

Effect of the 1967 United Nations Protocol on the Status of Refugees in the United States

Introduction

In pursuance of its sovereign right to control the entry within its borders of persons not citizens or nationals of the state, Congress has, over the years, adopted a number of complex laws. The legislation currently in force is the Immigration and Nationality Act of 1952, as Amended (hereinafter "the Act"), which is enforced by the Immigration and Naturalization Service, a component of the United States Department of Justice (hereinafter "the Service"). Although there is an extensive literature dealing with various aspects of the Act, to this writer's knowledge, no publication has ever attempted to deal exclusively with this important question: How have the 1951 Convention¹ and the 1967 Protocol² Relating to the Status of Refugees affected the administration and interpretation of Section 243(h)³ of the Immigration and Nationality Act of 1952? Section 243(h) establishes the humanitarian safeguard of withholding deportation of an alien when, in the opinion of the Attorney General, the alien would be subject to persecution on account of race, religion, or political opinion.

Before the legal problem can be analyzed intelligently, certain basic definitions and concepts must be understood and the legislation discussed in its historical perspective.

*B.A. Magna Cum Laude & Phi Beta Kappa Queens College of CUNY; J.D. St. John's University School of Law. The author is a member of the Committee on Immigration & Nationality of both the Section of International Law and the Section of Administrative Law (ABA). Mr. Frank is a career officer of the United States Department of Justice, Immigration and Naturalization Service. He is presently assigned to the New York District Deportation Branch.

All views expressed herein are those of the author alone and not necessarily those of the U.S. Dept. of Justice or the Immigration and Naturalization Service.

¹19 U.S.T. 6259, T.I.A.S. No. 6577.

²19 U.S.T. 6223, T.I.A.S. No. 6577.

³8 U.S.C. 1253(h).

Definitions

The term "alien," of course, applies to any person not a citizen or national of the United States.⁴ An alien lawfully admitted for permanent residence is one who has been rightfully accorded the privilege of residing permanently in the United States as an immigrant. If the legal resident alien conducts himself in accordance with the law, his residence in this country will not be disturbed. It is not the legal resident that is of concern nor those aliens properly maintaining their status as nonimmigrants under Section 101(a)(15)⁵ of the Act. The illegal aliens who face deportation under the seventeen classes of Section 241(a)⁶ of the Act are affected by the provisions of Section 243(h). These classes include criminals, drug traffickers, prostitutes, subversives, anarchists, illiterates, paupers, mental defectives, carriers of communicable diseases, ship jumpers, persons without proper entry documents or those failing to maintain their status, e.g., by taking unauthorized employment.

The term "deportation" likewise has acquired a specific connotation: it is the removal of an alien from the country simply because his presence is deemed inconsistent with the public welfare, and without any punishment being imposed or contemplated. Deportation has never been regarded in the United States as punishment for a crime,⁷ although it has been described by the Supreme Court as "a drastic measure and at times the equivalent of banishment or exile. . . ."⁸ Once deported, an alien may not return to the United States without the prior permission of the Attorney General. Reentry without such permission may mean the possibility of facing two years' imprisonment and/or a \$1,000 fine if convicted.⁹ There is also the likelihood of being deported again.¹⁰ The seriousness of permanent banishment from the United States to the prospective deportee is obvious.

Note should also be taken of the distinction between deportation proceedings¹¹ and exclusion proceedings.¹² Aliens entering or attempting to enter the United States are barred by exclusion proceedings. A common example would be an applicant for admission¹³ at an airport. Once an alien has actually entered the United States free from restraint by the government, his removal can be effected only by deportation proceedings. Thus, an alien who furtively

⁴Immigration and Nationality Act Section 101(a)(3), 8 U.S.C. 1101(a)(3).

⁵8 U.S.C. 1101(a)(15).

⁶8 U.S.C. 1251(a).

⁷Mahler v. Eby, 264 U.S. 32 (1924); Bugajewitz v. Adams, 228 U.S. 585 (1913).

⁸Tan v. Phelan, 333 U.S. 6, 10 (1948).

⁹Immigration and Nationality Act § 276, 8 U.S.C. 1326.

¹⁰Immigration and Nationality Act §§ 212(a)(17) and 241(a)(1), corresponding to 8 U.S.C. 1182(a)(17) and 8 U.S.C. 1251(a)(1).

¹¹Immigration and Nationality Act § 242, 8 U.S.C. 1252.

¹²Immigration and Nationality Act § 235(b), 8 U.S.C. 1225(b). See *Ma v. Barber*, 357 U.S. 185 (1958).

¹³Immigration and Nationality Act § 101(a)(4), 8 U.S.C. 1101(a)(4).

crosses the border of a country without inspection by an immigration officer¹⁴ is entitled to a deportation hearing because he was not prevented from passing by official action. The airport applicant being barred by an officer is merely "on the threshold of admission" and is subject to an exclusion proceeding.

Section 243(h) referred to above applies only to persons facing deportation. The other provision for granting refuge are Section 203(a)(7)¹⁵ of the Act involving conditional entrants, and Section 212(d)(5)¹⁶ concerning persons "paroled" into the United States.¹⁷ Persons in the United States under either of those two sections are expelled only by means of an exclusion proceeding. Such aliens are outside the scope of this article. With these elementary concepts in mind, let us now turn to the legislation itself.

Legislative History

Before 1950, the statutes pertaining to deportation contained no provision for withholding deportation because of anticipated persecution in the country of destination. Without statutory authority, no absolute right existed to claim asylum in the United States.

In 1950, the Attorney General was enjoined by legislation from deporting an alien to a country where he would suffer physical persecution.¹⁸ But the 1952 Act emphasized the Attorney General's discretionary power. The law contained in Section 243(h) was revised in 1965¹⁹ by substituting the phrase "persecution on account of race, religion, or political opinion" for the requirement of "physical persecution" which existed previously. The term "physical persecution" was not defined in the Acts of 1950 or 1952, nor in the administrative regulations implementing the latter. Subsequent practice clarified it so as to contemplate incarceration or subjection to corporal punishment, torture, or death based usually on one's race, religion, or political opinions. The argument for the change was that "techniques of persecution are not limited to bodily violence alone."²⁰ Section 243(h) in its amended form currently reads:

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

¹⁴Immigration and Nationality Act § 101(a)(18), 8 U.S.C. 1101(a)(18).

¹⁵8 U.S.C. 1153(a)(7).

¹⁶8 U.S.C. 1182(d)(5).

¹⁷See *Marie Sannon, et al. v. United States of America, et al.* Case No. 74-428-CIV-JLK (S.D. Fla.) (2/15/77) and *Ketley Jean-Baptiste, et al. v. United States of America, et al.* Case No. 75-2124 CIV-JLK (S.D. Fla.) (2/15/77) published in *International Legal Materials* Volume 16 No. 2 March 1977. The issue was whether claims for political asylum can be presented by a paroled alien at an exclusion hearing. The court held that an Immigration Judge must permit such an alien to have a full, fair adversary hearing, pertinent to his claim for political asylum under the U.N. Protocol. Appeal is pending in the Fifth Circuit Court of Appeals.

¹⁸Section 20(a), Act of February 5, 1917, 39 Stat. 890, as amended by Section 23, Internal Security Act of 1950, 64 Stat. 987.

¹⁹Section 11(f), Act of October 3, 1965, PL 89-236, 79 Stat. 918.

²⁰H.R. REP. No. 745, 89th Cong., 1st Sess. 22 (1965).

In 1968 the United States became a party to the United Nations Protocol Relating to the Status of Refugees, which entered into force for this country on November 1, 1968. The protocol incorporated, with appropriate modifications, a 1951 United Nations Convention Relating to the Status of Refugees, which the United States had not previously accepted. The Convention sought to deal with situations arising immediately after World War II, and by its terms was limited to persons who became refugees before January 1, 1951. The Protocol was designed to deal with refugee situations which have arisen since the adoption of the Convention in 1951 and to remove the time limitation on the effectiveness of the Convention. Article 1 of the Convention in pertinent part defined a refugee as a person who, as a result of events occurring before January 1, 1951,

. . . owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return for it.

The Protocol and Convention do not specifically impose obligations on receiving refugees, but seek to assure fair and humane treatment for refugees situated in the territory of the contracting states. It is Articles 32 and 33 that relate to the subject of the present paper.

The Immigration Service has the power administratively to grant asylum; 8 C.F.R. 108.2 reads in part: "A denial under this part shall not preclude the alien, in a subsequent expulsion hearing, from applying for the benefits of Section 243(h) of the Act and of Articles 32 and 33 of the Convention Relating to the Status of Refugees." The respondent in a deportation proceeding, if administratively denied a grant of asylum, may appear before an immigration judge²¹ to apply for the withholding of deportation under Section 243(h) and Articles 32 and 33 of the Convention.

Article 32, entitled "Expulsion," reads as follows:

1. The Contracting States shall not expel a refugee lawfully in their territory save on grounds of national security or public order.
2. The expulsion of such a refugee shall be only in pursuance of a decision reached in accordance with due process of law. Except where compelling reasons of national security otherwise require, the refugee shall be allowed to submit evidence to clear himself, and to appeal to and be represented for the purpose before competent authority or a person or persons specially designated by the competent authority.
3. The Contracting States shall allow such a refugee a reasonable period within which to seek legal admission into another country. The Contracting States reserve the right to apply during that period such internal measures as they may deem necessary.

Article 33 entitled Prohibition of Expulsion or Return ("Refoulement") reads:

1. No Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threat-

²¹8 C.F.R. 103.1(h). Under 8 C.F.R. 1.1(1), the term "immigration judge" may now be used interchangeably with special inquiry officer.

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

2. The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country.

On January 4, 1972, Secretary of State William P. Rogers delivered a policy statement that was sent to all interested United States government agencies at home and abroad positing the "General Policy for Dealing With Requests for Asylum by Foreign Nationals."²² A review of this statement facilitates an understanding of the actions taken by the Immigration and Naturalization Service.

Policy

Both within the United States and abroad, foreign nationals who request asylum of the U.S. Government, owing to persecution or fear of persecution should be given full opportunity to have their requests considered on their merits. The request of a person for asylum or temporary refuge shall not be arbitrarily or summarily refused by U.S. personnel. Because of the wide variety of circumstances which may be involved, each request must be dealt with on an individual basis, taking into account humanitarian principles, applicable laws and other factors.

In cases of such requests occurring within foreign jurisdiction, the ability of the U.S. Government to give assistance will vary with location and circumstances of the request.

* * *

Background

A primary consideration in U.S. asylum policy is the "Protocol Relating to the Status of Refugees," to which the United States is a party. The principle of asylum inherent in this international treaty (and in the 1951 Refugee Convention whose substantive provisions are by reference incorporated in the Protocol) and its explicit prohibition against the forcible return of refugees to conditions of persecution, have solidified these concepts further in international law. As a party to the Protocol, the United States has an international treaty obligation for its implementation within areas subject to jurisdiction of the United States.

U.S. participation in assistance programs for the relief of refugees outside U.S. jurisdiction and for their permanent resettlement in asylum or other countries helps resolve existing refugee problems. It also avoids extensive accumulation of refugees in asylum countries and promotes the willingness of the latter to maintain policies of asylum for other arriving refugees.

President Nixon has reemphasized the U.S. commitment to the provision of asylum for refugees and directed appropriate departments and agencies of the U.S. Government, under the coordination of the Department of State, to take steps to bring every echelon of the U.S. Government which could possibly be involved with persons seeking asylum a sense of the depth and urgency of our commitment.

Views of the Board of Immigration Appeals

A helpful way to ascertain the effect of the 1951 Convention and 1967 Protocol upon Section 243(h) of the Immigration Act, is to review the decisions rendered by the Board of Immigration Appeals, a quasi-judicial body responsible only to the Attorney General.²³ The Board of Immigration Appeals

²²Department of State Public Notice No. 351, Published:37 FR 3447; Feb. 16, 1972.

²³8 C.F.R. 3.1(a).

(hereinafter "the BIA" or "the Board") has appellate jurisdiction to review deportation proceedings.²⁴ A final decision of the Board is binding upon the Immigration Service.

On April 17, 1973, the BIA rendered its first decision concerning the effect of the U.N. Protocol upon Section 243(h) in the *Matter of Dunar*, (Interim Decision of the Board of Immigration Appeals No. 2192).

The respondent was a 32-year-old male alien, a native and citizen of Hungary, who was admitted to the United States on January 18, 1966 as a nonimmigrant visitor and remained longer than permitted. Respondent's counsel conceded deportability, designated England as the country of deportation, and requested withholding of deportation under Section 243(h) of the Act as to Hungary, the alternate country of deportation if England should refuse respondent entry. At a continued hearing, counsel withdrew the concession of deportability and asked that the proceedings be terminated. Respondent contended that, as a refugee who had lawfully entered the United States as a nonimmigrant, he was immunized from deportation under Article 32 of the 1951 Convention which became binding on the United States when it adhered to the 1967 Protocol Relating to the Status of Refugees. This was a novel question of law for the Board.

The BIA first disposed of the question of whether or not the respondent was indeed a deportable alien. It found this to be the case under Section 241(a)(2) of the Act, corresponding to 8 U.S.C. 1251(a)(2).

The Board viewed the Protocol as a treaty since it supplemented and incorporated the substantive provisions of the Convention.²⁵ As a treaty, in accordance with Article VI, Clause 2 of the U.S. Constitution, it becomes part of the supreme law of the land. Being a self-executing treaty, the Protocol has the force and effect of an act of Congress.²⁶ Neither the Convention nor the Protocol in terms refers to Sections 241(a), 243(h) or any other pertinent provision of the immigration laws. The precise question the Board faced in *Dunar* was how those provisions had been affected by the later treaty provisions and if so, in what way.

As is, of course, generally known, a self-executing treaty supercedes a prior congressional enactment if the act is inconsistent with the terms of the treaty.²⁷ If the language of the statute and treaty are inconsistent with another, the one of later date will control, provided that the stipulation of the treaty on the subject is self-executing.²⁸ Repeals by implication are never favored, and a later treaty will not be regarded as repealing an earlier enactment by implication unless the

²⁴8 C.F.R. 3.1(b)(2).

²⁵S. EXEC. REP. No. 14, 90th Cong., 2d Sess., at 8-9.

²⁶*Valentine v. United States*, 299 U.S. 5, 10 (1936).

²⁷*Cook v. United States*, 288 U.S. 102, 118 (1933).

²⁸*Whitney v. Robertson*, 124 U.S. 190, 194 (1888).

two are absolutely incompatible and the later one cannot be enforced without antagonizing the earlier.²⁹

Keeping in mind the above principles concerning the effect of a self-executing treaty upon a prior statutory enactment, the Board in *Dunar* satisfied itself from the legislative history that when the United States Senate gave its advice and consent to accession to the Protocol, it did not contemplate that any radical change in the existing immigration laws would be effected. The representation made in the legislative hearings which induced favorable Senate action was that our immigration law already contained provisions for humane treatment of refugees fostered by the Convention and Protocol. It was felt that if the United States subscribed to the United Nations provisions, it would influence other nations with less liberal refugee legislation to adhere to it.

The Secretary of State informed the President at the time he submitted the Protocol to him for signature that "United States accession to the Protocol would not impinge adversely upon the laws of this country."³⁰ The Secretary further stated:

Accession to the Protocol would promote our foreign policy interests through reaffirming, in readily understandable terms, our traditional humanitarian concerns and leadership in this field. It would also convey to the world our sympathy and firm support in behalf of those fleeing persecution. Actually, most refugees in the United States already enjoy legal and political rights which are equivalent to those which states acceding to the Convention or the Protocol are committed to extend to refugees within their territories. . . .³¹

Similar views were expressed in the President's message transmitting the Protocol to the Senate and in the accompanying Department of State report. In testimony before the Senate Committee on Foreign Relations, Laurence A. Dawson, Acting Deputy Director, Office of Refugee and Migration Affairs of the Department of State, said:

. . . [The President] has pointed out that since refugees in this country already enjoy the protection and rights which the Protocol seeks to secure everywhere, United States accession should help to advance the Protocol and acceptance of its humane standards in other states whose treatment of refugees is less liberal.³²

The BIA citing Sections 244(a), 245, and 249³³ of the Immigration and Nationality Act as examples, expressed the view that our law already contained certain provisions whereby aliens unlawfully in the United States, whether refugees or not, may achieve lawful permanent resident status by administrative action. Section 203(a)(7) of the Act³⁴ provides for the entity of certain refugees and eventually the obtaining of permanent resident status. It felt that to accept respondent's view, all of the above provisions as well as the deportation

²⁹Johnson v. Browne, 205 U.S. 309, 321 (1907).

³⁰S. EXEC. K, 90th Cong., 2d Sess. at VII.

³¹S. EXEC. K, 90th Cong., 2d Sess. at VIII.

³²S. EXEC. REP. No. 14, 90th Cong., 2d Sess. at 7.

³³8 U.S.C. 1254(a), 1255, and 1259.

³⁴8 U.S.C. 1153(a)(7).

provisions of Section 241(a)³⁵ would be without effect in the case of an alien refugee who entered legally as a nonimmigrant and remained unlawfully. If such an alien achieved non-deportability under Article 32, he would in effect become a permanent resident. There is nothing in the legislative history to indicate that the Senate believed passage would result in this happening. Every indication of those individuals who framed Article 32 on behalf of the United Nations was that a host country would not be saddled with any such limitation.

The United Nations Ad Hoc Committee on Statelessness and Related Problems stated that:

The expression "lawfully within their territory" throughout this draft Convention would exclude a refugee who while lawfully admitted has overstayed the period for which he was admitted or was authorized to stay or who has violated any other condition attached to his admission or stay.³⁶

In its report on the revised draft Convention, the Ad Hoc Committee stated:

The Committee decided that it was not always necessary to insert in the text definitions of expressions used. However, since some question was raised as to the phrase, "lawfully in the territory," the Committee expressed the view that, in any event, a Contracting State may consider that a refugee is no longer lawfully in its territory if he is in contravention of terms imposed as a condition of his admission or sojourn.³⁷

Counsel for Dunar presented a letter dated May 26, 1971, from the Deputy Representative of the U.N. High Commissioner for Refugees quoting directly from advice received from its Geneva headquarters in response to counsel's question concerning the interpretation of Article 32. In pertinent part, it read:

In determining whether a refugee is "lawfully in the territory" of a Contracting State, regard must be had to all the circumstances of his presence there, and in this respect the manner in which he originally entered the territory, i.e. lawfully or unlawfully, is not the only decisive factor.

Art. 31 of the 1951 Convention recognizes the possibility that the status of a refugee who has entered illegally the territory of a Contracting State may subsequently be regularized. Conversely, the stay of a refugee who has entered in a regular manner, may subsequently become unlawful. This would be, for example, the case if the authorities of the country are not prepared to grant him residence beyond the *limited period* for which he was admitted or if they withdraw his residence permission on the ground that he has not complied with the *conditions* under which he was admitted, e.g. to pursue his studies. As long as his stay is "lawful," even though admitted temporarily, he can only be expelled on grounds of "national security and public order." If, however, his stay ceases to be "lawful" in the circumstances described above, he is no longer "lawfully in the territory of the Contracting State" and may therefore not invoke the special protection of Art. 32 of the 1951 Convention. (Emphasis in original)

In his letter of submittal to the President, the Secretary of State commented with respect to Article 32:

. . . Article 32(1) of the Convention provides that, "The Contracting States shall not

³⁵8 U.S.C. 1251(a).

³⁶United Nations Economic and Social Council, Report of the Ad Hoc Committee on Statelessness and Related Problems, March 2, 1950, at 47 (E/1618/Corr. 1; E/AC. 32/5/Corr. 1).

³⁷United Nations Economic and Social Council, Report of the Ad Hoc Committee on Statelessness and Related Problems, Second Session, August 25, 1950, at 11, paragraph 20 (E/1850; E/AC.32/8).

expel a refugee lawfully in their territory save on grounds of national security or public order." Many if not most of the grounds for deportation set forth in Section 241 of the Immigration and Nationality Act, 8 U.S.C. 1251, are grounds of "national security or public order," including particularly the several provisions relating to subversive activities and criminal conduct. As refugees by definition are without a homeland, deportation of a refugee is a particularly serious measure, and it would not be humanitarian to deport a refugee for reasons of health or economic dependence.³⁸

In testifying before the Senate Foreign Relations Committee, Eleanor McDowell of the Department of State Legal Advisor's Treaty Section answered Senator Sparkman's inquiry as to whether Article 32 would conflict with existing immigration law in this manner:

. . . section 241 of . . . the Immigration and Nationality Act allows the Attorney General to deport an alien for certain stated reasons. Most of these are criminal conduct of various kinds or subversive activities. There are two categories, only two, that we think are not covered, and these are the deportation of an alien for reasons of mental illness or deficiency, where he has become institutionalized for that reason, or deportation on grounds that he has become a public charge. These two areas would not be enforced against refugees if the protocol were in force.

In examining the legislative history of the Convention and Protocol and the considerations taken into account before its passage by the Senate, the Board felt that in the absence of more compelling proof, the Senate did not intend that the Protocol would radically alter the provisions of the Immigration Act. The Senate was told and presumably concluded that the only refugees who by reason of Article 32 would no longer be deportable under Section 241(a)³⁹ of the Act would be those aliens lawfully in the United States who had become institutionalized because of mental illness or who had become public charges under Section 241(a)(3)⁴⁰ and Section 241(a)(8)⁴¹ respectively. The BIA rejected the notion that the Senate wished to preclude deportation in the case of an alien refugee who lawfully entered as a nonimmigrant and remained unlawfully.

The Board next considered the effect of the Protocol and Convention, particularly Article 1 (defining "refugee") and Article 33, upon Section 243(h). Dunar's counsel contended that these provisions affected not only the burden of proof upon Section 243(h) and the breadth of its coverage, but also the nature of the determination the Attorney General is permitted to make thereunder.

On the issue of burden of proof, 8 C.F.R. 242.17(c) provides that the respondent must satisfy the immigration judge that he would be subject to persecution on account of race, religion, or political opinion as claimed. The courts have sustained the Board's view that the alien has the burden of presenting evidence showing a "clear probability of persecution."⁴² Dunar's attorney contended

³⁸S. EXEC. K, 90th Cong., 2d Sess. at VIII.

³⁹8 U.S.C. 1251.

⁴⁰8 U.S.C. 1251(a)(3).

⁴¹8 U.S.C. 1251(a)(8).

⁴²See *Cheng Kai Fu v. INS*, 386 F.2d 750 (2d Cir. 1967), cert. denied, 390 U.S. 1003; *Rosa v. INS*, 440 F.2d 100 (1st Cir. 1971); *Lena v. INS*, 379 F.2d 536 (7th Cir. 1967); *Hamad v. INS*, 420 F.2d 645 (D.C. Cir. 1969).

that under Articles 1 and 33, an alien would now only need to show that he has a "well-founded fear of being persecuted." This change in terminology according to Dunar's counsel would relieve his client of the burden of showing a clear probability of persecution. The primary test would be the alien's own state of mind.

The requirement of "well-founded" fear eliminates a purely subjective apprehension, as fear that is illusory, neurotic, or paranoid would not be "well-founded." The Ad Hoc Committee which framed the provision stated:

The expression "well-founded fear of being the victim of persecution for reasons of race, religion, nationality or political opinion" means that a person has either been actually a victim of persecution or can show good reason why he fears persecution.⁴³

Generally, objective evidence will be needed. If the claimant's testimony is the only evidence offered and if accepted as true, it must present a realistic likelihood that he will be persecuted. If there is only a conjectural possibility of persecution, the fear will not be deemed "well-founded."

Nothing in the Senate proceedings indicated, according to the BIA's research, that accession to the Protocol would radically affect Section 243(h). The Secretary of State's letter to the President made one brief reference to Section 243(h):

As stated earlier, foremost among the rights which the Protocol would guarantee to refugees is the prohibition (under Article 33 of the Convention) against their expulsion or return to any country in which their life or freedom would be threatened. This article is comparable to Section 243(h) of the Immigration and Nationality Act, 8 U.S.C. 1254 (sic), and it can be implemented within the administrative discretion provided by existing regulations.⁴⁴

With the removal of the requirement in October, 1965 that the persecution be "physical," Mr. Dawson, the State Department's witness, said that one obstacle to our accession was removed.⁴⁵ Mr. Dawson was asked by Senator Sparkman if there was anything in the Protocol that conflicted with our existing law. It is noteworthy that Mr. Dawson made no mention of Section 243(h) in relation to Article 33. When it accepted the Protocol, the Senate had no notion that it would drastically alter Section 243(h) and the interpretation given to it by the Board of Immigration Appeals and the courts.

Section 243(h) recognizes persecution on the three grounds of race, religion, and political opinion. Articles 1 and 33 expand Section 243(h) by two more classes: "nationality" and "membership of a particular social group." Article 1 defines a refugee in terms of persecution on any of the five grounds, without further explaining the term. Article 33 makes no mention of persecution but forbids expulsion of a refugee to a place where his "life or freedom" would be

⁴³United Nations Economic and Social Council, Report of the Ad Hoc Committee on Statelessness and Related Problems, February 17, 1950, at 39 (E/1618;E/AC.32/5).

⁴⁴S. EXEC. K, 90th Cong., 2d Sess. at VIII.

⁴⁵S. EXEC. REP. No. 14 90th Cong., 2d Sess. at 9.

threatened because of any of the five grounds. These apparent differences are clearly reconcilable.

In Section 243(h), Congress intended to shield aliens from the actions of their government which would single them out for punitive treatment, not due to their individual misconduct but solely because they are members of dissident or unpopular minority groups. The inclusion of the two new classes within the ambit of Section 243(h) is clearly compatible with the beneficent purposes underlying that provision.

Article 33 deals in terms of threat to life or freedom on account of any of the five enumerated reasons. These threats would also constitute subjection to persecution within the purview of Section 243(h). In *Dunar v. Hurney*,⁴⁶ the Court of Appeals construed Section 243(h) to encompass economic sanctions sufficiently harsh to constitute a threat to life or freedom. The Board felt that there was no substantial difference in the coverage of section 243(h) and Article 33 and that any distinctions in terminology could be reconciled on a case-by-case basis.

Does Article 33 compel a change in the nature of the determination which the Attorney General may now make under Section 243(h)? Section 243(h) gives the Attorney General discretionary latitude in reaching his decision. Article 33 is mandatory in its directive that "No contracting State shall expel or return a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened. . . ." Except where the alien constitutes a security threat to the host nation or has been convicted of a serious crime, Article 33 seems not to be discretionary as is Section 243(h) where the Attorney General is "authorized" to withhold deportation and refers only to his "opinion." The cases have construed Section 243(h) as giving the Attorney General a "broad discretion" to withhold deportation.⁴⁷

The humanitarian values of Section 243(h) distinguish it from other provisions of the Act where the Attorney General is given power, in his discretion, to grant relief to aliens who meet the proscribed eligibility requirements. The aliens under these sections of the law must show themselves statutorily eligible for the relief requested. The Attorney General then may grant or deny in the exercise of administrative discretion. The cases are many that even where statutory eligibility is met, the relief may still be denied as a matter of discretion.⁴⁸

Section 243(h) speaks of the use of the Attorney General's discretion, yet the BIA knew of not a single case where the alien has established the clear probability that he would be persecuted and that the relief of Section 243(h) had been denied as a matter of administrative discretion. The brief of the Service's ap-

⁴⁶297 F.2d 744 (3rd Cir. 1962).

⁴⁷*Muskardin v. INS*, 415 F.2d 865 (2d Cir. 1969); *United States ex rel. Dolenz v. Shaughnessy*, 206 F.2d 392 (2d Cir. 1953).

⁴⁸*See Hamad v. INS, supra, Hintopoulos v. Shaughnessy*, 353 U.S. 72 (1957).

pellate trial attorney in *Dunar* case felt it highly probable that when the cases referred to the Attorney General's "broad discretion" under Section 243(h), they were referring to the manner in which the Attorney General arrived at his opinion and the limited scope of judicial review, rather than the eligibility-discretion dichotomy. In *United States v. Shaughnessy*, referred to above, the Court stated:

. . . That section modified the language of the former statute in a manner which shows clearly, we think, that the withholding of deportation in cases where the alien fears persecution rests wholly in the administrative judgment and "opinion" of the Attorney General or his delegate. The courts may not substitute their judgment for his. Doubtless a court might intervene to stay deportation, if the Attorney General or his delegate should deny the alien any opportunity to present evidence on the subject of persecution or should refuse to consider the evidence presented by the alien. But we see nothing in the statute to suggest that the courts may insist that the Attorney General's opinion be based solely on evidence which is disclosed to the alien. In his official capacity the Attorney General has access to confidential information derived from the State Department or other intelligence services of the Government which may be of great assistance to him in making his decision as to the likelihood of physical persecution of the alien in the country to which he is to be deported. We believe Congress intended the Attorney General to use whatever information he has. To preclude his use of confidential information unless he is willing to disclose it to the alien would defeat this purpose. Moreover, the very nature of the decision he must make concerning what the foreign country is likely to do is a political issue into which the courts should not intrude. . . .

In his brief in *Dunar*, the appellate trial attorney pointed out that:

In actual practice there has been no case under Section 243(h) in which it has been held that the Attorney General's discretion dictated the deportation of an alien to a country where there was a well-founded reason to believe that he would be persecuted. If such a contingency were to arise, it is inconceivable that it could arise in anything other than the context permitted under paragraph 2 of Article 33, namely, national security or danger to the community.

The Board concluded in *Dunar* that Article 33 had effected no substantial changes in the application of Section 243(h) in manner of arriving at decisions, coverage or by way of burden of proof. The case was remanded to the immigration judge to permit further proceedings because of new evidence submitted by the Department of State's Office of Refugee and Migration Affairs, without which *Dunar* would have been dismissed.

Another BIA case relevant to our discussion is *In re Chukmerije*, (interim Decision No. 2453, decided in November, 1975). The issue was whether the United States was compelled to honor the finding of the delegation in Belgium of the United Nations High Commissioner for Refugees made in 1969 that the respondent was a refugee. The Board held that the U.N. Convention does not provide that a person considered a refugee in one contacting nation must, for that reason, be also considered a refugee in the other signatory states.

Views of the Federal Judiciary

From these major decisions of the Board of Immigration Appeals, let us turn our attention to the few cases where the federal judiciary has considered the

effect of Articles 32 and 33 of the Convention upon Section 243(h). Generally, the federal courts have affirmed the BIA's *Dunar* decision.

In *Kan Kam Lin v. Rinaldi*⁴⁹ the court held that it was "patently clear" that if the plaintiffs were not lawfully in the United States, they took nothing from the terms of the treaty. The fact of illegal presence was established at the administrative hearing. Plaintiffs contended that the term cannot be defined as "lawfully in the territory pursuant to the immigration laws of that territory" since it would render the Protocol nugatory for an alien legally here would not need to claim asylum. The court simply asserted that individuals lawfully but temporarily present in the territory could apply for asylum under the terms of the Protocol. As an example, it cited alien seamen who, while their ship was in port and before the 29-day period had elapsed, could apply for the benefits of the Protocol.⁵⁰ The court viewed the matter from a practical viewpoint and considered the fact that the present immigration laws and quotas imposed by the United States government would be "devastatingly affected" if aliens should be granted asylum on the basis of possible persecution with no regard to the legality of their entry.

On November 27, 1973, the case of *Ming v. Marks*⁵¹ was decided favorably to the Immigration Service. The court, upholding the position of the immigration served, felt the immigration laws of the United States were determinative of whether or not an alien's presence here was lawful. It did not agree that the treaty would be a nullity because, as plaintiffs contended, most refugees are in this country illegally due to their desperate situations. Unlike the government, plaintiffs could offer no historical, legislative support, or legal precedent for their position. The court concluded that the Contracting States did not intend to protect refugees who unlawfully entered the country. Each of the plaintiffs, the court noted, had a period of legal status in this country when they could have made claims under the provisions of the Convention and they did not do so.

An issue was raised whether or not the Immigration Service could handle last minute requests for asylum without consulting the Department of State which is the normal practice. On this the court's opinion declared:

It should be noted . . . that while due process certainly requires that an alien receive full opportunity to present his claims, there is nothing in either the Convention or laws of this country which dictates that the State Department must be the final arbiter of all claims for refugee status. Thus, the mere fact that the Service, rather than the State Department, reviews an alien's claim would not appear to be objectionable in itself.

In affirming the decision below in *Ming v. Marks*, the Court of Appeals noted that the denial of the applicability of Article 32 was supported by Article 31. Under Article 31, it is possible for the refugee's status to be regularized even

⁴⁹361 F. Supp. 177 (D.N.J. 1973), *aff'd*, 493 F.2d 1229 (3rd Cir. 1974), *cert. denied*, 419 U.S. 874 (1974).

⁵⁰See 8 C.F.R. 252.1(d)(1).

⁵¹367 F. Supp. 673, *aff'd*, 505 F.2d 1170.

if he initially entered the territory illegally. Conversely, a lawfully admitted refugee might subsequently be found to be unlawfully in the territory as was the case here, where appellants were admitted for a limited period of time as nonimmigrant crewmen.

The Circuit Court did not consider that the decision below rendered the treaty a nullity without benefit to refugees. It viewed Subsection 2 of Article 31 as giving protection insofar as it provides that "Contracting States shall allow such refugees a reasonable period and all the necessary facilities to obtain admission into another country." Paragraph 1 of Article 33 would not permit the United States to return a refugee unlawfully here to a country where the refugee would be persecuted. This is supported by the express terms of Section 243(h) of the Act. Furthermore, failure to be covered under Article 32 of the Convention does not prevent a refugee from seeking other relief as under Section 203(a)(7).⁵²

In the case of *Yan Wo Cheng v. Rinaldi*,⁵³ the District Court of New Jersey was asked to examine the right of asylum created by the Service's Operations Instructions. The court viewed the Service's O.I.s as internal directives creating no right of asylum but simply setting forth instructions for implementation of the right of asylum granted by Section 243(h) of the Act, the Treaty Protocol and the Secretary of State's policy statement of January 4, 1972. Any change in these internal directives would not injure plaintiffs' rights to due process consideration of the claims they presented.

Summary

The 1951 Convention and the 1967 Protocol Relating to the Status of Refugees appear to have had little effect upon Section 243(h) of the current Immigration and Nationality Act. It is quite unusual to witness an alien being deported as a public charge or as a mental defective, the only classes of deportable aliens who might benefit by the Convention and Protocol.

In practice, an alien who has established a well-founded fear of persecution, has been accorded the benefits of Section 243(h). In some ways interpretation of Section 243(h) goes beyond that of the United Nations treaty. For example, severe economic deprivation (where an alien has been deprived of any means to earn a living) has been held to characterize an alien's possible treatment as persecution, whereas Article 33 refers to threat to "life and freedom" only.⁵⁴

Section 243(h) is expanded by the Convention in that there are two more categories of possible persecution, i.e., nationality and membership of a particular social group. This is not expected to enlarge any "rights" had under Section 243(h). The net effect of the Convention and Protocol upon current immigration law and its manner of dealing with claims for asylum appear to be very limited.

⁵²8 U.S.C. 1153(a)(7).

⁵³389 F. Supp. 583 (1975).

⁵⁴See *Dunar v. Hurney*, 297 F.2d 744 (3rd Cir. 1961).

Epilogue

Requests for asylum are accelerating rapidly. Each claim must be decided on its merits. Many attorneys will admit that the claims they are presenting are frivolous, but that they are gaining additional time in the United States for their clients while the claim is being considered. Where the same fact situations come up repeatedly, the claims are still made despite unmistakably clear decisions by competent tribunals deciding against the claims being advanced. The use of a claim to asylum as a "stall tactic" is professionally irresponsible. By inundating the adjudicating officers with unnecessary claims, they might be provoking a cynicism in the viewing of all these claims as being without merit. The potential for disaster when a valid claim is made is obvious. The Department of State would be able to devote more of its investigative resources to cases that may be meritorious if it did not have to spend time checking the dilatory claims.

It is important for applicants requesting asylum to be provided with an attorney to assist in properly presenting a claim. Oftentimes, the applicant is detained by the Immigration Service. Without resources or knowledge of our laws or legal system, it seems unjust that an alien requesting asylum must do so without the aid of counsel. Rarely are the stakes as high as they are when a person is facing a possibility of grave bodily harm or death as in the case of the sincere applicant for asylum. The right of an alien to have counsel of his own choosing at no expense to the government too frequently is chimerical.

Because of the many implications involved—not the least of which is political—the relief available in Section 243(h) of the Act and in the 1951 and 1967 United Nations Treaty will become available to only a very small number of aliens in this country.

