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The Well-Founded Fear of Persecution Standard in Asylum Proceedings: The Promise of Solace for Refugees After *INS v.* *Cardoza-Fonseca*

I. INTRODUCTION

The history of laws providing asylum to aliens in this country is marked by varying and confusing standards for the granting of asylum.¹ The Refugee Act of 1980² was enacted to provide a discretionary means by which the Attorney General may grant asylum to an alien who meets the statutory definition of a refugee.³ The standards to which the alien was to be held in order to meet that definition, however, remained controversial.⁴

On March 9, 1987, the United States Supreme Court decided the case of *Immigration and Naturalization Service v. Luz Marina Cardoza-Fonseca*.⁵ The Court held that, in discretionary asylum proceedings under section 208(a) of the Refugee Act of 1980, an alien must demonstrate that she has a "well-founded fear of persecution" if she is deported.⁶ The Court refused, however, to describe the content of a "well-founded fear".⁷

This Note will provide an analysis of the ramifications on immigration law of the decision in *Cardoza-Fonseca*. First, background information will be discussed, including the history of refugee legislation in this country, the development of the asylum standards at issue in *Cardoza-Fonseca*, the enactment of the Refugee Act of

1. See generally Anker & Posner, *The Forty Year Crisis: A Legislative History of the Refugee Act of 1980*, 19 SAN DIEGO L. REV. 9 (1980). The authors characterize pre-1980 immigration and asylum legislation as discriminatory in nature, with the availability of asylum based upon restricted categories to which the alien must belong. *Id.* at 10-12.

2. Pub. L. No. 96-212, 94 Stat. 102, 8 U.S.C. §§ 1157-59 (1980).

3. See *infra* notes 28-32 and accompanying text.

4. See *infra* notes 33-57 and accompanying text.

5. 107 S. Ct. 1207 (1987). Justice Stevens wrote the Court's opinion and was joined by Justices Brennan, Marshall, Blackmun, and O'Connor. Justice Blackmun wrote a separate concurrence. Justice Scalia concurred in the judgment only. Justice Powell wrote a dissenting opinion, in which Chief Justice Rehnquist and Justice White joined.

6. 107 S. Ct. at 1222.

7. *Id.* See *infra* notes 58-103 and accompanying text.

1980, and the pertinent case law from 1980 to 1986. Next, a detailed description of the lower court and Supreme Court decisions in *Cardoza-Fonseca* will be provided. Finally, the Note will raise questions regarding the impact of the holding on immigration law and will discuss some recommendations for future proceedings in light of the *Cardoza-Fonseca* decision.

II. BACKGROUND

A. Refugee Law Prior to 1968

1. Withholding of Deportation

In 1952, Congress passed the Immigration and Nationality Act (the "INA")⁸, creating section 243(h).⁹ That section authorized the Attorney General to withhold deportation if an alien could demonstrate a "clear probability of physical persecution," or a "likelihood of physical persecution" if the United States forced the alien to return home.¹⁰ Section 243(h) was discretionary and allowed withholding of deportation for as long as was deemed necessary by the Attorney General.¹¹ The relief was available, with certain exceptions, to aliens who were unlawfully present in the United States and subject to deportation.¹² In 1965, Congress amended section 243(h), changing the requirement that the alien show a clear probability of physical persecution to one requiring a showing of a clear probability of persecution based on race, religion, or political opinion.¹³

2. Asylum

Since 1947, refugees seeking asylum-like relief at the United States border have been generally subject to an agency policy which gives an immigration preference to refugees fleeing persecu-

8. Pub. L. No. 82-414, 66 Stat. 163, 8 U.S.C. §§ 1101-57 (1952).

9. 8 U.S.C. § 1253(h) (1964).

10. *Id.*

11. *Id.*

12. The exceptions included instances in which the alien applying for withholding of deportation actually participated in the persecution of another person, or was convicted of a serious crime and constituted a danger to the community or the United States. 8 U.S.C. § 1253(h)(2)(A)(B) (1964).

13. 8 U.S.C. § 1253(h) (1976). The provision read:

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

Id.

tion.¹⁴ Under section 203(a)(7) of the INA, the Attorney General was authorized to allow "conditional entry" to limited numbers of aliens who were fleeing Communist-dominated areas or the Middle East "because of persecution or fear of persecution on account of race, religion or political opinion."¹⁵

B. The Period 1968 to 1980

In 1968, the United States acceded to the United Nations Protocol Relating to the Status of Refugees (the "Protocol").¹⁶ The Protocol was formulated to provide increased protection to the rights of refugees world-wide.¹⁷ As the Supreme Court explained in *Immigration and Naturalization Service v. Stevic*,¹⁸ "the Protocol bound parties to comply with the substantive provisions of articles 2 through 34 of the United Nations Convention Relating to the Status of Refugees . . ."¹⁹ The Protocol expressly required the use of a "well-founded fear of persecution" standard,²⁰ and it was assumed generally that the Protocol was essentially consistent with existing United States law.²¹ It was also assumed that any apparent differences could be reconciled administratively by the Attorney General.²²

One of the most significant developments in the law of refugees and asylum to take place between the accession to the Protocol and the enactment of the Refugee Act of 1980 was the Board of Immigration Appeals' (the "BIA") decision in *In Re Dunar*.²³ *Dunar*

14. *Rosenberg v. Yee Chien Woo*, 402 U.S. 49 (1971).

15. 8 U.S.C. § 1153(a)(7)(A)(i) (1976). Section 1182(d)(5) allowed the Attorney General to parole aliens into the country on a temporary basis for emergency reasons. 8 U.S.C. § 1182(d)(5) (1976).

16. United Nations Protocol Relating to the Status of Refugees, January 31, 1967, [1968] 19 U.S.T. 6223, T.I.A.S. No. 6577.

17. See generally Anker & Posner, *supra* note 1, at 20-64.

18. 467 U.S. 407 (1984).

19. *Id.* at 416.

20. The Protocol defines "refugee" as one 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.

Compare 19 U.S.T. 6223 with 19 U.S.T. 6261 (1968).

21. *INS v. Stevic*, 467 U.S. 407, 418 (1984) (citing legislative history).

22. *Id.*

23. 14 I. & N. Dec. 310 (1973). The Seventh Circuit provides a succinct discussion of the procedure to be followed in asylum applications in *Carvajal-Munoz v. INS*, 743 F.2d 562 (7th Cir. 1984). The Attorney General's discretionary power to grant asylum is

involved a request for withholding of deportation under section 243(h) of the INA.²⁴ The deportee argued that accession to the Protocol had changed the standard required for withholding of deportation from a showing of a "clear probability of persecution" to a showing of a "well-founded fear of persecution," and that a conjectural possibility of persecution would satisfy that standard.²⁵ The BIA rejected Dunar's arguments, and specifically stated that a likelihood of persecution was required to establish a "well-founded fear."²⁶ This decision had a significant impact in the courts of appeals, and thereafter a number of courts equated the term "well-founded fear of persecution" with "clear probability of persecution" and "likelihood of persecution."²⁷

C. *The Refugee Act of 1980*

Congress passed the Refugee Act of 1980 (the "Act") in an effort to reform United States refugee law.²⁸ The Act removed the Attorney General's discretion in section 243(h) proceedings,²⁹ and provided a new statutory procedure for granting asylum to refugees. Specifically, Congress added section 208(a) to the INA, requiring the Attorney General to provide a procedure by which an alien, who is physically present in the United States, or at the border or a port of entry, can apply for a discretionary grant of asylum.³⁰ The

vested in either the district director of the I.N.S. or the immigration judge, depending upon the circumstances. *Id.* at 565 (citing 8 C.F.R. § 208.1 (1984)). Hearings before the district director or immigration judge are made subsequent to the issuing of an advisory opinion by the Bureau of Human Rights and Humanitarian Affairs. *Id.* (citing 8 C.F.R. §§ 208.7, 208.8(d), 208.10(b) (1984)). Denials of asylum by the district director may in appropriate circumstances be appealed to the immigration judge. *Id.* at 565-66. Denials by the immigration judge are reviewed by the BIA; and the court in *Carvajal-Munoz* held that asylum decisions of immigration judges, which are reviewed by the BIA, are subject to direct review by the circuit courts. *Id.* at 566. *See generally* Hing, B.O., *Handling Immigration Cases*, §§ 9.3, 10.1, 10.2, 10.17, and 10.21 (1985).

24. 14 I. & N. Dec. at 310 (1973).

25. *Id.* at 319.

26. *Id.*

27. *See Stevic*, 467 U.S. at 419 n.12, for collected cases. The Court of Appeals for the Seventh Circuit subsequently stated that a "well-founded fear of persecution [must be] satisfied by objective evidence," and in practice this standard would "converge" with the "clear probability" standard. *Kashani v. INS*, 547 F.2d 376, 379 (7th Cir. 1977). For further discussion *see infra* notes 42-57 and accompanying text.

28. *See Anker & Posner supra* note 1. The authors stress the humanitarian emphasis present in the debates of legislation proposed in the late 1970's. *Id.* at 10-42.

29. 8 U.S.C. § 1253(h)(1) (1980). This section provides, in pertinent part, that the Attorney General shall not deport or return any alien to a country if he determines that the alien's life or freedom would be threatened there due to race, religion, nationality, membership in a particular social group, or political opinion. *Id.*

30. 8 U.S.C. § 1150(a) (1980). The section provides:

Act requires aliens to fall into the statutory definition of a refugee as one who is outside her country of origin or last country of habitual residence and who cannot or will not return to that country.³¹ Further, the alien's unwillingness or inability to return must be due to persecution or a "well-founded fear of persecution" because of race, religion, national origin, political philosophy, or group affiliation.³²

D. INS v. Stevic

In 1976, Predrag Stevic came to the United States from Yugoslavia to visit his sister in Chicago.³³ Subsequently, Stevic married a United States citizen.³⁴ Shortly thereafter, Stevic's wife was killed in an automobile accident, and he was ordered to surrender for deportation to Yugoslavia.³⁵ Stevic sought an order withholding deportation under section 243(h) of the INA as amended by the Refugee Act of 1980.³⁶ Stevic claimed that he had become active in an anti-Communist organization and that his father-in-law had been imprisoned in Yugoslavia because of membership in that organization. Stevic, therefore, feared he also would be imprisoned if he returned to that country.³⁷ The BIA refused to withhold deportation, stating that section 243(h) required *prima facie* evidence of a clear probability of persecution and that Stevic had failed to pres-

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 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.

Id. Compare the discretionary nature of this provision with the mandatory nature of withholding of deportation, *supra* note 29.

31. 8 U.S.C. § 1101(a)(42) (1980). The definition of "refugee" provided in this section is as follows:

The term 'refugee' means (A) any person who is outside any country of such person's nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable 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. . . .

Id. Note the striking similarity between this language and that used in the United Nations Protocol, *supra* note 20.

32. 8 U.S.C. § 1101(a)(42) (1980).

33. *Stevic*, 467 U.S. at 409.

34. *Id.*

35. *Id.* at 409-10.

36. *Id.* at 410.

37. *Id.*

ent such evidence.³⁸

The United States Supreme Court agreed, holding that "an alien must establish a clear probability of persecution to avoid deportation under Section 243(h)."³⁹ Although the Court refused to define "well-founded fear of persecution," the Court indicated, in dicta, that the "well-founded fear" standard was not coterminous with the "clear probability of persecution" standard.⁴⁰ Moreover, the Court adopted the Second Circuit's assumption that the latter standard was the stricter one, but held nonetheless that it was applicable in 243(h) proceedings.⁴¹

E. 1984-1987: A Conflict Among the Circuits?

Despite the dicta in *Stevic* indicating that the "well-founded fear" and "clear probability of persecution" standards should not be equated, the BIA and the United States Court of Appeals for the Third Circuit continued to treat the standards as coterminous.⁴² In *Matter of Acosta*⁴³ the BIA acknowledged that the word

38. *Id.* at 410-11. On appeal, the United States Court of Appeals for the Second Circuit held that aliens requesting withholding of deportation should no longer be held to a "clear probability of persecution" standard; rather, deportation could be avoided by demonstrating a "well-founded fear of persecution." *Id.* The court believed that Congress had changed the standard of proof required under section 243(h) of the Refugee Act of 1980 to conform to the "well-founded fear of persecution" language of the United Nations Protocol. *Id.* at 412-13. See *supra* notes 27 and 36 and accompanying text.

39. *Stevic*, 467 U.S. at 413. Note that Justice Stevens authored the unanimous opinion. The Court refused to define a "clear probability of persecution" beyond noting the fact that it requires evidence which establishes that it is "more likely than not" that the alien would be subject to persecution if deported. *Id.* at 429-30.

40. *Id.*

41. *Id.* at 425-30. The issues and arguments involved here and those in *In re Dunar*, *supra* note 27 and accompanying text, were very similar. The *Stevic* court discusses *Dunar* as it relates to section 243(h) proceedings, and the subsequent equation of the "clear probability" and "well-founded fear" standards, but never expressly overrules *Dunar*. *Id.* at 424.

42. See *Matter of Acosta*, Interim Decision #2986 (BIA, Mar. 1, 1985); *Sankar v. INS*, 757 F.2d 532 (3d Cir. 1985). For discussions of the BIA's decisions, and the decisions of the various Courts of Appeals, see *Gumbol v. INS*, 815 F.2d 406 (6th Cir. 1987); *Carcamo-Flores v. INS*, 805 F.2d 60 (2d Cir. 1986); *Cruz-Lopez v. INS*, 802 F.2d 1518 (4th Cir. 1986); *Farzad v. INS*, 802 F.2d 123 (5th Cir. 1986); *McLeod v. INS*, 802 F.2d 89 (3d Cir. 1986); *Ganjour v. INS*, 796 F.2d 832 (5th Cir. 1986); *Yousif v. INS*, 794 F.2d 236 (6th Cir. 1986); *Guevara Flores v. INS*, 786 F.2d 1242 (5th Cir. 1986); *Bahramnia v. INS*, 782 F.2d 1243 (5th Cir. 1986); *Larimi v. INS*, 782 F.2d 1494 (9th Cir. 1986); *Diaz-Escobar v. INS*, 782 F.2d 1488 (9th Cir. 1986); *Del Valle v. INS*, 776 F.2d 1407 (9th Cir. 1985); *Bolanos-Hernandez*, 767 F.2d 1277 (9th Cir. 1985); *Cardoza-Fonseca v. INS*, 767 F.2d 1448 (9th Cir. 1985), *cert. granted* 106 S. Ct. 1181 (1986), *aff'd.*, 107 S. Ct. 1207 (1987); *Moosa v. INS*, 760 F.2d 715 (6th Cir. 1985); *Youkhanna v. INS*, 749 F.2d 360 (6th Cir. 1984); *Carvajal-Munoz v. INS*, 743 F.2d 562 (7th Cir. 1984). These cases are discussed in detail in the analysis section of this Note, *infra* notes 120-61 and accompanying text.

“fear,” as used in the Refugee Act of 1980, refers to a subjective, emotional awareness.⁴⁴ The BIA held, however, that the standards for discretionary grants of asylum and withholding of deportation were not significantly different and that they converge in practice.⁴⁵ Furthermore, in *Sankar v. INS*⁴⁶ the Third Circuit held that the BIA did not abuse its discretion by equating a “well-founded fear” with a “clear probability.”⁴⁷ The court refused to follow the dicta in *Stevic*, relying instead upon the Supreme Court’s statement that it was not deciding the meaning of “well-founded fear of persecution.”⁴⁸

Other circuits, however, have held that the asylum and withholding of deportation standards are not coterminous.⁴⁹ For example, in *Carvajal-Munoz v. INS*,⁵⁰ the United States Court of Appeals for the Seventh Circuit held that section 208(a) required an asylum applicant to present specific objective evidence indicating that the alien had been subject to persecution or has a “good reason to fear” being singled out for persecution.⁵¹ The court recognized that, in some instances, the applicant’s testimony would be the only evidence available.⁵² Even in those cases, however, the court held that the testimony would have to indicate strongly that she had a good reason to fear persecution.⁵³ The court also noted that this formulation of the asylum standard is similar to, but not

43. Interim Decision #2986 (BIA, Mar. 1, 1985).

44. *Id.* at 14.

45. *Id.* at 25. *But see infra* notes 104-19 and accompanying text.

46. 757 F.2d 532 (3d Cir. 1985).

47. *Id.* at 533.

48. *Id.*

49. *See cases cited supra* note 42.

50. 743 F.2d 562 (7th Cir. 1984).

51. *Id.* at 574. The court explained their formulation of the standard as follows: “The applicant must present *specific* facts establishing that he or she has actually been the victim of persecution or has some other good reason to fear that he or she will be *singled out* for persecution” *Id.* (emphasis in original).

52. *Id.*

53. *Id.* The court stated: “Ordinarily, this must be done through objective evidence supporting the applicant’s contentions. Sometimes, however, the applicant’s own testimony will be all that is available regarding past persecution or the reasonable possibility of persecution.” *Id.* The court went on to explain that the alien’s uncorroborated testimony would not suffice to meet this burden unless it was:

[C]redible, persuasive, and point[ed] to *specific* facts that [would] give rise to an inference that the applicant has been or has a good reason to fear that he or she will be singled out for persecution on one of the specified grounds, or, alternatively or in addition thereto, must show through testimony and corroborative objective evidence that he or she has good reason to fear persecution on one of the specified grounds.

Id. (emphasis in original).

identical to, the "clear probability" standard.⁵⁴ The Seventh Circuit's interpretation of the "well-founded fear of persecution" standard was subsequently adopted by both the Sixth Circuit in *Youkhanna v. INS*,⁵⁵ and by the Ninth Circuit in *Cardoza-Fonseca v. INS*.⁵⁶ Each court specifically relied upon the dicta in *Stevic* which assumed that the asylum and withholding of deportation standards were not coterminous.⁵⁷

III. *INS v. CARDOZA-FONSECA*

A. *The Facts of the Case*

Luz Marina Cardoza-Fonseca and her brother, both citizens of Nicaragua, entered the United States as visitors in 1979.⁵⁸ Cardoza-Fonseca remained longer than permitted and failed to depart voluntarily. The INS then began deportation proceedings against her.⁵⁹ She admitted that she was in the country illegally, but requested withholding of deportation under section 243(h) and asylum as a refugee under section 208(a).⁶⁰ To support her claims, Cardoza-Fonseca explained that her brother politically opposed the Sandinistas, and had been imprisoned and tortured because of his opposition.⁶¹ Although the rest of her family was still in Nica-

54. *Id.* at 574-75.

55. 749 F.2d 360 (6th Cir. 1984). In *Gumbol v. INS*, 815 F.2d 406 (6th Cir. 1987), the court pointed out that there was a division of precedent in the Sixth Circuit as to whether the "clear probability" and "well-founded fear" standards differed, but concluded that the *Stevic* dicta required that the cases holding that the standards did in fact differ were correct. *Id.* at 411. See *infra* note 190 and accompanying text.

56. 767 F.2d 1448 (9th Cir. 1985), *cert. granted* 106 S. Ct. 1181 (1986), *aff'd.*, 107 S. Ct. 1207 (1987). It is interesting to speculate at this point whether the interpretation of the standard adopted by the courts of appeals for the Fifth and Second Circuits is the same as that adopted by the Seventh. In *Guevara Flores v. INS*, 786 F.2d 1242 (5th Cir. 1986), the court stated that the standards for asylum and withholding of deportation are not identical, and cited *Carvajal-Munoz* with approval. *Id.* at 1250. The court held, however, that a reasonable person standard should be applied, but also stated that "[i]n so holding, we stand with the Sixth, Seventh and Ninth Circuits . . ." *Id.* at 1249. In *Carcamo-Flores v. INS*, 805 F.2d 60 (2d Cir. 1986), the court specifically adopted "the standard recently articulated by the fifth circuit in *Guevara-Flores v. INS*. . ." *id.* at 68, indicating that the Second Circuit implied some difference between the interpretations of the Seventh and Fifth Circuits. See also *infra* notes 161-90 and accompanying text.

57. See *Carvajal-Munoz*, 743 F.2d at 573; *Youkhanna*, 749 F.2d at 362; *Cardoza-Fonseca*, 767 F.2d at 1451 (noting that the Court in *Stevic* "clearly alerted the circuit courts and the Board to the distinct possibility that there is a significant difference between the two tests.") For a discussion of whether the difference is significant, even after the Supreme Court decision in *Cardoza-Fonseca*, see *infra* notes 120-64 accompanying text.

58. *INS v. Cardoza-Fonseca*, 107 S. Ct. 1207, 1209 (1987).

59. *Id.*

60. *Id.*

61. *Id.*

ragua, she contended that if she was forced to return home, the Sandinistas would interrogate her about her brother's activities and whereabouts. Her own political opposition would then likely be brought to light, and she would be tortured.⁶²

B. *The Lower Courts' Decisions*

The immigration judge and the BIA applied the same "clear probability of persecution" standard to both Cardoza-Fonseca's application for withholding of deportation and to her application for asylum as a refugee.⁶³ On appeal to the Ninth Circuit, Cardoza-Fonseca did not challenge the BIA's denial of her section 243(h) withholding of deportation claim.⁶⁴ Rather, she argued that both the immigration judge and the BIA had erred in applying a "more likely than not" standard rather than a "well-founded fear" standard to her section 208(a) asylum application.⁶⁵ The circuit court agreed and applied the Seventh Circuit's interpretation of the "well-founded fear" standard to her application.⁶⁶ Subsequently, the United States Supreme Court granted the government's petition for certiorari.⁶⁷

C. *The Opinion of the Court*

The United States Supreme Court, affirming the decision of the Ninth Circuit, held that the "well-founded fear" standard is more generous than the "clear probability" standard.⁶⁸ Justice Stevens began his analysis for the Court by noting that the Attorney General had the discretion to grant asylum to an alien meeting the

62. *Id.* at 1209-10.

63. *Id.* at 1210.

64. *Id.*

65. *Id.*

66. *Id.*

67. 106 S. Ct. 1181 (1986). Justice Stevens notes that certiorari was granted "to resolve a circuit conflict on this important issue." *Cardoza-Fonseca*, 107 S. Ct. at 1210. As discussed above at notes 42-57 and accompanying text, the principal conflict was between the BIA and the circuit courts, as the Third Circuit in *Sankar v. INS* relied specifically upon their own precedent and the *Stevic* Court's refusal to define "well-founded fear." 757 F.2d at 533. Furthermore, Justice Stevens explains in a footnote that Cardoza-Fonseca's claim was not rendered moot by the enactment of the Immigration Reform and Control Act of 1986, principally because of the differences in subsequent adjustment of status under the 1986 Act as opposed to that under the asylum procedure. *Cardoza-Fonseca*, 107 S. Ct. at 1210-11 n.3. Justice Stevens noted also that because asylum for refugee practice was unaffected by the 1986 Act and the question presented in *Cardoza-Fonseca* "will arise, and has arisen, in hosts of other asylum proceedings," certiorari was not improvidently granted. *Id.* at 1211 n.3.

68. *Id.* at 1222.

definition of refugee under section 208(a) and further, that the "persecution or well-founded fear of persecution" standard was applicable.⁶⁹

1. The Legislative History of the Refugee Act of 1980

Justice Stevens next analyzed the legislative history of the Refugee Act of 1980.⁷⁰ First, the Court looked to pre-1980 practice under section 203(a) (7) of the Immigration and Nationality Act.⁷¹ That section authorized the Attorney General to allow "conditional entry" to specific numbers of refugees fleeing from communist-dominated areas or the Middle East "because of persecution or fear of persecution on account of race, religion, or political opinion."⁷² The Court cited BIA decisions that held that the standard applied under section 203(a)(7) was less strict than the "clear probability" standard applied in section 243(h) proceedings.⁷³ Furthermore, the Court pointed to a BIA finding that the language in section 243(a) requiring proof that the applicant "would be" subject to persecution was significantly different from the "fear of persecution" language of section 203(a)(7).⁷⁴ The Court concluded, on the basis of legislative history, that the legislature had added the "well-founded fear" language to section 208(a) of the Refugee Act of 1980 to incorporate the language of the United Nations Protocol, not to change the standard that had been used under Section 203(a)(7).⁷⁵

Next, the Court analyzed the meaning of the phrase "well-founded fear" in relation to the Protocol.⁷⁶ The Court recognized

69. *Id.* at 1211. Justice Stevens also noted the holding in *Stevic* that section 243(h) applications required a "clear probability of persecution" standard. *Id.* at 1212. Most significant, however, was his note that the reasoning in *Stevic* was of no avail in this case because section 208(a) expressly provides that the "well-founded fear" standard governs eligibility for asylum. *Id.*

70. *Id.* at 1213.

71. *Id.*

72. *Id.* at 1213-14 (citing 8 U.S.C. § 1151 (1976)).

73. *Id.* at 1214 (citations omitted).

74. *Id.* (citing *Matter of Adamska*, 12 I. & N. Dec. 201, 202 (1967)).

75. *Id.* at 1214-15. Justice Stevens rejected the government's argument that Congress intended to perpetuate the standard applied in informal parole proceedings (a "would be subject to persecution" standard) not the section 203(a)(7) standard. *Id.* at 1215 n.17. Justice Stevens again reasoned using the different formulations adopted for refugee status and withholding of deportation, and argued that Congress was more likely to adhere to prior statutory practice rather than regulatory practice (as was that in informal parole proceedings). He also argued that the Government's (and Justice Powell's) reliance on the Senate Report of the debates on the Refugee Act of 1980 was misplaced, noting that the Senate version of section 208(a) was ultimately rejected by Congress. *Id.*

76. *Id.* at 1216.

that one of Congress' primary purposes in redefining the term "refugee" and passing the Refugee Act of 1980 "was to bring United States refugee law into conformance with [the Protocol]."77 The Court concluded that this provided a clear indication of Congressional intent that the "well-founded fear" standard was less strict than the "clear probability" standard.78

Finally, the Court emphasized Congress' rejection of the Senate version of the Refugee Act of 1980.79 Although the House version authorized the Attorney General, in his discretion, to grant any refugee asylum, the Senate version did not allow a grant of asylum unless "deportation or return would be prohibited under section 243(h)."80 The Court reasoned that the Senate version's restriction would simply limit the Attorney General's discretion to grant asylum under section 208(a), without affecting the standard used to determine refugee status.81 The Court concluded that the Senate recognized a difference between the "well-founded fear" standard and the "clear probability" standard, but intended to restrict the Attorney General's grants of asylum to cases in which the "clear probability" standard was met.82 Thus, enactment of the House

77. *Id.* (citing H.R. 781, 96th Cong., 2d Sess., 19, reprinted in 1980, U.S. CODE CONG. & ADMIN. NEWS 160).

78. *Id.* at 1218. In its analysis, the Court pointed out the near identity of the Congressional and Protocol definitions of "refugee," and a number of statements suggesting that Congress intended the new statutory definition to be interpreted in conformance with the Protocol's definition. *Id.* at 1216. The Court looked also to the history of the United Nations' development of the Protocol definition, and found no indication that an alien should be required to prove that persecution would be more likely than not to occur in order to be considered a refugee. *Id.* at 1216-17. The Court noted that the Office of the United Nations High Commissioner for Refugees, Handbook on Procedures and Criteria for Determining Refugee Status (Geneva, 1979) states that an applicant's "fear should be considered well-founded if he can establish, to a reasonable degree, that his continued stay in his country of origin has become intolerable to him for the reasons stated in the definition, or would for the same reasons be intolerable if he returned there." *Id.* at 1217 (quoting the U.N. HIGH COMMISSIONER FOR REFUGEES, HANDBOOK ON PROCEDURES AND CRITERIA FOR DETERMINING REFUGEE STATUS (Geneva, 1979), Ch. II B(2) (a) section 42. Justice Stevens went on to state that "[t]here is simply no room in the United Nations' definition for concluding that because an applicant only has a 10% chance of being shot, tortured, or otherwise persecuted, that he or she has no 'well-founded fear' of the event happening." *Id.* Only a reasonable possibility of persecution, not a situation which would probably result in persecution, need be established, and again the court emphasized the difference in the mandatory language of section 243(h) as amended by the 1980 Act and the "precatory" language of section 208(a) as supporting the Protocol's and Congress' intent that "well-founded fear" is a lesser standard. *Id.* at 1217-18.

79. *Cardoza-Fonseca*, 107 S. Ct. at 1218.

80. *Id.* at 1218 (quoting S. REP. NO. 96-256, p. 26 (1979)) (footnotes omitted).

81. *Id.* at 1218.

82. *Id.* (footnote omitted).

version reinforced the Court's opinion that Congress intended a less strict standard be applied when aliens apply for asylum as refugees.⁸³

2. The Government's Arguments

The government made three principal arguments for reversal of the Ninth Circuit's decision. First, the government argued that the standards are in fact coterminous.⁸⁴ Second, it argued that because section 208(a) affords potentially greater benefits to aliens than section 243(h), it would be anomalous for section 208(a) to have a less stringent standard of eligibility.⁸⁵ Third, the government argued that the BIA's construction of the Act should be given substantial deference, even if the Court concluded that the court of appeals' interpretation of the statute was more in keeping with Congressional intent.⁸⁶

Regarding its first contention, the government argued that an applicant may demonstrate a "well-founded fear of persecution" only if he proves a "clear probability of persecution" and, therefore, the standards are coterminous.⁸⁷ The Court disagreed, stating that the language of the Refugee Act of 1980 "does not lend itself to this reading."⁸⁸ The Court compared the objective component in the "would be threatened" language of section 243(h) with the subjective "fear" element contained in the section 208(a) standard and concluded that there was a clear difference in emphasis between the two standards "on the face of the statute."⁸⁹ Accordingly, Justice Stevens stated that there could be no question that Congress meant the standards to differ.⁹⁰

The Court rejected the government's second argument because it did not account for the discretionary nature of section 208(a) asylum decisions.⁹¹ Even if an alien meets the standard under section

83. *Id.* at 1219. The Court notes the significance of Congress' rejection of the Senate bill's language as an indication of their intent not to enact that language *sub silentio*. *Id.* (citations omitted).

84. *Id.* at 1212.

85. *Id.* at 1219.

86. *Id.* at 1220 (footnote omitted).

87. *Id.* at 1212.

88. *Id.*

89. *Id.* at 1212-13. Justice Stevens noted also that the BIA recognized the subjective aspect of "fear" as used in the statute. *Id.* at 1213 n.11.

90. *Id.* In particular, Justice Stevens noted that the two standards were incorporated into the separate sections by the same Congress, simultaneously. He then quoted language from earlier cases indicating that under such circumstances it is presumed that Congress is acting deliberately in its choice of language. *Id.* (citations omitted).

91. *Id.* at 1219.

208(a) and, therefore, is considered a refugee, she is merely eligible for asylum.⁹² The Attorney General may exercise his discretionary authority and choose not to grant asylum.⁹³ An alien meeting the stricter standard under section 243(h), however, automatically is entitled to relief.⁹⁴ The Court did not consider this statutory structure to be anomalous and rejected the government's contention that the discretionary/mandatory distinction had no practical significance.⁹⁵

The Court also rejected the government's third argument.⁹⁶ Although the Court acknowledged that agency interpretations of ambiguous terms must be respected,⁹⁷ the Court characterized its task in *Cardoza-Fonseca* as much more narrow, and certainly within the province of the judiciary.⁹⁸ The Court did not attempt to provide a precise definition of the well-founded fear test.⁹⁹

92. *Id.*

93. *Id.*

94. *Id.* (footnote omitted).

95. *Id.*

96. *Id.* at 1220. For this argument, the government placed considerable reliance on the principle of deference set forth in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

In *Chevron* the Court was required to address the manner in which an Article III Court is to review an agency's construction of a statute the agency is to administer. *Id.* at 842. The issue presented in *Chevron* was whether the Environmental Protection Agency's decision "to allow States to treat all of the pollution-emitting devices within the same industrial grouping as though they were encased within a single 'bubble' is based on a reasonable construction of the statutory term, 'stationary source'." *Id.* at 840. The Court said that a reviewing court must address two questions: First, has Congress "directly spoken to the precise question at issue?" *Id.* at 842. If the Congressional intent is unambiguous, that is the end of the matter, in both the agency and the courts. *Id.* at 842-43. If, on the other hand, the reviewing court determines that the statute is ambiguous or silent with regard to the precise issue in question, the court must analyze the agency's interpretation to determine whether it "is based on a permissible construction of the statute." *Id.* at 843. The Court pointed out in a footnote that the reviewing court need not find that the agency's construction is the only one, or even the one that the court would have reached. *Id.* n.11.

The *Chevron* Court noted that it is the duty and purpose of the agency to fill gaps in legislation left explicitly or implicitly by Congress, and agency regulations should control unless they are found to be arbitrary, capricious, or obviously contrary to the statute. *Id.* at 843-44 (footnote omitted). When the legislative delegation to an agency is implied in the statute, a court cannot substitute its own formulation of a statutory provision for a reasonable agency interpretation. *Id.* at 844 (footnote omitted). Finally, the Court quoted language from an earlier decision in which they stated that if the agency's decision is "a reasonable accommodation of conflicting policies that were committed to [its] care by the statute," the decision is not to be disturbed unless it is apparent from the statute or its legislative history that the accommodation is not one that Congress would have sanctioned. *Id.* at 844-45 (quoting *United States v. Shimer*, 367 U.S. 374, 382-83 (1961)).

97. *Cardoza-Fonseca*, 107 S. Ct. at 1221-22.

98. *Id.* at 1222.

99. *Id.*

Rather, the Court concluded that the immigration judge and the BIA incorrectly held that the "clear probability of persecution" standard and the "well-founded fear" standard were coterminous.¹⁰⁰ Finally, the Court stated that the language of the Act, its similarity to the United Nations Protocol, and its legislative history necessitated the conclusion that an alien should not be required to prove that it is more likely than not that she will be persecuted in order to demonstrate a "well-founded fear of persecution."¹⁰¹ The Court refused to describe how the standard should be applied,¹⁰² but made it clear that a showing of much less than a fifty percent chance of persecution could suffice.¹⁰³

D. The Dissent

In dissent, Justice Powell, joined by Chief Justice Rehnquist and Justice White, argued that the BIA's interpretation of the statute was reasonable.¹⁰⁴ Justice Powell noted that the BIA had adopted

100. *Id.* (footnote omitted).

101. *Id.*

102. *Id.*

103. *Id.* at 1217. Justice Blackmun, although joining the Court's opinion, wrote a brief concurrence. *Id.* 1222-23. He wished to stress that he understood the Court to be indicating appropriate sources from which the INS should derive the meaning of the "well-founded fear" standard, because he perceived the agency's prior interpretation of the term to be "strikingly contrary to plain language and legislative history." *Id.* Justice Blackmun cited the language of the Act, the Protocol, and "the well-reasoned opinions of the Courts of Appeals" as such sources. *Id.* Although Justice Blackmun noted some differences among the courts of appeals regarding the exact formulation of the standard, he believed that "[t]he efforts of these courts stand in stark contrast to . . . the years of seemingly purposeful blindness by the INS" *Id.*

For two reasons, Justice Scalia concurred in the judgment only. *Id.* at 1223-25. First, he objected to the Court's detailed analysis of the legislative history of the Refugee Act of 1980. *Id.* He argued that because the Court saw the language of the statute to clearly indicate that the two standards were different, there was no need for any analysis of legislative history. *Id.* The Court had argued that the history must be analyzed for an intent contrary to the language of the statute. Should such a contrary intent be discovered, the Court must "question the strong presumption that Congress expresses its intent through the language it chooses." *Id.* at 1213 n.12 (Stevens, J.). Justice Scalia also worried that lower courts might now find such analyses "generally appropriate (or, worse yet, required)" in similar situations. *Id.* at 1224 (Scalia, J., concurring in the judgment only). Second, and more significantly, Justice Scalia believed that the Court's discussion of whether the INS's interpretation of the "well-founded fear" standard was entitled to deference was both unnecessary and erroneous. *Id.* at 1224-25. He argued that the Court was implying that reviewing courts could use traditional methods of statutory construction to overrule an agency's interpretation of a statute whenever the court is able to determine the "correct" interpretation of the statute. *Id.* at 1225. Justice Scalia saw this as an "evisceration" of *Chevron*, and as a dangerous misinterpretation of settled administrative law. *Id.* He also noted that in *Chevron* the Court deferred to the EPA's "abstract interpretations" of the statute at issue. *Id.*

104. *Cardoza-Fonseca*, 107 S. Ct. at 1225 (Powell, J., dissenting). Justice Powell be-

a four-part test which required aliens to demonstrate that there was a "realistic likelihood" of persecution actually occurring, and that, in the Board's experience, this test seldom differed from a demonstration that persecution was "more likely than not" to occur.¹⁰⁵

Moreover, Justice Powell did not view the language of section 208(a) of the Refugee Act¹⁰⁶ to be as clear as the Court found it.¹⁰⁷ He contended that the Court put too much stress on the subjective aspect of the word "fear" and too little on the objective "well-founded" requirement.¹⁰⁸ He argued that whether the objective aspects of the "well-founded fear" and "clear probability" standards truly differ in practice should be decided by the agency that Congress had assigned to apply the standards.¹⁰⁹

The dissent also asserted that the legislative history on which the Court relied was ambiguous and of little guidance in interpreting whether the two standards differ.¹¹⁰ Justice Powell argued that prior agency practice under section 203(a)(7) of the INA was irrelevant to asylum procedures,¹¹¹ that any reliance upon the materials interpreting the United Nations Protocol was also irrelevant,¹¹² and that, contrary to the Court's arguments, there was no significance in the rejection of the Senate version of section 208(a) of the

lieved the BIA had "concluded that there is no practical distinction between the objective proofs an alien must submit to be eligible for these two forms of relief." *Id.*

105. *Id.* at 1226-27 (citing *Matter of Acosta*, Interim Decision #2986, 22 (BIA, March 1, 1985)). The four-part test is as follows: "the evidence must demonstrate that (1) the alien possesses a belief or characteristics 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; and (4) the persecutor has the inclination to punish the alien." *Cardoza-Fonseca*, 107 S. Ct. at 1226 (quoting *Matter of Acosta*, at ?2).

106. This is the section defining the term "refugee." *See supra* notes 28-32 and accompanying text.

107. *Cardoza-Fonseca*, 107 S. Ct. at 1227 (Powell, J., dissenting).

108. *Id.*

109. *Id.* at 1227-28. Justice Powell believed that the Court "ignore[d] the practical realities recognized by the expert agency and instead concentrate[d] on semantic niceties" by setting out mathematically based hypotheticals which could lead to a different result by application of the Court's interpretation of the standards. *Id.* at 1228. He dismissed any basis in "[c]ommon sense and human experience for a persecution-by-numbers scenario," and said that in light of the types of evidence usually presented in asylum cases the BIA was making "a qualitative evaluation of 'realistic likelihoods'." *Id.* (emphasis in original).

110. *Id.* at 1228.

111. *Id.* at 1229 (citing S. REP. 96th Cong., 2d Sess. 256, 9, reprinted in 1980 U.S. CODE CONG. & ADMIN. NEWS 149). *See supra* notes 72-75 and accompanying text.

112. *Id.* at 1229-30. *See supra* notes 76-78 and accompanying text.

Refugee Act.¹¹³

Finally, Justice Powell wrote that even if there was a difference between the two standards, he would reverse the court of appeals because the BIA had applied a lower standard to *Cardoza-Fonseca's* asylum application.¹¹⁴ Further, Justice Powell asserted that the absence of any substantive evidence supporting her claim of a "well-founded fear of persecution" other than her brother's past persecution, combined with her family's presence in Nicaragua, was of particular significance.¹¹⁵ Justice Powell noted also that the BIA had in fact applied three different formulations of the "well-founded fear" standard.¹¹⁶ Specifically, the BIA applied a "clear probability" test, a "good reason" test, and a "realistic likelihood" test and found that *Cardoza-Fonseca* had failed to meet any of those formulations.¹¹⁷ Justice Powell asserted that by concluding that the Board had applied the wrong legal standard, the Ninth Circuit ignored the factual and legal bases for the BIA's decision.¹¹⁸ He believed that the court of appeals gave no consideration to the Board's application of the three formulations of the standard and misunderstood its proper function in reviewing agency decisions.¹¹⁹

IV. ANALYSIS

The most significant question raised by the narrow holding in *Cardoza-Fonseca* is what practical effect the decision will have on aliens' applications for asylum as refugees under section 208(a) of the 1980 Act. The Court has left undisturbed, if not approved,¹²⁰ the formulations of the "well-founded fear" standard developed by the Second, Fifth, Sixth, and Seventh Circuits in the cases decided prior to *Cardoza-Fonseca*, which are discussed below.¹²¹

113. *Id.* at 1230. See *supra* notes 79-83 and accompanying text.

114. *Id.* at 1230-31.

115. *Id.* at 1231.

116. *Id.*

117. *Id.*

118. *Id.* at 1231-32.

119. *Id.* at 1232. Justice Powell notes that the Court could properly consider whether the Board's conclusion was proper in light of the evidence, but should not have assumed an improper test was applied when the BIA's opinion showed otherwise. *Id.*

120. *Id.* at 1223 (Blackmun, J., concurring in the opinion and in the judgment).

121. Obviously the opinion of the Ninth Circuit below, relying upon much of the language used by the Seventh Circuit in *Carvajal-Munoz v. INS*, 743 F.2d 562 (7th Cir. 1984) was upheld and left unaltered. Several insightful articles have addressed these matters, albeit without the benefit of the Supreme Court's decision in *Cardoza-Fonseca*. See generally Blum, *The Ninth Circuit and the Protection of Asylum Seekers Since the Passage of the Refugee Act of 1980*, 23 SAN DIEGO L. REV. 327 (1986) (reviewing standard of

The interpretation or formulation of the "well-founded fear" standard as set forth by the United States Court of Appeals for the Seventh Circuit in *Carvajal-Munoz v. INS*¹²² has been explicitly adopted in the Sixth and Ninth Circuits,¹²³ and has been cited with approval or as one available formulation, by the other circuit courts which have addressed the issue.¹²⁴ It is likely, therefore, in at least three circuits, that the Seventh Circuit's formulation will now be routinely applied in section 208(a) applications. The Seventh Circuit's formulation requires the applicant to establish that she has been subjected to persecution or has a good reason to fear that she will be singled out for persecution on the grounds specified in the statute.¹²⁵ Objective evidence generally will be required.¹²⁶

proof, method of proof, and the statutory bases for asylum applications required by the Ninth Circuit); 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) (suggesting that the *Stevic* dictum distinguishing the "well-founded fear" and "clear probability" standards was contrary to the general purposes of the Refugee Act of 1980; specifically, to unify immigration standards and procedures); Sautman, *The Meaning of "Well-Founded Fear of Persecution" in United States Asylum Law and In International Law*, 9 FORDHAM INT'L L. J. 483 (1986) (arguing that, in light of international practice, those courts which have held that the standards are not coterminous are correct); Comment, *Proving The Existence of Persecution in Asylum and Withholding Claims*, 62 CHI. KENT L. REV. 107, 135 (1985) (suggesting that the courts should strive to "effectuate the humanitarian goals of the [Refugee] Act"); Comment, *Evidentiary Satisfaction of Clear Probability Standards of Section 243(h), Bolanos-Hernandez v. Immigration and Naturalization Service*, 9 SUFFOLK TRANSNAT'L. L. J. 397 (1985) (specifically analyzing the Ninth Circuit's decision in *Bolanos-Hernandez*); Comment, *Rediscovery of the Burden of Proof for Asylum and the Withholding of Deportation*, 54 U. CIN. L. REV. 943 (1986) (arguing that the Seventh Circuit in *Carvajal-Munoz* misinterpreted *In re Dunar*, and that the "clear probability" standard should be applied in asylum cases because a lower standard would have a negative impact on U.S. immigration policy); Recent Development, *The Proper Standard for Asylum Eligibility is a Well-Founded Fear of Persecution*, 26 VA. J. INT'L L. 1039 (1986) (suggesting that the grant of certiorari in *Cardoza-Fonseca* provided the Supreme Court the opportunity to enlarge upon the Ninth Circuit's holding by specifically defining the "well-founded fear" standard); Note, *The Refugee Act of 1980 - What Burden of Proof: Controversy Lives on After Stevic*, 18 VAND. J. TRANSNAT'L. L. 875 (1985) (indicating shortcomings in the *Carvajal-Munoz* formulation, and suggesting legislative action be taken in order to guaranty a properly humanitarian approach to asylum eligibility).

122. 743 F.2d 562 (7th Cir. 1984). See *supra* notes 50-53 and accompanying text.

123. See *supra* notes 55-57 and accompanying text. It is interesting to speculate at this point whether the fact that the Ninth Circuit's decision in *Cardoza-Fonseca v. INS*, 767 F.2d 1448 (9th Cir. 1985) was affirmed by the Supreme Court will lead to a general acceptance of the *Carvajal-Munoz* formulation. See *infra* note 190.

124. See *supra* notes 49-57 and accompanying text. See also *Cruz-Lopez v. INS*, 802 F.2d 1518, 1522 (4th Cir. 1986). Cf. *McLeod v. INS*, 802 F.2d 89, 94 (3d Cir. 1986) (citing the Ninth Circuit decision in *Cardoza-Fonseca* as authority for the proposition that the "well-founded fear" standard is more lenient). See *supra* note 42 and accompanying text.

125. *Supra* note 51 and accompanying text.

126. *Id.*

Furthermore, when only the alien's own uncorroborated testimony is available, it must be credible and persuasive, and must point to specific facts that allow an inference that she has a good reason to fear persecution.¹²⁷

Application of this formulation will lead to insurmountable difficulties for many applicants. In practice, use of the formulation would nullify the result in *INS v. Cardoza-Fonseca* and perpetuate the BIA's conclusion that the "clear probability" and "well-founded fear" standards do not differ. An insistence on "specific, detailed" testimony from an applicant, which provides facts that give rise to an inference of a good reason to fear persecution, is not significantly less burdensome than requiring an applicant to demonstrate that persecution is "more likely than not." Moreover, such a stringent test in the absence of objective corroboration will make possible a wide variety of arbitrary outcomes, even in similar factual situations.

An analysis of several cases decided prior to *Cardoza-Fonseca* by the circuits that have adopted the Seventh Circuit's formulation articulated in *Carvajal-Munoz* supports these hypotheses. The Sixth Circuit, affirming a denial of asylum and withholding of deportation by the BIA, found testimony by the applicant regarding persecution of his family and friends because of religious and political affiliations insufficient under the *Carvajal-Munoz* formulation.¹²⁸ The court considered significant the absence of any specific evidence that the applicant himself would be singled out for persecution.¹²⁹

127. *Id.* Note, in fact, that the Seventh Circuit stated that "this evidentiary burden is very similar to that connected with the 'clear probability' standard, [but] it is not identical." *Carvajal-Munoz v. INS*, 743 F.2d 562, 575 (7th Cir. 1984).

128. *Moosa v. INS*, 760 F.2d 715 (6th Cir. 1985). The applicant was a citizen of Iraq and a Shiite Muslim who had refused to join the ruling Baath Party. He testified that the Party had imprisoned his uncle and three brothers and had executed five of his friends. He also claimed that one of his brothers was partially paralyzed due to beatings received during incarceration. *Id.* at 716. See *supra* note 42 and accompanying text.

129. *Id.* at 719. The result in *Carvajal-Munoz* was similar. There the applicant, a native of Chile and a former citizen of Argentina, claimed that he feared persecution in Argentina because of his birth in Chile, his past political activities, and his renunciation of his Argentine citizenship. 743 F.2d 562, 570. He testified of prior persecution by the Argentine police but not as to the specific circumstances of his arrests. *Id.* at 570-77. The only objective evidence submitted consisted of articles documenting the political environment in Argentina. *Id.* at 577. Because his testimony did not "describe credibly and persuasively specific detailed facts" demonstrating a good reason to fear persecution or actual persecution, the BIA's denial of the application was affirmed. *Id.* See also *Yousif v. INS*, 794 F.2d 236, 239, 244 (6th Cir. 1986) (affirming the BIA's denial of asylum to an Iraqi Christian who claimed he would be persecuted due to his criticism of the Baath regime).

Similarly, the Ninth Circuit has upheld a denial of asylum when a Guatemalan testified to having received a note warning him to "leave the country or 'be subject to the consequences.'" ¹³⁰ The applicant was held to have failed to meet the objective criteria required under the *Carvajal-Munoz* formulation because the note was not produced, and because there was no evidence establishing that the note was from a political group. ¹³¹ In another case decided the same day, the Ninth Circuit affirmed a denial of asylum to an Iranian who was sympathetic with the Mojahedin, a group which helped to overthrow the Shah, but subsequently became anti-Kohmeini. ¹³² The court ruled that the applicant's testimony that he had been photographed at a Mojahedin meeting by agents of the Kohmeini government, and that another member of the group had been executed upon his return to Iran, was not sufficient to meet the objective criteria required by the "well-founded fear" standard. ¹³³

Two circuits have refused to adopt a specific formulation of the standard, but have apparently assumed that the Seventh Circuit's formula may apply. ¹³⁴ The Fourth Circuit affirmed a denial of asylum to an applicant who had received a note from an El Salvadoran guerilla group which said "Join the BPR or you will regret it." ¹³⁵ Although one of the applicant's friends had been tortured and murdered after his family received a similar note, other friends and family who received them were unharmed. ¹³⁶ Also, the fact that the applicant's uncle was the leader of a political opposition group was seen as insignificant because the applicant had disavowed the beliefs of his uncle's group. ¹³⁷ Although the note was introduced as objective evidence, the court believed that because "such notes are widely distributed throughout El Salvador and they are frequently nothing more than idle threats," ¹³⁸ the applicant had failed to demonstrate a "specific fact" giving him "good

130. *Diaz-Escobar v. INS*, 780 F.2d 1488, 1490 (9th Cir. 1986). See *supra* note 42 and accompanying text.

131. *Id.* at 1493. It should be noted also that neither the immigration judge nor the BIA questioned the credibility of the applicant's testimony.

132. *Larimi v. INS*, 782 F.2d 1494, 1495 (9th Cir. 1986). See *supra* note 42 and accompanying text.

133. *Id.* at 1497.

134. *Cruz-Lopez v. INS*, 802 F.2d 1518, 1522 (4th Cir. 1986); *McLeod v. INS*, 802 F.2d 89, 93 (3d Cir. 1986). See *supra* note 42 and accompanying text.

135. *Cruz-Lopez*, 802 F.2d at 1519.

136. *Id.*

137. *Id.* at 1520.

138. *Id.* at 1522. But see *supra* note 136 and accompanying text.

reason" to fear persecution.¹³⁹

Although the Third Circuit has refused to consider whether the "clear probability" and "well-founded fear" standards differ,¹⁴⁰ that court has stated that, even under the more lenient standard of the Seventh and Ninth Circuits, a Grenadan's testimony that he feared persecution because of his political affiliations was insufficient.¹⁴¹ The applicant testified that he believed he would be imprisoned and tortured upon his return to Grenada for his opposition to the Gairy and Bishop regimes.¹⁴² He also presented evidence showing that factions of these former governments were still active in Granada.¹⁴³ The INS, however, rebutted this evidence with a statement that the Granadian government had changed in 1983, and the court found the applicant's testimony and evidence regarding faction activity to be speculative.¹⁴⁴ He therefore failed to set forth "specific, objective facts" supporting an inference of a good reason to fear future persecution.¹⁴⁵

It is apparent from the above discussion that the burden on the alien in an application for asylum proceeding is still great, even under the less strict "well-founded fear" standard as applied by the Sixth, Seventh, and Ninth circuits. Two Ninth Circuit cases give a good indication of the type of evidence and testimony that may be required to satisfy the standard. In one case the court reversed a denial of asylum to a citizen of El Salvador.¹⁴⁶ The applicant testified that he had been a member of a right-wing party in El Salvador for two years, had been in the army, and had been a member of a citizen police squad which guarded against guerrilla infiltration.¹⁴⁷ Because of his knowledge of these groups, the guerrillas attempted to recruit the applicant. When he refused to join them, they threatened to kill him.¹⁴⁸ The applicant believed that the guerrillas would carry out their threat because five of his friends

139. *Id.* at 1522. In dissent, Chief Judge Winter argued that, assuming the "well-founded fear" standard is in fact more lenient than the "clear probability" standard, and assuming the formulation as adopted by the Sixth, Seventh and Ninth Circuits is correct, *Cruz-Lopez* had demonstrated both the subjective and objective criteria required to meet the "well-founded fear" standard. *Id.* at 1523 (Winter, J., dissenting).

140. *See supra* notes 46-48 and accompanying text.

141. *McLeod*, 802 F.2d at 93. *See supra* note 134.

142. *Id.* at 92.

143. *Id.*

144. *Id.* at 93.

145. *Id.* (quoting *Cardoza-Fonseca v. INS*, 767 F.2d 1448, 1453 (9th Cir. 1985)).

146. *Bolanos-Hernandez v. INS*, 767 F.2d 1277 (9th Cir. 1985). *See supra* note 42 and accompanying text.

147. *Id.* at 1280.

148. *Id.*

had been murdered in similar situations and his brother disappeared after a similar threat.¹⁴⁹ He also introduced documentary evidence regarding the political situation in El Salvador.¹⁵⁰ Both the immigration judge and the BIA believed this was insufficient to show a specific reason to fear persecution,¹⁵¹ but the court of appeals found the evidence sufficient even under the more stringent "clear probability" standard,¹⁵² and *a fortiori*, under the "well-founded fear" standard.¹⁵³

An even more striking example of the extreme circumstances necessary to satisfy the "well-founded fear" standard is presented in another Ninth Circuit case.¹⁵⁴ Del Valle, the applicant, received three notes and several phone calls from the El Salvadoran Squadron of Death demanding he join them as an informer.¹⁵⁵ His second cousin was subsequently abducted and murdered. Following another "request" to join the Squadron of Death, the applicant was attacked on the street, and then abducted by fifteen men who broke into his apartment.¹⁵⁶ The men took the applicant to "headquar-

149. *Id.*

150. *Id.*

151. *Id.*

152. *Id.* at 1284-85.

153. *Id.* at 1283. Note the similarity of the facts in the instant case with those in *Diaz-Escobar v. INS*, *supra* notes 130-31 and accompanying text, and in *Cruz-Lopez v. INS*, *supra* notes 134-39 and accompanying text, both cases involving affirmation of denials of asylum. And note again that in the instant case the court found the evidence sufficient to satisfy the stricter of the two standards. In fact, in discussing the "clear probability" standard, the court in *Bolanos* made several pointed remarks regarding the practical effects of strict standards of proof upon aliens applying for withholding of deportation, and those remarks apply with equal or greater significance to asylum applications. The court noted that the imposition of a corroboration requirement (again, *in withholding of deportation proceedings*) "would result in the deportation of many people whose lives were genuinely in jeopardy. Authentic *refugees* rarely are able to offer direct corroboration of specific threats." 767 F.2d 1285. (emphasis added). In a moment of black humor, the court noted that "[p]ersecutors are hardly likely to provide their victims with affidavits attesting to their acts of persecution." *Id.* Finally, the court stated that "[i]f the alien's own testimony about a threat, when unrefuted and credible, were insufficient to establish the fact that the threat was made, it would be 'close to impossible for [any political refugee] to make out a section 243(h) case.'" *Id.* (quoting *McMullen v. INS*, 658 F.2d 1312, 1316 (9th Cir. 1981)). If the "well-founded fear" standard is indeed a more lenient standard, are these arguments not even more persuasive with regard to section 208(a) cases?

154. *Del Valle v. INS*, 776 F.2d 1407 (9th Cir. 1985). See *supra* note 42 and accompanying text.

155. *Id.* at 1409.

156. *Id.* These men were dressed in military uniforms, and the immigration judge and the BIA assumed they were "security forces" who believed Del Valle to be a member of opposition forces. *Id.* at 1410.

ters" and blindfolded, interrogated, and beat him.¹⁵⁷ He was released shortly thereafter and fled to the United States.¹⁵⁸ The immigration judge denied the asylum application, and the BIA affirmed, but the court of appeals reversed, again finding sufficient evidence to withhold deportation and therefore, sufficient evidence to meet the "well-founded fear" standard.¹⁵⁹

The evidence in these cases was sufficient to meet the "clear probability" standard. One must question, however, how significant is the difference between the evidence in these cases and that in the cases discussed earlier in this section.¹⁶⁰ If the difference between the two standards is meaningful as a practical matter, a question such as this should only arise in rare and unusual circumstances. In light of the cases discussed, there is reason to doubt that the "well-founded fear" standard, if applied as formulated in *Carvajal-Munoz*, will result in any noticeable diminution in the burden of proof to an alien applying for asylum as a refugee under section 208(a) of the 1980 Refugee Act.¹⁶¹

157. *Id.* at 1409-10. Del Valle was questioned regarding membership in an opposition group. *Id.* at 1409.

158. *Id.* at 1410. The immigration judge and the BIA assumed that Del Valle was released because the "security force" was satisfied he did not belong to an opposition group. *Id.* at 1413.

159. *Id.*

160. *See supra* note 153. Clearly, the evidence in *Del Valle* is much stronger than in any of the cases discussed above. *See also* *Turcios v. INS*, 821 F.2d 1396 (9th Cir. 1986), in which a denial of asylum by the BIA to an El Salvadoran was reversed. The applicant had been abducted, beaten, choked, and subjected to electric shocks by the National Police because he was believed to have been involved with guerrilla groups. *Id.* at 1399. The immigration judge found *Turcios*' evidence lacking in credibility and evasive and the BIA found no error. *Id.* at 1400-01. The Ninth Circuit held that *Turcios*' testimony established a "clear probability of persecution" and that, *a fortiori*, the "well-founded fear" standard was satisfied. *Id.* at 1401-03.

161. It is interesting to speculate at this point whether the "reasonable person" formulation adopted by the Second and Fifth Circuits, if it does indeed differ from the *Carvajal-Munoz* standard, would be any more favorable in practice to aliens applying for asylum as refugees. In remanding a denial of asylum to the BIA, the Second Circuit, in *Carcamo-Flores v. INS*, 805 F.2d 60 (2d Cir. 1986), stated that "the Board should be sensitive to the position into which the person is, hypothetically, being placed. What is relevant is the fear a reasonable person would have, keeping in mind the context of a reasonable person who is facing the possibility of persecution, perhaps including a loss of freedom or even, in some cases, the loss of life." *Id.* at 68.

The Fifth Circuit has considered several section 208(a) cases in 1986. The court first adopted the "reasonable person" formulation in *Guevara-Flores v. INS*. *See supra* note 56. In two prior cases the court had refused to adopt a formulation or to decide whether the "well-founded fear" standard was more lenient than the "clear probability" standard. *See Bahramnia v. INS*, 782 F.2d 1243, 1248 (5th Cir. 1986) (affirming denial of asylum when an Iranian applicant was a member of an anti-Khomeini group, two cousins were murdered and two jailed, but produced no evidence of attention of Iranian authorities drawn to him); *Youssefinia v. INS*, 784 F.2d 1254, 1260 (5th Cir. 1986) (affirming denial

It is clear from the foregoing discussion that there will likely be no meaningful effect on an alien applying for asylum as a refugee under section 208(a) after *Cardoza-Fonseca*, unless the objective component of the "well-founded fear" standard is liberalized. Requiring the alien to prove specific facts which lead to an inference of a good reason to fear persecution, in the absence of corroborating testimony or evidence, in most cases probably will lead to an insurmountable burden. In cases in which an alien has received oral threats, or written threats from an unidentified source, or has had friends or associates murdered but not family members, and has received no threats himself, it is likely that the person will be deported under the *Carvajal-Munoz* standard.

A more effective formulation of this standard is that articulated by the United States Court of Appeals for the Second Circuit, which emphasizes the importance of considering the circumstances into which an alien could be placed by deportation.¹⁶² Specifically, the Second Circuit has articulated a formulation which requires satisfaction of an objective test by the applicant, without undue emphasis upon the proof of specific, particularized facts.¹⁶³ Thus, there will be a reasonable chance in practice for an alien to meet the definition of refugee as set out in section 101(a)(42)(A) of the Refugee Act.¹⁶⁴

of asylum when Iranian applicant, son of informant of Shah's secret police and part-time informant himself, who had informed on a Mullah opposed to the Shah, produced evidence of speculative and incredible nature). Then, in *Guerava-Flores*, the court allowed reopening of the applicant's case at the BIA level, and held that an alien has a "well-founded fear of persecution" if "a reasonable person in her circumstances would fear persecution if she were to be returned to her native country." 786 F.2d 1242 at 1249. Because the applicant's case had been brought to the attention of the head of the El Salvadoran military, due to her being mistaken for a guerrilla leader and being in possession of "subversive literature" when she was arrested, the court believed she had made out a prima facie showing of a well-founded fear. *Id.* at 1250. Subsequently, the court affirmed two denials of applications for asylum, but in one case the standard as formulated in *Guevara-Flores* was clearly ignored. See *Ganjour v. INS*, 796 F.2d 832, 836 (5th Cir. 1986). In *Farzad v. INS*, 802 F.2d 123 (5th Cir. 1986), the Court applied the "reasonable person" formulation, but found no indication in the record that the Iranian applicant had been identified by Iranian authorities as an opponent of the Khomeini regime. *Id.* at 125. *But see* the Ninth Circuit discussion of unreasonable evidentiary burdens in *Bolanos-Hernandez*, *supra* note 153. See also *infra* notes 162-90 and accompanying text.

162. See *supra* note 161.

163. *Id.*

164. The point at which the granting or denial of asylum becomes discretionary and the burden upon the United States and/or the applicant's community in allowing the individual to remain must be considered. The discretionary nature of the grant of asylum is, ultimately, the key to the impact of the *Cardoza-Fonseca* holding. Once the legal standard is defined, only in the most outrageous instances is the Attorney General likely to be found to have abused his discretion.

Recently, the BIA adopted this formulation in *Matter of Mogharrabi*.¹⁶⁵ The Mogharrabis, husband and wife, were citizens of Iran, who had been admitted to the United States as non-immigrant students in 1978.¹⁶⁶ They remained in the United States longer than authorized, and were ordered to appear at a deportation hearing.¹⁶⁷ Although the Mogharrabis admitted they were subject to deportation, the husband applied for withholding of deportation and for asylum.¹⁶⁸ Mogharrabi testified that he feared persecution in Iran because of an incident involving an agent of the Khomeini regime.¹⁶⁹ An Iranian student, employed in the Iranian Interests section of the Algerian Embassy, physically assaulted and drew a gun on Mogharrabi during an argument¹⁷⁰ in which the Khomeini agent threatened Mogharrabi after Mogharrabi made remarks critical of the Khomeini regime.¹⁷¹ Mogharrabi testified that cameras in the Embassy recorded the entire incident and that he is "now known to Khomeini officials and that as a result he has good reason to fear persecution if returned to Iran."¹⁷²

The BIA's opinion contains a well-reasoned analysis of the history of section 208(a) of the 1980 Act, of prior case law, and the Supreme Court decision in *Cardoza-Fonseca*.¹⁷³ The Board first noted that the meaning of "well-founded fear" must be determined "in the contexts of individual cases", but that "some guidance [could] be provided and would be helpful."¹⁷⁴ The Board made clear that they were not attempting to construct "a definitive statement on the meaning of well-founded fear" but were providing "a starting point for use in an ongoing effort to formulate a workable and useful definition" of the standard.¹⁷⁵ The Board recognized that the Court in *Cardoza-Fonseca* had not defined the "well-founded fear" standard.¹⁷⁶ The Board, however, cited the dicta in *Stevic* and the *Cardoza-Fonseca* Court's emphasis that the standard was clearly a lesser one than the "clear probability of persecution" standard as "starting point[s] in defining the term 'well-founded

165. Interim Decision #3028 (BIA, June 12, 1987).

166. *Id.* at 2.

167. *Id.* at 2-3.

168. *Id.* at 3.

169. *Id.* at 12.

170. *Id.* at 12-13.

171. *Id.* at 13.

172. *Id.*

173. *Id.* at 3-12.

174. *Id.* at 4-5.

175. *Id.* at 5.

176. *Id.*

fear.'"¹⁷⁷ A pointed reference was made to language in Justice Blackmun's concurrence suggesting that immigration judges and the BIA should be guided in their derivation of a definition of the standard by the opinions of the courts of appeals.¹⁷⁸

There followed a detailed analysis of several of the cases discussed *supra* in the analysis section of this Note.¹⁷⁹ In particular, the Board discussed the formulation adopted by the Seventh Circuit in *Carvajal-Munoz* and its adoption by the Sixth and Ninth Circuits in *Youkhanna* and *Cardoza-Fonseca*, respectively.¹⁸⁰ But of primary significance was the opinion of the Board that the Fifth and Second Circuits had "offered a somewhat more concrete definition" in *Guevara-Flores* and *Carcamo-Flores*, respectively.¹⁸¹ Specifically, the Board stated: "We agree with and adopt the general approach set forth by the Fifth Circuit; that is, that an applicant for asylum has established a well-founded fear if he shows that a reasonable person in his circumstances would fear persecution."¹⁸² The Board quoted the Second Circuit's statement that the "reasonable person standard appropriately captures the various formulations that have been advanced to explain the well-founded fear test."¹⁸³ The Board noted that this formulation also comported best with official interpretations of refugee practice under the United Nations Protocol.¹⁸⁴

The Board went on to state, however, that their holding did not require a total discarding of the requirements for asylum set out in *Matter of Acosta*.¹⁸⁵ The Board suggested that by eliminating the word "easily" from the second requirement, they could still be "useful guidelines in assessing an asylum application" because "omission of the word 'easily' lightens the applicant's burden of proof and moves the requirements as a whole into line with *Cardoza-Fonseca*."¹⁸⁶ Finally, the Board noted that grants of asylum ultimately remain discretionary and that there must be "a clear delineation of findings" as to applications for withholding of deportation and asylum.¹⁸⁷ The application of the reasonable person for-

177. *Id.* (footnote omitted).

178. *Id.* at 6.

179. *Id.* at 6-10; see *supra* notes 120-61 and accompanying text.

180. *Id.* at 7-9.

181. *Id.* at 9.

182. *Id.*

183. *Id.* at 10 (quoting *Carcamo-Flores v. INS*, 805 F.2d 60, 68 (2d Cir. 1986)).

184. *Id.*

185. *Id.* at 11. See *supra* note 105.

186. *Id.*

187. *Id.* at 12.

mulation to Mogharrabi's testimony led the Board to conclude that "a reasonable person in [his] circumstances would fear persecution if returned to Iran."¹⁸⁸ His reasons for fearing persecution were found to be "plausible, detailed, and coherent" and his testimony was considered credible.¹⁸⁹

V. CONCLUSION

Despite the clear difference in statutory language and the relatively clear legislative intent, the Immigration and Naturalization Service had consistently held that aliens applying for asylum as refugees must meet the same standard as those applying for withholding of deportation. Several circuit courts, however, heeded the dicta of the Supreme Court in *INS v. Stevic* and held that the standard required under the asylum statute was indeed a lesser standard. Finally, the court confirmed the *Stevic* dicta assumption in *INS v. Cardoza-Fonseca*.

Questions remain, however, about what practical effect this ruling will have. In the circuits that have adopted a "lesser" standard prior to *Cardoza-Fonseca*, the practical effects were negligible. A formulation which allows persons with little or no access to documentary evidence or corroborative testimony the chance to demonstrate a "well-founded fear of persecution" must be adopted or the decision in *Cardoza-Fonseca* will be of no benefit to aliens seeking asylum in the United States. If the circuit courts accept *Matter of Mogharrabi* as a valid interpretation of the "well-founded fear" standard, and if the BIA sees to it that the standard is properly applied by district directors and immigration judges, the promise of *Cardoza-Fonseca* will be achieved.¹⁹⁰

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188. *Id.* at 13.

189. *Id.*

190. The *Mogharrabi* decision is very encouraging and provides some hope that a meaningful lesser standard may be adopted in future asylum proceedings as a result of *Cardoza-Fonseca*. However, a recent decision of the United States Court of Appeals for the Sixth Circuit, decided shortly after the Supreme Court's decision in *Cardoza-Fonseca* was announced, may cast a pall on that hope. In *Gumbol v. INS*, 815 F.2d 406 (6th Cir. 1987), the court concluded that the applicant, an Iraqi Christian who had been beaten by members of the ruling Baath party, did not meet the lesser "well-founded fear of persecution" standard. *Id.* at 412. The court noted that the immigration judge had discounted the applicant's testimony due to inconsistencies, and that the BIA had concluded that "even if all the petitioner's allegations were accepted as true, [a] single incident is not sufficient to enable petitioner to avoid deportation under section 208(a) . . ." *Id.* at 412. The court also considered it important that the applicant's family had remained in Iraq and were apparently unharmed and that the applicant had never been arrested or impris-

oned for religious or political beliefs. *Id.* at 413. Of most significance was the court's statement that "[w]e find that our decision in the instant case is consistent with the rule adopted by the Supreme Court in *Cardoza-Fonseca*." *Id.* at 410 n.3. It is important to note, however, that *Gumbol* was decided prior to the BIA's decision in *Mogharrabi*.

It is also important to note that the Department of Justice had recently proposed sweeping changes in asylum procedures, which would have, *inter alia*, removed the jurisdiction over asylum claims from immigration judges and transferred that jurisdiction to the INS. See the proposed rule at 52 Fed. Reg. 167, 32,552 (1987).

Because of strong objections to the proposed rules, the INS has withdrawn them, but has announced that new rules will be proposed. 52 Fed. Reg. 46,776 (1987). See also, Helton, *Proposed Regulations on Asylum: An Improvement or Retrogression*, NAT'L L.J., Feb. 8, 1988, at 18.

