

9-1-1990

Three Years after Matter of Mogharrabi: Is a "Reasonable Person" Test the Answer to the Confusing "Well-Founded Fear of Persecution" Standard in Asylum Cases?

Michael E. Mangelson

Follow this and additional works at: <https://digitalcommons.law.byu.edu/lawreview>



Part of the [Immigration Law Commons](#)

Recommended Citation

Michael E. Mangelson, *Three Years after Matter of Mogharrabi: Is a "Reasonable Person" Test the Answer to the Confusing "Well-Founded Fear of Persecution" Standard in Asylum Cases?*, 1990 BYU L. Rev. 1123 (1990).
Available at: <https://digitalcommons.law.byu.edu/lawreview/vol1990/iss3/7>

This Casenote is brought to you for free and open access by the Brigham Young University Law Review at BYU Law Digital Commons. It has been accepted for inclusion in BYU Law Review by an authorized editor of BYU Law Digital Commons. For more information, please contact hunterlawlibrary@byu.edu.

Three Years After *Matter of Mogharrabi*: Is a "Reasonable Person" Test the Answer to the Confusing "Well-Founded Fear of Persecution" Standard in Asylum Cases?

I. INTRODUCTION

As long as despotism abounds in the world, the oppressed will continue to seek refuge in self-proclaimed sanctuaries like the United States. Limitations on United States resources and conflicting interests among its citizens, however, dictate that only bona fide immigrants and refugees be permitted to permanently reside within its borders.¹

United States immigration law² prescribes that a refugee is

1. See Bell, *Introduction to the Immigration and Nationality Act*, BASIC IMMIGR. L. 7, 9 (Litigation and Administrative Practice Course Handbook Series No. 373, 1989).

2. Immigration law is the area of law which governs the flow of foreign nationals into the United States and their treatment once there. See generally *id.* at 9, 11 (introducing U.S. immigration law).

United States immigration law has undergone significant changes since its inception when most everyone within its borders was an "immigrant". See generally Calvo, *Overview of Immigration and Nationality*, BASIC IMMIGR. L. 31, 33-35 (Litigation and Administrative Practice Course Handbook Series No. 373, 1989); Note, *The Simpson-Mazzoli Bill: Altering the Policy of Neglect of Undocumented Immigration from South of the Border*, 18 TEXAS INT'L L.J. 347, 353-58 (1983).

A historical sketch of United States immigration law depicts four general phases of development: (1) virtually unrestricted entry, (2) deliberate exclusion of designated groups, (3) immigration quotas based on nationality, and (4) a standardized quota system extending equal immigration opportunities to all countries. See Serviss, *Immigration Law Comes Into its Own*, 75 A.B.A. J. 66, 66 (1989); see also Bell, *supra* note 1, at 9 (1875 law banned prostitutes, criminals and other "undesirables" from entering the United States); Note, *supra*, at 354-55 (legislation passed in 1917 banning Chinese, Indians, and other Asians from immigrating to the U.S.; 1924 act established the "national origins formula" which barred eastern and southern Europeans from entering the U.S.; 1921 Quota Law assigned every nationality "an annual immigration ceiling equalling three percent of the foreign-born persons of that nationality living in the United States in 1910." This law remained virtually unchanged until 1965.).

United States Immigration law today divides foreign nationals ("aliens") wishing to visit, work, live or invest in the United States into two categories: "immigrants" and "nonimmigrants." Wangerin, *A Beginner's Guide to Business-Related Aspects of United States Immigration Law*, 5 Nw. J. INT'L L. & BUS. 844, 848 (1983). "Nonimmigrants" are aliens wishing to enter and remain in the United States temporarily, while "immigrants" are aliens wishing to remain in the United States permanently. However, all aliens seeking entry into the country are initially presumed to intend to stay permanently. Stillwagon & Hendel, *Nonimmigrant Visa Categories: A Basic Overview of Practical Consider-*

one who is unable or unwilling to return to her mother country because she was persecuted or has a *well-founded fear* that she will be persecuted there "on account of race, religion, nationality, membership in a particular social group, or political opinion."³ Many who seek asylum in the United States veritably fear persecution, while some are merely seeking economic relief. The flood of feigned refugees has made it difficult for bona fide refugees to persuade the relevant administrative agency⁴ and appellate courts that their fear is well-founded.⁵

This inability to meet the burden of persuasion is, to a large extent, the consequence of the INS and appellate courts imposing an austere evidentiary burden of proof on the asylee and the prevailing discord among their standards.⁶ The precise meaning of the term "well-founded fear" is the subject of considerable controversy and litigation.⁷

Arguably, courts should be able to exercise some freedom in assessing each asylum case independently on its own merits. However, a practical and common definition of the well-founded fear standard must be established to fill in gaps left by legislation and to educate asylees and those entrusted to help them. In

ations, BASIC IMMIGR. L. 49, 54-71 (Litigation and Administrative Practice Course Handbook Series No. 373, 1989).

Aliens wishing to stay in the United States permanently must acquire an immigrant visa. Understandably, acquiring an immigrant visa is more difficult than acquiring a non-immigrant visa, especially if the applicant is already in the United States. Interagency Task Force on Immigration Policy, *Staff report*, 104-06 (1979) (nonimmigrant visa holder attempting to obtain immigrant visa while in the United States may be deemed as having preconceived intent to permanently reside in the United States, resulting in denial of immigrant visa). To avoid deportation, a nonimmigrant visa holder who wishes to reside in the United States permanently must fall into one of the following five categories: (1) aliens with long residency in the United States, (2) aliens with certain relatives in the United States, (3) aliens with specified employment, (4) aliens with special humanitarian reasons for staying in the United States, or (5) aliens fleeing persecution from their country of origin. See Calvo, *supra*, at 41-43. This last category is one of the most litigated issues in immigration law today and the topic of this note.

3. Refugee Act of 1980, 8 U.S.C. § 1101(a)(42) (1988).

4. The relevant administrative agency here is the Immigration and Naturalization Service (INS). The INS is the federal agency under the Department of Justice primarily responsible for immigration matters. See Bell, *supra* note 1, at 13; see also J. WASSERMAN, IMMIGRATION LAW & PRACTICE 12-38 (3d ed. 1979).

5. See, e.g., Matter of Acosta, Interim Decision No. 2986 (B.I.A. 1985).

6. See Sautman, *The Meaning of "Well-Founded Fear of Persecution" in United States Asylum Law and in International Law*, 9 FORDHAM INT'L L.J. 483, 486-87 (1986).

7. See *infra* notes 33-49 and accompanying text. See generally Note, *The Well-Founded Fear of Persecution Standard in Asylum Proceedings: The Promise of Solace for Refugees After INS v. Cardoza-Fonseca*, 19 LOY. U. CHI. L.J. 217 (1987) (controversy over the "well-founded fear or persecution" standard).

the absence of this working definition, bona fide refugees may be deported to regimes that will subject them to persecution or even death.

In 1987, the Board of Immigration Appeals⁸ (BIA) set forth a definition of the "well-founded fear of persecution" standard in *Matter of Mogharrabi*.⁹ Since then, an increasing number of circuit courts have followed the *Mogharrabi* approach. This note analyzes the BIA's definition and its use in other forums. Part II summarily recounts *Matter of Mogharrabi*, where the BIA adopted a "reasonable person" test in granting an Iranian national's application for asylum. While the BIA set forth four evidentiary elements that an asylee should establish to show that his fear is reasonable or well-founded, it also recognized that an asylee's own testimony might be sufficient to establish this when corroborative evidence is lacking. Thus, as prescribed by the Supreme Court, the BIA's approach includes a primary subjective inquiry and a secondary objective inquiry into the asylee's fear. Part III explores the prospect for a working definition of the "well-founded fear of persecution" standard by first showing how the standard developed prior to *Mogharrabi* and then analyzing the BIA's "reasonable person" approach. Finally, this note concludes that the BIA's approach is currently the most compatible and workable framework for dealing with the "well-founded fear of persecution" standard and should be the basis for future development of the standard.

II. *Matter of Mogharrabi*

A. *The Facts*

Mogharrabi and his wife were Iranian nationals permitted into the United States as nonimmigrant students. The two remained in the United States beyond the authorized time, and proceedings were initiated to deport them.¹⁰ Mogharrabi applied for asylum and withholding of deportation, fearing that he would be persecuted for his political opinion if deported to Iran.¹¹ He based his fear principally on an altercation that he

8. The Board of Immigration Appeals is a quasi-judicial agency within the Department of Justice that hears appeals of selected INS decisions. 8 C.F.R. §§ 3.1-3.8 (1988).

9. Interim Decision No. 3028 (B.I.A. June 12, 1987).

10. *Id.* at 2-3.

11. *Id.* at 3, 12-13.

had with an agent of the Ayatollah Khomeini regime working in the Iranian Interests Section of the Algerian Embassy.¹²

Mogharrabi testified that he and a friend went to the Algerian Embassy to document Mogharrabi's student status, but the agent refused to accommodate them because Mogharrabi did not have originals of the requisite documents.¹³ An argument ensued. The agent grabbed Mogharrabi's friend's neck, and a supervisor had to separate them.¹⁴ The agent then told Mogharrabi's friend that "he and his kind had better keep their eyes and ears open because 'their day' would come soon."¹⁵ Mogharrabi reacted by telling the agent that "he and his kind had robbed Iran of all that was worth living for and that they were nothing more than religious fascists stuffing their pockets with the nation's wealth."¹⁶ The agent then drew a gun and Mogharrabi and his friend ran outside. Mogharrabi testified that the room was full of cameras recording the incident.¹⁷ A witness, who also accompanied Mogharrabi and his friend to the Algerian Embassy but did not go inside, testified that Mogharrabi and his friend were very nervous when they came out of the Embassy and that some people were following them.¹⁸ Mogharrabi maintained that after this incident "he [was] known to Khomeini officials and that as a result he had good reason to fear persecution if returned to Iran."¹⁹

B. The BIA's Holding

The BIA held that Mogharrabi met his burden of showing a well-founded fear of persecution in Iran because "a *reasonable person* in his position would fear that his opposition to [the Khomeini] regime has become known to those who are both in a position, and who have the inclination, to punish him for it."²⁰ Furthermore, the BIA held that given his statements in the embassy, Mogharrabi's fear was on account of his political opin-

12. *Id.* at 12-13.

13. *Id.* at 13.

14. *Id.*

15. *Id.*

16. *Id.*

17. *Id.*

18. *Id.*

19. *Id.*

20. *Id.* at 14 (emphasis added).

ion.²¹ As a result, the BIA granted Mogharrabi's application for asylum.

C. The BIA's Reasoning and Application of the "Reasonable Person" Test

The BIA adopted the "reasonable person" test for three reasons. First, it felt that the test appropriately captured features previously advanced by the courts to explain a well-founded fear of persecution. Second, the test "provid[ed] a 'common sense' framework for analyzing whether claims of persecution are well founded."²² Third, the test was easier to satisfy than a "more likely than not" standard because a reasonable person may well fear persecution even where its likelihood is significantly less than likely.²³

The BIA then judged Mogharrabi's account of the embassy incident to be credible.²⁴ The BIA noted that Mogharrabi, while at the embassy, candidly expressed his political opinions, which were extremely derogatory to the Khomeini regime, and that the Khomeini regime often persecuted those who opposed it.²⁵ Accordingly, Mogharrabi satisfied the BIA's "reasonable person" test, and the BIA consequently granted Mogharrabi's application for asylum.²⁶

D. Asylee's Evidentiary Burden

The BIA presented four evidentiary elements that an asylee should normally show to satisfy the "reasonable person" test:

- (1) the alien possesses a belief or characteristic a persecutor seeks to overcome in others by means of punishment of some sort;
- (2) the persecutor is already aware, or could become aware, that the alien possesses this belief or characteristic;
- (3) the persecutor has the capacity of punishing the alien; and
- (4) the persecutor has the inclination to punish the alien.²⁷

21. *Id.*

22. *Id.* at 10 (quoting *Carcamo-Flores v. INS*, 805 F.2d 60, 68 (2d Cir. 1986)).

23. *Mogharrabi*, Interim Decision No. 3028, at 10.

24. *Id.* at 13-14.

25. *Id.* at 14.

26. *Id.*

27. *Id.* These four elements were originally set forth in a slightly different form in *Matter of Acosta*, Interim Decision No. 2986, at 22 (B.I.A. 1985). *Acosta* held that the

The BIA also recognized the difficulty that many asylees have in obtaining documentary or other corroborating evidence to satisfy these four elements.²⁸ Accordingly, the BIA determined that if such evidence is lacking, the asylee may still meet its evidentiary burden by (1) offering personal testimony which is "believable, consistent, and sufficiently detailed to provide a plausible and coherent account of the basis for his fear,"²⁹ and (2) showing "what has happened to others who are similarly situated."³⁰

In sum, the BIA applied a test which contained both an objective component and a subjective component. The subjective component is the asylee's claim to fear, while the objective component is the reasonableness of his claim to fear. The asylee may satisfy the subjective component simply by claiming to fear persecution. To satisfy the objective component, however, the asylee must show that a reasonable person in his position would also fear persecution. This is done by either satisfying the four evidentiary elements above³¹ with documentary or other corroborating evidence, or if this is impracticable, with credible personal testimony.

standards for withholding deportation and for granting asylum were identical. *Id.* at 23. This holding, however, was overruled by the Supreme Court. *INS v. Cardoza-Fonseca*, 480 U.S. 421, 448 (1987). Consequently, the four *Acosta* elements were modified by the BIA in *Mogharrabi*. The primary modifications consisted of the elimination of the word "easily" before the words "become aware" in the second element and the imposition of a lower burden of proof on asylum applicants for establishing the elements.

28. *Mogharrabi*, Interim Decision No. 3028, at 10.

29. *Id.* The BIA noted that the requirement that the applicant "provide a 'plausible and coherent account' of the basis for his fear" was developed by the International Refugee Organization. *Id.* at 10 n.4.

30. *Id.* at 11. This is especially beneficial when the alien's country of origin has had a history of persecuting its people.

The Fifth and Ninth Circuits maintain that in order to satisfy the subjective component of the standard, an asylee must "prove that his fear is 'subjectively genuine'" by credibly testifying that his fear of persecution is genuine. *Cuadras v. INS*, 910 F.2d 567, 570-71 (9th Cir. 1990); *Blanco-Comarribas*, 830 F.2d 1039, 1042 (9th Cir. 1987); *Guevara-Flores v. INS*, 786 F.2d 1242, 1249 (5th Cir. 1986). However, in the BIA's analysis, credible testimony is used in satisfying the objective component of the standard. See *supra* note 31 and accompanying text.

31. See *supra* text accompanying note 27.

III. PROSPECT FOR A WORKING DEFINITION OF THE "WELL-FOUNDED FEAR OF PERSECUTION" STANDARD

A. Background

Section 243(h) of the Immigration and Nationality Act of 1980³² (the Act) provides that the Attorney General must withhold deportation of an alien who shows it is "more likely than not" that he would be subject to persecution in his native country on account of his race, religion, nationality, membership in a social group or political opinion.³³ In contrast, section 208 of the Act authorizes the Attorney General to use his discretion in granting asylum to an alien who is unable or unwilling to return to his home country because of persecution or a "well-founded fear of persecution" on account of his race, religion, nationality, membership in a social group or political opinion.³⁴

Shortly after the Act was passed, controversy arose regarding the meanings and distinction between the "more likely than not" standard and the "well-founded fear of persecution" standard.³⁵ The BIA and the Third Circuit Court of Appeals maintained that the "more likely than not" standard converged with, and was equal to, the "well-founded fear of persecution" standard.³⁶ The majority of circuits, however, regarded the standards to be different, but disagreed on the degree of difference.³⁷

32. 8 U.S.C. § 1253(h) (1988).

33. 8 U.S.C. § 1253(h)(1) (1988).

34. 8 U.S.C. § 1101(a)(42)(A) (1988).

35. See generally Keener, *Asylum Law: One Year After Cardoza-Fonseca*, 21ST ANN. IMMIGR. & NATURALIZATION INST. 126, 130-31 (Litigation and Administrative Practice Course Handbook Series No. 362, 1988); Sautman, *supra* note 6, at 486-87; Note, *Immigration and Naturalization Service v. Cardoza Fonseca: The Last Word on the Standard of Proof for Asylum Proceedings?*, 13 N.C.J. INT'L L. & COM. REG. 171, 177, 182-83 (1988) [hereinafter *Last Word*]; Note, *supra* note 7, at 222-24.

36. See *Rejaie v. INS*, 691 F.2d 139, 146 (3d Cir. 1982) ("no difference in the . . . burden of proof formulation whether labeled 'clear probability' or 'well-founded fear' of persecution"); *Matter of Acosta*, Interim Decision No. 2986 (B.I.A. 1985); see also *Sankar v. INS*, 757 F.2d 532 (3d Cir. 1985); *Sotto v. United States INS*, 748 F.2d 832 (3d Cir. 1984) (well-founded fear standard does not differ significantly from the clear probability standard). But see *Guevara Flores v. INS*, 786 F.2d 1242, 1249-50 (5th Cir. 1986) (*Sotto* decision constrained by *Rejaie*, but reasoning in both *Sotto* and *Rejaie* was neither persuasive nor decisive); *Carcamo-Flores v. INS*, 805 F.2d 60, 66-67 (2nd Cir. 1986) (based on a number of factors, including the more persuasive reasoning of other courts, "we reject the analysis of the third circuit.").

37. See *Carcamo-Flores v. INS*, 805 F.2d 60, 64 (2d Cir. 1986) (the burden of proof on an alien seeking to qualify under §§ 208(a) and 243(h) is different); *Guevara-Flores v. INS*, 786 F.2d 1242, 1249 (5th Cir. 1986) (well-founded fear of persecution standard imposed on asylum applicants differs from clear probability standard imposed on aliens

In 1984, the United States Supreme Court in *INS v. Stevic*³⁸ determined that in order for deportation to be withheld, an alien must show that he or she would "more likely than not" be subject to persecution if deported.³⁹ The Court stated, in dicta, that this standard was not coterminous with the "well-founded fear of persecution" standard which applied to asylum cases.⁴⁰ However, the Court declined to define the meaning of the "well-founded fear of persecution" standard, due to the apparent ambiguity in its wording.⁴¹

Then in 1987, the Supreme Court determined in *INS v. Cardoza-Fonseca*⁴² that the "more likely than not" standard for withholding of deportation under section 243(h) and the "well-founded fear of persecution" standard for asylum under section 208 were not identical.⁴³ Thus, an asylee "need not prove that it is more likely than not that he or she will be persecuted in his or her home country."⁴⁴ Nevertheless, the Court did not present a definitive approach on how to apply the "well-founded fear of persecution" standard. The Court did observe, however, that the "term 'well-founded fear' demands a particular type of analysis—an examination of the subjective feelings of an asylum applicant coupled with an inquiry into the objective nature of the articulated reasons for the fear."⁴⁵ Although the Supreme Court's decision in *Cardoza-Fonseca* clarified that the standards for withholding deportation and granting asylum are different,⁴⁶ the INS and lower courts are still struggling to develop a work-

seeking withholding of deportation); *Yousif v. INS*, 794 F.2d 236 (6th Cir. 1986); *Youkhanna v. INS*, 749 F.2d 360, 362 (6th Cir. 1984) (clear probability of persecution standard applied only to petitions for withholding deportation); *Bolanos-Hernandez v. INS*, 767 F.2d 1277, 1283 (9th Cir. 1984) (clear probability of persecution required for withholding of deportation, but alien seeking asylum need only establish a valid reason for fear); *Carvajal-Munoz v. INS*, 743 F.2d 562, 574-75 (7th Cir. 1984) (burden on the asylum applicant is similar, but not identical, to that imposed by clear probability standard). Prior to *Mogharrabi*, the Fourth Circuit declined to decide the issue. *Cruz-Lopez v. INS*, 802 F.2d 1518, 1522 (4th Cir. 1986). *But see infra* note 51 and accompanying text (Fourth Circuit subsequently adopts "reasonable person" test).

38. 467 U.S. 407 (1984).

39. *Id.* at 424.

40. *Id.*

41. *Id.* at 430.

42. 480 U.S. 421 (1987).

43. *Id.* at 448.

44. *Id.* at 449.

45. *Id.* at 450 (Blackmun, J., concurring).

46. *See Keener, supra* note 35, at 127.

ing definition of the "well-founded fear of persecution" standard in asylum cases.

B. Analyzing the Mogharrabi Approach

Shortly after the *Cardoza-Fonseca* decision, the BIA, in *Matter of Mogharrabi*,⁴⁷ presented its "reasonable person" test and the requirements to satisfy the test. Under the "reasonable person" test, an asylee can establish that he has a "well-founded fear of persecution" if she can show that a reasonable person in her circumstances would fear persecution if returned to her native country. An asylee can satisfy the "reasonable person" test by presenting documentary or corroborating evidence which shows that (1) she possesses a belief or characteristic that a persecutor wishes to subdue in others by means of punishment, (2) the persecutor knows, or could learn, that she possesses this belief or characteristic, (3) the persecutor is capable of punishing her, and (4) the persecutor has the propensity to persecute her. If documentary and corroborating evidence is unavailable, the BIA's approach permits the asylee to satisfy these four evidentiary elements with her own credible testimony and evidence of what has happened to others who have been in the asylee's position.

The "reasonable person" test in asylum cases has now been embraced by at least five circuit courts.⁴⁸ The "reasonable person" test is currently the most appropriate framework to determine whether an asylee's fear is well-founded, because in general (1) it properly advances the Supreme Court's observations on how the "well-founded fear of persecution" standard should be defined and applied and (2) it provides the most practical and common approach for asylees and practitioners to follow.

47. Interim Decision No. 3028 (B.I.A. June 12, 1987). See *supra* notes 10-29 and accompanying text.

48. See *Cuadras v. INS*, 910 F.2d 567, 570-71 (9th Cir. 1990) ("the 'reasonable person' test used by the BIA . . . includes both the subjective and objective inquiries required by *Cardoza-Fonseca*."); *Figeroa v. INS*, 886 F.2d 76 (4th Cir. 1989) (the Fourth Circuit, which prior to *Mogharrabi* declined to decide the "well-founded fear of persecution" issue, see *Cruz-Lopez*, 802 F.2d 1518, 1522 (4th Cir. 1986), adopts a "reasonable person" test); *John Doe v. INS*, 867 F.2d 285 (6th Cir. 1989); *Guevara-Flores v. INS*, 786 F.2d 1242, 1249 (5th Cir. 1986), *cert. denied*, 480 U.S. 930 (1987); *Carcamo-Flores v. INS*, 805 F.2d 60, 68 (2d Cir. 1986) ("reasonable person" test followed).

1. Advancing the Supreme Court's observations of the "well-founded fear of persecution" standard

First, the Supreme Court observed that the focus of the "well-founded fear of persecution" standard be on the asylee's subjective state of mind.⁴⁹ Simply determining what a hypothetical reasonable person might have feared arguably might not place the focus on the asylee's subjective state of mind because the asylee might not personify a hypothetical reasonable person.⁵⁰ However, by placing the hypothetical reasonable person in the asylee's circumstances and by relying, if necessary, on evidence other than documentary or corroborating evidence, the BIA's approach significantly apprehends the asylee's subjective state of mind. The BIA's exception to corroborating evidence also advances the Court's recognition that the standard substantially conform to the 1967 United Nations Protocol Relating to the Status of Refugees which excuses the asylee from a strict objective inquiry in certain circumstances.⁵¹

Second, the Court also suggested, in dicta, that the "well-founded fear of persecution" standard requires an inquiry into the objective nature of the asylee's reasons for his or her fear.⁵² The BIA's four evidentiary elements embody this objective inquiry.⁵³ An asylee cannot simply claim fear of persecution, but must come forward with any available documents and corroborating evidence to satisfy each of the four BIA elements. Nevertheless, in accordance with the standard's dominant subjective inquiry, it is also possible for the asylee to satisfy the four elements by credible personal testimony.

Third, the Court also stated that an asylee can possess a "well-founded fear of persecution" even when there is less than a fifty percent chance that the persecution will occur.⁵⁴ A test requiring the applicant to show that it is "more than likely" that he will be persecuted is too strict because the applicant must show that there is more than a fifty percent chance that the persecution will occur. However, the BIA's "reasonable person" test

49. See *Cardoza-Fonseca*, 480 U.S. at 431.

50. See, e.g., *Cuadras v. INS*, 910 F.2d 567, 573 (9th Cir. 1990) (Noonan, J., dissenting).

51. See *Cardoza-Fonseca*, 480 U.S. at 436-41.

52. *Cardoza-Fonseca*, 480 U.S. at 450 (Blackmun, J., concurring).

53. See *supra* text accompanying note 27.

54. *Cardoza-Fonseca*, 480 U.S. at 431; see also *Carcamo-Flores v. INS*, 805 F.2d 60, 68 (2d Cir. 1986).

does not require a showing of at least a fifty percent chance; a reasonable person may well fear persecution even where the likelihood that persecution will occur is significantly less than fifty percent. In other words, even if it is "less than likely" that the asylee will actually be persecuted, the asylee can still satisfy the BIA's test by showing that a "reasonable person" in his position might also fear persecution.

Finally, Justice Stevens stated that the "well-founded fear of persecution" standard "can only be given concrete meaning through a process of case-by-case adjudication."⁵⁵ In this process, the judiciary should respect the interpretation of the agency that has been "delegated the responsibility for administering the statutory program."⁵⁶ The INS and BIA are responsible for administering the statutory program governing asylum proceedings. The BIA was fulfilling its duty by presenting its approach to the "well-founded fear of persecution" standard in *Mogharabi*. Therefore, reviewing courts should show a high degree of deference when reviewing the BIA's interpretation of the "well-founded fear of persecution" standard. As previously mentioned, a number of circuit courts have already shown deference to the BIA's "reasonable person" approach.⁵⁷

2. The most practical and common approach for asylum applicants and practitioners to follow

First, the "reasonable person" test provides a common, sensible approach for determining whether an asylee's fear of persecution is well-founded because courts have applied the "reasonable person" standard extensively in civil liability proceedings for over 150 years.⁵⁸ In addition, the BIA's approach significantly lessens the difficulty in determining the state of mind of a hypothetical "reasonable person" by placing the reasonable person in the asylee's position and by requiring the asylee to meet four evidentiary elements establishing the reasonableness of his fear.

Second, the four separate evidentiary elements and direction on satisfying them provides the asylee and practitioner with a practical framework on which to build their case. The practi-

55. *Cardoza-Fonseca*, 480 U.S. at 448.

56. *Id.*

57. See *supra* note 48.

58. For further discussion on the "reasonable person" standard, see W. PROSSER, J. WADE & V. SCHWARTZ, *TORTS*, 149-74 (1988).

tioner can easily create an outline of the BIA's approach that can be used as a guide for establishing the asylee's well-founded fear of persecution.⁵⁹

Finally, while the BIA's focus on the asylee's subjective feelings significantly reduces the asylee's burden of proof and persuasion, the BIA's approach also requires any obtainable, objective corroborating evidence to be presented.⁶⁰ Only when such evidence is nonexistent or unobtainable will the BIA permit the asylee's own credible testimony to satisfy his or her burden of proof.⁶¹ This flexibility complies with the Supreme Court's charge that the focus of the standard be on the asylee's subjective belief, but also appreciates the real predicament in which many asylees flee their country.⁶² Of course, when an asylee must rely heavily or solely on her own testimony, her credibility is plainly crucial.⁶³ The BIA teaches that the asylee's own testi-

59. For example, the practitioner's outline for meeting the well-founded fear of persecution standard under the BIA's approach might look like this:

(1) *Subjective Prong*: Does the asylee claim to fear persecution in her native country on account of her race, religion, nationality, membership in a social group or political opinion?

(2) *Objective Prong*: Would a reasonable person in the asylee's position also fear persecution? In other words, does the asylee have a *reasonable basis* for her fear so as to make it well-founded? The asylee can establish the reasonable basis for her fear by meeting the following four evidentiary elements:

- (a) the asylee possesses a belief or characteristic that a persecutor wishes to subdue in others by means of punishment;
- (b) the persecutor knows, or could learn, that the asylee possesses this belief or characteristic;
- (c) the persecutor is capable of punishing the asylee, and
- (d) the persecutor has the propensity to persecute the asylee.

* These four elements should be satisfied by documentary or other corroborating evidence if available. However, since the focus of the test is on the asylee's subjective belief, if such evidence is unavailable, the asylee can meet the four elements by (1) offering credible personal testimony and (2) presenting corroborating evidence showing that her home country has persecuted others similarly situated.

60. See Rohan, *Evidence in Hearings Before Immigration Judges: Asylum and Withholding of Deportation*, 21ST ANN. IMMIGR. & NATURALIZATION INST. 103, 107-08 (Litigation and Administrative Practice Course Handbook Series No. 362, 1988).

61. See *supra* notes 27-29 and accompanying text.

62. Often asylees flee their country with nothing more than the clothes on their backs. They have no time to gather corroborating evidence which shows a persecutor's inclination to punish them. Moreover, even if asylees do have time to gather their belongings, they usually do not collect evidence of a persecutor's inclination to punish them because either they are not aware of the evidentiary requirements of U.S. asylum law or—due to personal or country status—they are not yet refugees. The former reason is even more plausible given the confusion surrounding the "well-founded fear of persecution" standard.

63. See Rohan, *supra* note 60, at 108; Note, *Credibility Findings in INS Asylum*

mony be as consistent, believable, and sufficiently detailed as possible "to provide a plausible and coherent account of the basis for his fear."⁶⁴ Furthermore, the BIA permits an asylee, who lacks evidence of a persecutor's inclination to persecute her personally, to rely on evidence of "what has happened to others who are similarly situated."⁶⁵ This can be very worthwhile to the asylee and practitioner because countries from which legitimate asylees often flee tend to have a history of persecuting their people. As a result, a variety of sources exist from which the asylee or practitioner can find this evidence.⁶⁶

IV. CONCLUSION

A practical and common definition of the "well-founded fear of persecution" standard in asylum cases must be established to fill in gaps left by legislation, to overcome widespread confusion among the courts, and to educate asylum applicants and those entrusted to help them. If such a standard is not established, many bona fide refugees that possess a "well-founded fear of persecution" could be wrongly excluded or deported.

The BIA, in compliance with Supreme Court guidelines, set forth its "reasonable person" approach for satisfying the "well-founded fear of persecution" standard in *Matter of Mogharrabi*. This approach is currently the most compatible and defined framework for dealing with the "well-founded fear of persecution" standard, and should be the established point for future development of the standard. Failure to develop the BIA's approach in future asylum cases will only result in further confusion among asylees, practitioners, the INS, and the courts.

Michael E. Mangelson

Adjudications: A Realistic Assessment, 23 TEXAS INT'L L.J. 139 (1988).

64. *Matter of Mogharrabi*, Interim Decision No. 3028, (B.I.A. June 12, 1987) at 10. For a good characterization of the issue of credibility findings in asylum cases, see Rohan, *supra* note 60, at 108-10.

65. *Mogharrabi*, Interim Decision No. 3028, at 11.

66. For example, some possible sources include libraries, the State Department, Amnesty International, Americas Watch, National Center for Immigrant's Rights, Inc., and Human Rights Internet. For a small fee (or nominal fee if a pro bono case) most of the above sources will compile the required evidence for the asylee or practitioner. For additional sources and addresses, see Rohan, *supra* note 60, at 112-14.