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Deportation and the Refugee

Elwin Griffith*

Long ago when it was unnecessary to restrict the number of aliens entering the United States, there was little distinction between refugees and other immigrants. Both groups shared similar motivations and problems. Some immigrated solely for economic reasons, while others sought new horizons because of political or religious persecution at home. In the main, though, the desire to immigrate was nurtured by the yearning for a better life.

After a time, however, the United States imposed numerical restrictions on immigrants and, therefore, refugee status assumed added importance.¹ Since 1948, Congress has enacted special measures to accommodate refugees.² The 1965 amendments to the Immigration and Nationality Act (INA), in particular, solidified the refugee's place within the statutory scheme, allowing the conditional entry and subsequent permanent status of refugees who came from certain parts of the world.³ The Refugee Act of 1980 made further refinements,⁴ streamlining the admissions process for political refugees⁵ by providing a systematic plan for the immigration of those aliens for whom the United States has some special humanitarian concern.

The framers of the Refugee Act, however, could not foresee a constant stream of refugees from the Caribbean area and did not prepare the United States to deal with the wave of Cuban and Haitian entrants which peaked only after the Act's passage. The Haitians in particular pose a legal quandary, raising squarely the meaningfulness of the distinction between aliens fleeing political oppression—who benefit from U.S. refugee and asylum law—and aliens fleeing economic deprivation, who are not likely to qualify as statutory refugees or asylees.⁶ But the Cuban-Haitian situation points up a more general, though perhaps less emotional, issue: the problem of dealing with aliens who assert their eligibility for special treatment not as refugees during the visa process at an overseas U.S. consulate, but as refugees within the United States in exclusion or deportation hearings.

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In the past, conditional entry visas⁷ and the attorney general's parole power⁸ were available to bring in refugees from abroad; the 1980 Refugee Act formalized the admissions process for refugees by according them a precise status under the immigration laws. A welter of policy statements and INS regulations formerly governed asylum applications made within the United States, and the Refugee Act of 1980 established a regularized statutory foundation for these too.⁹ But aliens afraid to return to their homeland have also been able to raise this fear in deportation proceedings, and still can, after the 1980 Act. Neither the new asylum provisions nor the refugee admission provisions supplant section 243(h) of the Immigration and Nationality Act, which formerly authorized, and now requires, the attorney general to withhold deportation if an alien shows that expulsion will lead to dire consequences for him or her back home.¹⁰ This article discusses section 243(h) as a part of U.S. refugee law, as it has evolved over the years into a means of relief for the alien on the brink of expulsion from the United States.

BACKGROUND: THE NEED FOR A WITHHOLDING OF DEPORTATION PROVISION

When the Immigration and Nationality Act was amended in 1965, a preference system was established which included refugees in the statutory scheme. Seven preference categories allocated the total of 170,000 available visas;¹¹ 6 percent of the total were reserved initially for the seventh preference category, but this number was increased in 1978 to 17,400 annually. Aliens were admitted under the seventh preference for "conditional entry."¹² These conditional entrants were refugees of two types: aliens who had fled Communist, Communist-dominated, or Middle Eastern countries because of persecution or fear of persecution,¹³ and aliens who were displaced by some natural catastrophe.

Another immigration route for refugees was INA section 212(d), which authorized the attorney general to admit refugees under emergency conditions or for reasons deemed in the public interest.¹⁴ Aliens paroled into the United States under this authority were known as parolees. Like conditional entrants, they were technically not legal residents and were deemed not to be "within" the United States. Thus they remained subject to exclusion, rather than deportation, until their status was adjusted. However, they could stay as long as the emergency existed which gave rise to their admission.¹⁵ Parole was a rather flexible device for the admission of aliens who might be inadmissible otherwise.¹⁶ Theoretically, the parole provision was used to counterbalance other refugee provisions which operated in favor of those fleeing Communist territory. In practice, however, a

significant number of parolees came from Communist countries.¹⁷ With the introduction of the conditional entry provision in 1965,¹⁸ Congress intended that parole should be available only on an individual basis; in this respect it impliedly rejected parole as a supplementary means for the admission of groups of refugees who could not fulfill the normal statutory requirements for immigrants.¹⁹

Conditional entry and parole were the appropriate vehicles for aliens seeking refuge from outside the United States. Since 1980 the vehicle has been admission as a refugee. Sometimes, though, aliens already within U.S. borders are afraid to return to their homelands. Upon the expiration of their authorized stay, they would prefer to remain in the United States. Yet, remaining without permission, or other events—for example, conviction of a serious crime, illegal entry across the border, engaging in subversive activities, membership in the Communist party—subjects aliens to deportation.²⁰ Deportation proceedings, however, do not inexorably result in expulsion. INA section 243(h) may provide the alien the relief he or she desires.

SECTION 243(h) BEFORE THE 1980 REFUGEE ACT

Before 1950 there was nothing in the immigration law providing for the deferment of deportation if an alien feared persecution at his or her destination. It was clear that something had to be done to deal with this situation. In 1950 a provision was enacted which required the attorney general to suspend deportation upon a finding that the alien would be subject to physical persecution on return to his or her native land.²¹ If the alien raised a persecution claim, the attorney general had to make a fact determination that the alien would not be subject to persecution if deported. Section 243(h), as originally written into the Immigration and Nationality Act in 1952, merely authorized, rather than required, the attorney general to suspend deportation if the physical persecution requirement was met.²² This discretionary approach had more to do with the limited judicial review and the function of the attorney general in assessing the likelihood of persecution than with the possibility of the attorney general's rejecting a claim if the probability of persecution was proved. However, the original section provided rather narrow relief; the alien had to show the possibility of torture, or even of death, to meet the physical persecution test,²³ although some courts held that depriving an alien of all means of earning a livelihood would constitute physical persecution.²⁴ In 1965, Congress deleted the word "physical" and authorized the attorney general to withhold deportation if the alien would be subject to persecution on account of "race, religion, or political opinion."²⁵ The deletion of the word

"physical" convinced some courts that experiencing substantial economic disadvantage was sufficient to invoke the statute.²⁶ In any event, the amendment broadened the provision's application,²⁷ obviating the necessity for the alien to show the probability of bodily harm, and permitting courts to emphasize the motivation behind the persecution rather than the results of the oppression.²⁸ A closer look was taken at the grounds underlying the persecution. It was this aspect that would prove troublesome later on because it was soon evident that not every form of persecution would qualify the alien for relief.

The 1965 amendment to section 243(h) did not change the discretionary nature of the relief provided. The attorney general was still authorized, not required, to withhold deportation if the alien would be subject to persecution.²⁹ This language providing for the exercise of discretion seemed to mirror other INA provisions permitting discretionary relief in deportation proceedings.³⁰ These other provisions suggested a two-step process in fashioning a remedy. First, the alien had to establish statutory eligibility, and then the attorney general could exercise administrative discretion either in favor of, or against, the alien.³¹ But under section 243(h), the more apposite approach seemed to be to regard the attorney general's discretion as applying to the entire review of the probability that the alien would be persecuted; if persecution was likely, then the attorney general was expected to withhold deportation.³² In other words, if the attorney general determined that an alien would be persecuted back home, he could not then decide to deport the alien in the face of that determination.

The attorney general could exercise his discretion to withhold deportation only if the alien was within the United States. In this context the word "within" was significant because physical presence was not the same as being within the United States for purposes of the statute.³³ Thus, an alien detained by authorities at the border, or allowed in, pending a determination of admissibility, was not regarded as "within" the United States although he or she was physically present.³⁴ The same problem arose in determining whether the alien had made an "entry" into the United States, a prerequisite of being "within" the country. A parolee or a conditional entrant was unable to take advantage of the pre-1980 version of section 243(h), because he or she was not "within" the United States for the purposes of the statute.³⁵

However, an alien who gained admission through fraud could request protection of the statute because he or she was within the United States, even though illegally. In a word, the alien who was subject to exclusion proceedings because he or she was not "within" the country could not invoke section 243(h) because that section was applicable only to deportation proceedings. And although procedural safeguards are present in exclusion proceedings, they are a creature of statute rather than of the

Constitution. The section 243(h) remedy was therefore just one more example of the difference between the two proceedings.

THE UN REFUGEE PROTOCOL AND SECTION 243(h)

In 1968 the United States acceded to the United Nations Protocol relating to the Status of Refugees, which incorporated by reference the Convention relating to the Status of Refugees.³⁶ These instruments do not require contracting states to accept refugees, but do codify certain minimal protections for aliens.

When the United States became a party to the Protocol, the language of the Convention differed in some respects from the relevant immigration statutes of the United States. Because of assurances that the Protocol would bring about no substantial change in domestic law,³⁷ accession to the Protocol did not result in any change in immigration procedures. However, despite legislative assurances, questions arose about the effect of Articles 32³⁸ and 33³⁹ of the Convention on INA section 243(h). Article 32 prohibits expulsion of a refugee lawfully within the territory of a state, unless the refugee poses a threat to national security or public order; Article 33 prohibits expelling any refugee to a country where his or her life or freedom would be threatened on account of race, religion, nationality, membership in a social group, or political opinion, except if the refugee is a danger to the security of the country of refuge or has been convicted of a serious crime and thus is a danger to the community.

In *In re Dunar*⁴⁰ the Board of Immigration Appeals addressed the Protocol's effect on INA section 241, which provided for deportation, and section 243(h). The alien in *Dunar* had argued that, as a refugee who had entered the United States lawfully, his deportation was precluded under Article 32 of the Convention, which was binding on the United States through its accession to the Protocol. The board viewed the Protocol as a treaty, because it incorporated and supplemented the substantive provisions of the Convention. Thus the Protocol had the same effect as an Act of Congress,⁴¹ and the board needed to determine whether the later Protocol affected the INA. The board looked to the general principle that a subsequent treaty does not repeal an act of Congress unless the two are incompatible and cannot be reconciled.⁴² The board found that the grounds for deportation in section 241 were still operative against a refugee because most of them could be construed as having some basis in national security or public order, the two grounds for expulsion of a refugee allowed under Article 32. Thus, the board held that Article 32 did not prevent a state from deporting an alien who had overstayed his visit of his own accord because he was not at that point lawfully within the United

States.⁴³ The only refugees who benefit from Article 32 appear to be those aliens who would otherwise be deportable under the mental illness or public charge provisions of section 241, for these cannot be characterized as Article 32 exceptions.⁴⁴

Article 1 of the Convention requires an alien, to qualify as a refugee, to have a well-founded fear of being persecuted. The alien in *Dunar* argued that his deportation should be stayed on the basis of Article 33 because of his subjective fear of persecution, an interpretation seemingly inconsistent with the burden of proof previously required under section 243(h), which was that the alien show a clear probability of persecution. The board found that this difference between the Article 33 and established board standards did not provide a firm basis for changing the established burden of proof requirement. *Dunar's* contention that his fear of persecution should be governed by a subjective test was not upheld. Had this argument prevailed, it would have changed the standard applied in previous cases by emphasizing the alien's state of mind rather than an objective assessment of the probability of persecution in the nation of origin.⁴⁵

Section 243(h) applied to persecution on account of "race, religion, or political opinion." Articles 1 and 33 of the Convention include these grounds as well as persecution on the basis of "nationality" and membership of a particular "social group." The five bases of persecution in Articles 1 and 33 were similar to the three set out in section 243(h). Congress intended to protect aliens who were characterized as members of certain unpopular groups. Thus, the board's treatment of the section 243(h) persecution grounds as if they were subsumed under those Articles 1 and 33 certainly promoted the basic objectives of the section. Furthermore, the threat to life or freedom envisaged by Article 33 would also constitute persecution within the meaning of section 243(h). Thus, in *Dunar*, the board was satisfied that the differences in terminology could be reconciled without any difficulty,⁴⁶ thus settling any doubts which existed about the fact that Article 33 did not displace section 243(h).

In ruling against *Dunar*, the board had to determine the nature of the decision that the attorney general was called upon to make under section 243(h), in light of the mandate in Article 33 that a refugee not be expelled to a place where his or her life or freedom would be threatened. Section 243(h) authorized, but did not compel, the attorney general to withhold deportation. Some cases viewed the attorney general's discretion broadly.⁴⁷ The board took the view that the discretion contemplated under section 243(h) was not curtailed by Article 33 because there was no case where the attorney general had denied a stay of deportation to an alien who proved the probability of persecution. Therefore, the board found that Article 33 did not change the application of section 243(h) "either by way of burden of proof, coverage, or manner of arriving at decisions."⁴⁸

The Refugee Act of 1980 resolves most of the issues raised in *Dunar*, as it brings the U.S. definition of refugee in line with that in the Convention and Protocol,⁴⁹ and adopts the Article 33 language in revised section 243(h).⁵⁰ This harmonization should lessen any future tension between section 243(h) and the international obligations assumed by the United States in acceding to the Protocol.

THE 1980 AMENDMENTS TO SECTION 243(h)

Section 203(e) of the Refugee Act of 1980 amended INA section 243(h) in several significant ways. The attorney general is now required, and not merely authorized, to withhold deportation of an alien to a country where the alien's life or freedom would be threatened on account of race, religion, nationality, membership in a particular social group, or political opinion.⁵¹ Thus, the troublesome discretion problem is resolved, and the grounds underlying the threat have been expanded to conform to the provision in the United Nations Convention relating to the Status of Refugees.⁵² Section 243(h) is not available to an alien who has persecuted others or who may have committed a serious nonpolitical crime prior to arrival in the United States.⁵³

Another change brought about by the 1980 amendments to section 243(h) is that relief is no longer limited to deportation proceedings.⁵⁴ The alien may also request relief in exclusion proceedings, which normally apply to aliens who have not gained "entry" to the United States. That change obviates the difficulty of determining whether the alien is "within" the United States or merely physically present. It enables aliens to stake their claims to relief without having to deal with technical distinctions normally applicable to exclusion and deportation. A threat to life or freedom is the same against an alien clamoring for admission in an exclusion proceeding or against one resisting expulsion in a deportation hearing.

CONCLUSION

The Refugee Act of 1980 has wrought order out of chaos. The amended section 243(h) has brought some consistency to the treatment to be accorded to an alien whose life or freedom would be threatened if he or she were deported to a particular country. The admonition not to deport or return such an alien comports with the language of Article 33 of the Convention. In light of the change, it is entirely possible that some aliens who would not have qualified before will benefit now from the new language.

The mere existence of widespread persecution has not been sufficient to

invoke section 243(h). Membership in a particular social group will henceforth provide an additional basis for relief. This might accommodate those aliens who feel threatened because of their identification with a certain segment of society. This expansion of the categories qualifying for consideration will allow for a new focus. However, in another sense, the statute has become more restrictive because there must be threats to life or freedom rather than mere persecution. To the extent that persecution often takes the form of imprisonment, the statute works little change in this respect. Possibly the new language will provide a better basis for adjudicating aliens' claims even when there is no history of political involvement.

Section 243(h) has undergone changes over the years. It has gone from a requirement of "physical persecution" to one of "persecution," and finally to that of threats to "life or freedom." But the effect of these changes will be felt only through judicial and administrative decisions which recognize the intent of this legislative action.

NOTES

¹ The Immigration and Nationality Act of 1952, as amended, controls the admission of aliens. Pub. L. No. 414, ch. 477, 66 Stat. 163 (1952) (codified at 8 U.S.C. §§ 1101-1503 (1976 & Supp. III 1979)) (hereinafter cited as INA).

² See Appendix II, *Review of United States Law*, this volume.

³ Act of Oct. 3, 1965, Pub. L. No. 89-236, § 3, 79 Stat. 912 (1965).

⁴ Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102 (1980) (to be codified in scattered sections of 8, 22 U.S.C.).

⁵ Cf. Parker, *Victims of Natural Disasters in United States Refugee Law and Policy*, this volume, regarding the failure of the Act to provide for nonpolitical refugees.

⁶ See, e.g., Dornis, *Haitian Immigrants: Political Refugees or Economic Escapees?* 31 U. MIAMI L. REV. 27-31 (1976); Note, *Behind the Paper Curtain: Asylum Policy Versus Asylum Practice*, 7 N.Y.U. REV. L. & SOC. CHANGE 107, 121-26 (1978).

⁷ Act of Oct. 3, 1965, 8 U.S.C. § 1153(a)(7) (1976) (repealed by Refugee Act of 1980, § 203(c)).

⁸ INA § 212(d)(5), 8 U.S.C. § 1182(d)(5) (1976) (amended by Refugee Act of 1980, § 203(f)).

⁹ Under the Act, section 208(a), an alien at a land border or port of entry, or physically present in the United States, is an asylee if the attorney general determines that the alien meets the definition of refugee in section 201(a) of the Act. The term "refugee" is defined broadly to conform to the UN Refugee Convention and Protocol: a refugee is a person who is unable or unwilling to return to his country of origin 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." Refugee Act of 1980, § 201(a); Protocol relating to the Status of Refugees, *done* Jan. 31, 1967, 19 U.S.T. 6223, T.I.A.S. No. 6577, 606 U.N.T.S. 267; Convention relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 137.

¹⁰ Refugee Act of 1980, § 203(e) (amending 8 U.S.C. § 1253(h) (1976)).

11 Act of Oct. 3, 1965, § 3, 8 U.S.C. § 1153(a)(1)-(7) (1976) (amended by Refugee Act of 1980, § 203(c)).

12 8 U.S.C. §§ 1151(a), 1153(a) (Supp. III 1979) (amended by Refugee Act of 1980, § 203(a), (c)).

13 The "general area of the Middle East" was defined as "the area between and including (1) Libya on the west, (2) Turkey on the north, (3) Pakistan on the east, and (4) Saudi Arabia and Ethiopia on the south." 8 U.S.C. § 1153(a)(7) (1976) (amended by Refugee Act of 1980, § 203(c)).

14 INA § 212(d)(5) 8 U.S.C. § 1182(d)(5) (1976) (amended by Refugee Act of 1980, § 203(f)).

15 See 8 C.F.R. § 212.5(b) (1980).

16 See C. GORDON & H. ROSENFELD, IMMIGRATION LAW AND PROCEDURE § 2.54 (rev. ed. 1980).

17 About 15,000 Hungarian refugees were admitted as parolees soon after the revolution of October 1956. This was the first time that the parole provision was used to admit a group of refugees. More recently, approximately 46,000 Soviet and Eastern European refugees were admitted under the same provision between January 1977 and April 1979. By far the majority of persons admitted as parolees, however, have been from Cuba (418,000 between 1959 and 1977) and Indochina (205,000 from 1975 to 1979). CONGRESSIONAL RESEARCH SERVICE, 96TH CONG., 1ST SESS., REVIEW OF U.S. REFUGEE RESETTLEMENT PROGRAMS AND POLICIES 10, 30, 32 (Comm. Print 1979).

18 Act of Oct. 3 1965, § 3, 8 U.S.C. § 1153(a)(7) (1976) (repealed by Refugee Act of 1980, § 203(c)).

19 The parole device was intended to give the attorney general the authority to act only in emergency situations on individual petitions, and not for the immigration of classes or groups outside the limits prescribed by law. S. REP. NO. 748, 89TH CONG., 1ST SESS. 17 (1965), *reprinted in* [1965] U.S. CODE CONG. & ADMIN. NEWS 3335.

20 INA § 241(a), 8 U.S.C. § 1251(a) (1976 & Supp. III 1979).

21 Internal Security Act of 1950, ch. 1024, § 23, 64 Stat. 987 (1950) (repealed 1952).

22 INA, Pub. L. No. 414, ch. 477, § 243(h), 66 Stat. 163 (1952) (amended 1965).

23 See *Blazina v. Bouchard*, 286 F.2d 507, 511 (3d Cir.), *cert. denied*, 366 U.S. 950 (1961).

24 *Diminich v. Esperdy*, 299 F.2d 244, 246-48 (2d Cir. 1961), *cert. denied*, 369 U.S. 844 (1962) (deportation not withheld where alien seaman failed to prove he would be subject to persecution in his native country); *Soric v. Flagg*, 303 F.2d 289, 290 (7th Cir. 1962) (refusing to withhold deportation of an alien seaman because of lack of evidence showing the alien would be subject to physical persecution or denial of employment in his native country); *Dunat v. Hurney*, 297 F.2d 744, 746 (3d Cir. 1961) (denial of employment on grounds of religious or political beliefs constitutes physical persecution sufficient to require withholding of deportation).

25 Act of Oct. 3, 1965, § 11(f), 8 U.S.C. § 1253(h) (1976) (amended by Refugee Act of 1980, § 203(e)).

26 *Berdo v. INS*, 432 F.2d 824, 847 (6th Cir. 1970); *Kovac v. INS*, 407 F.2d 102, 107 (9th Cir. 1969).

27 Congressman Richard Poff suggested the proper language by stating:

The clause "physical persecution" is entirely too narrow. It is almost impossible for an alien under an order of deportation to assemble the quantum of evidence necessary to discharge his burden of proof.

111 CONG. REC. 21,804 (Aug. 25, 1965).

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

29 Act of Oct. 3, 1965, § 11(f), 8 U.S.C. § 1253(h) (1976) (amended by Refugee Act of 1980, § 203(e)).

30 For example, the attorney general may suspend an alien's deportation and adjust the

alien's status if the alien meets certain requirements. INA § 244, 8 U.S.C. § 1254(a) (1976). An alien who is under deportation proceedings may also be allowed to depart voluntarily so as to avoid deportation. *Id.* § 1254(e).

³¹ See *Hintopoulos v. Shaughnessy*, 353 U.S. 72 (1957)(denial of alien's petition for suspension of deportation was not an abuse of discretion although the petitioners were eligible for relief under the INA); *Thomaidis v. INS*, 431 F.2d 711 (9th Cir. 1970), *cert. denied*, 401 U.S. 954 (1971) (denial of an alien's application for adjustment of status did not constitute abuse of discretion although the alien was eligible for relief under INA).

³² See *In re Dunar*, 14 I. & N. Dec. 310 (1973); GORDON & ROSENFELD, *supra* note 16, at § 5.16(b).

³³ The Supreme Court stated in *Leng May Ma v. Barber*, 357 U.S. 185, 187 (1958): [O]ur immigration laws have long made a distinction between those aliens who have come to our shores seeking admission . . . and those who are within the United States after an entry, irrespective of its legality. In the latter instance the Court has recognized additional rights and privileges not extended to those in the former category who are merely "on the threshold" of initial entry.

An alien must make an "entry" to be "within" the United States. *Id.* at 186, 188. The term "entry" means any voluntary or involuntary coming of an alien into the United States. See INA § 101, 8 U.S.C. § 1101(a)(13) (1976). A parolee or a conditional entrant could not effect an entry. See also *In re Kotur*, 12 I. & N. Dec. 609 (1968).

³⁴ An alien seeking "entry" at the border may be excludable for many reasons. See 8 U.S.C. § 1182(a) (1976 & Supp. III 1979). They include mental and physical disability, criminal conviction, lack of a job, illiteracy, and subversive activities. There are thirty-three different grounds for exclusion. If an alien was within one of these excludable classes at the time of entry but nevertheless was admitted, he or she can still be deported on the basis that he or she was excludable at entry. Any one of eighteen additional grounds would justify deportation. See *id.* §§ 1251(a) (1976 & Supp. III 1979).

³⁵ See Comment, *Extending the Constitution to Refugee-Parolees*, 15 SAN DIEGO L. REV. 139, 141, 146-47 (1977).

³⁶ Protocol, *supra* note 9; Convention, *supra* note 9. The Protocol took effect with respect to the United States on November 1, 1968.

³⁷ In submitting the Protocol to the president, the secretary of state advised him that "accession to the Protocol would not impinge adversely upon the laws of this country." S. EXEC. DOC. K, 90th Cong., 2d Sess. (1968). Lawrence A. Dawson, acting deputy director of the Office of Refugee and Migration Affairs, in his testimony before the Senate Committee on Foreign Relations, remarked that if the United States acceded to the Protocol, that would encourage "more generous practices on the part of Countries whose approach to refugees is less liberal than our own." S. EXEC. REP. No. 14, 90th Cong., 2d Sess. 7 (1968).

³⁸ Article 32 of the Convention, *supra* note 9, reads as follows:

Expulsion

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 especially 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.

³⁹ Article 33 of the Convention, *supra* note 9, reads as follows:

Prohibition of Expulsion or Return ("Refoulement")

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 threatened 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.

⁴⁰ 14 I. & N. Dec. 210 (1973).

⁴¹ *Id.* at 313.

⁴² *Id.* at 314, citing *Johnson v. Browne*, 205 U.S. 309, 321 (1970) (treaty with Great Britain did not repeal statutes by implication because statutes were not absolutely incompatible).

⁴³ 14 I. & N. Dec. at 318.

⁴⁴ *Id.*; see INA § 241(a)(3), (8), 8 U.S.C. § 1251(a)(3), (8) (1976).

⁴⁵ See *Rosa v. INS*, 440 F.2d 100 (1st Cir. 1971) (affidavits submitted by petitioner held insufficient to meet evidentiary burden); *Hamad v. INS*, 420 F.2d 645 (D.C. Cir. 1969) (alien failed to meet burden needed to prove that he would be subjected to persecution); *Lena v. INS*, 379 F.2d 536 (7th Cir. 1967) (where special inquiry officer found that Greeks in Turkey are permitted to practice their religion, stay of deportation was properly denied to petitioner claiming persecution on religious grounds).

⁴⁶ 14 I. & N. Dec. at 318.

⁴⁷ See *Muskardin v. INS.*, 415 F.2d 865 (2d Cir. 1969) (attorney general has broad discretionary powers under INA which are subject to review only for abuse of discretion); *Kasravi v. INS*, 400 F.2d 675 (9th Cir. 1968) (emphasizing broad discretion of attorney general to grant or deny a stay of deportation); *U.S. ex rel Dolenz v. Shaughnessy*, 206 F.2d 392 (2d Cir. 1953) (use of information by immigration commissioner not disclosed to alien petitioner does not violate due process as power to withhold deportation is exercised solely at discretion of attorney general).

⁴⁸ 14 I. & N. Dec. at 323. See also *Pierre v. United States*, 547 F.2d 1281 (5th Cir.), *vacated on other grounds*, 434 U.S. 962 (1977); *Kashani v. INS*, 547 F.2d 376 (7th Cir. 1977).

⁴⁹ Compare Convention, *supra* note 9, art. 1 with Refugee Act of 1980, § 201 (to be codified at 8 U.S.C. § 1101(a)(42)).

⁵⁰ Compare Convention, *supra* note 9, art. 33(1), with Refugee Act of 1980, § 203(e) (to be codified at 8 U.S.C. § 1253(h)).

⁵¹ Refugee Act of 1980, § 203(e) (to be codified at 8 U.S.C. § 1253(h)).

⁵² Two additional grounds added in section 243(h) are "nationality" or "membership in a particular social group." *But cf.* 57 INTERPRETER RELEASES (American Council for Nationalities Service) 133, 135 (1980):

The amended provision thus both expands and narrows the available relief. On the one hand, the bases for persecution are broadened and relief is made mandatory. On the other hand, the alien must show that his/her life or freedom would be threatened rather than that he or she would be subject to persecution.

⁵³ Refugee Act of 1980, § 203(e) (to be codified at 8 U.S.C. § 1253 (h)). The Office of the United Nations High Commissioner for Refugees has published HANDBOOK ON PROCEDURES AND CRITERIA FOR DETERMINING REFUGEE STATUS (1979) [hereinafter cited as HANDBOOK] which suggests a balancing test for determining whether a crime is a serious nonpolitical crime. HANDBOOK, para. 156.

In *Re Rodriguez-Palma*, Int. Dec. No. 2185 (BIA Aug. 26, 1980), the Board of Immigration Appeals had its first opportunity since the passage of the Refugee Act of 1980 to decide whether an alien had committed a "serious non-political crime." Since neither the Act nor

the Convention defines the term "serious non-political crime," the Board looked for guidance to the UNHCR *Handbook*. The *Handbook* takes a rather straightforward approach by suggesting that a serious crime within this context must be "a capital crime or a very grave punishable act." HANDBOOK, para. 155. However the *Handbook* also suggests balancing the nature of the crime committed and the degree of persecution feared. The Board in *In re Rodriguez-Palma* found that the alien was ineligible for relief, either by applying the balancing test to the nature of the crime and the degree of persecution feared, or simply by considering the nature of the crime itself.

The Refugee Act of 1980 permits the attorney general to waive certain criminal provisions of § 212(a) of the INA in order that the alien may still be eligible for relief. Refugee Act of 1980, § 201(b) (to be codified at 8 U.S.C. § 1157); INA § 212(a), 8 U.S.C. § 1182(a) (1976 & Supp. III 1979). This suggests that in this situation Congress had the balancing test in mind.

In determining whether the crime is political or nonpolitical, some consideration must be given to the motive behind its commission. If the crime is to be characterized as political, there should be a direct connection between the crime and the purported political objectives. HANDBOOK, para. 152. The political aspect of the offense should also outweigh its common law character. It would be difficult, however, to appreciate the political nature of the crime if it involved acts that were particularly cruel or repulsive. In any event, all the circumstances surrounding a particular act should be taken into account in determining whether a crime is nonpolitical. HANDBOOK, para. 157.

⁵⁴ The amended section 243(h) prevents the deportation or return of any alien who meets the section's criteria, whereas the former section affected only aliens "within the United States." The omission of that language in the new section cleared up any lingering doubts about the section's application. Compare Refugee Act of 1980, § 203(e), with INA § 243(h), 8 U.S.C. § 1253(h) (1976). In the regulations dealing with asylum procedures, the following language is used in one of the sections: "Nothing in this part, however, shall be construed to prevent an alien from requesting relief under section 243(h) during exclusion or deportation proceedings." 45 Fed. Reg. 37,395 (1980) (to be codified at 8 C.F.R. § 208.11). See also 45 Fed. Reg. 37,394 (1980) (to be codified at 8 C.F.R. § 208.3), where asylum requests made after exclusion or deportation proceedings have begun are treated as requests to withhold exclusion or deportation under section 243(h).