MATTER OF ACOSTA

In Deportation Proceedings

A-24159781

Decided by Board March 1, 1985

(1) Construction of the provisions the United Nations Protocol Relating to the Status of Refugees, Jan. 31, 1967, [1968] 19 U.S.T. 6223, T.I.A.S. No. 6577, 606 U.N.T.S. 268, is left by that agreement to each state that is party to the Protocol; accordingly, the various international interpretations of the Protocol, including the *Handbook on Procedures and Criteria for Determining Refugee Status Under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees* published by the Office of the United Nations High Commissioner for Refugees, are useful tools in construing our obligations under the Protocol, but they are neither binding upon the United States nor controlling as to construction of the Refugee Act of 1980.

(2) An alien in an exclusion or deportation proceeding who seeks to demonstrate eligibility for either asylum under section 208 of the Immigration and Nationality Act, 8 U.S.C. § 1158 (1982), or withholding of deportation under section 243(h) of the Act, 8 U.S.C. § 1253(h) (1982), must make two related showings: he must meet his evidentiary burdens of proof and persuasion as to the facts, and he must meet the statutory standards of eligibility set out by the pertinent provisions in the Act.

(3) It is the alien who bears the burdens of proof and persuasion in asylum and withholding of deportation cases and he must establish the facts by a preponderance of the evidence.

(4) In order to meet the statutory standard of eligibility for asylum, an alien must satisfy each of the following four elements in the definition of a refugee created by section 101(a)(42)(A) of the Act, 8 U.S.C. § 1101(a)(42)(A) (1982): (1) the alien must have a "fear" of "persecution"; (2) the fear must be "well founded"; (3) the persecution feared must be "on account of race, religion, nationality, membership in a particular social group, or political opinion"; and (4) the alien must be unable or unwilling to return to his country of nationality or to the country in which he last habitually resided because of persecution or his well-founded fear of persecution.

(5) The statutory standard for asylum requires the facts to show that an alien's primary motivation for requesting refuge in the United States is "fear," *i.e.*, a genuine apprehension or awareness of danger in another country; no other motivation will suffice.

(6) The term "persecution" in the definition of a refugee under the Act means harm or suffering that is inflicted upon an individual in order to punish him for pos-

sessing a belief or characteristic a persecutor seeks to overcome; the word does not encompass the harm that arises out of civil or military strife in a country.

(7) The requirement of a "well-founded fear of persecution" in section 101(a)(42)(A) of the Act means that an individual's fear of persecution must have its basis in external, or objective, facts that show there is a realistic likelihood he will be persecuted upon his return to a particular country; this requires an alien to show that his fear has a solid basis in objective facts or events and that it is likely he will become the victim of persecution.

(8) In order for an alien to show that it is likely he will become the victim of persecution, his evidence must demonstrate that (1) the alien possesses a belief or characteristic a persecutor seeks to overcome in others by means of punishment of some sort; (2) the persecutor is already aware, or could easily become aware, that the alien possesses this belief or characteristic; (3) the persecutor has the capability of punishing the alien; and (4) the persecutor has the inclination to punish the alien.

(9) The well-founded fear standard for asylum and the clear probability standard for withholding of deportation are not meaningfully different and, in practical application, converge.

(10) "Persecution on account of membership in a particular social group" refers to persecution that is directed toward an individual who is a member of a group of persons, all of whom share a common, immutable characteristic, *i.e.*, a characteristic that either is beyond the power of the individual members of the group to change or is so fundamental to their identities or consciences that it ought not be required to be changed.

(11) In order for an alien to show persecution on account of "political opinion" within the meaning of the Act, it is not sufficient to show that a persecutor's conduct furthers his goals in a political controversy; rather, the alien must show that it is his own, individual political opinion that a persecutor seeks to overcome by the infliction of harm or suffering.

(12) The requirement that an alien must be unable or unwilling to return to a particular country because of persecution or a well-founded fear of persecution requires an alien to do more than show a threat of persecution in a particular place or abode within a country—he must show that the threat of persecution exists for him country-wide.

CHARGE:
Order: Act of 1952—Sec. 241(a)(2) [8 U.S.C. § 1251(a)(2)]—Entered without inspection

ON BEHALF OF RESPONDENT:
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ON BEHALF OF SERVICE:
William M. Darlington
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BY: Milhollan, Chairman; Maniatis, Dunne, Morris, and Vacca, Board Members

In a decision dated December 22, 1983, the immigration judge found the respondent deportable pursuant to section 241(a)(2) of the

Immigration and Nationality Act, 8 U.S.C. § 1251(a)(2) (1982), for entering the United States without inspection, denied the respondent's applications for a grant of asylum and for withholding of deportation to El Salvador, but granted the respondent the privilege of departing voluntarily in lieu of deportation. The respondent has appealed from that portion of the immigration judge's decision denying the applications for asylum and withholding of deportation. The appeal will be dismissed.

The respondent is a 36-year-old male native and citizen of El Salvador. In a deportation hearing held before an immigration judge over the course of 2 days in July and August 1983, the respondent conceded his deportability for entering the United States without inspection and accordingly was found deportable as charged. The respondent sought relief from deportation by applying for a discretionary grant of asylum pursuant to section 208 of the Act, 8 U.S.C. § 1158 (1982), and for mandatory withholding of deportation to El Salvador pursuant to section 243(h) of the Act, 8 U.S.C. § 1253(h) (1982).[1] In an oral decision, the immigration judge denied the respondent's applications for these two forms of relief finding that he had failed to meet his burden of proof for such relief. It is this finding that the respondent has challenged on appeal.

In order to be eligible for withholding of deportation to any country, an alien must show that his "life or freedom would be threatened in such country on account of race, religion, nationality, membership in a particular social group, or political opinion." Section 243(h)(1) of the Act. We have held, and the Supreme Court of the United States has recently affirmed, that this statutory provision requires an alien to demonstrate "a clear probability" of persecution on account of one of the five grounds enumerated in the Act. *INS* v. *Stevic,* 467 U.S. 407 (1984). The Court has construed the clear probability standard to require a showing that it is more likely than not an alien would be subject to persecution. *Id.* at 424.

In order to be eligible for a grant of asylum, an alien must show he or she is a "refugee" as defined by section 101(a)(42)(A) of the Act, 8 U.S.C. § 1101(a)(42)(A) (1982). *See* section 208 of the Act. That definition includes the requirement that an alien must have "a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion." *See* section 101(a)(42)(A) of the Act. In *INS* v. *Stevic, supra,*

[1] Under the regulations of the Immigration and Naturalization Service, any asylum request made after the institution of deportation proceedings is also considered to be a request for withholding of deportation under section 243(h) of the Act. 8 C.F.R. § 208.3(b) (1984).

the Supreme Court did not find it necessary to construe the meaning of the phrase "well-founded fear of persecution." Rather, the Court assumed for the purposes of analysis that the well-founded fear standard for asylum is more generous than the clear probability standard for withholding of deportation. *INS* v. *Stevic, supra,* at 425.

It has been our position that as a practical matter the showing contemplated by the phrase "a well-founded fear" of persecution converges with the showing described by the phrase "a clear probability" of persecution. *See, e.g., Kashani* v. *INS,* 547 F.2d 376, 379 (7th Cir. 1977); *Matter of Dunar,* 14 I&N Dec. 310, 319–20 (BIA 1973). Accordingly, we have not found a significant difference between the showings required for asylum and withholding of deportation. *Matter of Salim,* 18 I&N Dec. 311, 314 (BIA 1982); *Matter of Lam,* 18 I&N Dec. 15 (BIA 1981); *accord Matter of Portales,* 18 I&N Dec. 239, 241 (BIA 1982).

The United States Court of Appeals for the Third Circuit has agreed with this position, holding that there is no difference between the standards for asylum and withholding of deportation. *Sotto* v. *INS,* 748 F.2d 832, 836 (3d Cir. 1984); *see also Rejaie* v. *INS,* 691 F.2d 139, 146 (3d Cir. 1982). The Seventh Circuit has concluded that the well-founded fear standard for asylum is not identical, but "very similar," to the clear probability standard for withholding of deportation and has described the showing for asylum as one requiring actual persecution or some other "good reason" to fear persecution. *Carvajal-Munoz* v. *INS,* 743 F.2d 562, 574–76 (7th Cir. 1984). This position also appears to have been adopted by the Sixth Circuit. *Youkhanna* v. *INS,* 749 F.2d 360, 362 (6th Cir. 1984). The Ninth Circuit, however, which has indicated that the well-founded fear standard requires a "valid reason" to fear persecution, has concluded that this standard is more generous to the alien than the clear probability standard for withholding of deportation. *Bolanos-Hernandez* v. *INS,* 749 F.2d 1316, 1321 (9th Cir. 1984). In light of the conflicting positions over the standards controlling asylum and withholding of deportation, we shall reexamine our position on the showings required for these forms of relief.

We begin with the understanding that an alien in an exclusion or a deportation proceeding who seeks to demonstrate eligibility for either asylum or withholding of deportation must necessarily make two related showings. First, the alien must go forward with his evidence and initially persuade the immigration judge that the facts alleged to be the basis of the claim for asylum or withholding of deportation are true, *i.e.,* the alien must meet his evidentiary burdens of proof and persuasion. *See generally,* E. Cleary, *McCormick's*

Handbook of the Law of Evidence § 336, at 783-85 (2d ed. 1975). Second, the alien must demonstrate that the facts found to be true meet the tests of eligibility for asylum or withholding of deportation set out in the Act, *i.e.*, the alien must meet the statutory standards of eligibility for these forms of relief. *See* sections 208 and 243(h) of the Act.

THE EVIDENTIARY BURDENS OF PROOF AND PERSUASION FOR ASYLUM AND WITHHOLDING OF DEPORTATION

Case law and the regulations have always made clear that it is the alien who bears the burden of proving that he would be subject to, or fears, persecution. *See INS* v. *Stevic, supra,* at 422 n.16; 8 C.F.R. §§ 208.5, 242.17(c) (1984); *see also Matter of Nagy,* 11 I&N Dec. 888, 889 (BIA 1966); *Matter of Sihasale,* 11 I&N Dec. 759, 760-62 (BIA 1966). However, to date our decisions have not articulated the burden of persuasion an alien must meet in order to convince the trier of fact of the truth of the allegations that form the basis of the claim for asylum or withholding of deportation.

It is the general rule in both administrative and immigration law that the party charged with the burden of proof must establish the truth of his allegations by a preponderance of the evidence. *See* E. Cleary, *supra,* § 355, at 853; 1A C. Gordon & H. Rosenfield, *Immigration Law and Procedure* § 5.10b, at 5-121 (rev. ed. 1984).[2] This is the burden of persuasion generally applied to aliens when they seek to prove their admissibility to the United States or when they seek relief from deportation through such means as suspension of deportation under section 244(a) of the Act, 8 U.S.C. § 1254(a) (1982), or adjustment of status under section 245 of the Act, 8 U.S.C. § 1255 (1982). *See Matter of Vorrais,* 12 I&N Dec. 84 (BIA 1967); 1A C. Gordon & H. Rosenfield, *supra,* §§ 3.20d, 5.10b, at 5-121. We see no reason to depart from this burden of persuasion when aliens seek asylum and withholding of deportation. Thus, in such cases we consider it to be incumbent upon an alien to establish the facts supporting his claim by a preponderance of the evidence.[3] *Cf. Bolanos-Hernandez* v. *INS, supra,* at 1320 n.5. In deter-

[2] The Service's burden of proving an alien's deportability by clear, unequivocal, and convincing evidence is an exception to this general rule. *See Woodby* v. *INS,* 385 U.S. 276 (1966).

[3] We note that in *McMullen* v. *INS,* 658 F.2d 1312, 1316 (9th Cir. 1981), the Ninth Circuit held that a "substantial evidence" standard of review applies in cases in which aliens seek withholding of deportation under section 243(h) of the Act. *See also Carvajal-Munoz* v. *INS, supra,* at 567. The standard of review employed by a

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mining whether a preponderance of the evidence supports an alien's allegations, it is necessary to assess the credibility and the probative force of the evidence put forward by the alien. *See, e.g., Saballo-Cortez* v. *INS,* 749 F.2d 1354, 1357 (9th Cir. 1984).

In order to prove the facts underlying his applications for asylum and withholding of deportation, the respondent testified, and attested in an affidavit attached to his asylum application, to the following facts. In 1976 he, along with several other taxi drivers, founded COTAXI, a cooperative organization of taxi drivers of about 150 members. COTAXI was designed to enable its members to contribute the money they earned toward the purchase of their taxis. It was one of five taxi cooperatives in the city of San Salvador and one of many taxi cooperatives throughout the country of El Salvador. Between 1978 and 1981, the respondent held three management positions with COTAXI, the duties of which he described in detail, and his last position with the cooperative was that of general manager. He held that position from 1979 through February or March of 1981. During the time he was the general manager of COTAXI, the respondent continued on the weekends to work as a taxi driver.

Starting around 1978, COTAXI and its drivers began receiving phone calls and notes requesting them to participate in work stoppages. The requests were anonymous but the respondent and the other members of COTAXI believed them to be from anti-government guerrillas who had targeted small businesses in the transportation industry for work stoppages, in hopes of damaging El Salvador's economy. COTAXI's board of directors refused to comply with the requests because its members wished to keep working, and as a result COTAXI received threats of retaliation. Over the course of several years, COTAXI was threatened about 15 times. The other taxi cooperatives in the city also received similar threats.

Beginning in about 1979, taxis were seized and burned, or used as barricades, and COTAXI drivers were assaulted or killed. Ultimately, five members of COTAXI were killed in their taxis by unknown persons. Three of the COTAXI drivers who were killed were friends of the respondent and, like him, had been founders and officers of COTAXI. Each was killed after receiving an anonymous note threatening his life. One of these drivers, who died from injuries he sustained when he crashed his cab in order to avoid being

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court in reviewing our decision is a separate and distinct standard from that imposed upon a party to measure his burden of persuasion on issues of fact. *Woodby* v. *INS, supra,* at 282-83. Thus, the Ninth Circuit's decision in *McMullen* has no bearing on the issue of an alien's burden of persuasion in withholding or asylum cases.

shot by his passengers, told his friends before he died that three men identifying themselves as guerrillas had jumped into his taxi, demanded possession of his car, and announced they were going to kill him.

During January and February 1981, the respondent received three anonymous notes threatening his life. The first note, which was slipped through the window of his taxi and was addressed to the manager of COTAXI, stated: "Your turn has come, because you are a traitor." The second note, which was also put on the respondent's car, was directed to "the driver of Taxi No. 95," which was the car owned by the respondent, and warned: "You are on the black list." The third note was placed on the respondent's car in front of his home, was addressed to the manager of COTAXI, and stated: "We are going to execute you as a traitor." In February 1981, the respondent was beaten in his cab by three men who then warned him not to call the police and took his taxi. The respondent is of the opinion that the men who threatened his life and assaulted him were guerrillas who were seeking to disrupt transportation services in the city of San Salvador. He also has the impression, however, that COTAXI was not favored by some government officials because they viewed the cooperative as being too socialistic.

After being assaulted and receiving the three threatening notes, the respondent left El Salvador because he feared for his life. He declared at the hearing that he would not work as a taxi driver if he returned to El Salvador because he understands that there is little work for taxi drivers now. He explained that the people are too poor to call taxis. Additionally, he stated that the terrorists are no longer active.

As evidence of the truth of his version of the facts, the respondent submitted a letter from the present manager of COTAXI, stating that the respondent was a member of that organization for 3 years. The respondent also submitted several articles reporting that leftist guerrillas had threatened to kill American advisors and personnel in El Salvador, had launched an offensive in three of the provinces in the country, and had engaged in a campaign designed to sabotage the transportation industry and the country's economy.

The Service did not submit any evidence refuting the respondent's testimony. As required by regulation, the Service did submit a written advisory opinion from the Bureau of Human Rights and Humanitarian Affairs in the Department of State pertaining to the respondent's Request for Asylum in the United States (Form I-589). *See* 8 C.F.R. §§ 208.7, 208.10(b) (1983). That opinion states that the respondent does not appear to qualify for asylum because he failed to show a well-founded fear of persecution in El Salvador on ac-

count of race, religion, nationality, membership in a particular social group, or political opinion.

The immigration judge found the respondent's testimony sufficient to prove that he was a founder and member of COTAXI but insufficient to prove that he had received several death threats and had been assaulted by guerrillas. The immigration judge did not make any finding that the respondent lacked credibility; rather, he rejected a substantial portion of the respondent's testimony solely because it was self-serving.

While the immigration judge's assessment of the evidence deserves deference, we disagree with his conclusion that the respondent's testimony should be rejected solely because it is self-serving. The respondent described in specific detail the circumstances surrounding the deaths of his three friends shortly after they received threatening notes, the threats he received, and the facts surrounding his assault. His testimony as to these matters was logically consistent with his testimony about the threats made to COTAXI and its members for failing to participate in guerrilla-sponsored work stoppages. Moreover, the respondent submitted objective evidence to establish his membership in COTAXI and to corroborate his testimony that the guerrillas sought to disrupt the public transportation system of El Salvador. Thus, absent an adverse credibility finding by the immigration judge, we find the respondent's testimony, which was corroborated by other objective evidence in the record, to be worthy of belief. It remains to be determined, however, whether the respondent's facts are sufficient to meet the statutory standards of eligibility for asylum and withholding of deportation.

THE STATUTORY STANDARD FOR ASYLUM

A grant of asylum is a matter of discretion. *See* section 208 of the Act; *INS* v. *Stevic, supra,* at 423 n.18. However, an alien is eligible for a favorable exercise of discretion only if he qualifies as a "refugee" under section 101(a)(42)(A) of the Act. Therefore, that section establishes the statutory standard of eligibility for asylum. The pertinent portion of section 101(a)(42) provides 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 or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.... The term "refugee" does not include any person who ordered, incited, assisted, or otherwise participated in the persecution of any

person on account of race, religion, nationality, membership in a particular social group, or political opinion.

This section creates four separate elements that must be satisfied before an alien qualifies as a refugee: (1) the alien must have a "fear" of "persecution"; (2) the fear must be "well founded"; (3) the persecution feared must be "on account of race, religion, nationality, membership in a particular social group, or political opinion"; and (4) the alien must be unable or unwilling to return to his country of nationality or to the country in which he last habitually resided because of persecution or his well-founded fear of persecution.[4]

(1) *The alien must have a "fear" of "persecution."*

Initially, we note that Congress added the elements in the definition of a refugee to our law by means of the Refugee Act of 1980, Pub. L. No. 96–212, 94 Stat. 102. In so doing Congress intended to conform the Immigration and Nationality Act to the United Nations Protocol Relating to the Status of Refugees, Jan. 31, 1967, [1968] 19 U.S.T. 6223, T.I.A.S. No. 6577, 606 U.N.T.S. 268 ("Protocol"), to which the United States had acceded in 1968. H.R. Rep. No. 781, 96th Cong., 2d Sess. 19, *reprinted in* 1980 U.S. Code Cong. & Ad. News 160, 160; S. Rep. No. 256, 96th Cong., 1st Sess. 4, 14–15, *reprinted in* 1980 U.S. Code Cong. & Ad. News 141, 144, 154–55; H.R. Rep. No. 608, 96th Cong., 1st Sess. 9–10 (1979); *see also INS* v. *Stevic, supra,* at 422–23. Article 1.2 of the Protocol [5] defines a refugee as one who

owing to 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. 6225 with 6261.[6]

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[4] While the language of section 101(a)(42)(A) excludes from the definition of a refugee any person who "ordered, incited, assisted, or otherwise participated in the persecution of any person," we do not construe this language as establishing a fifth statutory element an alien must initially prove before he qualifies as a refugee. This provision is one of exclusion, not one of inclusion, and thus requires an alien to prove he did not participate in persecution only if the evidence raises that issue.

[5] Article 1.2 of the Protocol largely incorporated the definition of a refugee contained in Article 1A(2) of the United Nations Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 150 ("U.N. Convention"), to which the United States was not a party.

[6] Despite Congress' intention to conform our law to the Protocol, the actual definition of "refugee" adopted in the Act differs in several significant respects from that

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