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Basing Asylum Claims on a Fear of Persecution Arising from a Prior Asylum Claim

I. Introduction

It is well established that Congress has the power to legislate on matters concerning immigration.¹ To this end, Congress has provided, through a series of laws,² for the entry of a limited number of aliens as immigrants.³ These immigrants must satisfy specific requirements of the Immigration and Nationality Act of 1952 (INA).⁴ For those aliens who cannot meet these requirements, the Act provides alternative relief in the form of refugee and asylee status for aliens who face persecution if returned to their country of origin.⁵

Recently, the question has arisen whether an alien who has sought and been denied asylum can enter a renewed asylum claim, using as its basis a fear of persecution arising because his original asylum claim was viewed as a political statement in his home country.⁶

The alien who has an asylum claim denied will be subject to exclusion or deportation.⁷ He may claim, however, that deportation or exclusion will subject him to the danger of losing his life or freedom.⁸ The alien may claim that he is subject to persecution by his home country because he has claimed asylum.⁹ He may then file a second asylum claim based solely on a fear of persecution result-

1 See *The Chinese Exclusion Case*, 130 U.S. 581 (1889); *Ekiu v. United States*, 142 U.S. 651 (1892); C. GORDON & H. ROSENFELD, 1 IMMIGRATION LAW AND PROCEDURE 1-33 to 1-34 (1980). Such a power has also been held to be an essential attribute of sovereignty. *Shaughnessy v. Mezei*, 345 U.S. 206, 210 (1953); *Makin v. Eby*, 264 U.S. 32, 40 (1923); *United States v. Williams*, 194 U.S. 279, 294 (1904); *The Chinese Exclusion Case*, 130 U.S. at 581.

2 C. GORDON, *supra* note 1, at 1-6 to 1-32.4.

3 The Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102, has set the annual ceiling for immigrant visas at 270,000.

4 8 U.S.C. §§ 1101-1503. Section 1153(a) sets forth six preference categories based on relationship to present citizens, professional skills, and work skills that are needed in the United States. Immigrant visas are allocated on a set percentage basis among these preference groups with any excess being allocated to non-preference immigrants.

5 INA §§ 207, 208 (amended 1980) (to be codified at 8 U.S.C. §§ 1157, 1158). Refugee and asylum differ in that refugee is limited in number and asylum is not. The numerical limit for refugee admissions is set at 50,000 annually for 1980, 1981, and 1982. For those years, and for each year thereafter, these numbers can be increased by the President prior to the beginning of the fiscal year, INA § 207(a), or during the year in case of an emergency, INA § 207(b). Section 208 is silent as to any limits on the number of asylees.

6 The issue was raised by Judge Lawrence King in *Haitian Refugee Center v. Civiletti*, No. 79-2086 (S.D. Fla. July 2, 1980). The case was brought as a class action on behalf of 5000 Haitians who sought relief from deportation orders entered against them after their asylum claims were denied. *Id.* at 1. While King decided the case on procedural grounds, *see id.* at 22, he outlined in depth the persecution that he found existed in Haiti, *id.* at 44-57.

7 See notes 14-15 *infra*.

8 Unless the alien is a refugee under INA section 207, his main avenue of relief is to apply for asylum. INA § 208 (amended 1980) (to be codified at 8 U.S.C. § 1158). The procedures for entering an asylum claim are found at 8 C.F.R. § 208.2 (1981). Application is made with the district director of the INS or with an immigration judge, depending on the alien's status at the time of filing the claim. *Id.* § 208.3. Aliens making an asylum claim after the institution of exclusion or deportation proceedings file the requests with the immigration judge, while all others file with the district director. *Id.*

9 This problem arises with the Haitians, who are considered opponents of the President and traitors to the Republic if they ask for asylum in the United States. *Haitian Refugee Center v. Civiletti*, Record at 45-46. This group may face long periods of detention when returning to Haiti. *Id.* at 52.

ing from the denial of his first claim. It is the second claim that presents the dilemma. There is a concern in our laws for anyone facing persecution, and a concern that bona fide asylum seekers will choose not to apply for asylum lest they be denied, and subsequently subjected to persecution for having made the claim. On the other hand, the entire immigration system is noted for its quantitative and qualitative criteria.¹⁰ It is a system of limited availability.

This note will explore the issue by looking at the statutory basis for asylum as it relates to immigration law in general, and the conflicting policy considerations which surround the specialized request for asylum. This note will then explore the application of asylum law to the situation of a specific group of aliens who have gained national attention in recent years—emigrants from the Republic of Haiti.¹¹

The Haitians typify the dilemma created by this unresolved issue in asylum law. They seek asylum status as a last-hope method of gaining entry into the United States.¹² Many of them come to the United States without the visa necessary for entry as an immigrant,¹³ and therefore are subject to exclusion proceedings which will deny them entry.¹⁴ Others have gained entry, legally or illegally, but remain subject to expulsion through the deportation process.¹⁵ From the evidence presented in *Haitian Refugee Center v. Civiletti*,¹⁶ it would appear that those Haitians returned to Haiti after making an asylum claim are considered traitors to the Republic.¹⁷ They face persecution in the form of imprisonment or death.¹⁸

II. Asylum Law in General

During the United States' first century, Congress did little to limit the immigration of aliens.¹⁹ In its second century, however, the United States reversed its earlier practice of openly admitting aliens and began to restrict the number of immigrants that would be admitted.²⁰ The Immigration and Nationality Act of

¹⁰ See notes 3-4 *supra*.

¹¹ The recognized Haitian experience in the United States dates back at least to 1963. HOUSE SUB-COMM. ON IMMIGRATION, CITIZENSHIP AND INTERNATIONAL LAW, COMM. OF THE JUDICIARY, HAITIAN EMIGRATION 1, 94th Cong., 2d Sess. (1976) [hereinafter cited as HAITIAN EMIGRATION]. The Haitians who have not obtained entry visas before arriving in the United States face exclusion or deportation if they are detected and apprehended. See notes 14-15 *infra*. Many of those will enter claims for asylum. Over 9000 Haitians had entered asylum claims as of December, 1979. *Hearings, Select Commission on Immigration and Refugee Policy*, Transcript at 23 (Miami, Fla., Dec. 4, 1979) (testimony of Rev. Edward McCarthy). Of these 9000, only 55 were successful. *Id.*

¹² For those fleeing persecution, three main types of relief are available under the INA. First, a limited number of those fleeing may be eligible for immigrant visas under INA § 203. Since this is limited to 20,000 per country per year, INA § 202(a), 8 U.S.C. § 1152(a) (1976), a large group could not be accommodated. Second, if the group is designated for refugee status, the aliens may enter as "section 207" refugees. See note 42 *infra*. The third area of relief is asylum, which is determined on an individual basis, see 8 C.F.R. § 208 (1981), without numerical limits. See note 5 *supra*.

¹³ 8 C.F.R. § 211.1 (1980).

¹⁴ INA § 212, 8 U.S.C. § 1182 (1976) lists 33 grounds for exclusion. Those excluded are denied admission to the United States.

¹⁵ INA § 241, 8 U.S.C. § 1251 (1976) lists 18 classes of deportable aliens. An alien is subject to deportation rather than exclusion if he is present in the United States.

¹⁶ *Supra* note 6.

¹⁷ *Haitian Refugee Center v. Civiletti*, Record at 45-46.

¹⁸ *Id.* at 52.

¹⁹ C. GORDON, *supra* note 1, at 1-6. The only significant legislation restricting immigration was the Alien Act of 1798, 1 Stat. 570, which expired after two years. *Id.* at 1-18.

²⁰ See *id.* at 1-5.

1952²¹ established a system of national quotas²² and presented detailed grounds for excluding and deporting aliens.²³ The INA also provided the forerunner of today's refugee law.²⁴ The 1965 amendments to the INA established the first permanent statutory provision for refugees,²⁵ allowing an alien who faced persecution three alternative forms of relief.²⁶ They were: (1) "seventh-preference refugee" status;²⁷ (2) parole status;²⁸ and (3) asylum,²⁹ which had no statutory basis, but was derived from the Attorney General's regulations in 8 C.F.R. section 108.1. In response to several large influxes of aliens under provisions of the INA³⁰ and the fact that the number of aliens being admitted was determined outside of congressional control,³¹ Congress passed the Refugee Act of 1980.³²

A. *The Refugee Act of 1980*

The Refugee Act of 1980 (1980 Act) gives United States refugee law a measure of regularity, and has brought it in line with the United Nations Protocol Relating to the Status of Refugees (Protocol), to which the United States acceded in 1968.³³ As a party to the Protocol, the United States obligated itself to apply the substantive provisions of the 1951 Convention Relating to the Status of Refugees³⁴ (1951 Convention), which the United States had not previously adopted.³⁵

21 Pub. L. No. 82-414, 66 Stat. 163 (1952).

22 INA § 202, 8 U.S.C. § 1152 (1976). See note 12 *supra*.

23 INA §§ 212, 241, 8 U.S.C. §§ 1182, 1251 (1976). See notes 14-15 *supra*.

24 INA § 243(h), 8 U.S.C. § 1253(h) (1976) originally gave the Attorney General authority to withhold the deportation of aliens who he felt would be faced with physical persecution if returned to their home country. It was amended to read "persecution on account of race, religion or political opinion." Pub. L. No. 89-236, 79 Stat. 918 (1965).

25 The Immigration and Nationality Act Amendments of 1965, Pub. L. No. 89-236, 79 Stat. 911, § 3, added INA § 203(a)(7), the provision for seventh-preference refugees. Six percent of the overall numerical quota was made available for refugees. Section 203(a)(7) limited refugee status to those who "because of persecution or fear of persecution on account of race, religion or political opinion . . . have fled (I) from any Communist or Communist-dominated country or area, or (II) from any country within the general area of the Middle East, . . . are unable or unwilling to return to such country or area on account of race, religion or political opinion. . . ." or who were displaced by a natural calamity. This followed a period of *ad hoc* legislation on refugee matters during which large groups of refugees had entered from Cuba and Hungary. CONGRESSIONAL RESEARCH SERVICE, U.S. IMMIGRATION LAW AND POLICY: 1952-1979, 18, 24, 46 [hereinafter cited as U.S. IMMIGRATION]. For a discussion of earlier specific legislation see C. GORDON, *supra* note 1, at 2-183.

26 See note 25 *supra*.

27 See note 25 *supra*. This status was limited to six percent of the overall figure. Refugees having this status could enter as conditional entrants and could obtain immigrant status after two years.

28 See INA § 212(d)(5), 8 U.S.C. § 1182(d)(5) (1976), as amended by Pub. L. No. 960212, 94 Stat. 103 (1980). Parolees are granted temporary admission under procedures promulgated by the Attorney General in 8 C.F.R. § 212.5 (1981). Parole had previously been used for large groups of aliens. The 1980 Act, however, was intended to return parole to its original purpose of individual entry. U.S. IMMIGRATION, *supra* note 25, at 18, 89; THE REFUGEE ACT OF 1979, H.R. REP. 96-608, 96th Cong., 1st Sess. 3 (1979) [hereinafter cited as 1979 HOUSE REPORT].

29 Asylum provisions prior to the 1980 Act derived from the Attorney General's power under INA § 103, 8 U.S.C. § 1103 (1976), to administer the immigration system. 1979 HOUSE REPORT, *supra* note 28, at 17.

30 *Id.* at 2-3.

31 The parole and asylum powers vested in the Attorney General were not subject to the numerical limits set by Congress for the seventh preference. *Id.* at 11. Parole was being used for groups on a large scale basis. *Id.* at 3.

32 *Supra* note 3. Congress intended to provide a systematic refugee admissions policy, see *id.* § 101(b), and to return parole to its original purpose of admitting individuals rather than groups. 1979 HOUSE REPORT, *supra* note 28, at 10.

33 HAITIAN EMIGRATION, *supra* note 11, at 2.

34 *Id.* The Protocol had the effect of a treaty and hence the force of law, U.S. CONST. art. IV, thus providing an additional substantive base for refugee claims.

The Protocol incorporates articles 2 through 35 of the 1951 Convention,³⁶ with article 33 the most relevant to this study.³⁷ Article 33 of the Protocol states: "No contracting state shall expel or return a refugee in any manner whatsoever to the frontiers of any territory where his life or freedom would be threatened on account of race, religion, nationality, membership in a particular social group or political opinion."³⁸

Congress reinforced its adoption of the Protocol's provisions by adopting the definition of refugee found in article 1 of the 1951 Convention.³⁹ A refugee is an alien who faces persecution on one of five grounds: (1) race; (2) religion; (3) nationality; (4) membership in a particular social group; or (5) political opinion.⁴⁰

In passing the 1980 Act, Congress also expanded the availability of refugee status to thousands more aliens than were covered by the previous law. While prior law limited "seventh preference refugees" to 17,400 visas annually, the 1980 Act eliminated the seventh preference and increased the number of annual admissions as "section 207" refugees to 50,000 per year for 1980, 1981, and 1982.⁴¹ The 50,000 total would be allocated among various refugee groups in accordance with the 1980 Act.⁴²

Even with the increased number of visas available for section 207 refugee admissions, some aliens who face persecution may still fall outside the provisions of the 1980 Act because of full quotas or the lack of any quota for their specific refugee group. To handle these aliens, the Act provided the first specific provisions for asylum law in the United States.⁴³ Although asylum and refuge are separate entities, they share a common bond in the definition of refugee. INA section 208 states that the asylee must meet the definition of "refugee" found in the INA.⁴⁴ Despite this threshold similarity, however, important differences exist between an asylee and a refugee. Differences lie in the lack of a quota for asylum

35 HAITIAN EMIGRATION, *supra* note 11, at 2.

36 *Id.*

37 Article 32 prohibits the return of an alien lawfully within the country if the alien is a refugee. The Haitians who come to the United States without visas are not lawfully within the country, and therefore are not protected by article 32.

38 OFFICE OF THE UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES, COLLECTION OF INTERNATIONAL INSTRUMENTS CONCERNING REFUGEES 22-23 (2d ed. 1979).

39 1979 HOUSE REPORT, *supra* note 28, at 9. INA § 101(a)(42) (amended 1980) (to be codified at 8 U.S.C. § 1101(a)(42)) states:

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

40 INA § 101(a)(42) (amended 1980) (to be codified at 8 U.S.C. § 1101(a)(42)).

41 INA § 207(a) (amended 1980) (to be codified at 8 U.S.C. § 1157(a)). The number can be increased by the President if an increase is justified by "humanitarian concerns or if otherwise in the national interest." *Id.* § 207(a). *See* note 5 *supra*.

42 Admissions are to be allocated among refugees of special humanitarian concern to the United States in accordance with a determination made by the President after appropriate consultation. *Id.* § 207(a)(3).

43 1979 HOUSE REPORT, *supra* note 28, at 17.

44 Section 208(a) reads: "[T]he alien may be granted asylum in the discretion of the Attorney General if the Attorney General determines that such an alien is a refugee within the meaning of section 101(a)(42)(A)."

entries and the limited duration of asylum status.⁴⁵ Asylum, therefore, provides a distinct alternative for the alien who fails to gain entry as a "section 207" refugee.

III. Elements of Making an Asylum Claim

A. *Persecution*

In finding an alien to be an asylee, and hence a refugee, INA section 101(a)(42)(A) requires that the alien show that he faces, or has a well-founded fear that he will face, persecution if returned to his home country. The term persecution must therefore be defined.⁴⁶ Congress, unfortunately, failed to do so in the 1980 Act or in previous legislation. It has been said to be too strong a term to encompass minor inconveniences or disadvantages.⁴⁷ But it is not so strong a term as to require actual physical harm.⁴⁸ Courts have said that Congress must at least have meant to give the term its normal meaning: "The infliction of suffering or harm upon those who differ (in race, religion or political opinion) in a way regarded as offensive."⁴⁹

Because in all societies the treatment of various groups often differs, such differences do not always amount to persecution.⁵⁰ Persecution instead comprehends consequences of a substantially prejudicial nature for the person concerned.⁵¹ Clearly, a threat to life or freedom on one of the five enumerated grounds rises to the level of persecution.⁵²

B. *Well-Founded Fear of Persecution*

Even more elusive than the concept of persecution is the problem of deter-

⁴⁵ Asylees are granted such status on a yearly basis. 8 C.F.R. § 208.8(e) (1981). Extensions may be granted in yearly redeterminations. *Id.* Adjustment to the status of an alien admitted for permanent residence is possible under INA § 209(b) (amended 1980) (to be codified at 8 U.S.C. § 1159).

⁴⁶ Persecution was originally limited to physical acts, *supra* note 24, which included confinement, torture or death. *Kalatjis v. Rosenberg*, 305 F.2d 249 (9th Cir. 1962); *Blazina v. Bouchard*, 286 F.2d 507 (3d Cir. 1961). Removal of the "physical" limitation expanded the meaning of persecution, as it was no longer necessary to show bodily harm. *Kovac v. INS*, 407 F.2d 102, 106 (9th Cir. 1969). "Persecution" clearly includes threats to life or freedom, *In re Dunar*, (Bd. Imm. App. 1973), No. 2192 but goes beyond that to include lesser threats. *Moghianian v. United States Dep't of Justice*, 577 F.2d 141, 142 (9th Cir. 1978).

The courts have found persecution to be present in a variety of factual settings. *See, e.g.*, *Durvat v. Henry*, 297 F.2d 744, 753 (3d Cir. 1961) (economic reprisals depriving all means of livelihood); *Kovac v. INS*, 407 F.2d at 106 (economic reprisals causing substantial economic disadvantage); *Rosa v. INS*, 440 F.2d 100 (1st Cir. 1971) (government could not control mob which threatened the alien); *Sovich v. Esperdy*, 319 F.2d 21, 29 (2d Cir. 1963) (long period of confinement for political crimes). The settings in which persecution has been found not to be present are equally various. *See, e.g.*, *Blagiac v. Flagg*, 304 F.2d 623 (7th Cir. 1962) (loss of job for failure to join the communist party); *Mac Caud v. INS*, 500 F.2d 355 (2d Cir. 1974) (abuse by prison guards not countenanced by the government); *Sovich v. Esperdy*, 319 F.2d at 29 (dictum that a short period of confinement, even for a political crime, could not constitute persecution). Clearly, a finding of persecution is a factual issue to be decided on the evidence presented in each case.

⁴⁷ *Kovac v. INS*, 407 F.2d 102 (9th Cir. 1969).

⁴⁸ *Berdo v. INS*, 432 F.2d 824 (6th Cir. 1970).

⁴⁹ *Id.* at 846; *Kovac v. INS*, 407 F.2d at 107. *See* WEBSTER'S THIRD INTERNATIONAL DICTIONARY 1685 (1965).

⁵⁰ OFFICE OF THE UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES, HANDBOOK ON PROCEDURES AND CRITERIA FOR DETERMINING REFUGEE STATUS 15 (1979) [hereinafter cited as UNHCR HANDBOOK].

⁵¹ *Id.*

⁵² *Id.* at 14.

mining what constitutes a well-founded fear.⁵³ The concept involves a subjective component and a qualifying requirement of objectivity.⁵⁴ It allows for consideration of the alien's belief as to what conditions would face him at home, but it also requires that such beliefs have support in the objective situation found in the alien's home country.⁵⁵ Fear is well-founded if it can be established that the alien's presence has been, and would remain, intolerable in his country of origin, or would become intolerable were he to return.⁵⁶

It is the alien who bears the burden of showing such a well-founded fear of persecution.⁵⁷ He must show that he is unable or unwilling to avail himself of his country's protection.⁵⁸ "Unable" implies circumstances beyond the alien's control,⁵⁹ while "unwilling" refers to those who refuse to avail themselves of their country's protection.⁶⁰ If such protection is available, and there is no reason for the alien to be unwilling to avail himself of it, then the alien is not a refugee, and not eligible for asylum.⁶¹

Of all the reasons for an alien to leave a country or to be unwilling to return, only one, a well-founded fear of persecution based on the specific grounds previously listed, has been chosen as the basis for an asylum claim. All other reasons are irrelevant,⁶² unless used to augment a claim of persecution, or to show the circumstances that the alien would face at home.⁶³ Thus asylum status does not extend to those who are economically oppressed,⁶⁴ unless such economic oppression is due to the alien's persecuted status.⁶⁵

IV. Timing of the Asylum Claim

Asylum claims can be entered upon arrival on American soil, and virtually anytime thereafter.⁶⁶ The availability of asylum, however, may be related to the

53 Because the term "well-founded fear" is new to the refugee definition, there are few reported decisions construing it. Prior cases tried to determine the relationship of the term to the term then used, "clear probability." *Kashani v. INS*, 547 F.2d 376 (7th Cir. 1977), held the two terms to be essentially the same, in that both required a showing that the applicant (1) participated in certain conduct and (2) would be persecuted because of it. *Id.* at 380. Other courts held that the language required the alien to be a victim of actual persecution or to show good reason why he was threatened by it. *In re Dunar*, No. 2192, at 15-16. More recently, the language of *Coriolan v. INS*, 559 F.2d 993 (5th Cir. 1977), and the congressional adoption of the U.N. Protocol definition of refugee, *supra* note 39, clearly indicate that the terms "well-founded fear" and "clear probability" have distinctive meanings, with the former term more subjective than the latter. The parameters of "well-founded fear," however, are not yet clear.

54 UNHCR HANDBOOK, *supra* note 50, at 11.

55 *Id.*

56 *Id.* at 12-13.

57 *Fluerinor v. INS*, 585 F.2d 129, 133 (5th Cir. 1978); *Martineau v. INS*, 556 F.2d 306, 307 (5th Cir. 1977); *Henry v. INS*, 552 F.2d 130, 131 (5th Cir. 1977); 8 C.F.R. § 208.5 (1981).

58 UNHCR HANDBOOK, *supra* note 50, at 23.

59 *Id.*

60 *Id.*

61 *Id.*

62 *Id.* at 12.

63 *Id.*

64 HAITIAN EMIGRATION, *supra* note 22, at 11. Because Haitians are seen as fleeing Haiti for economic reasons, *id.* at 3, they are not regarded as political refugees by the INS or the State Department. *Haitian Refugee Center v. Civiletti*, Record at 41.

65 HAITIAN EMIGRATION, *supra* note 11, at 11; UNHCR HANDBOOK, *supra* note 50, at 16.

66 Both persons seeking admission to the United States and those already present are eligible to claim asylum. 8 C.F.R. § 208.3(a) (1981). The asylum claim of an alien already present in the United States usually arises in connection with deportation proceedings brought against him, as in the case of an illegal entrant, 8 U.S.C. § 1251(a)(2) (1976), or an alien who no longer holds a valid nonimmigrant visa, 8 U.S.C. § 1251(a)(9) (1976).

time at which the events underlying the asylum claim arose. Three periods present themselves: (1) the time while the alien is present in his home country; (2) the time following the alien's departure and preceding his first asylum claim; and (3) the time following the first unsuccessful asylum claim.

The first period,⁶⁷ which lasts until the alien leaves his home country,⁶⁸ is explicitly included in INA section 101(a)(42)(A). The group included in this period includes those who have actually been persecuted. Aliens in this group have clearly established their claim based on preexisting facts. Alternatively, many aliens fear persecution because of their race, religion, nationality, membership in a social group, or political opinion. They are also eligible for asylum under the language of INA section 101(a)(42)(A).

The alien's claim, however, may be based on circumstances such as a change of government at home, political activity while abroad, or the act of illegal departure,⁶⁹ which raise a fear of persecution that begins after the alien has left his home country. These claims fall into the second category. The time period involved may be extremely short, if asylum is sought upon arrival, or very long, if asylum is sought after an extended stay, perhaps while facing deportation. Under any of these circumstances, once an asylum claim is first served, the third period begins.

During this third period one last issue remains. Can this alien, who has sought and been denied asylum, enter a renewed asylum claim based upon a fear of persecution because his first asylum claim has been considered a political statement at home?

A. *Refugees Sur Place*

Refugees who fall into the second and third time periods are known as *refugees sur place*.⁷⁰ The United Nations High Commissioner for Refugees (UNHCR) holds that an alien who becomes a refugee only after leaving his country of origin is a *refugee sur place*. This may be a result of the alien's actions or it may be due to circumstances arising in his home country during his absence.⁷¹ Regard should be given to whether such actions will come to the attention of the alien's home government and what the government's reaction will be.⁷²

The United Nations' position has been adopted with some changes by the decisions of United States courts.⁷³ The cases have looked at two factors in determining the overall validity of the claim: the degree to which the alien was politically active at home and the alien's motive for leaving his home country.

67 Any Haitian who can meet his burden of proof based on conditions before he left Haiti faces no further problem. Most have failed to meet this burden, however. See note 11 *supra*. It is necessary to determine if those who have failed have become refugees since they left Haiti.

68 The alien must be "outside any country of his nationality, or, in the case of a person having no nationality, . . . outside any country in which such person last habitually resided. . . ." INA § 101(a)(42)(A) (amended 1980) (to be codified at 8 U.S.C. § 101(a)(42)(A)).

69 Of course, aliens entering the country legally are eligible for asylum. See 8 C.F.R. § 108.1 (1981). See also note 8 *supra*.

70 UNHCR HANDBOOK, *supra* note 50, at 22.

71 *Id.*

72 *Id.*

73 See notes 74-89 *infra* and accompanying text.

1. Prior Political Activity

Two Ninth Circuit decisions illustrate the value of showing prior political activity when making an asylum claim. In *Kovac v. INS*,⁷⁴ the Ninth Circuit considered an alien's prior political activity as a factor in granting asylum. The case involved a Yugoslav merchant seaman⁷⁵ who claimed that he faced persecution because he had jumped ship,⁷⁶ which was an illegal departure.⁷⁷ The court upheld Kovac's claim, but distinguished his case from that of an alien who had no prior political activity.⁷⁸ The court also noted Kovac's fear of persecution because of his Hungarian nationality, which provided an additional ground for asylum.⁷⁹

Conversely, in *Hosseinardi v. INS*,⁸⁰ an Iranian student who had only begun to criticize his home government after leaving Iran was denied asylum. The Ninth Circuit noted the alien's lack of political activity at home and upheld the denial of his asylum claim.⁸¹

2. The Motive Test

A standard similar to that used by the Ninth Circuit in *Kovac* and *Hosseinardi* was applied by the Fifth Circuit in *Paul v. INS*.⁸² The court required the alien, a Haitian, to show (1) that his departure was politically motivated, and (2) that he faced persecution for political reasons upon his return to Haiti.⁸³

The United States view seems to require the alien to show that he had engaged in some prior political activity⁸⁴ and that his flight from his home country was in part politically motivated.⁸⁵ Where the evidence of probable persecution is less than clear, courts use the political motive requirement to distinguish successful and unsuccessful applications.⁸⁶ Generally, the successful applicants are those who can show political acts. Of course, the act of leaving the home country might itself be seen as a political act, especially if done with political overtones.

The decision in *Coriolan v. INS*⁸⁷ seems to open the door for such a claim by illegal departees. In *Coriolan*, the Fifth Circuit referred to earlier illegal departure cases and extended their holdings to cases in which the alien may not have engaged in prior political activity at home.⁸⁸ In *Coriolan*, two Haitians who had illegally entered the United States sought review of the denial of their asylum

74 407 F.2d 102 (9th Cir. 1969).

75 *Id.* at 104.

76 *Id.*

77 *Id.*

78 *Id.* at 105.

79 *Id.* at 104.

80 405 F.2d 25 (9th Cir. 1968).

81 *Id.*

82 521 F.2d 194 (5th Cir. 1975).

83 *Id.* at 196-97.

84 Most Haitians had not been politically active in their home country, although some spoke of problems with the Haitian secret police, the Ton Ton Macoute, and of executions of some of their relatives. Note, *Behind the Paper Curtain*, 7 N.Y.U. REV. L. & SOC. CHANGE, 107, 123-25 (1978). The State Department views the Macoute's actions as private banditry and not government persecution. HAITIAN EMIGRATION, *supra* note 11, at 11.

85 See note 64 *supra*.

86 *Coriolan v. INS*, 559 F.2d 993 (5th Cir. 1977).

87 *Id.*

88 *Id.* at 1000. See notes 74-81 *supra* and accompanying text.

requests.⁸⁹ Though they offered conflicting testimony, neither alien had a substantiated claim of prior political activity.⁹⁰ Nonetheless, the court reversed the earlier denial of the asylum applications and remanded the case for further proceedings.⁹¹

B. *Persecution Versus Prosecution*

One of the difficulties presented in the case of refugees *sur place* is determining whether punishment for an illegal departure or for acts committed while the alien was abroad is prosecution or persecution. In questioning the validity of the motive test,⁹² the Fifth Circuit in *Coriolan* expressed concern that the test did not consider the government's motive in punishing the alien.⁹³ Since the government administers the punishment, logic requires that the focus be on the government's motives for such punishment. The difficulty lies in drawing the line where punishment for an illegal act (prosecution) becomes repression for a political act or the expression of a political opinion (persecution). In differentiating between prosecution and persecution, three factors seem relevant: (1) the presence of a valid, nonpolitical law; (2) the nature of the judicial system involved; and (3) conformity to human rights standards.

1. Presence of a Valid Nonpolitical Law

Persons who flee prosecution are not refugees.⁹⁴ Immigration law protects those who flee injustice, not valid prosecution.⁹⁵ Even where punishment is politically motivated, it must be considered whether the punishment conforms to the general law of the nation involved.⁹⁶ If so, such punishment alone does not make the alien a refugee.⁹⁷ Congress did not intend to extend asylum to common criminals or to fugitives from justice.⁹⁸ However, punishment of some crimes lacking the element of moral turpitude often serves as a vehicle for persecution.⁹⁹

Specifically, many illegal departure crimes are the products of deep political motivations.¹⁰⁰ *In re Janus and Janek*¹⁰¹ dealt with Hungary's political application of an illegal departure statute. In that case, the Board of Immigration Appeals held that the home country's punishment was persecution for political opinion,¹⁰² and granted the asylum claim.

2. Nature of the Judicial System

The need to consider the nature of the judicial system in an alien's home

89 559 F.2d at 995.

90 *Id.* at 995-996.

91 *Id.* at 1004.

92 Judge Tuttle questioned whether previous decisions requiring a political motive for departure would still control. *Id.* at 1000.

93 *Id.*

94 UNHCR HANDBOOK, *supra* note 50, at 15.

95 *Id.*

96 *Id.* at 20.

97 *Id.*

98 *Sovich v. Esperdy*, 319 F.2d 21, 28 (2d Cir. 1963).

99 *Id.*

100 *Id.*

101 *Cited in Berdo v. INS*, 432 F.2d at 839, 842.

102 *Id.*

country is almost inseparable from the need to look at the law involved. Punishment for a recognized offense of a nonpolitical nature is not persecution if it is administered under a recognized judicial system.¹⁰³ The lack of a judicial system or the lack of trials and criminal safeguards, however, would undermine any claim that the punishment faced by the alien was prosecution rather than persecution.¹⁰⁴

3. Conformity to Human Rights Standards

Conformity to the nation's general law and the presence of a protective judicial system does not eliminate the possibility that the alien faces persecution. The law involved must also conform to human rights standards and be applied uniformly.¹⁰⁵ It cannot single out political opponents for harsh treatment.¹⁰⁶ In addition, the type and length of punishment is relevant.¹⁰⁷ In *Sovich v. Esperdy*,¹⁰⁸ an illegal departure case, the Second Circuit held that incarceration under an illegal departure statute is not persecution if the period of detention is brief, but that it will be persecution where the detention is for a long period of time, or for life.¹⁰⁹

C. *Persecution for Making an Asylum Claim*

Although not all illegal departures raise the fear of persecution so as to justify granting an alien asylum, claims are often made based on such an expectation. If the government grants the asylum claim, the alien no longer fears persecution. If the claim is denied, however, the alien may claim that he is now subject to persecution because his asylum claim was seen as a political statement or, as in the case of the Haitians, caused him to be regarded as a traitor.¹¹⁰

In *Kovac v. INS*,¹¹¹ the Ninth Circuit said that an alien could base his asylum claim on a fear of persecution arising from his first claim.¹¹² *Kovac* involved an alien who had engaged in prior political activity, however, as well as a claim based on nationality.¹¹³ It must be distinguished from the case of an alien who has no prior activity and no claim of persecution before his original asylum claim was made. No United States court has yet decided if a request for asylum, standing alone, constitutes a political act sufficient to justify a subsequent grant of asylum.

The United Nations High Commissioner for Refugees (UNHCR) holds that a person becomes a refugee whenever he first fits the definition of that term. A

¹⁰³ *Sovich v. Esperdy*, 319 F.2d at 28.

¹⁰⁴ The Haitian legal system has been said to be nonexistent. *Haitian Refugee Center v. Civiletti*, Record at 100. Few protections exist, and Haitians often face imprisonment without trial. *Id.* at 51. The lack of criminal courts in Haiti tends to undermine any claim that punished returnees are simply being prosecuted within an established criminal system. Interview with Claus Feldman of the Office of the United Nations High Commissioner for Refugees, in South Bend, Indiana (Sep. 15, 1980).

¹⁰⁵ UNHCR HANDBOOK, *supra* note 50, at 16.

¹⁰⁶ *Id.*

¹⁰⁷ *Sovich v. Esperdy*, 319 F.2d (2d Cir. 1963).

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *Supra* note 17.

¹¹¹ 407 F.2d 102 (9th Cir. 1969).

¹¹² *Id.* at 104.

¹¹³ *Id.*

court's recognition of refugee status does not make a person a refugee; it merely acknowledges his preexisting status.¹¹⁴ The UNHCR states that eligibility must occur prior to the time when the alien's status is determined.¹¹⁵

Congress has declared that the purpose of the Refugee Act of 1980 is to respond to the needs of persons subject to persecution in their homelands.¹¹⁶ The alien must be unable or unwilling (with a proper reason) to return to his homeland. In the situation considered here, the alien might have been able to return had he not made the original asylum claim. Also, prior to making his original asylum claim, the alien may have had no reason recognized under the 1980 Act to be unwilling to return. Like the UNHCR, Congress has evidenced an intent to restrict asylum to those who are eligible when they first apply. The grant of asylum recognizes an existing status; it is not meant to create one.

Asylum law protects those who in good faith need to be sheltered from persecution. This protection was not meant to encompass those who make political statements for the sole purpose of becoming refugees. In *Cisternas-Estay v. INS*,¹¹⁷ the asylum claims of two Chileans failed. The court found that the statements made by those aliens were made for the sole purpose of making themselves eligible for asylum.¹¹⁸ The two had no reason to fear persecution before they staged a press conference,¹¹⁹ and the court refused to find that the statements made were sufficient to create a valid asylum claim.¹²⁰ The same situation is presented by the alien who, with no prior asylum eligibility, makes an asylum claim solely for the purpose of justifying a subsequent asylum claim. The results should not differ.¹²¹

V. The Haitian Situation

The Haitian situation presents a multifaceted issue. Some Haitians may claim asylum based on persecution experienced firsthand while still in Haiti. For these people, the only problem is meeting the burden of proof placed upon them. Unfortunately, most have not been able to do so.¹²²

There are also Haitians whose fear of persecution stems from their illegal departure from Haiti.¹²³ They are also eligible for asylum under the *Coriolan* decision and the United States and UNHCR positions.¹²⁴ For these people, the problem is also one of meeting the burden of proof. Unlike those who must prove

114 UNHCR HANDBOOK, *supra* note 50, at 9.

115 *Id.*

116 The 1980 Act states in § 101(a): "Congress declares that it is the historic policy of the United States to respond to the urgent needs of persons subject to persecution in their homelands"

117 531 F.2d 155 (3d Cir. 1976).

118 *Id.* at 159.

119 *Id.*

120 *Id.* at 160.

121 One problem that might arise in denying the asylum claim is that the unsuccessful asylum applicant may still argue that he is eligible for withholding of deportation under INA § 243(h). Since the actual deportation takes place after the asylum claim is denied, although the deportation hearing may be the same as the asylum hearing, 8 C.F.R. § 208.10 (1981), an alien subject to persecution based on his asylum claim might be able to claim that he was a refugee at the time of his section 243(h) claim. To allow such a backdoor approach would seem to defeat both the holding of *Cisternas-Estay*, 531 F.2d 155, and the concepts underlying asylum.

122 See note 11 *supra*.

123 Haitian Refugee Center v. Civiletti, Record at 46.

124 See notes 87-109 *supra*.

actual persecution, however, the burden on these people is to show a well-founded fear of future persecution. These Haitians have also failed, for the most part, to meet their burden of proof.¹²⁵

One group which has suffered a pattern of persecution consists of those who have been returned to Haiti after making an asylum claim here.¹²⁶ If no valid grounds for the claim exist, asserting the claim does not make the alien an asylee. However, those making the asylum claim may face a real danger in Haiti if their claim is refused. The tactics of a government in punishing asylum-seekers can have a chilling impact on those who would otherwise seek asylum. Those with close cases may not choose to take the chance.

VI. Conclusion

The solution to the dilemma confronted here must protect the oppressed while denying asylum to those without bona fide fears. The solution must recognize the limited nature of asylum. Therefore, when faced with an asylum claim based on a previous unsuccessful claim, the courts must determine (1) the applicant's background and conditions in his country of origin, (2) whether the first asylum claim had a good faith, substantive basis, and (3) whether the first asylum claim was simply a bootstrap for the second asylum claim.

Like the concept of well-founded fear, this inquiry will involve the use of both objective and subjective standards. But, as was done in *Cisternas-Estay*, the courts must at times inquire into the good faith of the alien and of his political acts. To do otherwise would do injustice to the competing values of asylum—relief and restriction.

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125 See note 11 *supra*.

126 *Haitian Refugee Center v. Civiletti*, Record at 46.