting that asylum-seekers might be "extremely cautious and suspicious" to protect themselves or others from reprisals in their homeland).

58. *See* Helton, *supra* note 31, at 800-08.

59. *In re* Sihasale, 11 I. & N. Dec. 759, 762 (B.I.A. 1966) (asylum sought under predecessor of 8 U.S.C. § 1158(a), providing for conditional entry).

60. *Id. See also In re* Ugricic, 14 I. & N. Dec. 384, 385-86 (B.I.A. 1972) (credible testimony could satisfy the fear of persecution standard under the predecessor of 8 U.S.C. § 1158(a), providing for conditional entry).

mends a generous approach to reviewing such claims.[61] The Handbook favors the subjective "fear" component of the standard,[62] and suggests a liberal standard when the objective "well-founded" component is used.[63] According to the Handbook:

> 196. [C]ases in which an applicant can provide evidence of all his statements will be the exception rather than the rule. In most cases a person fleeing from persecution will have arrived with the barest necessities and very frequently even without personal documents . . . and there may also be statements that are not susceptible of proof. In such cases, if the applicant's account appears credible, he should, unless there are good reasons to the contrary, be given the benefit of the doubt.
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> 197. The requirements of evidence should thus not be too strictly applied in view of the difficulty of proof inherent in the special situation in which an applicant for refugee status finds himself.[64]

Prior to the enactment of the Refugee Act, Congress was dissatisfied with the failure of the Immigration and Naturalization Service to meet the United States' international obligation to grant asylum.[65] By declaring, in *Cardoza-Fonseca*, a generous standard of proof to be applied in asylum cases, the Supreme Court has ameliorated the difficulties inherent in demonstrating a "well-founded fear of persecution." A generous standard for the examination of asylum claims furthers the purposes and policies of the Refugee Act, places the United States in conformity with its international obligations, and reflects "one of the oldest themes in America's history — welcoming homeless refugees to our shores."[66]

Congress intended that the statutes dealing with refugees and asylum, such as the Refugee Act, be interpreted and applied consistent with the Protocol. General principles of statutory interpretation require reference to the Protocol and Convention in interpreting the Refugee Act. For over a century and a half, the United States' courts have embraced the principle that a domestic statute should be construed consistently with international law whenever possible.[67]

As a duly signed and ratified international agreement, the Protocol is a

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61. *See supra* text accompanying note 35. *See* HANDBOOK, *supra* note 38.

62. HANDBOOK, *supra* note 38, at 37-41, 45, 52.

63. *Id.* at 42-43, 196-97.

64. *Id.* at 196-97.

65. *See Admission of Refugees into the United States, II: Hearings Before the Subcomm. on Immigration, Citizenship and International Law of the House Comm. on the Judiciary*, 95th Cong., 1st & 2nd Sess. 15 (1978) (statement of Rep. Eilberg). *See also* Helton, *supra* note 31, at 795-98.

66. S. REP. NO. 256, *supra* note 40, at 1.

67. Weinberger v. Rossi, 456 U.S. 25, 32 (1982); Lauritizen v. Larsen, 345 U.S. 571, 578-79 (1953); MacLeod v. United States, 229 U.S. 416, 434 (1913); Murray v. The Schooner Charming Betsy, 6 U.S. (2 Cranch) 64, 118 (1804); RESTATEMENT OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 134 (Tent. Draft No. 6 (1985)) [hereinafter RESTATEMENT].

binding rule of international law.[68] Therefore, a court should seek to harmonize the Refugee Act with the Protocol. To do otherwise would thwart the well-established principle of construing United States laws consistently with international law.

To determine the proper meaning of the Protocol — and therefore the Refugee Act — it is necessary to examine the practice of other nation-state parties to those agreements.[69] Application of the treaty, evidenced by the practice of parties to the treaty, is a strong indication of the parties' goals and intentions. Thus, the courts of the United States should consider state practice under the Protocol and Convention when interpretating the Protocol and Convention.[70]

Several parties with legal and political systems similar to the United States — including Canada, the United Kingdom, France and the Netherlands — have established exemplary principles of refugee law.[71] Given the difficulties facing asylum seekers and the nature of the rights involved, these nations have recognized the need for a generous standard of proof in determining refugee status. In interpreting the United States' law, which embodies this nation's international treaty obligations, great weight should be given to the lessons offered by these other nations.

A. Canada[72]

The Convention's definition of refugee status is incorporated into Canadian law in § 2 of the Immigration Act of 1976 (the "Act"). Canada adopted generous procedural and substantive rules to effect a liberal interpretation of the Convention's definition of refugee and to protect refugees' constitutional rights. The procedural rights of aliens seeking asylum have been clearly articulated and vigilantly enforced by Canadian courts. For example, the rules of evidence adopted by the Federal Court of Appeal provide that the Canadian Board of Immigration Appeals (the "Board") must consider all of the evidence presented by the applicant, including evidence which would otherwise be hearsay.[73] Applicants must have an opportunity to respond to any evidence or assertions which derive from a Board member's personal knowledge

68. Vienna Convention of the Law of Treaties, May 22, 1969, art. 26, U.N. Doc. A/CONF 39/27, *reprinted in* 8 I.L.M. 679 (1969) [hereinafter Vienna Convention]; RESTATEMENT, *supra* note 67, at § 321.

69. Vienna Convention, *supra* note 68, at art. 31(3)(b); RESTATEMENT, *supra* note 67, at § 147(1)(f).

70. *See also* Sumitomo Shoji America, Inc. v. Avagliano, 457 U.S. 176 (1982); Day v. Trans World Airlines, Inc., 528 F.2d 31, 35-37 (2d Cir. 1975); Husserl v. Swiss Air Transport Co., 351 F. Supp. 702, 707 n.6 (S.D.N.Y. 1972), *aff'd*, 485 F.2d 1240 (2d Cir. 1973).

71. *See infra* text accompanying notes 71-113.

72. For a detailed discussion and analysis of Canadian and United States asylum law, see Blum & Laurence, *Cold Winds from the North: An Analysis of Recent Shifts in North American Refugee Policy*, 16 N.Y.U. REV. L. & SOC. CHANGE 55 (1987-88).

73. Oyarzo v. Minister of Employment and Immigration, 2 F.C. 779 (Can. Fed. Ct. App. 1982) (minimal political involvement many years earlier must be considered in evaluating foundation for present fear, and including evidence which would otherwise be hearsay); Re Saddo

or understanding of conditions abroad.[74] Most significantly, the sworn testimony of an applicant carries a presumption of validity.[75]

The Supreme Court of Canada recently invalidated certain appellate procedures of the Act as conflicting with constitutional principles of procedural fairness in *Singh v. Minister of Employment and Immigration*.[76] The Supreme Court showed solicitude to the asylum seekers' procedural protections, recognizing the difficulties asylum applicants face in establishing their claims.

The issue presented in *Singh* involved the proper construction of § 71 of the Act, which provides for redetermination of the Minister's asylum decision. A 1982 Supreme Court decision had adopted a harsh construction of § 71, requiring redetermination of refugee status only where the applicant was *more likely than not* to establish refugee status.[77] This construction deprived many applicants of the opportunity to reinforce their claim with oral argument.

In striking down this restrictive access, the Court in *Singh* recognized that aliens applying for asylum are protected by Canada's constitutional law and basic principles of fundamental fairness. Applying these principles, the Court noted that "[t]he most important factors in determining the procedural content of fundamental justice in a given case are the nature of the legal right at issue and the severity of the consequences to the individuals concerned."[78] Based on the importance of individual rights and the potentially severe consequences in asylum cases, the Court concluded that Canada's constitutional law requires an oral hearing at some point in the asylum process.[79]

The substantive standards under Canadian immigration law are similarly generous to asylum applicants. In 1982, the Supreme Court defined a well-founded fear of persecution as requiring a subjective fear, to be evaluated on the basis of objective evidence "to determine if there is a [reasonable] foundation for it."[80] The Federal Court of Appeal in 1981 ruled that a well-founded fear of persecution does *not* require the applicant to show that she *would* be subject to persecution.[81] The same court, three years later, in 1984, held that

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and Immigration Appeal Board, 126 D.L.R.3d 764 (Can. Fed. Ct. App. 1981) (newspaper articles submitted by applicant must be considered).

74. Permaul v. Minister of Employment and Immigration, 53 N.R. 323 (Can. Fed. Ct. App. 1983); Galindo v. Minister of Employment and Immigration, 2 F.C. 781 (Can. Fed. Ct. App. 1981).

75. Maldonado v. Minister of Employment and Immigration, 31 N.R. 34, 38 (Can. Fed. Ct. App. 1979) (where applicant under oath alleged fear for his safety in Chile, the Board could not infer from the fact that he had returned to Chile from Argentina before seeking asylum in Canada that his allegations were not credible); *Permaul*, 53 N.R. at 324 (Board could not contradict applicant's sworn testimony based on its knowledge of conditions in Guyana).

76. 58 N.R. 1, 73-74 (Can. 1985).

77. Kwiatowsky v. Minister of Manpower and Immigration, 45 N.R. 116, 124 (Can. 1982).

78. *Singh*, 58 N.R. at 14.

79. *Id.* at 6, 71.

80. *Kwiatowsky*, 45 N.R. at 122.

81. Ardvengo v. Minister of Employment and Immigration, 40 N.R. 436 (Can. Fed. Ct. App. 1981).

no more than a "valid basis" for an applicant's subjective fear was required.[82] In determining the validity of a fear of persecution, the Board must view the applicant's activities from the perspective of the feared government, rather than from the perspective of either the Board or the Canadian Government.[83]

Canada's interpretation of the Convention's well-founded fear standard is far more generous to asylum applicants than is a "clear probability" standard, or even a "balance of probabilities" criterion.

B. The United Kingdom

The United Kingdom has also incorporated the Convention's "well-founded fear of persecution" standard into its refugee and asylum laws.[84] Notwithstanding the United Kingdom's limited judicial review of administrative decisions,[85] the appellate courts have adopted a generous interpretation of the Convention's definition of political refugees and of the well-founded fear standard.

The Immigration Appeal Tribunal recently considered the application of an Ethiopian woman who, because of her membership in the Eritrean minority, was vulnerable to arbitrary arrest and persecution.[86] In granting her claim of refugee status, the Tribunal held that "for a fear of persecution to be well-founded, there must be a reasonably grounded expectation of persecution [which] must be higher than a mere remote possibility, but need *not* be higher than a probability, of persecution."[87] The Tribunal found that because the applicant's family connections with Eritrea and the existing circumstances in Ethiopia would put her "at risk of arbitrary treatment" if she returned, she adequately established a well-founded fear.[88]

Decisions of the Queen's Bench Division support the Tribunal's liberal interpretation of the well-founded fear standard. In a case where a member of the Tamil minority in Sri Lanka sought asylum, the Queen's Bench Division stated that the Immigration Rules require a two-tiered analysis: "subjectively, whether [the applicant] had a fear of the kind specified; and, objectively, whether it was well-founded."[89] The court recognized "the administrative problem of numbers seeking asylum" but refused "to adopt artificial and inhuman criteria in an attempt to solve it."[90]

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82. Rajudeen v. Minister of Employment and Immigration, 55 N.R. 129, 134 (Can. Fed. Ct. App. 1984).

83. Astudillo v. Minister of Employment and Immigration, 31 N.R. 121 (Can. Fed. Ct. App. 1979) (membership in a sports club viewed by Chilean government as political).

84. Statement of Changes in Immigration Rules, House of Commons Papers (1983) No. 169, at para. 134.

85. *See Ex Parte* Bugdaycay, 1 W.L.R. 155 (C.A. 1986).

86. Woldu v. Secretary for the Home Dep't, Immigration Appeal Tribunal No. TH/93591/82 (2705), slip op. (1983).

87. *Id.* at 4.

88. *Id.* at 4-5.

89. *Ex Parte* Jeyakumaran, CO/290/84 (Q.B. 1985) (LEXIS, Enggen Library, Cases file).

90. *Id.*

In yet another English case,[91] a former union leader from Ghana, forced to go into hiding in a remote village, sought asylum. The Queen's Bench Division noted the distinction between proving a likelihood of persecution and proving that the applicant *would* be persecuted on the balance of probabilities.[92] Citing an extradition case decided by the House of Lords,[93] the court pointed out the inappropriateness of the balance of probabilities standard when a court is required to predict what would happen to an asylum applicant returned to her home country.[94] A clear probability standard, used prior to *Cardoza-Fonseca* in some United States cases,[95] is similarly inappropriate. It requires courts to predict whether applicants would be subject to persecution, rather than to evaluate the applicants' present fears.

A very recent decision of the House of Lords confirmed the inappropriateness of those standards.[96] The case involved six Tamil asylum seekers who claimed to be refugees from Sri Lanka. The Secretary of State for the Home Department refused their claims.[97] The initial court upheld his decision but the Court of Appeals reversed.[98] The Court of Appeals, citing *Cardoza-Fonseca*, held that an asylum applicant demonstrates a well-founded fear where she shows not only actual fear but also a reasonable basis of this fear, "looking at the situation from the point of view of one of reasonable courage." Recognizing that fear is an entirely subjective state experienced by the person who is afraid, the court stated that the adjectival phrase "well-founded"[99] qualifies, but does not transform, the subjective nature of the emotion.[100]

But the House of Lords found that the Court of Appeal went 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 the reflection that the general purpose of the [Refugee] Convention . . . 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

91. *Ex Parte* Jonah, CO/860/84 (Q.B. 1985) (LEXIS, Enggen Library, Cases file).

92. *Id.*

93. Fernandez v. Government of Singapore, 1 W.L.R. 987 (H.L. 1971).

94. *Id.*

95. *See, e.g.*, Youkhanna v. INS, 749 F.2d 360 (6th Cir. 1984); Carvajal-Muñoz v. INS, 743 F.2d 562 (7th Cir. 1984).

96. Regina v. Secretary of State for the Home Dep't, *ex parte*, Sivakumaran, House of Lords, slip op. (Court of Appeal 1987).

97. *Id.* at 1-2.

98. 3 W.L.R. 1047 (1987).

99. *Id.* at 1052-53.

100. *Id.*

question.[101]

In finding that the circumstances causing the fear must be real, Lord Keith noted that the majority opinion in *Cardoza-Fonseca* determined whether or not there was a reasonable chance or serious possibility of persecution by weighing objective considerations established by evidence. He found that *Cardoza-Fonseca* made no suggestion that the matter should be looked at solely from the point of view of the individual claiming to have the well-founded fear.[102]

C. *France*

The liberal construction of the Convention's terms is not limited to countries adhering to Anglo-American legal traditions. In France, for example, the Office for the Protection of Refugees and Stateless Persons ("OFPRA") recognizes as refugees those who show that they fear persecution and that such fear is reasonable.[103] The Commission des Recourse, the administrative tribunal which reviews the determinations of the OFPRA, has found that the grant of refugee status does not require actual proof of threatened persecution. Rather, the Commission may take notice of the general conditions in the country of origin, or other facts that are relevant to the determination of refugee status, to show a likelihood of persecution.[104]

The decisions of the administering authorities and the appellate bodies in France are not based on the probability of persecution. Instead, they are based on a plausible account of fear of persecution. For example, the Commission held that an applicant who alleged, but did not substantiate, threats of persecution, had a "plausible reason" for a well-founded fear of persecution because of the then-occurring regional conflicts in his home country as well as his ethnic origins.[105] The Commission also found that, in view of the existing political regime in the country receiving the deported applicant, the applicant, who had never resided in that country, could possibly fear persecution solely on account of his Jewish faith.[106] This standard of plausibility is more consistent with the Convention's refugee definition than the clear probability standard.

D. *The Netherlands*

Reviewing courts in the Netherlands do not hesitate to overturn decisions

101. Regina v. Secretary of State for the Home Dep't, *ex parte* Sivakumaran, House of Lords, slip op. at 4 (Court of Appeal 1987).

102. *Id.* at 6. The statement of Lord Goff on the standard of proof in recognizing refugees and its applicability to the non-refoulment provision in Article 33 of the Refugee Convention is also noteworthy. *Id.* at 12-13.

103. *See* F. TIBERGHIEN, LA PROTECTION DES REFUGIES EN FRANCE (1984).

104. *Id.* at 194 (discussing Judgment of Jan. 13, 1955, Commission des Recourses 530 and Judgment of Sept. 28, 1956, Commission des Recourses 1.287).

105. *Id.* at 194 (discussing Judgment of Apr. 23, 1981, Commission des Recourses 12.529).

106. *Id.* at 194 (discussing Judgment of June 7, 1982, Commission des Recourses 14.243).

by the State Secretary on the question of refugee status. Recognizing the difficulties inherent in proving asylum claims, Dutch courts apply the liberal standard of plausibility. For example, the Judicial Division of the Council of State (the "Division") held that a protest singer from Uruguay had a well-founded fear of persecution based on the fact that the political environment in Uruguay had deteriorated since the singer's departure and that his songs publicly expressed his disapproval of the current political regime.[107] The Division also held that a Mexican national had a valid fear of persecution based on his political views when Mexican authorities had taken action against both demonstrations and peaceful political activies in which the applicant had been involved.[108]

In another case, the Division found that a South African had participated in political activities and, if returned to his homeland, would face military service and would be subject to apartheid. Therefore, the applicant was entitled to refugee status based on his fear of persecution due to the nature of the racist regime of his homeland.[109] In a case involving a Hungarian who possessed knowledge of state secrets, the Division granted asylum due to the disproportionately heavy penalty to which the applicant would be subjected for leaving Hungary.[110] The Division followed its expansive view of fear of persecution when it overturned the State Secretary's denial of refugee status to an Argentinian who had been banned from practicing his religion.[111] It observed, "[T]here is no evidence that the Divine Light Mission is proscribed in Argentina for reasons which are acceptable by international standards. . . ."[112] The Division held that persecution for membership in a particular social group can include discrimination based on sexual disposition, where such discrimination will actually "limit [the applicant's] means of subsistence to such an extent as to justify the term 'persecution'."[113]

E. Summary

Canada, the United Kingdom, France and the Netherlands all reflect similar approaches to the determination of refugee status under the Convention. All four countries have recognized the necessity for a generous standard of proof because of the difficulties inherent in proving asylum claims and the

107. Judgment of July 12, 1978, Judicial Division of the Council of State, Neth., No. A-20107.

108. Judgment of Oct. 1, 1980, Judicial Division of the Council of State, Neth., Nos. A-2.137-A & B.

109. Judgment of Apr. 6, 1981, Judicial Division of the Council of State, Neth., No. A-2.0932.

110. Judgment of Feb. 21, 1983, Judicial Division of the Council of State, Neth., Nos. A-2.0071-A & B.

111. Judgment of Sept. 30, 1982, Judicial Division of the Council of State, Neth., Nos. A-2.1234-A & B.

112. *Id.*

113. Judgment of Aug. 13, 1981, Judicial Division of the Council of State, Neth., No. A-2.1113.

gravity and nature of the harm facing the applicants if their claims are unjustly denied. The English House of Lords has specifically cited *Cardoza-Fonseca* in support of formulating a generous standard of proof.[114] These factors reinforce the United States Supreme Court's adoption of a liberal construction of the Protocol and Convention which construction is consistent with international jurisprudence.

IV.
IMPLICATIONS

The United States Board of Immigration Appeals has already responded to *Cardoza-Fonseca* by adopting a "reasonable person" standard to establish a well-founded fear of persecution.[115] The Board described how adjudicators should evaluate the evidence submitted under the liberal standard as follows:

> In determining whether the alien has met his burden of proof, we recognize, as have the courts, the difficulties faced by many aliens in obtaining documentary or other corroborative evidence to support their claims of persecution. . . . In general, the assessment of the application for asylum should be a qualitative, not a quantitative one.
>
> Where the country at issue in an asylum case has a history of persecuting people in circumstances similar to the asylum applicant's, careful consideration should be given to that fact in assessing the applicant's claims. A well-founded fear, in other words, can be based on what has happened to others who are similarly situated. The situation of each person, however, must be assessed on its own merits.[116]

The next set of questions in the asylum area requiring resolution by the federal courts include further interpretation of the definition of a refugee, the meaning of "persecution," as well as "social group" and "political opinion" concepts, and the proper ambit of discretion in asylum adjudications.

Cardoza-Fonseca provides an important touchstone for future liberal interpretations of these elements of the refugee definition under the Refugee Act. The sources of guidance identified by the Court in *Cardoza-Fonseca* — the United Nations High Commissioner for Refugees Handbook and the works of noted commentators such as Grahl-Madsen[117] and Goodwin-Gill — provide

114. *See supra* notes 96-102 and accompanying text.

115. *In re* Mogharrabi, No. 3028, slip op. at 7 (B.I.A. June 12, 1987), (citing Cardoza-Fonseca v. I.N.S., 805 F.2d 60 (2nd Cir. 1986) and Guevara-Flores v. I.N.S., 786 F.2d 1224 (5th Cir. 1986)). This decision has been designated by the Board as a binding precedent pursuant to 8 C.F.R. § 3.1(g) (1987). The "reasonable person" standard is a traditional legal formulation that has long been used by adjudicators. *See* I A. GRAHL-MADSEN, THE STATUS OF REFUGEES IN INTERNATIONAL LAW 174 (1966) (utilizing the "reasonable person" standard).

116. *Mogharrabi*, slip op. at 7, 8 (citation omitted).

117. *See supra* note 30.

authority for the liberal construction of such concepts as "political opinion" and "particular social group" as establishing bases for persecution under the refugee definition.

Cardoza-Fonseca did not prevent the Board from finding continuing vitality in its own precedent:

> We note that although our decision in *Matter of Acosta* has been effectively overruled by *INS* v. *Cardoza-Fonseca*, *supra*, insofar as *Acosta* held that the well-founded fear standard and the clear probability standard may be equated, much of our decision remains intact, and good law. . . . In *Acosta*, we set forth four elements which an applicant for asylum must show in order to establish a well-founded fear of persecution. What we required was that the evidence establish that (1) the alien possesses a belief or characteristic a persecutor seeks to overcome in others by means of punishment of some sort; (2) the persecutor is already aware, or could easily become aware, that the alien possesses this belief or characteristic; (3) the persecutor has the capability of punishing the alien;[118] and (4) the persecutor has the inclination to punish the alien.
>
> In our view, these requirements, for the most part, survive the Supreme Court's decision in *Cardoza-Fonseca*, and are still useful guidelines in assessing an asylum application. . . . The second requirement should be changed by omitting the word "easily." Thus, it is enough for the applicant to show that the persecutor could become aware that the applicant possesses the belief or characteristic in question. The omission of the word easily lightens the applicant's burden of proof and moves the requirements as a whole into line with *Cardoza-Fonseca*. Of course, all these requirements must now be considered in light of the lower burden of proof which will be imposed on asylum applicants generally.[119]

In addition to the implications of the Board's modest doctrinal adjustment, the Supreme Court's decision itself points to a potentially powerful mechanism to deny asylum without respect to eligibility under the well-founded fear standard. The emphasis *Cardoza-Fonseca* placed on the discretionary nature of asylum is cause for a note of caution.

More and more frequently, the authorities, as a matter of discretion, deny asylum to refugees who are considered to have not only a "well-founded fear

118. The concept of "punishment" should not be construed narrowly to exclude other recognized forms of persecution such as deprivation of the ability to subsist, the imposition of substantial economic disadvantages, or the imposition of substantial discrimination. *See* Kovac v. INS, 407 F.2d 102 (9th Cir. 1969) (persecution is established where there exists the probability that the alien would be subject to deliberate economic disadvantage); Dunat v. Hurney, 297 F.2d 744 (3rd Cir. 1961) (denying employment to alien was persecution).

119. *Mogharrabi*, slip op. at 8-9.

of persecution" but even a "clear probability" of persecution.[120] The justifications offered for these discretionary denials include: the applicant's movement across borders in a precipitious or irregular fashion without awaiting refugee processing; her circumvention of overseas refugee admission processing; or her having turned to others who, often for pecuniary gain, facilitate travel by arranging for air transport, creating bogus travel documents or illegally bringing asylum seekers into the United States.[121]

Desperation is a source of boundless creativity, which United States' courts often construe as fraud or misrepresentation. An approach to asylum that uses discretion excessively to narrow the availability of refugee protection is unwarranted and incompatible with the generous humanitarian purpose underlying the Refugee Act. *Cardoza-Fonseca* does not authorize such an approach.

In any event, *Cardoza-Fonseca* may require legislative action. *Stevic* created a discrete anomaly that *Cardoza-Fonseca* has reinforced. A refugee who is denied asylum on discretionary grounds may be returned to a country where he or she faces persecution short of a "threat to life or freedom."[122] No other party to the U.N. Protocol has interpreted its law to permit such an outcome. This dangerous gap in protection risks violation of the prohibition under Article 33 of the U.N. Protocol against returning a refugee to a place of possible persecution. While instances of such *refoulment* are likely to be rare, legislative steps should be taken now to shore up the breach.

CONCLUSION

Following the enactment of the Refugee Act of 1980, the courts of the United States sought to discover limiting principles in the area of asylum that would define the entitlement to refuge and at the same time maintain the integrity of the United States' refugee policy. These efforts have included abuses in the nature of deterrence measures such as interdiction and detention programs, and the use of overly restrictive standards in adjudicating cases.[123] With the decision in *Cardoza-Fonseca*, advocates, adjudicators and policy makers have an opportunity to apply limiting principles compatible with the traditions of generosity and humanitarian concern that led to the enactment of the Refugee Act.

The authorities face a significant implementation responsibility. In the words of Justice Blackmun in his *Cardoza-Fonseca* concurrence, this responsibility is to put aside "the years of seemingly purposeful blindness by the INS

120. *See* Helton, *The Proper Role of Discretion in Political Asylum Determinations*, 22 SAN DIEGO L. REV. 999 (1985).

121. *Id.* at 1001-09. *See also In re* Salim, 18 I. & N. Dec. 311 (1982); *In re* Shirdel, No. 2958, slip op., (B.I.A. Feb. 21, 1984); *In re* McMullen, No. 2967, slip op., (B.I.A. Feb. 21, 1984).

122. INS v. Stevic, 467 U.S. 407, 428 n.22 (1984). *See* 8 U.S.C. § 1253(h) (1982).

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

[Immigration and Naturalization Service], which only now begins its task of developing the standard entrusted to its care."[124] The agency's success in fulfilling this responsibility will be the asylum story over the next several years.[125]

124. 480 U.S. 421, 452 (1987) (Blackmun, J., concurring).

125. The immigration authorities have issued internal memoranda designed to implement the *Cardoza-Fonseca* decision. These memoranda include a June 4, 1987, memorandum advising agency officials to "expect a substantial number of motions to reopen or reconsider filed by denied asylum applicants with both district directors and immigration judges." Immigration and Naturalization Service Telegraphic Message, File No. CO. 208-P (June 4, 1987) (for information about the memorandum, contact Ralph B. Thomas CORAP 202-633-2361). On July 8, 1987, the Attorney General directed the immigration authorities to "encourage Nicaraguans whose claims for asylum or withholding of deportation have been denied to reapply for reopening or rehearing of such claims in accordance with . . . *Cardoza-Fonseca* . . . ." Department of Justice, Press Release AG 87 243 (JULY 8, 1987) (FOR INFORMATION CALL 202-633-2007). *See also* Immigration and Naturalization Service Memorandum No. CO-208-P (Mar. 24, 1987).

Immigration authorities proposed asylum adjudication rules on August 28, 1987. These rules sought to incorporate the *Cardoza-Fonseca* standard. 52 Fed. Reg. 32,557 (August 28, 1987) (to be codified at 8 C.F.R. § 208.12(b)(2)(i)). The proposed regulations were modified in view of an unrelated controversy and were re-published again in revised form, once more incorporating the *Cardoza-Fonseca* standard. 52 Fed. Reg. 46,776 (Dec. 10, 1987); 53 Fed. Reg. 11,306 (Apr. 6, 1988) (to be codified at 8 C.F.R. § 208.13(b)(2)).