STANDARDS OF PROOF UNDER *I.N.S. v. FONSECA:* SEPARATE TESTS FOR WITHHOLDINGS OF DEPORTATION AND GRANTS OF ASYLUM

Aliens seeking to remain in the United States under the Immigration and Nationality Act of 1952[1] have at least two methods to obtain residency.[2] Recently, in *I.N.S. v. Fonseca*,[3] the Supreme Court held that each method has its own standard of proof: the "well-founded fear of persecution" standard applies to applications for asylum and the "clear probability of persecution" test applies to applications to withhold deportation.

This note examines the Court's rationale in the *I.N.S. v. Fonseca* holding that these separate standards of proof must be used under § 208(a) and § 243(h) of the Immigration and Nationality Act. Special emphasis is given to the practical application of Justice Blackmun's concurring opinion[4] which raises several existing acceptable tests which clarify the standards adopted by the Court in *Fonseca.*

FACTS OF *FONSECA*

Luz Marina Cardoza-Fonseca was a Nicaraguan citizen who entered the United States in 1979 as a visitor. After overstaying her visa and failing to depart voluntarily, the Immigration and Naturalization Service (I.N.S.) commenced deportation proceedings against her. After conceding deportability,[5] Fonseca requested relief

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[1]8 U.S.C. § 1101, *et seq.*

[2]The two relevant sections of the Immigration and Nationality Act of 1952 are as follows:

> The Attorney General shall not deport or return any alien (other than an alien described in section 1251(a)(19) of this title [Title 8]) to a country if the Attorney General determines such alien's life or freedom would be threatened in such country on account of race, religion, nationality, membership in a particular social group, or political opinion.

Immigration and Nationality Act of 1952 § 243(h), as amended by Pub. L. No. 97-212, 8 U.S.C. § 1253(h)(1) (1980).

> 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 [Title 8].

Immigration and Nationality Act of 1952 § 208(a), Pub. L. No. 82-414, 66 Stat. 103 (1952), recorded as amended 94 Stat. 105, 8 U.S.C. § 1158(a) (1980).

[3]107 S. Ct. 1207 (1987).

[4]*Id.* at 1222 (1987) (Blackmun, J., concurring).

[5]*Id.* at 1209. Fonseca admitted only that she was in the country illegally, and requested protection against deportation under § 208(a) and § 243(h).

under § 243(h) of the Immigration Act (withholding of deportation) and § 208(a) (political asylum).

Fonseca attempted to prove that her "life or freedom would be threatened" if she was forced to return to Nicaragua as a result of her anti-Sandinista views. She based her argument in part on the testimony of her brother, who had been tortured and imprisoned by the Sandinistas. Fonseca argued that she had a "well-founded fear of persecution" if she were returned to Nicaragua due to her own anti-Sandinista views, as well as her brother's anti-Sandinista activities.[6] Thus, she argued she was eligible for asylum and should not be deported.

Initially, the Immigration judge applied the "clear probability of persecution" standard to Fonseca's claim for withholding of deportation under § 243(h) and application for asylum under § 208(a).[7] Fonseca's claims under this analysis were denied. The Board of Immigration Appeals (B.I.A.) affirmed.[8]

The Ninth Circuit Court of Appeals held that "the Board erred in applying the 'strict probability' standard to petitioners' asylum claims."[9] In reaching this conclusion, Judge Reinhold noted that the correct "question under the § 243(h) standard is whether it is more likely than not that the alien would be subject to persecution."[10] The court went on to explain that the petitioner must present objective specific facts in order to meet the burden of proof under § 243(h).

In contrast to § 243(h), the Court of Appeals found that for asylum claims under § 208(a), a petitioner's testimony must be credible and persuasive and "refer to 'specific facts that give rise to an inference'" that the petitioner will be singled out for persecution.[11] The key difference between what the Court of Appeals called the "strict probability" or "clear probability" standard and the "well-founded" standard is the degree of objectivity of the "specific facts" presented by the petitioner. Under the "clear probability" standard an alien must show "objective specific facts," whereas under the "well-founded" standard, an alien need only show "specific facts," subjective or objective.

On appeal, the Supreme Court upheld the Ninth Circuit Court of Appeals' holding, finding that an alien's burden of proving eligibility

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[6]*Id.* at 1209.
[7]*Id.* at 1210.
[8]*Id.* at 1210 *citing* App. to Pet. for Cert. at 21a.
[9]Fonseca v. I.N.S., 767 F.2d 1448, 1454 (1985).
[10]*Id.* at 1452 (quoting Bolanos-Hernandez v. I.N.S., 767 F.2d 1277, 1281 (9th Cir. 1984), in turn quoting I.N.S. v. Stevic, 467 U.S. 407, 424 (1984)).
[11]*Id.* at 1453 (quoting Carvajal-Munoz v. I.N.S., 743 F.2d 562, 574 (7th Cir. 1984)).

for asylum under § 208(a) is different, and lighter, than proving eligibility for withholding of deportation under § 243(h).[12] The Court rejected both the immigration judge's and the B.I.A.'s rulings that the standards of proof under § 243(h) and § 208(a) are and should be identical.[13] In affirming the Ninth Circuit Court of Appeals, the Court analyzed the statutory language of § 208(a) and § 243(h),[14] reviewed the legislative history of the Refugee Act of 1980,[15] and then specifically rejected the government's request for judicial deference in favor of the I.N.S. interpretation of the statutory language.[16]

BACKGROUND

The Refugee Act of 1980[17] amended, inter alia, the Immigration and Naturalization Act of 1956 to include § 208(a).[18] The change resulted in a "problem of determining exactly how withholding of deportation and asylum are to fit together."[19] In *I.N.S. v. Stevic*,[20] the Supreme Court held that § 208(a)'s "well-founded fear of persecution" standard did not apply to section § 243(h), but rather that the "clear probability of persecution" standard applied.[21] The Court in *Stevic* left open the question whether the "well-founded fear of persecution" standard was coterminous with the "clear probability" standard.[22] The Court granted certiorari in *Fonseca* only "to resolve a circuit conflict"

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[12]*Fonseca*, 107 S. Ct. at 1222 (1987).
[13]*Id.* at 1222.
[14]*Id.* at 1212-1213.
[15]*Id.* at 1211.
[16]*Id.* at 1220.
[17]94 Stat. 102.
[18]Section 208(a) authorized the Attorney General to create a procedure whereby aliens within the United States or at the borders could apply for asylum. 8 U.S.C. § 1158(a). See note 2 for the text of § 208(a).

To be eligible for asylum under § 208(a), the petitioner must first prove he is a refugee within the meaning of § 101(a)(42)(A). After meeting this threshold requirement, the alien is only eligible for asylum. The decision to grant the application is precatory with the Attorney General. The Court noted that "[t]he principal motivation for the enactment of the Refugee Act of 1980 was a desire to revise and regularize the procedures governing the admission of refugees into the United States," I.N.S. v. Stevic, 467 U.S. 407, 425 (1984).
[19]I.N.S. v. Stevic, 467 U.S. 407, 430 (1984) (quoting In re Lam, Interim Dec. No. 2857, p.6, n.4 (B.I.A. Mar. 24, 1981)).
[20]I.N.S. v. Stevic, 467 U.S. 407 (1984).
[21]*Id.* at 430.
[22]*Id.*

as to whether § 243(h)'s "clear probability" standard governs applications under § 208(a).[23]

THE *FONSECA* DECISION

The Court reached its "narrow legal question" in *Fonseca* by primarily relying on statutory construction principles.[24] The Court first conducted an exhaustive review of: (1) the legislative history of the Refugee Act of 1980; (2) judicial practice under the previous statute § 203(a)(7); and (3) the 1967 United Nations Protocol Relating to the Status of Refugees.[25] In addition, the Court examined the government's claim that the Court should grant "substantial deference" to an administrative agency's rulings.[26]

The Refugee Act Of 1980

The Court in *Fonseca*, after studying the legislative history, found that the Refugee Act of 1980 was enacted by Congress primarily to bring U.S. refugee law into compliance with the 1967 U.N. Protocol.[27] The 1980 Act added § 208(a) to the Immigration and Naturalization Act of 1952. Before the 1980 Act, there was "no statutory basis" for the Attorney General to grant political asylum to aliens who applied from within U.S. borders.[28]

During the legislative process of enacting the 1980 Refugee Act, the House set forth a different standard for obtaining asylum under § 208(a) than did the Senate counterpart bill.[29] The House bill required that an alien must only prove that he is a refugee to be eligible for asylum whereas the Senate bill tied grants of asylum to the same

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[23]*Fonseca*, 107 S. Ct. at 1210. The question before the Court was "[w]hether an alien's burden of proving eligibility for asylum pursuant to § 208(a) of the Immigration and Nationality Act of 1952, 8 U.S.C. § 1158(a), is equivalent to his burden of proving eligibility for withholding of deportation pursuant to § 243(h) of the Act, 8 U.S.C. 1253(h)." *Fonseca*, 107 S. Ct. at 1222, n.32, quoting Pet. for Cert. (I).

[24]*Fonseca*, 107 S. Ct. at 1213.

[25]19 U.S.T. 6223, TIAS No. 6577.

[26]*Fonseca*, 107 S. Ct. at 1220.

[27]*Id.* at 1216.

[28]*Id.* at 1214.

[29]The House Bill, H.R. 2816, 96th Cong., 1st Session (1979) did not link asylum claims to the § 243(h) standard. The Senate Bill, S. 643, 96th Cong. 1st Sess. (1979), on the other hand, had such a requirement where the alien should be granted asylum "if he is a refugee within the meaning of § 101(a)(42)(A) *and his deportation or return would be prohibited under § 243(h)* of this Act." *Fonseca*, 107 S. Ct. at 1218 (emphasis added).

standard under the existing § 243(h).The House bill was the one ultimately enacted. The Court found that Congress "refused to restrict eligibility for asylum only to aliens meeting the stricter [§ 243(h)] standard."[30] Thus, by rejecting the Senate version, the Court inferred that Congress intended the "well-founded fear of persecution" standard to differ from § 243(h)'s "clear probability of persecution" standard.

Section 208(a)

Grants of political asylum under § 208(a) are precatory.[31] Thus, although an alien may prove she is a "refugee" under § 101(a)(42)(A), this merely makes the alien eligible for consideration by the Attorney General for political asylum. The refugee must prove a "well-founded fear of persecution" to meet the requisite threshold for the Attorney General to consider granting political asylum. The benefits conferred under § 208(a), however, are broader than the benefits under § 243(h).[32] The chief benefit of asylum is that the alien "may be eligible for adjustment of status to that of a lawful permanent resident" after one year of residency.[33] Section 243(h) merely prevents the alien's deportation to the country where there is a "clear probability of persecution."[34] The alien may still be deported to "any other hospitable country."[35]

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[30]*Fonseca*, 107 S. Ct. at 1219.

[31]*See* note 2 for the full text of § 208(a). The text emphasized here reads " ... the alien may be granted asylum in the discretion of the Attorney General." 8 U.S.C. § 1158(a).

[32]The distinctions between withholding of deportation under § 243(h) and asylum under § 208(a) are significant. There is no right to asylum once an alien is eligible under § 208(a). Section 243(h), in contrast, grants a mandatory entitlement to withholding of deportation once a clear probability of persecution has been proven. If asylum is granted, however, the alien receives more extensive benefits. As the Court noted:

> Section 243(h) relief is 'country specific' and accordingly, the applicant here would be presently protected from deportation to [his homeland where persecution is likely] pursuant to section 243(h). But that section would not prevent his exclusion and deportation to [a neighboring country] or any other hospitable country under section 237(a) if that country will accept him. In contrast, asylum is a greater form of relief. When granted asylum the alien may be eligible for adjustment of status to that of a lawful permanent resident pursuant to section 209 of the Act, 8 U.S.C. 1159, after residing here one year, subject to numerical limitations and the applicable regulations.

Fonseca, 107 S. Ct. at 1211, n.6, quoting Matter of Salim, 18 I. & N. Dec. 311, 315 (1982).

[33]*Fonseca*, 107 S. Ct. at 1211, n. 6.

[34]*Id.*

[35]*Id.*

Section 243(h)

Section 243(h) was amended by the 1980 Act to comport with the 1951 U.N. Convention Relating to the Status of Refugees.[36] The U.N. Convention imposed a mandatory obligation on signatories "not to return an alien to a country where his 'life or freedom would be threatened' on account of one of the enumerated reasons."[37] The effect of the 1980 amendment to § 243(h) was to remove the Attorney General's discretion and impose instead a mandatory entitlement to withholding of deportation to an alien who has shown a "clear probability of persecution" if returned to his country of origin.[38]

As noted above, the benefits of § 243(h) withholding of deportation are more limited than the benefits under § 208(a) asylum. An alien may succeed in proving the stricter "clear probability of persecution" standard and be entitled to the right not to be deported to the country where that probability exists. The alien may, nevertheless, be deported to another country where that probability does not exist. Therefore, without the Attorney General's grant of asylum, the alien may still be subject to deportation from the United States. An alien applying for withholding of deportation under § 243(h) may well be advised to simultaneously apply for asylum under § 208(a) if the alien's desire is to remain in the United States, especially since any alien able to meet the "clear probability of persecution" standard under § 243(h) will *ipso facto* meet the "well-founded fear of persecution" standard under § 208(a).[39] It should be noted that after deportation proceedings commence, an application for political asylum under § 208(a) will automatically trigger a request for withholding of deportation under § 243(h).[40] An application for withholding under § 243(h), however, will not automatically trigger a claim for asylum under § 208(a). The

[36]19 U.S.T. 6223, 6259. TIAS No. 6577 (1968). *See Fonseca,* 107 S. Ct. at 1212.
[37]*Id.*
[38]*Id.*, n.9.
[39]Since the "clear probability" standard is a higher standard to meet than the "well-founded fear" standard, if an alien can prove a "clear probability of persecution," he has more than satisfied the "well-founded fear of persecution" standard.
[40]8 C.F.R. § 208.3(b) provides that a request for asylum "shall also be considered as a request" for withholding of deportation under § 243(h). The Court in *Stevic,* however, noted that even though a § 208(a) claim would trigger a request for withholding of deportation under § 243(h) this would not affect the standards of proof for either claim. The Court "further note[d] that a § 243(h) request is not automatically also considered as a § 208(a) request under the regulations. Indeed, the alien may be barred from asserting a § 208(a) claim while still allowed to invoke § 243(h)." *Stevic,* 467 U.S. 407, 423, n.18 (1984).

factors considered by the Attorney General when reviewing applications under § 208(a) and the likelihood that a particular alien would be granted asylum is beyond the scope of this note.

The United Nations Protocol

Article 1(2) within the 1967 U.N. Protocol Relating to the Status of Refugees contained a definition of "refugee" which the Court found probative.[41] Since the U.N. Protocol utilized the "well-founded fear of persecution" standard, the Court found that Congress adopted that standard for refugees and intended that the definition of "refugee" be interpreted in conformance with the U.N. Protocol.[42] The Court reviewed what "well-founded fear of persecution" meant in regard to the Protocol and found that "it certainly does not require an alien to show that it is more likely than not he will be persecuted in order to be" classified as a "refugee."[43]

The Court noted that the Committee that drafted Article 1(2) of the Protocol stated that the "well-founded fear of persecution" meant that a person need only show either that she was actually a victim of persecution or "good reason" why she fears persecution.[44] Thus, a "good reason" test may be sufficient under § 208(a) to prove "well-founded fear of persecution," as the Court found that the Protocol's definitions were adopted by Congress in 1980 and added to the Immigration and Nationality Act and intended to be interpreted in conformance with the U.N. Protocol.

Article 33.1 of the Protocol corresponds with § 243(h) of the Immigration and Nationality Act.[45] Article 33.1 requires that in order to be entitled to the right of withholding of deportation the applicant must (1) prove that he is a "refugee" by showing at least a "well-

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[41]Article 1(2) of the Convention defines a 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.

1967 United Nations Protocol Relating to the Status of Refugees, 19 U.S.T. 6223, TIAS No. 6577.

[42]*Fonseca,* 107 S. Ct. at 1216.

[43]*Id.* at 1217.

[44]*Id.* at 1216.

[45]*Id.* at 1218. The Court found that the 1980 Refugee Act amended § 243(h) for the sole purpose of complying with Article 33.1. *See id.* at 1218, n. 25.

founded fear of persecution" and (2) prove that his "life or freedom 'would be threatened' if deported."[46] Relying on Article 33.1 and Article 34 of the Protocol, the Court found a "precise distinction" between refugees eligible for § 208(a) relief and a "subcategory" of refugees entitled to § 243(h) relief.[47]

IMPACT AND APPLICATION OF *FONSECA*

The Court in *Fonseca*, ignoring the maxim *probationes debent esse evidentes, id est, persicuae et faciles intelligi*,[48] stated that it "did not attempt to set forth a detailed description of how the well-founded fear test should be applied."[49] Instead, the Court limited its holding to the issue that the two standards were not identical.[50] The primary reason for this conclusion was based upon the 'plain meaning' of the statutes as discussed below. The Court acknowledged that there is "some ambiguity" in the "well-founded fear of persecution" test and delegated the task of "giving concrete meaning" to the test to the courts through a case-by-case basis.[51]

The Court's holding that the "well-founded fear of persecution" standard is not the same as the "clear probability of persecution" standard, was based on the 'plain meaning' or literal reading of the phrases.[52] Section 243(h) requires a showing that the alien "would be threatened" if deported.[53] The Court found that this language was absent any "subjective component" and that it required "the alien [to] establish by objective evidence that it is more likely than not he or she will be subject to persecution upon deportation."[54]

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[46]*Id.* at 1218.
[47]*Id.* at 1217.
[48]"Proofs ought to be evident, that is, perspicuous and easily understood." Black's Law Dictionary 1082 (5th ed. 1979).
[49]*Fonseca*, 107 S. Ct. at 1222.
[50]*Id.*
[51]*Id.* at 1221-1222. In *Matter of Mogharrabi*, the Board of Immigration Appeals grappled with adopting a standard, after a thorough review of the various standards of proof. Matter of Mogharrabi, Interim Decision #3028 p.9 (June 12, 1987). The Board ultimately adopted the "reasonable person" standard set forth by the Fifth Circuit in Guevara-Flores v. I.N.S., 786 F.2d 1242 (5th Cir. 1986).
[52]"As we have explained, the plain language of this statute appears to settle the question before us." *Fonseca*, 107 S. Ct. at 1213, n.12.
[53]*See supra* note 2 for the text of § 243(h).
[54]*Fonseca*, 107 S. Ct. at 1212.

Eligibility for political asylum under § 208(a) is dependent upon the Attorney General's finding that the alien is a "refugee" within the meaning of § 101(a)(42).[55] The Court noted that the "well-founded fear of persecution" test controls the Attorney General's precatory determination of whether an alien is a refugee and thus eligible for political asylum.[56] The Court also found, however, that the 1980 amendments altered § 243(h), creating a mandatory entitlement to withholding of deportation, by removing all discretion from the Attorney General under this section.[57]

Section 208(a), on the other hand, by its reference to "fear," contains a subjective element inherent in the mind of the alien.[58] Therefore, the Court found that the ordinary meaning of the language used clearly showed a subjective versus objective dichotomy. Thus, it concluded that "[t]he linguistic difference between the words 'well-founded fear' and 'clear probability'" demonstrate that the standards are not identical.[59] The Court further supported its conclusion[60] by noting that the "same Congress chose to maintain the old standard in § 243(h), but to incorporate a different standard in § 208(a)" when § 243(h) was amended and § 208(a) was added in 1980.[61]

Lastly, the Court rejected the argument that the only way to prove a "well-founded fear of persecution" is to prove a "clear probability of persecution." This argument carries considerable weight in light of the fact that the administrative agency experienced in the day-to-day application of these standards, the I.N.S., had reached the same conclusion.

All but one circuit court which addressed the issue ultimately reached agreement with the Supreme Court.[62] The lengthy and detailed analysis in those decisions, however, belies the purported lucidity "so clear on the face of the statute"[63] as seen through the unfogged lenses of the Court. The two standards, when read on their faces, are anything but clear. The voluminous litigation concerning the meanings of these

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[55]The alien must first prove he is a refugee in order to be eligible for asylum. *See supra* note 18.

[56]*Fonseca*, 107 S. Ct. at 1213.

[57]*Id.* at 1212.

[58]*Id.* at 1212-1213.

[59]*Id.* at 1213.

[60]The court concluded that the linguistic differences in the statute essentially settled the question whether the two standards were actually different.

[61]*Fonseca*, 107 S. Ct. at 1213.

[62]The Court of Appeals for the Third Circuit maintained, even after *I.N.S. v. Stevic*, 467 U.S. 407 (1984), that the two standards were identical. Sankar v. I.N.S., 757 F.2d 532, 533 (3rd Cir. 1985).

[63]*Fonseca*, 107 S. Ct. at 1213.

standards is more probative of this fact than anything the Court or I can point out.[64] The "linguistic difference" relied upon by the Court, although sufficient by itself, was only one prong the Court used to support its holding.

THE CONCURRENCE: HELP FOR THE COURTS AND THE PRACTITIONER

Justice Blackmun wrote his concurrence to "emphasize" that the Court has directed the I.N.S. to several sources which should give meaning to the "well-founded fear of persecution" standard.[65] These several sources include *I.N.S. v. Stevic*,[66] the circuit courts, international law, and scholarly commentaries.

"Reasonable Possibility" Test Of Stevic

As noted above, the Court in *Stevic* pointed to a "moderate" interpretation of the "well-founded fear of persecution" standard.[67] An alien need show a "reasonable possibility" of persecution based on an objective situation established by the evidence to satisfy a "well-founded fear of persecution" standard.[68]

"Reasonable Person" Test

The Second and the Fifth Circuits utilize the "reasonable person" test.[69] The inquiry is focused on the context and circumstances of the

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[64]*See, e.g.*, Matter of Mogharrabi, Interim Dec. No. 3028, at 4 (June 12, 1987) where the Board of Immigration Appeals noted that "[t]he meaning of the term "well-founded fear" has been the subject of considerable controversy and litigation." The mere fact that the Court was faced with interpreting the two statutes cuts against the Court's assertion that the meanings are clear on the face of the statute.

[65]*Fonseca*, 107 S. Ct. at 1223.

[66]467 U.S. 407 (1984).

[67]*Id.* at 425.

[68]*Id.* at 424. Although the Court set forth this meaning for the "well-founded fear of persecution" standard, the Court later stated that "[w]e do not decide the meaning of the phrase "well-founded fear of persecution" which is applicable by the terms of the Act" to § 208(a) claims. *Id.* at 430. Therefore, the Court gave meaning to the phrase but later disclaimed any precedential value to the dicta. It is this section, the disclaimer not withstanding, to which Justice Blackmun points.

[69]Guevara-Flores v. I.N.S., 786 F.2d 1242 (5th Cir. 1986); Carcamo-Flores v. I.N.S., 805 F.2d 60 (2nd Cir. 1986).

applicant and whether a reasonable person would fear persecution if subjected to the same or similar circumstances.[70]

"Sufficient Basis For A Subjective Fear" Test

The Ninth Circuit promulgated a two part test: (1) the alien must have a subjective fear and (2) this fear must have enough of a basis that it can be considered well-founded.[71]

"Specific Facts" Test

The Seventh Circuit set forth a better test than all other circuits addressing the problem.[72] It is a better test because it narrows the inquiry of the court to the "specific facts" which establish that an applicant (1) has been the victim of persecution or (2) has a "good reason" to fear that he will be "singled out" for persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.[73] The degree of specificity required of an applicant, combined with the burden of proving either past persecution or a good reason to fear being singled out for persecution, reduces the conjectural nature of the "subjective component" of the "well-founded fear of persecution" standard. Thus, under this test, if the court is confronted with mere speculation by the applicant or an applicant's generalized fear, a "well-founded fear of persecution" would not be established. Courts should be reluctant to act upon the whims and suspicions of every applicant before the bar.

International Law: "Plausible And Coherent" Test

Within the Manual for Eligibility Officers,[74] the International Refugee Organization stated that an applicant giving a "plausible and

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[70]The Board of Immigration Appeals adopted the "reasonable person" test in Matter of Mogharrabi, Interim Dec. No. 3028 at 9 (June 12, 1987). The B.I.A. favored this test because of its "'common sense' framework for analyzing" claims. This test however is almost totally dependent upon the applicant's statements and portrayal of the facts. Not even a scintilla of objective evidence need be submitted according to the Board's own statement as "the alien's own testimony may in some cases be the only evidence available." Matter of Mogharrabi, Interim Dec. No. 3028 at 10 (June 12, 1987). It is for this reason that the "specific facts" test is more desirable. *See infra* note 72 and accompanying text.

[71]Diaz-Escobar v. I.N.S., 782 F.2d 1488 (9th Cir. 1986).

[72]Carvajal-Munoz v. I.N.S., 743 F.2d 562 (7th Cir. 1984).

[73]*Id.* at 574.

[74]International Refugee Organization, Manual for Eligibility Officers, Ch. IV, No. 175, Annex 1, pt.1 Sec. C19, p.24 (May 1950).

coherent account of why he fears persecution" has set forth reasonable grounds for his fear.

"Reasonable Or Real Chance" Test

Several commentators have noted that "if there is a real chance," or a "reasonable chance," or a "serious possibility" of persecution, the fear is well-founded.[75] Note, however, the Court's apparent reluctance to analyze a "well-founded fear" standard on probabilities or statistical formulas alone, in spite of *Stevic's* "reasonable possibility" test.[76] By rejecting the "clear probability" standard, the Court set the ceiling at less than 51% probability.[77] Furthermore, the Court, by way of example, found that even a 10% chance of persecution is sufficient to create a "well-founded fear."[78] Where the floor rests, however, is not certain, but it must be found somewhere between 1% and 9%. The question remains whether a 1% or 2% chance of persecution is sufficient to create a "reasonable possibility" or a "real chance" or a "serious possibility" of persecution. To avoid this quagmire, even assuming a court could, with any accuracy, determine the statistical probability of an event such as the persecution of an applicant, courts may benefit by adopting the "specific facts" test.[79]

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[75]A. Grahl-Madsen, The Status of Refugees in International Law 181 (1966) ("real chance" for persecution); G. Goodwin-Gill, The Refugee in International Law 22-24 (1983) ("reasonable chance" or "serious possibility" for persecution); and generally Cox, *Well-Founded Fear of Being Persecuted: The Sources and Application of a Criterion of Refugee Status*, 10 Brooklyn J. Int'l L. 333 (1984). *See Fonseca*, 107 S. Ct. at 1217, n. 24.

[76]*Fonseca*, 107 S. Ct. at 1217-1218. Rather than focusing on a specific probability of an event occurring, the general intent of the Court is to point out that the focus should be on whether persecution could occur at all.

[77]The clear probability test requires that an event be "more likely than not." *See* I.N.S. v. Stevic, 467 U.S. 407 (1984). Thus, at a minimum, an event must have at least a 51% probability of occurring. Conversely, the more generous "well-founded" test takes up where the other leaves off, at less than 51%.

[78]*Fonseca*, 107 S. Ct. at 1217. "There 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."

[79]*See* Caraval-Munoz v. I.N.S., 743 F.2d 564 (7th Cir. 1984).

CONCLUSION

The Court in *Fonseca* held that the "clear probability of persecution standard" is different from the "well-founded fear of persecution" standard. Thus, claims under § 243(h) should be evaluated under the more strict "clear probability" standard and claims under § 208(a) should be evaluated under the more generous "well-founded fear" standard. The Court found sufficient disparities on the face of the statutes to justify its holding, but the Court also evaluated the legislative history of the statutes via the Refugee Act of 1980 and the 1967 U.N. Protocol Relating to the Status of Refugees. Although declining to specify what tests should be employed in satisfying the "well-founded fear" standard, the *Fonseca* Court, per Justice Blackmun, directed the I.N.S. to existing tests which may be used. Of these numerous tests, the Seventh Circuit's "specific facts" test may prove to be the most workable, as it limits the courts to specific, objective facts rather than subjective sooth saying.

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