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Arthurc. Helton

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The Proper Role of Discretion in Political Asylum Determinations

ARTHUR C. HELTON*

This article analyzes the limits of discretion in asylum adjudications. The author describes the recent administrative jurisprudence concerning discretion; jurisprudence that is expanding, in part, because of the 1984 Supreme Court decision in INS v. Stevic. Reported and unreported Board of Immigration Appeals cases are described and analyzed. Also analyzed are the permissible limits of administrative discretion under the Refugee Act of 1980 and international law, including the Protocol relating to the Status of Refugees and customary international legal principles respecting family reunification. The “refugee-in-orbit” phenomenon resulting from discretionary denials of asylum is also discussed. The article concludes that an unprincipled expansion of the role of discretion in asylum cases could threaten the right to apply for asylum in the United States.

INTRODUCTION

An alien in the United States “may be granted asylum in the discretion of the Attorney General” if the alien is determined to be a “refugee.” Refugees status is available to persons who have been persecuted or who have “a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social...
Despite findings that they are "refugees" who would face persecution upon return to their home countries, with increasing frequency asylum applicants are being denied asylum as a matter of discretion. The discretionary character of asylum, particularly as opposed to the mandatory character of withholding of deportation, was emphasized in the recent decision of the Supreme Court in \textit{INS v. Stevic}.  

In a unanimous decision authored by Justice Stevens, the Court in \textit{Stevic} held that the refugee standard — "well-founded fear of persecution" — did not apply to the immigration remedy of withholding of deportation. Rather, the Court ruled that the prior administrative clear probability standard obtained — "whether it is more likely than not that the alien would be subject to persecution." This result was compelled, according to the Court, by the language of the statute and legislative history.

The Court began its analysis with the language of the withholding statute:

\begin{quote}
[T]he text of the statute simply does not specify how great a possibility of persecution must exist to qualify the alien for withholding of deportation. To the extent that such a standard can be inferred from the bare language of the provision, it appears that a likelihood of persecution is required.\footnote{8}
\end{quote}

The Court found persuasive the fact that the section literally provides for withholding of deportation only if the life or freedom of the alien "would \[not ‘might’ or ‘could’\] be threatened in the home country, and the fact that the withholding provision, both prior to and after amendment, makes no mention of the term ‘refugee.’"\footnote{9} The Court, in its textual analysis, distinguished the withholding provision from requests for discretionary asylum, which incorporate the refugee definition and well-founded fear of persecution standard.\footnote{10} While expressly eschewing the opportunity to discuss the

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\begin{footnotes}
5. 104 S. Ct. 2489 (1984). The withholding remedy is available in exclusion as well as deportation proceedings. 8 C.F.R. § 208.11 (1982).
8. \textit{Id.} at 2497.
9. \textit{Id.} Of course, a different result could have been justified by focusing on the term "threatened, which also appears in the provision, as indicative of the fact that it would be necessary to show but a "reasonable possibility" that the alien would be persecuted upon return to the home country — a standard suggested by Justice Stevens in the asylum context, in order to qualify for withholding of deportation. Sometimes the "plain meaning" of statutory language is in the eye of the beholder.
10. \textit{Id.} at 2499. The Board of Immigration Appeals recently applied the probability of persecution standard to asylum as well as withholding claims. \textit{In re Acosta}, Interim Dec. 2986 (BIA March 1, 1985). In \textit{Acosta}, the Board recognized that the federal courts have split on the refugee standard of question. It is likely that the Supreme Court will soon need to resolve the issue.
\end{footnotes}
meaning of the well-founded fear standard, the Court characterized as moderate the notion "that so long as an objective situation is established by the evidence, it need not be shown that the situation will probably result in persecution, but it is enough that persecution is a reasonable possibility." The emphasis on the "discretionary" character of asylum, however, was apparent.

Following a denial of asylum as a matter of discretion, there are sometimes efforts to deport the refugees to countries through which they transited on their way to the United States. The unwillingness typically demonstrated by these intermediary countries to re-accept the refugees, however, raises a haunting spectre: a perpetual and indefinite shuttle to and fro; or even worse, return to the home countries to face persecution.

This article discusses the development, in published and unpublished decisions of the Board of Immigration Appeals, of the role of discretion in political asylum, and the bases upon which asylum may be denied as a matter of discretion. Also discussed are principles which may limit the exercise of discretion in the area, and selected issues which are likely to be the subject of litigation on behalf of asylum seekers who suffer discretionary denials.

THE Salim DECISION

Despite the precatory nature of the language of the asylum statute, it was not until 1982, in In re Salim, that the Board of Immigration Appeals articulated the concept of discretionary asylum. In that case, the Board held that a refugee could be denied political asylum as a matter of discretion on the ground that he or she had engaged in fraud in obtaining an invalid travel document (passport and/or visa), and circumvented the overseas refugee admission process by coming directly to the United States rather than applying abroad for refugee status. Salim involved an appeal from a denial by the immigration judge of the alien's applications for asylum and temporary withholding of deportation. Excludability had been conceded on the grounds of fraud and lack of valid travel documents. To appreciate the holding, and its rationale, a brief examination of

11. Id. at 2498.
the facts of *Salim* is necessary.

Mr. Salim arrived in the United States from Pakistan in February of 1982 with the passport of another. He had purchased the passport in order to obtain a visa to the United States as a non-immigrant visitor for business. Mr. Salim was placed under exclusion proceedings; he subsequently applied for political asylum and withholding of deportation. The State Department Bureau of Human Rights and Humanitarian Affairs (BHRHA) issued an advisory opinion in connection with the applications, stating that Mr. Salim had established a well-founded fear of persecution in Afghanistan.

At the evidentiary hearing on the asylum claim, Mr. Salim testified that he had been affiliated with the Mujahdeen freedom fighters in Kandahar, and that two of his brothers had been arrested by the Soviet-controlled regime for similar activities. Another brother was taken into custody by Russian troops at Kandahar, and his fate was unknown. After refusing to join the Soviet-controlled Afghan army in its war against the freedom fighters, Mr. Salim fled Afghanistan.

The immigration judge denied both asylum and withholding of deportation. The Board, however, noted that the State Department opinion supporting Mr. Salim's contention that he will be persecuted in his native country should be given significant weight, and held that he "has established a well-founded fear of persecution despite the immigration judge's conclusion to the contrary." A grant of withholding of deportation was therefore mandated.

The Board ruled, however, that a grant of asylum was not required. Referring to the language in the asylum statute which states that an alien "may be granted asylum in the discretion of the Attorney General," the Board drew a distinction between asylum and withholding. While a finding on the question of persecution under the withholding statute "is also binding on the issue of persecution for the purposes of asylum," it only established, according to the Board, statutory eligibility for asylum. The Board had not previously considered the exercise of discretion in an asylum case where it was found that the alien would be persecuted if returned to his home country. Because of the recent acquisition of jurisdiction over asylum claims and the revisions of the law in this area in 1980, the Board characterized the issue as one of first impression. The Board further explained:

The language in Section 208(a) specifying the discretionary nature of asy-

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20. *Id.* at 313.
22. *Id.*
23. *Id.*

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lum relief is clear, and since that section was enacted subsequent to the 1967 Protocol, it controls over any conflicting language in the Protocol under the applicable rules of statutory interpretation. Consequently, under the present statute, an otherwise eligible alien who the Attorney General determines that his life or freedom would be threatened in his native country on account of race, religion, nationality, membership in a particular social group, or political opinion, is entitled to 243(h) relief and may also be granted asylum relief, but only as a matter of discretion.24

The withholding remedy was characterized by the Board as "country specific." Asylum, on the other hand, was characterized as a greater form of relief which could lead ultimately to permanent resident status in the United States.25 While Mr. Salim was protected from deportation to Afghanistan, there was no impediment to prevent his deportation to Pakistan or any other country that would accept him.26

Since it had never before considered a discretionary denial of asylum, the Board pointed to the regulation permitting a District Director to deny an asylum request on discretionary grounds "if it is determined that there is an outstanding offer of resettlement by a third nation where the applicant will not be subject to persecution and the applicants' resettlement in a third nation is in the public interest."27 Conceding that the regulation is not binding in the exclusion or deportation context, the Board considered it to be a set of useful guidelines for the exercise of discretion in asylum requests.28

In Salim, the finding of fraud was significant. The Service and the State Department posited that the "public interest requires that we do not condone this applicant's attempt to circumvent the orderly procedures that our government has provided for refugees to immi-

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24. Id. at 314-15 (footnote omitted).
26. The number of possible countries to which the INS may deport an excludable alien was increased in 1981. Pub. L. 97-116, 95 Stat. 1611. The current 8 U.S.C. § 1227(a) (1982) provides in pertinent part:
   (1) Any alien. . . . arriving in the United States who is excluded shall be. . . .
   (2) If the government of the country designated in paragraph (1) will not accept
   the alien into its territory, the alien's deportation shall be directed by
   the Attorney General in his discretion and without necessarily giving any priority or
   preference because of their order as herein set forth, either to — (A) the
   country of which the alien is a subject, citizen, or national; (B) the country in
   which he was born; (C) the country in which he has a residence; or (D) any
   country which is willing to accept the alien into its territory, if deportation to
   any of the foregoing countries is impracticable, inadvisable, or impossible.
27. 8 C.F.R. § 208.8(f)(2) (1985).
grate lawfully." It explained:

The fraudulent passport was obtained after the applicant had escaped from Afghanistan, with the sole purpose of reaching this country ahead of all of the refugees awaiting their turns abroad. This is not the case where an alien was forced to resort to fraudulently obtained documentation in order to escape or prevent being returned to the country in which he fears persecution.30

The Board ruled that the "fraudulent avoidance of the orderly refugee procedures that this country has established is an extremely adverse factor which can only be overcome with the most unusual showing of countervailing equities."31 It found no such equities in Salim, and denied asylum.32 Judicial review was not sought.33

BOARD DECISIONS SUBSEQUENT TO Salim

Only two reported Board decisions have discussed the discretionary rationale in Salim: In re Shirdel34 and In re McMullen.35 Shirdel concerned Afghans who arrived in the United States posing as transits without visa (TRWOV) aliens using fraudulently obtained Turkish passports and airline tickets issued to others. They applied for asylum and withholding of deportation. Citing Salim, the immigration judge found the Afghans excludable on grounds of fraud and denied them asylum as a matter of discretion.36

In reviewing the finding of fraud, the Board noted the "question of what constitutes fraud or material misrepresentation in seeking to enter the United States as an applicant for asylum is an issue of first impression."37 The Board found a fraud committed upon the United

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29. Id. at 316.
30. Id. (citing In re Ng, 17 I. & N. Dec. 536 (1980)).
31. Id. The Board also noted that alleged cooperation with United States authorities in the investigation of crimes committed in connection with the refugee's entry into the United States "is not a sufficient significant factor to warrant granting asylum relief as a matter of discretion." Id.
32. Cf. In re 29 Afghans (EOIR, San Francisco, Aug. 10, 1982) (holding that asylum should not be denied to the Afghans who had been victimized by "an unscrupulous arranger who [had] preyed upon their desperation" in providing counterfeit travel documents in India, which had then been used by the Afghans to circumvent the refugee admission process).
33. The courts have had little occasion to address the proper role of discretion in asylum. See, e.g., Sarkis v. Sava, 599 F. Supp. 724 (E.D.N.Y. 1984) (in view of the eligibility determination, discretionary denial upheld without extensive discussion and without addressing the role of discretion in asylum). The Supreme Court has recently indicated that it is prepared to defer to an exercise of discretion by immigration adjudicators in determining a motion to reopen a deportation decision, at least where the discretionary determination is based on the "particular conduct" of the individual alien. INS v. Rios-Pineda, 105 S. Ct. 562 (1985).
States in the efforts of the Afghans "to arrive in this country by posing as Turkish citizens."\(^{38}\)

The Board in *Shirdel* also upheld the judge's discretionary denial of asylum, explaining and elaborating:

An asylum applicant seeks the favorable exercise of discretion. Consequently, as with all such discretionary applications, an applicant has the burden to establish that the favorable exercise of discretion is warranted. The critical factor for denying the applications for asylum is that by using fraudulent passports they improperly bypassed the orderly procedures prescribed for obtaining refugee status abroad. The record reflects that the applicants were sold the airplane tickets and documents which they used to board an airplane bound for the United States by an organized ring of smugglers. We have in the past considered it a strong negative factor to enter the United States with the aid of a professional smuggler because of the threat it presents to the enforcement of our immigration laws.\(^{39}\)

The Board noted that the State Department BHRHA, in its advisory opinion, recommended denial of the asylum applications based on policy considerations since the applicants had misused the immigration laws to gain an advantage over all other similarly situated Afghan refugees who followed established procedures for legally immigrating to the United States.\(^{40}\) The Board reviewed the equities and found the aliens wanting:

To grant asylum to someone who reaches our shores aided by a ring of smugglers, after he had already escaped from the country where he reasonably feared persecution, would only encourage others to likewise bypass the orderly procedures prescribed for immigrating as a refugee. The applicants should not be placed ahead of all the other similarly situated Afghan refugees. Their only relatives in this country are other applicants for asylum.\(^{41}\)

\(^{38}\) *Id.* The Board explained:
The applicants clearly intended to enter the United States. This was the ultimate goal. They chose not to wait abroad for a refugee visa. Instead, their first step for eventually entering this country as refugees was to apply for asylum when they arrived in the United States on February 5, 1983. They needed to be physically present in this country in order to submit such an application. Yet, they could not fly here legally because they did not have visas and were precluded from obtaining TRWOV status as Afghan nationals. They avoided the 8 C.F.R. 212.1(a)(3) restriction on TRWOV status for Afghans by fraud. The four Turkish passports they fraudulently purchased for $8,000 included airline tickets to the same names listed in the passports. Turkish nationals are not precluded from obtaining TRWOV status pursuant to 8 C.F.R. 212.1(a)(3). Posing as Turkish nationals, the applicants were able to apply for asylum in New York, circumventing the orderly procedures for applying for refugee status abroad. *Id.*

\(^{39}\) *Id.* at 6.

\(^{40}\) *Id.* (citations omitted).

\(^{41}\) *Id.* at 7. The Board further explained:
The discretionary determination in In re McMullen was somewhat more peripheral. That case involved the question of whether a member of the Provisional Irish Republican Army (PIRA) was ineligible for refugee status and withholding of deportation as "one who has ordered, incited, assisted, or otherwise participated in the persecution of any person . . . ." The Board held that the terrorist activities of the PIRA precluded eligibility and that, in any event, asylum would have been denied as a matter of discretion.

UNREPORTED BOARD DECISIONS

There have been over sixty unreported Board decisions concerning the issue of discretionary asylum subsequent to Salim. Sometimes the Board focused on the manner of entry or attempted entry into the United States, basing discretionary denial upon a finding of fraud in gaining or attempting to gain admission. At other times, the Board premised a discretionary denial of asylum, irrespective of fraud, on deterring circumvention of the overseas refugee admission process, despite a recent statement that, in the absence of fraud,

[The refugees'] contention that being denied asylum could result in an unjust result because the mother and daughter are not in detention and are also applicants for asylum is illogical. If the mother and daughter obtain asylum on their own in their separate applications, then the applicants could still receive derivative refugee status, pursuant to 8 C.F.R. 207.2(e), and subsequent adjustment of status, pursuant to 8 C.F.R. 209.2(a)(3). Consequently, the applicants would not be unduly prejudiced by their asylum applications having been denied. Id.

The Board also noted that since excludability derived from the second portion of 8 U.S.C. § 1182(a)(19) (1982), it would not preclude a subsequent entry in an adjustment application as a derivative refugee. Id.

45. See, e.g., In re Oshidari, A23105864 (BIA Dec. 11, 1984) (Iranian found ineligible for asylum because of failure to show a well-founded fear of persecution); In re Farenas, A27049509 (BIA Oct. 31, 1984) (Cuban found ineligible for asylum); In re Escoto, A26414505 (BIA Oct. 4, 1984) (Nicaraguan found ineligible for asylum); In re Cardozo, A26669493 (BIA Sept. 14, 1984) (Cuban); In re Cherubin, A26189282 (BIA July 26, 1984) (Haitian); In re Marcelus, A24566687 (BIA June 1, 1984) (Haitian); In re Amin, A24932215 (BIA May 22, 1984) (Afghan); In re Hamid, A24548430 (BIA May 8, 1984) (Afghan); In re Hakimi, A26898129 (BIA Mar. 8, 1984) (Afghan); In re Hakimi, A26172901 (BIA Jan. 19, 1984) (Afghan); In re Alas-Vaquero, A26002656 (BIA Sept. 21, 1983) (Salvadoran); In re Paguaga-Urbina, A26003499 (BIA Jan. 14, 1983) (Nicaraguan).
46. See, e.g., In re Haji, A24520549 (BIA Sept. 25, 1984) ("The mere fact that the respondent was not found excludable under Section 212(a)(19) of the Act does not eliminate his circumvention of our immigration laws"); In re Hussain, A26582482 (BIA Oct. 12, 1983) (lack of fraud finding for Iraqi "not a positive discretionary factor"); In re Sarwar, A26149766 (BIA Oct. 5, 1983) (absence of fraud finding not determinative for Afghan); In re Kohyar, A24937657 (BIA Sept. 19, 1983) (no fraud finding); In re Hamkar, A26144869 (BIA May 24, 1983) (no fraud finding); In re Rahmany, A26138057 (BIA Apr. 19, 1983) (no "different result" for Afghan for whom there was
the facts of each case should be evaluated carefully. It has also referred to this second basis for denying asylum as a public policy consideration. In addition, discretionary denials of asylum have been justified by the belief that refugees have found a "safe haven" from persecution before coming to the United States. Still, at other times, the Board has denied asylum because of criminal activities in the United States, or terrorist activities abroad, not only as a matter of eligibility, but also as a discretionary matter.

The exercise of discretion by the Board has been subject to some self-imposed limitations. In Salim, the Board recognized that the use of fraudulent documentation to escape or avoid persecution was not improper.

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no fraud finding); In re Hashemi, A26120730 (BIA Apr. 13, 1983) (no fraud finding); In re Batihija, A26125281 (BIA Mar. 31, 1983) (no fraud finding); In re Hatami, A26111993 (BIA Jan. 17, 1983) (no fraud finding). Cf. In re Yousafzal, A24923932 (BIA Mar. 20, 1984) (irrelevant that other Afghans in India not following lawful refugee admission procedures); see also In re Haqiq, A24903452 (BIA Mar. 19, 1984).

47. In re Singh, A27080602 (BIA Sept. 6, 1985).


49. See, e.g., In re Nashir A24069376 (Afghan in Pakistan); In re Sarkis, A24583821 (BIA July 17, 1984) remanded on other grounds (Iraqis in Greece); Sarkis v. Nelson, 585 F. Supp. 235 (E.D.N.Y. 1984), aff'd, Sarkis v. Sava, 599 F. Supp. 724 (E.D.N.Y. 1984). See also In re Dower, A26187839 (BIA Jan. 10, 1984) (Iranian found "relative safety" in Italy); In re Afsharzadeh, A24990191 (BIA Jan. 26, 1984) ([Iranian could have applied for asylum in either Turkey or Spain before coming to the United States). The "safe haven" concept is to be distinguished from a finding that the refugee has "firmly resettled" in a third country, which presumably renders the alien ineligible for asylum. 8 C.F.R. §§ 208.8(f)(ii) and 208.14 (1985). The INS is considering the issuance of regulations which specify the achievement elsewhere of protection or the evading of the overseas refugee admission process as grounds to deny asylum. N.Y. Times, Mar. 17, 1985, § A, at 28, col. 1; Wash. Post, Aug. 12, 1985, § A, at 11, col. 3. See also A. Helton and R. Brauer, Report on Selected Problems in the Asylum Regulations Now Being Considered for Issuance for Public Comment by the Immigration and Naturalization Service (Lawyers Committee for Human Rights, New York 1985).

While it is beyond the scope of this article to compare the law of other nations, it is significant that the Conseil D'Etat of France in 1981 in the Conte case (1981 Recueil Dalloz Sirey 250) rejected the concept of "safe haven" in a third country as a ground for denying asylum, where the individual was not recognized in the third country as having the "rights and obligations" of a national of that state under the 1951 Convention.


51. See In re Gallagher, A23694107 (BIA Sept. 1984) (active involvement in bombing campaigns of the Provisional Irish Republican Army).

52. Salim, 18 I. & N. Dec. at 316.
Additional limitations were imposed in the unreported decisions. For example, the Board recognized that asylum should not be denied if the refugee was in danger in the third country in question, although the Board suggested that the evidence of the danger would have to rise to a level to warrant a grant of withholding of deportation or exclusion. The Board also suggested that a discretionary denial would be improper if the refugee did not intentionally avoid the overseas refugee admission process. Further, the Board recognized that it would be inappropriate to deny asylum to a refugee solely because he had sojourned briefly in a third country on the way to the United States, or because it might currently be possible to apply for asylum in another country.

In evaluating the discretionary determination, the Board identified close relatives in the United States as a positive factor which can overcome a discretionary denial. Also, the Board has ruled that the

53. See, e.g., In re Betoushana, A26124086 (BIA Nov. 30, 1983) (Iranian's fear of persecution in Spain held unfounded); In re Azizi, A26144281 (BIA July 22, 1983) (Afghan's fear of persecution in India held unsubstantiated).

54. See, e.g., Rahimyer, A26962839 (BIA Aug. 1, 1984) (Afghan in India); In re Mohammadi, A242244959 (BIA Feb. 21, 1984) (Iranian in India failed to prove reasonable possibility of persecution under asylum standard).

55. See, e.g., In re Arsalai, A27037776 (BIA Aug. 28, 1985); In re Sakhah, A27043010 (BIA Aug. 24, 1984) (Afghans who sought to transit through U.S. with intent to apply for asylum in Canada did not have intent to circumvent U.S. immigration laws); In re Oeyym, A24324640 (BIA May 25, 1984) (Afghan's assertion that he was not permitted by the United States consul to apply for refugee status in Pakistan held unsubstantiated); In re Afsahrazadeh, A24990191 (BIA Jan. 26, 1984) (Iranian's contention that he did not know that he could apply for refugee status at American consulate in Spain ruled "implausible"); In re Tokhi, A26124051 (BIA Sept. 23, 1983) (testimony of Afghan that he was refused admission to refugee camp unsubstantiated); In re Sanchez, A26149724 (BIA Aug. 16, 1983) (innocent use of invalid travel documents would not warrant discretionary denial); In re Laban, A26144877 (BIA June 7, 1983) (discretionary denial of asylum reversed for a Syrian family with transit visas who had been paroled into the United States when the father became ill). Cf. In re Channa, A26124010 (BIA Mar. 31, 1983) (issue not whether refugee knew about overseas admission process where "an organized ring of smugglers" is involved).

56. In re Mehrbakush, A26144255 (BIA Aug. 4, 1983) (refugee's "brief sojourn [of approximately one month] in Turkey was merely incidental to his flight from Iran to the United States").

57. In re Vahedi, A22993391 (BIA Sept. 14, 1984) (immaterial that Iranian who had uncle in Germany might be able to apply for asylum there).

58. See, e.g., In re Nasery, A24088152 (BIA Nov. 6, 1984) (discretionary denial overcome on motion to reopen showing that alien's parents and five siblings had been granted refugee status, and that two other brothers were asylum applicants); In re Eskandari, A26189240 (BIA May 23, 1984) (having a mother who is an asylum applicant and brother who is non-immigrant student in the United States does not constitute "outstanding equities" required to overcome a discretionary denial); In re Rahmany, A26138057 (discretionary denial upheld as the alien had but "a lawful permanent resident cousin and two brothers who were also applicants for asylum"); In re Muktarzada, A26105762 (BIA Mar. 31, 1983) (motion to reopen granted and appeal remanded because the refugee's son and grandson had been granted asylum by the District Director. "These grants of asylum substantially raised the weight of the applicant's equities in this country, as well as raised the possibility of inconsistent results under similar
basis for a discretionary denial of asylum must be set forth in the decision of the immigration judge, or must be clearly reflected in the administrative record.69

THE LIMITS OF DISCRETION

The refugees who have been denied asylum under the rationale of Salim and its progeny are either returned to their countries or granted withholding of deportation or exclusion. Withholding has been granted in these circumstances to numerous Afghans and Iranians. Absent a grant of asylum, they cannot become permanent residents or citizens, they can never petition to have close family members join them in the United States, and they cannot travel abroad without jeopardizing their status. Further, should a country ever agree to accept them, they could be immediately deported.60 Thus, in view of the grave consequences that can attend a discretionary denial, an examination of the limits of administrative discretion is appropriate.

In the immigration area, administrative discretion is broad, but not unlimited. As in other areas, it is circumscribed by statute,61 and sometimes even by Constitution62 or international law.63 Discretion must be exercised with all relevant positive and negative factors taken into account.64 Discretion may be abused if its exercise was:

[ma]de without a rational explanation, inexplicably departed from established policies, or rested upon an impermissible basis, such as an invidious discrimination against a particular race or group, or, in Judge Learned Hand's words, on other "considerations that Congress could not have in-

59. See, e.g., In re Tusell, A22183204 (BIA Jan. 11, 1984); In re Azizi, A26144281 (BIA July 22, 1983); In re Ghahrmanloo, A26127562 (BIA April 19, 1983). See also In re Rahmani, A22599707 (BIA April 21, 1983) (conditional grant of asylum and withholding of deportation overruled in view of absence of authority for any such remedy under the Refugee Act).
60. See 8 U.S.C. §§ 1153, 1159(b), 1227 and 1253 (1982).
61. See Manhattan General Equipment Co. v. Commissioner, 297 U.S. 129, 134 (1936) (agency action which is inconsistent with statute is void).
62. It has been said that certain arriving or "excludable" aliens have no constitutional rights with respect to admission to the United States. See U.S. ex rel. Knauff v. Shaughnessy, 338 U.S. 537 (1950). Even these aliens, however, may be the beneficiaries of constitutional protections created by statutory and regulatory entitlements. Augustin v. Sava, 735 F.2d 32 (2d Cir. 1984).
63. See Stevic, 104 S. Ct. at 2489, 2500-01 n.22. In In re Frentescu, 18 I. & N. Dec. 244 (BIA 1982), the Board determined that a discretionary denial of asylum to an applicant who had been convicted of burglary was unauthorized by the regulations as interpreted and defined by the Protocol.
64. 2 K. Davis, Administrative Law § 813 (2d ed. 1979).
How exercises of discretion in the asylum area fare under these principles must be examined.

**DOMESTIC LAW**

The concept of discretionary asylum is new and its contours have not yet been fully developed. It is clear, however, that a primary underlying principle is one of policy — the perceived need to maintain the integrity of the overseas refugee admission process. This approach would appear to be at odds with the humanitarian purpose of the Refugee Act of 1980 — to establish ideologically-neutral and uniform standards upon which to measure claims for asylum based on the evidence presented in each individual case.

Congress passed the Refugee Act of 1980 to create a more humane and effective procedure for dealing with refugees and to bring this country into compliance with its obligations under international law.

The Immigration and Nationality Act now provides a statutory right to petition the government for asylum. It directs the Attorney General to 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. Even an alien who has been found otherwise excludable or deportable is entitled to apply for asylum.

The legislative history of the Refugee Act indicates that Congress intended the amendments to create a humane refugee procedure and to bring the United States in line with the United Nations Protocol relating to the Status of Refugees. The House Report states that it considered the inclusion of an asylum provision "both necessary and desirable" in order to insure a fair and workable asylum policy. This would be consistent with the United States' tradition of welcoming the oppressed of other nations and with its international obligations.

An alien is entitled to seek asylum irrespective of fraud in entering or attempting to gain entry in the United States. The proper ques-

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65. Wong Wing Hang v. INS, 360 F.2d 715, 719 (2d Cir. 1966) (suspension of deportation). See also Bertrand v. Sava, 684 F.2d 204 (2d Cir. 1982) (release on parole).
71. 8 U.S.C. § 1158 (1982) (alien eligible to apply for asylum "irrespective of
tion is whether the individual has been persecuted or has a well-founded fear of persecution based on race, religion, nationality, membership in a particular social group or political opinion, not whether a grant of asylum might have adverse policy consequences. An over-broad use of discretion, particularly involving factors "that Congress could not have intended to make relevant," would violate the Refugee Act. Similarly, a categorical rejection of asylum claims for those who have come to the United States in an irregular fashion would violate not only the Refugee Act, but also administrative law principles which mandate individualized justice.

Furthermore, the policy justification advanced in support of the doctrine of discretionary asylum — the maintenance of the overseas admission process — simply does not withstand scrutiny. The refugee situation in Afghanistan, for example, is one of mammoth proportions; over three million Afghan refugees have fled into Pakistan and India.\(^7\) In 1985, however, under the Refugee Act annual consultation process, only 5,000 admission places were allocated to the area where Afghan refugees are located.\(^7\)

In any event, absent a realistic opportunity for asylum seekers to avail themselves of the overseas refugee admission process, or even to learn about its existence, then its circumvention would clearly be a misnomer. A description of the admission process for Afghans in Pakistan and India provides a useful illustration.

**THE REFUGEE ADMISSION PROCESS**

The first step in the refugee admission process is the fixing of admission ceilings of refugees by geographical area. This is done each year through consultation between the President and the Judiciary Committees of both Houses of Congress.\(^7\) For fiscal year 1985, a ceiling of 5,000 was allocated to the Near East and South Asia, which includes Afghanistan, Pakistan, and India.\(^7\) Actual admissions, however, are much lower. Only 2,698 Afghans, for example, were resettled as refugees in the United States in 1983, despite a

\[^7\] See United States v. Kavazanjian, 623 F.2d 730 (1st Cir. 1980) (illegal manner of arrival did not diminish lawful entitlement to seek asylum).

\[^7\] Department of State, *Country Reports on the World Refugee Situation: Statistics*, 20 (July 1984) [hereinafter "Refugee Reports"].


\[^7\] See Refugee Admissions, supra note 73.
comparably high ceiling.\textsuperscript{76}

Since the established ceilings were insufficient to resettle all the refugees, a priority system has been developed. In order to be eligible for the United States refugee program, an applicant must meet the priority ratings currently accepted by the United States.\textsuperscript{77} For the Near East and South Asia, the numbers allocated are few. Consequently, applications by Afghans are accepted only if they qualify for the first four of six priorities.\textsuperscript{78} Generally, this means that if the refugee does not have strong family or prior employment links with the United States, then he or she may not even be eligible for admission.

The first processing step is a pre-screening in the area by an American joint voluntary agency staff or the Office of the United Nations High Commissioner for Refugees. In the case of Afghans in Pakistan or India, the voluntary agencies pre-screen the refugees and determine whether they are within the four categories accepted by the U.S. Employees of the State Department. The agencies then review the files and confirm the priority classifications of the refu-

\textsuperscript{76} Refugee Reports, supra note 72, at 32. The comparable report on proposed refugee admissions for 1983 shows a ceiling of 6,000 numbers allocated to the Near East and South Asia.

\textsuperscript{77} Refugee Admissions, supra note 73, at 36-38.

\textsuperscript{78} Cables from the offices of the United Nations High Commissioner for Refugees in Islamabad, Pakistan, and New Delhi, India, copies of which are in files of the author. The priorities are the following:

1. **Compelling Concern/Interest**: exceptional cases; (a) of refugees in immediate danger of loss of life and for whom there appears to be no alternative to resettlement in the United States, or (b) of refugees of compelling concern to the United States, such as former or present political prisoners and dissidents.

2. **Former U.S. Government Employees**: refugees employed by the U.S. government for at least one year prior to the claim for refugee status. This category also includes persons who were not official U.S. government employees, but who for at least one year were so integrated into U.S. government offices as to have been in effect and appearance U.S. government employees.

3. **Family Reunification**: refugees who are spouses, sons, daughters, parents, grandparents, unmarried siblings, or unmarried minor grandchildren of persons in the United States. (The status of the anchor relative in the United States must be one of the following: U.S. citizen, lawful permanent resident alien, refugee, or asylee).

4. **Other Ties to the United States**: (a) refugees employed by U.S. foundations, U.S. voluntary agencies, or U.S. business firms for at least one year prior to the claim for refugee status; and (b) refugees trained in the United States or abroad under U.S. government auspices.

5. **Additional Family Reunification**: refugees who are married siblings, unmarried grandchildren who have reached their majority, or married grandchildren of persons in the United States; also more distantly related individuals who are part of the family group and dependent on the family for support. (The status of the anchor relative in the United States must be one of the following: U.S. citizen, lawful permanent resident alien, refugee, or asylee.)

6. **Otherwise of National Interest**: other refugees in specified regional groups whose admission is in the national interest.

Refugee Admissions, supra note 73, at 37-38.
The interview takes place at the agency office. There is an interview waiting list, and if the applicant is not within the first four categories, then he or she may not even be permitted to fill out an application.

The applicant is thereafter interviewed by the Immigration and Naturalization Service to determine whether he or she is a "refugee" as defined by law, and whether the person is admissible to the United States, subject to medical clearances and sponsorship agreements. The INS' determinations as to refugee status and overall admissibility are final. The criteria to be used by INS officers are outlined in written guidelines.

Refugees who do not fall within the first four categories are effectively precluded from participating in the admissions process. Under these circumstances, it seems inappropriate to preclude them from receiving asylum merely because of these general priorities. While it may be permissible to consider various factors unrelated to the actual refugee situation in setting ceilings in the overseas refugee admission process, such factors appear inappropriate when considered in the context of individual asylum adjudications under the statutory scheme.

In any event, domestic law is not the only limiting principle. International law also provides limits to the role of discretion in asylum.

INTERNATIONAL LAW

Generally, under customary international law, individuals are not considered to have a right to be granted political asylum. On the other hand, individuals are generally considered to have a right to non-refoulement, under international law, that is, to not be returned to a territory where he or she would face persecution. One noted commentator has stated that individuals have a right under international law to temporary refuge in a country until a reliable determin-
nation can be made respecting refoulement.86

This same scheme of entitlements is prescribed by the 1967 Protocol relating to the Status of Refugees, to which the United States acceded in 1968.87 The Protocol is silent on the right of an individual to be granted asylum. Article 33 of the Protocol, however, prohibits the return of a refugee in "any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion."88 Article 31 of the Protocol, moreover, provides that only necessary restrictions may be placed on the movements of refugees unlawfully in the country until such time as they regularize their status or gain admission into another country.89 This implies a right to temporary refuge pending a determination under article 33.

The concept of discretionary asylum, however, seems to survive scrutiny under these principles of general international or treaty law. The withholding remedy can be applied in a manner congruent with the non-refoulement obligation.86 The statutory scheme in the United States, furthermore, generally provides that aliens may remain in the United States pending a decision on a withholding claim.91

International law, however, may provide some limits on the exercise of discretion in the asylum area. Discretionary limits apply particularly where principles favoring family reunification are threatened by refugees separated from close family members located abroad.92

86. Id. at 74-78.
88. Article 33(1) of the Protocol.
89. Article 31(2) of the Protocol.
90. See supra notes 83-84 and accompanying text. In unreported decisions, the Board has found the discretionary denial of asylum not to violate the refugee Convention and Protocol. See, e.g., In re Omar, A24934789 (BIA Apr. 16, 1984).
92. A domestic law analogue exists in the context of the provision for waivers of the use of fraudulent documentation in the deportation context. 8 U.S.C. § 1251 (1982). This section allows the Attorney General, in his discretion, to waive deportability based on a finding of excludability for fraud or misrepresentation if the alien is the spouse, parent, or child of a citizen or of a permanent resident. This waiver of deportation provisions grew out of the Displaced Persons Act of 1948, 62 Stat. 1009, to deal with the problem of refugees who lied about their homelands to avoid repatriation to communist countries. See generally INS v. Errico, 385 U.S. 214 (1966). Such misrepresentations, although widely felt to be justifiable, made the refugees excludable from the United
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FAMILY REUNIFICATION

Protection of the family has been recognized for some years as a proper goal of international law, and particularly of refugee law. A number of the major documents of international law contain references to the family.

The Universal Declaration of Human Rights93 states that, "the family is the natural and fundamental group unit of society and is entitled to protection by society and the State." The International Covenant on Civil and Political Rights94 and the American Convention on Human Rights95 track this language. The International Covenant on Economic, Social, and Cultural Rights96 expands on the concept, stating that "[t]he widest possible protection and assistance should be accorded to the family, and expresses particular concern for the establishment of the family and the care of dependent children. The American Declaration of the Rights and Duties of Man97 States. Sympathy for the refugees inspired proposals for statutory reform, including a provision in the House version of the Immigration and Nationality Act of 1952. The Conference Committee deleted the section, but in its report, stated the expectation that the fraud provisions of the Act would be applied in accordance with "fair humanitarian standards" and not to be used to exclude these refugees. H.R. REP. No. 2096, 82nd Cong., 2d Sess. 128 (1952), reprinted in 1952 U.S. CODE CONG. & AD. NEWS 1754. In 1957, the Act was amended to provide for waiver of deportation of some aliens who entered fraudulently. To qualify for waiver, the alien had to be either the spouse, parent, or child of a citizen or a permanent resident alien and otherwise admissible at the time of entry, or a refugee who entered between 1945 and 1954. The latter class of aliens had to prove that their misrepresentation was made to avoid persecution and that it was not made to avoid quota restrictions or to foreclose investigation. This provision, which had been codified as 8 U.S.C. § 1251(a), was repealed in 1961 as having served its purpose, Pub. L. No. 87-301, 75 Stat. 657, and was replaced by a section substantially similar to the present section, 8 U.S.C. § 1251(f). See Errico, 385 U.S. at 220-24. In holding that waiver of deportation was available to an otherwise qualified alien whose fraud constituted an evasion of quota restrictions, the Court construed the various Acts as reflecting the Congressional policy that "it was more important to unite families and preserve family ties than it was to enforce strictly the quota limitations or even the many restrictive sections that are designed to keep undesirable or harmful aliens out of the country." Errico, 385 U.S. at 220. The Court further noted that any doubt as to the proper construction of the statute should be resolved in favor of the alien. Errico, 385 U.S. at 225. A similar construction would seem to be appropriate under international law.

97. Resolution XXX, adopted by the Ninth International Conference of Ameri-
states in article VI that "[e]very person has the right to establish a family, the basic element of society, and to receive protection therefore."

The European Convention for the Protection of Human Rights and Fundamental Freedoms is even more specific:

1. Everyone has the right to respect for his private and family life, his home and his correspondence.
2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

There is a fairly substantial body of decisional law from the European Commission interpreting this provision. While applicants claim denial of rights in varied contexts, most applications involve attempts to block the deportation of a person on the ground that it would interfere with family life. In nearly all of these cases, the Commission reiterates the principle that the Convention does not guarantee an alien the right to enter or reside in a particular country, or the right not to be expelled from a particular country. The Commission does, however, recognize that exclusion or deportation of a person from a country where his close relatives live can constitute an interference with family life. A prohibition of entry into a country where family members are living, however, will be considered an interference with family life only if the family life is firmly established in the territory concerned. When a person is expelled from a country, the possibility of his family following him to his destination is a relevant consideration. Even if the family is unable to follow, expulsion may be justified on the grounds of public safety or the prevention of disorder where the person expelled has committed a serious crime. Under the European Convention, a country may deport a parent, even though it will result in the de facto deportation of

99. Article 8 of the Convention.
100. See, e.g., Application No. 8041/77, 12 European Commission on Human Rights Decisions and Reports 197 [reporter hereinafter cited as Decisions].
101. See Application Nos. 7289/75 and 7349/76, 9 Decisions 57 (denying a father permission to visit his illegitimate children not an interference when he has never lived with them in the country concerned and when it is possible for them to meet elsewhere).
102. See Application No. 9478/81, 27 Decisions 243; Application No. 6357/73, 1 Decisions 77.
103. See Application No. 8041/77, 12 Decisions 197; compare Application No. 6357/73, 1 Decisions 77 (interference with family life not justified where person has not committed a serious offense).
minor children who are citizens by birth of the deporting country, where the deportation of the parent is justified by the policy of maintaining public order through the enforcement of the immigration laws.\textsuperscript{104}

The Final Act of the Helsinki Conference\textsuperscript{105} contains detailed provisions dealing with family unification under the Human Contacts section (Basket III). The State parties to the Act pledge to "deal in a positive and humanitarian spirit" with petitions for reunification of families. The Concluding Document of the Madrid Conference strengthened this language to read "favorably deal with" and "decide upon" such applications. The Madrid Conference also committed the participants to decide on applications within six months, and to refrain from imposing punitive sanctions on people applying for family reunification.\textsuperscript{106} The family reunification provisions of the Helsinki Final Act, however, have been utilized exclusively to allow people to leave a particular country to join family members living elsewhere, rather than to allow people to enter a particular country to join family members living there.

Moreover, the United Nations High Commissioner for Refugees (UNHCR) has given particular attention in recent years to the problem of family reunification. A section dealing with family reunification has appeared in the Reports of the High Commissioner since 1971. The policy of the High Commissioner's office was guided by the Final Act of the United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons. While the 1951 Convention relating to the Status of Refugees developed by the Conference contains no language directly applicable to the problem of family reunification, the Conference adopted a Final Act which strongly recommends that governments take action to protect the unity of refugee families.

In 1981, in response to the problem of the boat people, the Executive Committee of UNHCR adopted a number of conclusions on the reunification of separated refugee families. Included in the recommendations of the committee are provisions encouraging asylum countries to apply "liberal criteria" in identifying family members to be admitted and to grant family members the same legal status as

\textsuperscript{104} Application No. 8245/78, 24 Decisions 98.

\textsuperscript{105} Dept St. Bull., Sept. 1, 1975, at 305.

\textsuperscript{106} See Joint Committee on Security and Cooperation in Europe, Madrid Conference on Security and Cooperation in Europe Review Meeting (Committee Print 1983).
the head of the family who was designated a refugee. 107

While there are no specific treaty provisions involving the principles favoring family reunification which bind the United States, the general principle has achieved the status of a norm under customary international law. 108 This is established by state practice as reflected in the international instruments already discussed. A precise application to the situation of immigration parolees, however, is less clear. To the extent that the concept of discretionary asylum results in barring the reunification of family members, it runs afoul of this general principle. 109

COLLATERAL CONSEQUENCES — REFUGEES IN ORBIT

The concept of discretionary asylum recently spawned a bizarre development. Since October of 1983, the INS has attempted to deport numerous Afghan and Iranian refugees to countries through which they had travelled on their way to the United States, such as Pakistan or India, in cases in which asylum was denied as a matter of discretion. This was done by placing the refugees unescorted on air carriers headed to the countries in question. But since these countries ordinarily will not accept aliens without valid travel documents, the refugees faced the possibility of being flown back and forth between the United States and the refusing country, conceivably in perpetual motion. 110

The most celebrated case to date involved two Iranian refugees who were ordered deported and sent by the INS in October 1983 to Spain. Spanish immigration officials refused to accept them and immediately returned them to the United States. The INS immediately sent them back to Spain, which again refused them entry and returned them to the United States. They were scheduled for a third attempted deportation when a federal court intervened. 111

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108. See Rodriguez-Fernandez, 654 F.2d at 1382.

109. Article 31 of the Protocol relating to the Status of Refugees, which prohibits imposing penalties upon and unnecessarily restricting the movements of refugees, also may be implicated to the extent that family reunification and travel abroad are precluded.

110. See, e.g., Khugiani v. Sava, CV. 84-0939 (E.D.N.Y. 1984). This was a habeas corpus petition which challenged the method of deportation planned for an Afghan refugee. The petition was dismissed on April 1, 1984. Over twenty individuals have been subjected to this method of attempted deportation.

111. Sedgh v. Sava, 83 Misc. Civ. 436 (E.D.N.Y. 1983). The case involved a federal habeas challenge to review the execution of the deportation order. It was settled by an arrangement for refugee processing in a third country.
The Europeans, partly because of the proximity of state borders, have had more experience with this situation. Finding a bit of humor in an otherwise macabre situation, the office of the United Nations High Commissioner for Refugees has termed the phenomenon "refugees in orbit."

In some cases, the consequences may even be more drastic. Sometimes, refusing countries have sent refugees on to their home countries, where all parties concede that they will face persecution.

**Conclusion**

The recent phenomenon of discretionary asylum raises new issues about the proper role of discretion in the asylum area, and the appropriate interface with domestic and international law. The discretionary doctrine may be invoked with greater frequency and in more varied circumstances in the future. This injection of discretion into the asylum standard, however, threatens to swallow the right to apply for asylum in the United States.

Moreover, the consequences flowing from the denials may be bizarre, such as the launching of refugees into perpetual motion, or dangerous, such as creating the risk of refoulement to countries of
persecution. Initiation of litigation to avoid the application of the discretionary standard or to resist its expansion and consequences is inevitable. The exercises of discretion in denying asylum, and the results that flow therefrom, will be measured against constitutional, statutory and international law entitlements. These principles will be invoked in order to safeguard the right of asylum.