OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 82-973

TITLE IMMIGRATION AND NATURALIZATION SERVICE, Petitioner v. PREDRAG STEVIC

PLACE Washington, D. C.

DATE December 6, 1983

PAGES 1 thru 49

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IN THE SUPREME COURT OF THE UNITED STATES

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IMMIGRATION AND NATURALIZATION :

SERVICE, :

Petitioner :

v. : No. 82-973

PREDRAG STEVIC :

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Washington, D.C.

Tuesday, December 6, 1983

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 12:59 p.m.

APPEARANCES:

KENNETH S. GELLER, ESQ., Office of the Solicitor General, Department of Justice, Washington, D. C.; on behalf of the Petitioner.

MS. ANN L. RITTER, ESQ., New York, New York; on behalf of the Respondent.

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C O N T E N T S

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P R O C E E D I N G S

CHIEF JUSTICE BURGER: We'll hear arguments next in Immigration and Naturalization Services v. Stevic.

Mr. Geller, you may proceed whenever you are ready.

ORAL ARGUMENT OF KENNETH S. GELLER, ESQ.

ON BEHALF OF THE PETITIONER

MR. GELLER: Thank you, Mr. Chief Justice, and may it please the Court:

The issue in this case is whether Congress, when it passed the Refugee Act of 1980, intended to change the substantive standard that an alien must meet under Section 243(h) of the Immigration and Nationality Act in order to avoid deportation on the ground that he would be subject to persecution.

Although the Second Circuit stated that the matter was not free from doubt, that court held that Congress in 1980 had intended to make a significant change in the substantive standard under Section 243(h). We believe that the Court of Appeals interpretation of the statute is plainly inconsistent with Congress' intent, and that it will create harmful problems for the administration of the immigration laws.

The facts here may be briefly stated. Respondent Stevic came to this country as a nonimmigrant visitor from Yugoslavia in 1976. Respondent stayed here beyond the time authorized in his visa, and he was therefore ordered deported in December 1976, but Respondent at that time designated Yugoslavia as the country to which he wished to be deported. Respondent did not leave the United States as a result of this deportation order; instead, in 1977 he moved to reopen his deportation proceedings, to apply for withholding relief under Section 243(h). Respondent contended that he had recently joined a Serbian anticommunist organization in Chicago and that as a result, he feared he would be subject to persecution on the basis of his political opinions if he were to be returned home to Yugoslavia.

The Immigration Judge and the Board of Immigration Appeals denied the motion to reopen on the grounds that Respondent's application consisted largely of conclusory assertions, and that Respodent hadn't made a sufficient showing that he was likely to be singled out for persecution if he went home to Yugoslavia.

Respondent did not appeal that decision.

In February 1981 the INS again ordered Respondent to surrender for deportation, and he

responded by filing a second motion to reopen his deportation proceedings in order to renew his request for withholding relief under Section 243(h). The Board of Immigration Appeals denied this request in September 1981 saying that Respondent's second motion to reopen was identical to his first, and that he still hadn't submitted -- he still had submitted evidence only of general conditions in Yugoslavia and hadn't provided any direct evidence that he personally would be subject to persecution if he were sent home.

I should add that at no time during the proceedings on the second motion to reopen before the Board of Immigration Appeals, which took place in 1981, did Respondent claim that the Refugee Act of 1980 had changed the substantive standard for judging 243(h) claims.

Now, Respondent sought review of the BIA's denial of the second motion to reopen, and as I said a moment ago, the Court of Appeals held that Congress in 1980, when it passed the Refugee Act, had intended to substantially liberalize the standard that an alien must satisfy under Section 243(h). The Court of Appeals declined to announce what in its view was the proper standard, but it did state that deportation must now be withheld upon a showing far short of the showing that

had to be made prior to 1980.

The Court of Appeals then remanded Respondent's case to the Board of Immigration Appeals for further proceedings under this new but undefined legal standard that the Second Circuit had announced.

Now, I think it would be useful to begin by briefly summarizing the government's position because it is really quite a straightforward one and by going back and discussing at somewhat greater length some of the key points.

For at least the last 20 years, the Immigration and Naturalization Service, the Board of Immigration Appeals and reviewing courts have applied a consistent legal standard in judging applications for withholding relief under Section 243(h). An applicant under Section 243(h) has had to make a subjective showing and an objective showing. The test has required an applicant to show both that he fears persecution or feared persecution in the country to which he would be deported on the basis of one of the statutorily enumerated grounds -- that is the subjective showing -- and that his fear was supported by objective evidence demonstrating a realistic likelihood that he would be singled out for persecution if he were deported.

QUESTION: Aren't there clear probabilities?

MR. GELLER: Well, the terms "clear probability" and "realistic likelihood" have been used interchangeably by the Board of Immigration Appeals and the Court.

QUESTION: So as long as you don't assign any difference to these words, difference in words, that's been a consistent standard.

MR. GELLER: Yes, and I think the Board and the courts have used the words interchangeably over the years, which shows that there is no substantive difference in these catchword phrases. They don't describe the legal standard; they merely refer to it.

QUESTION: Well, one standard, one use of words might declare it a minimum hurdle and another one declare something else.

MR. GELLER: Well, the Board has always taken this to be the minimum standard that the alien must meet. In other words, an alien over the last --

QUESTION: But that's the objective test, is it?

MR. GELLER: Excuse me?

QUESTION: You're saying that the objective test is the one which the Board has said was the minimum.

MR. GELLER: Yes. In other words, over the

last 20 years, an alien has had to show consistently in order to get relief from the Board or the courts that there is some reason to believe he would be treated differently from the mass of his fellow citizens in his home country if he were deported.

Now, prior to 1968 the Board generally referred to this as reasonable likelihood of persecution. As Justice White mentioned, on occasion some courts called it a clear probability of persecution or a reasonable likelihood.

QUESTION: I was just reading it out of your brief.

MR. GELLER: Yes. Well, the courts -- that was a phrase that actually, first of all, was in a court case. The Board had referred to it as a reasonable likelihood of persecution.

The point is that we can't get too caught up, as I think the Second Circuit was, with these catchword phrases. We have to look at the test that the Board was in fact applying over these years because however the standard was denominated, it seems quite clear that the standard I just described was the standard that the Board and the Courts had been following consistently prior to 1968. We don't take anybody to be disputing that. We don't take Respondent or the Second Circuit to

be disputing that it was an appropriate legal standard prior to 1968 under Section 243(h).

QUESTION: Mr. Geller, just as a matter of curiosity, has the Department ever indulged in any empirical evidence that would show what has happened to those who were deported and denied relief?

MR. GELLER: Not to my knowledge, Justice Blackmun.

Now, that was the situation prior to 1968, and as I say, there is no assertion that the pre-1968 standard that the Board and the courts had been applying was in any way incorrect.

There have been two statutory changes since 1968 that will --

QUESTION: May I ask one other question about the pre-1968 situation?

MR. GELLER: Yes.

QUESTION: Does -- what's the government's view as to whether the same standard was applied on deportation as on admission under --

MR. GELLER: The same, the same standard --

QUESTION: The same standard under both.

MR. GELLER: Yes, the same standard was applied under 243(h), which is the withholding provision --

QUESTION: As under 203(a) --

MR. GELLER: As under 203(a)(7) which is -- except that 203(a)(7) obviously had some other ideological and geographical restrictions. But the standard, the eligibility standard, was the same.

Now, there were, as I said, two statutory changes since 1968 that relate to refugees. One was the United States' accession in 1968 to the United Nations protocol related to refugees, and the other was the passage in 1980 of the Refugee Act.

It is the government's position that neither of the statutory changes was intended in any way to alter the substantive standard applied to Section 243(h) relief, so that if the standard was correct, as we take everyone to agree it was prior to 1968, it is still the correct standard today because each time Congress has revisited this area of the law, although it has changed some of the terminology, it has gone on record as saying it didn't intend to make any substantive change in the standard that the Board and the court should apply in judging claims for withholding relief.

Now, we reached this conclusion by the following route. First, when the Senate acceded tc the United Nations protocol in 1968, it did so on the express understanding that it would not alter or enlarge

the substance of our immigration laws relating to withholding of deportation in any way. This is what the Senate was told by the President of the United States. This is what the Senate was told by the Secretary of State and what it was told by a representative of the State Department who was the only witness to testify before the Senate on the hearings that were held on the protocol.

We have --

QUESTION: May I ask you a question about the protocol?

MR. GELLER: Yes.

QUESTION: Mr. Geller, the convention from 1951 requires that the alien have a well-founded fear, that is, be a refugee, and also that the alien's life or freedom would be threatened.

Do those two phrases mean the same thing?

MR. GELLER: I think that the well-found -- the life or freedom would be threatened is simply a synonym for what we had called up until that point persecution, and the well-founded fear goes to the substantive standard that an alien must meet in order to show that he would be persecuted. We don't think that Congress intended either change when it adhered to the protocol, even though the protocol had that different

language, and in fact, the different language, as I will come to, was worked into the Immigration and Nationality Act in 1980 with Congress again saying we don't intend to make any substantive change in the law.

Now, as I was saying, the Senate was explicitly told this by everyone who testified on the protocol in 1968. We have quoted some of that testimony at page 26 of our brief, that Laurence Dawson, who was a representative of the State Department, said, and I quote, "accession does not in any sense commit the Contracting State," the United States, "to enlarge its immigration measures for refugees."

Mr. Dawson also said "Refugees in the United States have long enjoyed the protection and the rights which the protocol calls for, and the United States already meets the standard of the protocol."

And the President told the Senate accession to the protocol would not impinge adversely upon established practices under existing laws of the United States. In fact, there were in fact two provisions of the protocol that could have been taken to have an adverse impact upon our domestic laws. One related to the taxation of nonresident aliens; the other related to the receipt of Social Security benefits. The Senate explicitly reserved as to those two provisions. Its

accession did not cover those two provisions, so there should be no doubt that the protocol would not change our domestic laws in any way. And in fact, as we quote in footnote 28, after those reservations, Senator Proxmire assured is colleagues that with the reservations included, this removes even the slightest possible conflict between federal law and the provisions of the protocol.

All of the representations made to the Senate in 1968 indicated that our immigration laws already included the human provisions of the protocol, and perhaps the best evidence of this, the fact that Congress thought it was simply making a symbolic gesture when it adhered to the protocol, was that there was absolutely no opposition to the protocol. There were virtually no hearings on the protocol, and it passed the Senate unanimously.

We think it was therefore common ground in 1968 that the phrase "well-founded fear of persecution," which appears in the protocol, was not -- was meant -- was thought to mean the same thing as the test that the Board and the courts, whether dominated a realistic likelihood or a clear probability, had already been applying. And in fact, this understanding was completely borne out, if there could have been any doubt

in 1968 itself, this understanding that the phrase was exactly the same was borne out by the administrative practice over the next 12 years because no court, after accession to the protocol in 1968, held that the substantive standard had in any way been changed.

QUESTION: So what this case is all about, in your view, is how one defines the term "well-founded fear of persecution."

MR. GELLER: Well, no. We think what this case is all about is whether Congress, in adhering to the protocol in 1968, or in passing the Refugee Act of 1980, intended in any way by using the phrase "well-founded fear" as a substitute for prior phrases to change the substantive standard that the Board and the court should follow in applying --

QUESTION: But that in turn must be decided, I suppose, upon what Congress meant by using the term "well-founded fear of prosecution."

MR. GELLER: Well, I think in part that is correct, and as I am saying, by adhering to the protocol which included the phrase "well-founded fear," and adhering to it on the understanding that it would not change in any way the substantive law that we had been following up until 1968, we think Congress was obviously saying the phrase "well-founded fear" is the

equivalent.

QUESTION: So the government's quarrel with the Court of Appeals opinion is not saying -- is not that opinion saying that the standard is a well-founded fear of prosecution; its quarrel is with the Court's observation that that standard is a good deal more lenient than the earlier one.

MR. GELLER: Exactly, exactly, and in fact, during the years 1968 to 1980, the courts and the Board used the phrase "well-founded fear of persecution" as a synonym, as a shorthand phrase for the --

QUESTION: It doesn't seem to me tha there is any doubt about what standard the Court of Appeals said governed this case. They said a well-founded fear.

MR. GELLER: The problem is -- there is no doubt that that is now the standard under the Refugee Act. The question is whether that means something different.

QUESTION: Sure, I agree with you. I understand.

MR. GELLER: The question is whether that means something different, and we think Congress explicitly --

QUESTION: But the Court of Appeals didn't leave -- didn't fail to define what the standard was.

MR. GELLER: Well, I think it did because it --

QUESTION: Well, it did. It said well-founded fear is the standard.

MR. GELLER: It failed to give any -- what it said was that the way that the Board and the courts had been applying that standard was erroneous, and it failed to tell the board what the new content of that standard is other than to say it is something less than what you had been doing up until now.

At the moment the Board doesn't -- isn't quite sure what the correct standard is in light of the Second Circuit's decision.

QUESTION: Mr. Geller, the statute, 1253(h), doesn't use the well-founded fear language.

MR. GELLER: That's --

QUESTION: It refers only to the alien's life or freedom would be threatened. In fact, it doesn't refer to refugees.

MR. GELLER: That's true. The Board though, early on, has held -- I don't think there's any dspute -- that the 1253(h) relief is available to people who would meet the definition of refugee, so that someone who --

QUESTION: And you think that even though it

doesn't say it that --

MR. GELLER: Yes.

QUESTION: -- well-founded fear is somehow incorporated in that statute?

MR. GELLER: Yes, because if you can show a well-founded fear, then you would be entitled to asylum relief, for example, under Section 208 of the act, and since withholding of deportation relief is a lesser remedy than granting asylum, it seems logical that Congress couldn't have meant to deport someone who would be in -- who would have -- meet the eligibility standard under Section 208 for asylum. There is no real dispute as to that.

QUESTION: You can get asylum if you are not within the country, can't you?

MR. GELLER: You have to be in the country or at a land border.

QUESTION: At a land border.

MR. GELLER: Or port of entry to get asylum. If you are overseas, you apply for refugee relief under Section 207 of the Act, which also includes this well-founded fear line which we think -- the standard is the same for all through, although under Section 207 and 208, there is an additional discretionary aspect to relief.

That brings us up to 1980 because we think it is clear that until 1980, at least, the standard was exactly the same.

Now, the second essential part of our test, then, is that when Congress passed the Refugee Act in 1980, it again did so on the expressed and often-repeated understanding that it was not intending to make any substantive change in the law. The phrase "well-founded fear" was written into the act for the first time simply for the purposes of clarity, to conform our domestic obligations to the international commitments we had already made in 1968 by acceding to the protocol.

Let me run through this one more time because we think these two steps completely resolve the Respondent's claim in this case.

Prior to 1968, as I said, there was no dispute as to what the correct standard was. There is no claim on the part of Respondent or the Second Circuit that the Board and the courts were applying an incorrect standard.

QUESTION: Well, but Mr. Geller, it is true, isn't it, that the second circuit -- maybe they were wrong -- thought there were two different standards before '68, one for 203(a)(7), or whatever it is, and

the other for --

MR. GELLER: They did feel that. We think they were --

QUESTION: And that was sort of the source of their whole problem. They said we started with two standard, and somewhere along the line they must have been combined.

MR. GELLER: Right, but the initial premise is completely wrong.

QUESTION: But that's the source of their trouble according to your view, I think.

MR. GELLER: Well, that is one of the problems.

One of the problems that I think -- one of the reasons that the Second Circuit had so much trouble with this case, and understanding some of the concepts, I should add, is that this issue was never briefed to the Second Circuit. It was raised, really, in the first time in Mr. Stevic's reply brief in the Second Circuit, and therefore, the Second Circuit delved into this fairly complicated area of the law without any help from briefing from the parties.

The one case that they relied on, the matter of Tan, to justify their asssrtion that 203(a)(7) relief wa different than 243(h) relief, we think for the

reasons we have stated in our brief is clearly erroneous and distinguishable. That was the only Board case that they relied on.

So in any event, in 1968 we acceded to the protocol on the express understanding that there was no change in our substantive law, and in 1980 we incorporated the language of the protocol into the statute for the first time, again only for the purposes of clarity so -- not to -- once again not to make any substantive change in the law.

So if the protocol did not change the law in 1968, it is hard to see how Congress, by using the same phrases, putting it into the law in 1980 for the purposes of clarity, as they said, could be taken to have changed the substantive standard.

And we think that the Second Circuit's contrary conclusion can really only be described as a form of judicial alchemy. Here you have Congress repeatedly saying each time it tinkers with some statutory language, we don't mean to be making any substantive change, and at the end of the process, the Second Circuit tells us that the standard has been completely overhauled.

QUESTION: How did Congress express this view?

MR. GELLER: Well, in the -- I have already read to the Court some of the provisions from the legislative history of the 1968 accession.

QUESTION: Would you say that that absolutely forecloses a court from giving any different meaning to those words?

MR. GELLER: The only issue in this case is the intent of Congress in passing the Refugee Act of 1980, whether it intended to change the substantive standard in this area of the law.

QUESTION: Well, of course, one of the usual inidica of what Congress means is the words it uses in the act rather than a lot of legislative history.

MR. GELLER: Well, well, but the words, the key words here, I assume, would be the well-founded fear language. Those words are not inherently meaningful. They don't have any inherent meaning. They have to be defined. Congress has told us how they -- how they mean to have them defined. They mean to have them defined by continuing the process that the court and the Board have used under prior versions of the law.

Now, I would not normally read to the Court from legislative reports, but here the only question is the intent of Congress in passing the Refugee Act of 1980 and in changing some of the language in Section

243(h).

Congress, in the reports that we have reprinted in our brief at pages 38 and 39, has answered completely, we think, the question before the Court. There is some -- middle of page 138 -- this is from the House report, and I quote, the House says "Although this section," meaning Section 243(h), "has been held by court and administrative decisions to accord to aliens the protection reuired under" the protocol, "the Committee feels it ius desirable, for the sake of clarity, to conform the language of that section to the" protocol.

Now, here is Congress explicitly saying with as much clarity as I think we can expect Congress to speak, that it recognizes that the courts and the Board of Immigration Appeals, have construed Section 243(h) to incorporate the substance of the protocol, even though the protocol uses this well-founded fear language. And here Congress is saying simply for the sake of clarity we are going to put the well-founded fear language into the Immigration and Nationality Act.

This was the portion of the House report that the Second Circuit dismissed as ambiguous. We don't think it's ambiguous at all, and in fact, the Senate report which is reprinted at the top of page 39, is even

less ambiguous. There the Senate is saying to us "The substantive standard is not changed."

Nowhere in the legislative history of the entire Refugee Act has Respondent been able to show even the slightest indication that Congress intended to change the substantive standard under Section 243(h) or that it wanted to tinker with the way the courts and the Board of Immigration Appeals have been applying it.

QUESTION: Mr. Geller, in deciding this case, do we have to say what the standard is, or do we just have to say it hasn't changed?

MR. GELLER: Well, I think you would probably be answering the same question because --

QUESTION: Well, if we say what it is, do we -- is it the same or different as the one described in the United Nations handbook or that handbook that is discussed at some length?

MR. GELLER: Well, it would be inappropriate, I think, for this court to say that that is what the phrase means when Congress when it adhered to the protocol in 1968 said that it wasn't making any change in the law.

In fact, let me answer the question by emphasizing this. For Respondent to prevail in this court, it seems to me he would have to convince the

court of two things, both of these things. First he would have to convince the court that Congress in 1980 meant, without saying so, to change the substantive standard for Section 243(h) relief. We don't think, for the reasons I have already stated, that Respondent can meet that burden.

But if he could, let's assume that the Court were convinced that Congress in 1980 meant to put this well-founded fear language in the statute as the new standard, without any thought as to what the prior standard had been, then it seems to us Respondent would have to convince the Court that the well-founded fear standard is a different substantive standard than the one that had previously been applied up until 1980.

We don't think as to that that Respondent could possibly meet that burden either because to do so, to say that the well-founded fear language is a different substantive standard you would have to ignore the following things. You would have to ignore the fact that, a I said earlier, the Senate in 1968 adopted that language on the express understanding it wasn't changing the substantive standard. You would have to show -- you would have to ignore the fact that from 1968 until 1980 the Board and the reviewing courts were using the phrase "well-founded fear" interchangeably with the clear

probability standard and --

QUESTION: Well, I think I understand all that, but I just really am not sure I got your answer to my question.

Is the standard that you say is the correct one the same or different from the standard described in the Handbook of Procedures that is referred to in your brief?

MR. GELLER: Well, it's not clear what the Handbook of Procedures is. I mean, the handbook of -- the handbook of -- on procedures is in many ways like the Bible. You can find support for any proposition.

For example, paragraph 45 of the handbook on procedures says that an applicant for refugee status must normally show good reason why he individually fears persecution. That seems top us to sound very much like the singling out --

QUESTION: So you say it is the same standard.

MR. GELLER: Well, I'm not sure because --

QUESTION: I just want to know what your posiotion is.

MR. GELLER: I'm not sure what the handbook says the standard is. It is somewhat ambiguous. It seems to us, though, that the handbook was written in

1979. Therefore, it can't inform what Congress must have meant when it acceded to the protocol in 1968. Therefore, we think that for this court to give meaning to the -- the protocol clearly states, Justice Stevens, that there is -- that it is up to each contracting state to decide for itself what a definition of refugee is. There is no internationally accepted definition of refugee that this court could look to. It is up to each contracting state, here, the United States, to decide what the phrase "well-founded fear" means.

QUESTION: Well, I understand all that, Mr. Geller, but my problem is I can follow an argument very easily that says the standard has never changed.

MR. GELLER: Yes.

QUESTION: Then you say yes, but you also have to tell us what the standard is.

MR. GELLER: We think --

QUESTION: And then I ask you, can I look at the handbook to find out what it is, and I don't know what your answer is.

MR. GELLER: Well, because I'm not sure that the handbook gives the right answer. I think the standard is --

QUESTION: Well, so you say you don't know, I gather.

MR. GELLER: No, I'm not saying I don't know, Justice stevens I think that the Court does -- should say what the standard is, but I think it says that by answering the question that the standard has not changed because Congress, each time it changed the language in this area, specifically said we are not meaning to change the standard. The standard was quite clear prior to 1968, and the Board and the Courts have been following that same standard consistently until 1983, except for the Second Circuit's decision in the Stevic case.

So the standard that I set out at the outset of my argument with the subjective and objective test is in fact the standard that --

QUESTION: Well, I would suppose that if we agree with you, all we have to do is to say to the Court of Appeals that, or that as far as we should go, is that you said the standard had changed by the protocol, the Refugee Act, and you were wrong, it hasn't changed.

MR. GELLER: That's precisely right.

QUESTION: And remand the case.

MR. GELLER: That is what we think the relief should be. It should go back to the Second Circuit, which should determine --

QUESTION: Let them figure out what the

standard should be.

MR. GELLER: Well, the standard -- I don't --

(General laughter.)

MR. GELLER: The standard would be clear at that point if this Court agrees with us that it hasn't changed because it was clear until --

QUESTION: Well, I suppose the Court of Appeals must have thought it knew what the old standard was. Otherwise it couldn't have said it had changed.

MR. GELLER: Well, yes. Well, it thought it -- it did know what the old standard was. It did't tell us what it thought the new standard was other than to say that it is something less.

QUESTION: Well, I know, but if you tell them to go back to the old standard, they must have known what that was.

MR. GELLER: Well, I think the old standard is clear. It is the standard that I set out at the outset of my argument, and it hasn't changed, and we think that the appropriate disposition of this case is to send the case back to the Second Circuit to determine --

QUESTION: Well, Mr. --

MR. GELLER: -- Mr. Stevic's case under that --

QUESTION: -- Geller, under the old standard

which you think is clear --

MR. GELLER: Yes.

QUESTION: Can the United States in meeting it establish whole countries or whole categories of people that would meet the standard without an individual applicatin?

MR. GELLER: Yes, and the INS has done that for certain categories. It is very difficult to do with people who are relying on pclitical opinions as the basis, as Mr. Stevic is, for withholding of deportation, but for example, the INS has determined that members of large religious groups in certain countries, for example, are subjected to persecution. We think, though, the case should go back to the Second Circuit to determine whether the Board of Immigration Appeals correctly determined Mr. Stevic's second motion to reopen on the basis of the standard that we submit has always been applied by the courts and by the Board of Immigration Appeals.

Justice Stevens, the problem is that the words "well-founded fear of persecution," like the phrase "clear probability" and "realistic likelihood," have no inherent meaning. They have no meaning in the international scene. They have to be given meaning by each domestic -- each contracting state, and our

position is that the Board was following a clear standard in 1968, and Congress, when it acceded to the protocol which included this well-founded fear language, essentially said we construe the phrase well-founded fear to be identical to the standard that the courts and the board were applying up until then.

So we think that the standard that was applicable prior to 1968 meets the well-founded fear language of the protocol.

QUESTION: I take it the government has not established a categorical view of the members of this particular group from Yugoslavia.

MR. GELLER: Of this group, that's correct. It requires a case-by-case determination.

QUESTION: And in how many areas or countries has the United States established one of these categories?

MR. GELLER: I am not aware of the extent of the categorization, but in fair number, in fact, a handbook was just put out a few months ago to deal with people who are seekng refugee status from Southeast Asia which discusses at great length the catgories that are entitled to refugee status as a matter of law.

Thank you.

CHIEF JUSTICE BURGER: Ms. Ritter?

ORAL ARGUMENT OF ANN L. RITTER, ESQ.

ON BEHALF OF THE RESPONDENT

MS. RITTER: Mr. Chief Justice, members of the Court:

The government would have us believe that this is a matter simply of clarification of language and that it simply is a matter of cosmetic changes having been made to our laws which cosmetic changes don't have any meaning at all.

It's the government's contention that the passage of the Refugee Act of 1980 made no change in the standard an alien must meet in order to have deportation withheld on the ground that he would be subject to persecution in his own country. It is also the government's contention that the standard prior to the Act's passage, which was clear probability of persecution, and the standard subsequent to the passage of the Refugee Act, which was well-founded fear of persecution, are really one and the same, and by mixing up the language and using the different terms indiscriminately, that we might be able to come to that conclusion.

Well --

QUESTION: What did the congressional committees have to say about the change when they made

it?

MS. RITTER: The congressional committee at the time that Section 243(h) was amended, the congressional committee reported that the changes in the Refugee Act had to be construed consistent with the United Nations protocol relating to the status of refugees. Now, the United Nations protocol makes it very clear what their standard was, which was well-founded fear of persecution.

Also, this was referred to just a few minutes ago, but only in part. It would say that the substantive standard is not changed was what had been reported to Congress. In addition to that -- this is on page 39 if the government's brief -- there is a statement, "asylum will continue to be granted only to those who qualify under the terms of the United Nations Protocol Relating to the Status of Refugees, to which the United States acceded in November 1969."

In other words, when the Refugee Act of 1980 was passed, it was the intent, it was the clear intent of Congress that we should follow our obligtions under the United Nations Protocol, and that we should recognize a new standard.

Now, one of the problems is that I don't believe that it was recognized by the Congress that the

old standard had made such a mess of itself, and that is one of the major problems here. The old standard had been -- had grown up through Section 243(h). Originally, Section 243(h) gave to the Attorney General the power to withhld deportation in his discretion if it was found that the alien would be subject to persecution. This discretion to withhold deportation was assumed to me by the Attorney General that they could determine the standard and, since there was no other -- since there was at that time no law giving them any other criteria, that they could just determine the standard by which an alien would not be deported.

The discretion of the Attorney General as enunciated in the very early cases was that there should be a clear probability of persecution and that an alien had to be singled out for persecution in order to avoid deportation.

Now, no matter how you look at it, this language is not the same language that is now used. Why it has continued to be upheld by the government, I really don't know. I tried to point out in my brief some possibility, and that possibility I felt was that we had a peculiar situation. We had adhered to the United Nations protocol in 1969. Under the protocol we had the -- there was a standard set forth for refugees.

That was a person who would be -- whose life or freedom would be threatened if he were to be returned to his own country. There was a -- it was clearly based upon a well-founded fear of persecution.

After we adhered to the protocol, very little was done by the government or by the administrative agencies to recognize their obligations under the protocol, practically nothing. This was in 1968. The Refugee Act was not passed until 1979, I believe, and went into force in 1980.

QUESTION: Well, didn't the INS after '68, in view of what Congress had been -- take the position that there had been no change?

MS. RITTER: Well, that was curious. The matter came up in a case called In the Matter of Dunar. At that time Congress -- pardon? You were talking about the INS/

QUESTION: Yes.

MS. RITTER: Yes. At that time the INS recognized that there was a protocol, and they also recognized that we had a standard which was clear probability of persecution, and it tried to reconcile the two, and in order to reconcile the two, it stated that the protocol was a self-executing treaty, and that therefore it was part of our domestic law.

If this was a self-executing treaty and it was part of our domestic law to justify why we were not following our domestic law, it stated that what we -- and this is very similar to the argument now -- it stted that what we were following was equivalent with almost the same, the same kind of argument that you are hearing today, almost the same, and afterwards I will try to point out why this almost the same kind of thing is very dangerous.

They said that the -- that this was almost the same, and therefore, there was absolutely no conflict for their obligations under the protocol, and that well-founded fear and clear -- which was under the protocol's standard, and clear probability, were in fact the same kind of thing, and therefore, an alien who had asserted rights under the protocol could be deported.

Now, very -- this was all based upon the fact of our considering the protocol a self-executing treaty, and a lot of terrible decisions have arisen out of that. Curiously, very recently in the Federal Register, in order to support the position that the government is now taking regarding detention of aliens, the Immigration Service in the Federal Register is stating that the protocol was a non-self-executing treaty, which of couse would have wiped out Matter of Dunar, and that

the Immigration Service therefore has the power to follow only those provisions of the protocol which have been enacted into law in the Refugee Act of 1980.

Now, I am not discussing that whole thing. The government takes whichever side it feels that it should take and then tries to say that, well, if we call this well-founded fear and it is really clear probability, then they are all really the same.

Now, I would like to, before I go any further, make some statements about the facts of this case because I think that the difference between clear probability and well-founded fear can be highlighted by the facts, by the very facts in the Stevic case and the government has left out some of the facts which I think would throw some light on what the difference is.

Mr. Stevic, as was stated, came to the dUnited States in 1976. He applied for I think an extension. In any case, he came before an immigration judge who gave him the ability to leave the country voluntarily. He was not ordered deported.

Shortly thereafter he married an American citizen. Now, the background of this lady has a bearing on this case. Her father was a national of Yugoslavia originally who had fled Yugoslavia, had gone to Belgium where she was born. She was a United States citizen;

her father was a United States citizen, but they were Yugoslavian by origin and by ethnic affiliation.

At the time that Mr. Stevic married Mirjana Doichin, her father, who was a United States citizen, had returned to Yugoslavia and had been imprisoned, even as a United States citizen, in Yugoslavia for three years. He returned I believe around 1977 or '78 and committed suicide.

At that time, after he married Mirjana, before he ever had any need to assert the fact that the was a refugee, he became involved in the efforts of the -- in the activities of the Yugoslavian community in Chicago. He joined the Ravnagora, which is an organization which is trying to rid Yugoslavia of Communism. He joined other Serbian organizations in the United States, outside of his own country. He became quite active.

Now, this was partially because he was a part of this family, and this was partially because of his own conviction. Mr. Stevic was a philosophy graduate in Yugoslavia. He was not a simple man. He was a complicated man. Perhaps he might have done these things in Yugoslavia, but it would have been very dangerous for him to do that. But certainly at this time, when he did this, he had no reason to believe that he would have been deported because he was married to an

American citizen. He was going to becoming a resident and eventually a U.S. citizen if, you know, by the normal operation of our laws. He had no reason to believe that he would have any repercussion. He had only a reason to believe that in our country he could join these organizations, he could speak out, he could be the kind of person that he would have liked to have been, perhaps, in Yugoslavia, and not be persecuted.

Now, in Yugoslavia there is a very interesting law which we don't have here, so it seems bizarre. It is called hostile propaganda. It is part of the Yugoslavian constitution. Under the Yugoslavian constitution, if I or you or any of us, if we are a Yugoslavian citizen, speaks out against the government in any way whatsoever -- this doesn't mean that I have to write an article in the newspaper or give a speech. I can talk to you as a friend, I can meet with people at private social gatherings. Certainly if I joined an emigre organization avowedly against the government, that is more than is required, but if I do that, under Yugoslavia's hostile propaganda laws, I will be imprisoned if I return to Yugoslavia.

I don't have to do this in Yugoslavia. I can do this outside of the country. I can do this as an emigre. This is what poor Mirja's father did. He

though that he was protected by his U.S. citizenship, which he wasn't, because they considereds him still a national of Yugoslavia.

But I don't have to be in Yugoslavia. I can be anywhere.

Now, even now -- and this is not in the briefs, but I just noticed this in the newspaper about two weeks ago, and I think it is sort of interesting -- there was a Yugoslavian journalist who at private parties talked about the government, and she has now been put in jail for about a year, even now.

These are not laws that are unknown to the U.S. government. There are country reports that are issued every year by the United States government. The information that I am giving you was partially obtained from the U.S. government country reports.

QUESTION: Of course, you are not asking us to apply the standard ourselves, are you? I mean, the Second Circuit didn't do that.

MS. RITTER: Well, pardon me?

QUESTION: You are not suggsting that we apply whatever standard we find is applicable to the facts of Mr. Stevic's case.

MS. RITTER: No. I am saying that his case may shed light on the -- how the different standards can

be applied, and I will finish up the facts of his case in just a moment. The only reason I went into this was because the government skipped from the original order of deportation, which did not happen initially in 1977, but later, after his wife died, to, you know, to the fact that he applied for withholding without indicating what kind of information the government had which, if --

QUESTION: Well, could all of these facts that you are describing meet the government's test as applied befcre 1968?

MS. RITTER: That's the problem. Under the clear probability standard --

QUESTION: Do you concede they could not meet that test?

MS. RITTER: No, absolutely not. Under the clear probability standard, I can -- I must show that I will be singled out for persecution, I will be singled out for persecution. It is not necessarily based upon what happened in my country, what happened to my relatives, what happened to my father or my mother. I must show that -- most refugees, and I am not --

QUESTION: Well, all right, but do you think that the facts in this case show that for Mr. Stevic?

MS. RITTER: That he could not meet the -- yes.

QUESTION: That he would be singled out for persecution?

MS. RITTER: No, he could not. With all of this, with all of this, his facts, not only do I think the Board of Immigration Appeals held they did not meet the clear probability test. That is where the problem is because they would meet the well-founded fear test. For clear probability, I must show objective evidence. I have had this problem with other refugees from countries who left with the clothes on their backs. What can they show, a little execution list? They don't carry that.

What can they show, a -- there is very little that they can show. It is my assertion that a special inquiry officer, a judge, should be able to, using the well-founded fear standard which we adopted by the adoption of the Refugee Act of 1980, should be able to take the subjective situation of an alien, determine whether or not that subjective situation is supported by some objecxtive evidence but not the kind of objective evidence that the government requires now because under the clear probability test, they require what most people cannot produce.

A determination can be made. As a matter of fact, this determination is now required to be made

overseas. The government alluded to a report that had been issued by the Immigration Service. This was in August of this year. It was issued to posts overseas, Immigration Posts overseas to use in determining whc would be qualified for refugee status so that we -- so that the officers who would be interviewing would have some guidance.

There is guidance available, and in the government report it is stated individuals may be determined to be refugees if they have a well-founded fear of persecution based upon one of the five bases named in the Act, race, religious, nationality, membership in a particular social group, or political opinion.

The government apply -- uses the well-founded fear of persecution test which rather than say, well, we don't know what that means, fellows, you will have to decide, it has spent about 50 pages of a report defining what well-founded fear of persecution is. There is guidance.

Now, the definition follows the United Nations handbook that was referred to in many of the briefs. In one part it states that refugee status may be based upon persecution suffered in the past or upon a likely -- the likelihood of future persecution.

Now, it also states that the present of both conditions is now required.

Now, under the singled out for persecution test, it would be necessary to show my background, back where I came from, the fact that I had been persecuted, the possibility of future persecution which would have to be inferred by a person with some understanding of the background who uses the government reports and some understanding of the -- but an intelligent person I think using the guidelines that have been issued by the Immigration Service itself could make a determination of what well-founded fear of persecution would be.

In the clear probabilit test, a person who has nothing but his clothes and who simply says I come from Indonesia, I am a Chinese national, they are burning our stores, they are wiping us out, we are not allowed to work, they are terrorizing cur children, assuming that there is a country report that shows that -- and by the way, over here there is one, or it states that there is one -- assuming that is correct, his own statement under the clear probability test would not have been regarded as enough. Under the new regulations which the government has adopted, it says a statement by the applicant must not be disregarded solely because it is self-serving and that it supports his cwn claim.

Testimony by the applicant is frequently all that is available, and if that testimony is credible, it is sufficient to establish a claim to refugee status. An overall assessment of credibility should be made by the adjudicator, and then it goes on.

Now, we are not talking about an impossibility in applying the new standard which forces us to stick with the old standard because we sort of knew what that was and therefore we sort of know what this is. There are guidelines. It is possible to follow a new standard.

Now, the issue in this case hinges upon whether or not there has been a change. There has been a change. By the government's own admission, we did not regard the protocol as binding, but we do regard the Refugee Act as binding. Maybe we should have regarded -- I spoke at some length about the concept of whether or not it was a self-executing treaty, but the point is that whether or not it wasn't, if we take some cognizance of how the Immigration Service has regarded it, they have regarded it as a non-self-executing treaty right now as of last year, and that they regard the law which put into domestic effect what the protocol tried to have us follow in terms of our regard for refugees, that certainly is a law, and we can say that these are

just cosmetic changes.

These are not comestic changes. These are changes which will -- which have meaning behind them, which have -- which it is possible to judge. I believe that some attention has been paid to the Second Circuit's statement that they did not want to go into what well-founded fear of persecution meant. That might be that if we are bringing into our domestic legislation the standards that we had promised to bring into our domestic legislation by adhering to the United Nations protocol, then there is voluminous information and guidelins, specific guidelines, handbooks of the government, handbooks of the United Nations, that tell us what clear probability of persecution means without the Second Circuit having to write an 80 page decision telling us.

I don't think that that was necessary, but for the government to say that because they said that they wouldn't go into that now, that it was -- you know, that that is a matter that is still left in the large haze is certainly not true.

QUESTION: Ms. Ritter, if the Court should conclude that the two standards are one and the same, is that the end of your case?

MS. RITTER: If you conclude that the two

standards are one and the same, it would appear that would be the end of my case. But it would also mean that we would be giving no recognition whatsoever to the language that we have tried so hard to put into our domestic law.

Now, speaking about that, the government stated that our accession to the protocol was passed with practically no discussion in the Senate. I don't know whether anybody here is aware of it, but the well-founded fear standard in the United Nations convention was developed partially by the United States. Although we did not become signatories to the convention, we were one of the prime instruments in writing that convention. This terminology is something that the United States gave to the United Nations.

Also, in the passage of the 1968 protocol, the language of -- if you read the Senate reports, which I have, the language was modified several times. As a matter of fact, the language in the United States law is broader, broader, gives more rights to refugees than the language in the United Nations protocol. So it can't be that we didn't know what we were doing, that we just sort of said let's do something to adhere to our obligations, let's look like good guys in front of the rest of the world. We didn't have to do that because we

do, we do look good, and we have done a lot of very good things for refugees.

We are talking about one specific area where we are not doing good things and where we should have.

Now, I will just summarize at this point. I just have a few more minutes.

It is my contention that with the passage of the Refugee Act of 1980, the Congress intended to change the standard used for withholding of deportation. Because of that, it amended Section 243(h) and it incorporated for the first time in any of our legislation a definition of refugee which is taken directly from the United Nations protocol definition which we had helped to develop. This is clearly an intention to change our law. We had never had any definition of refugee prior to the Refugee Act.

With this change, we had certain obligations. We had to change our administrative regulations so that the Board of Immigration Appeals would recognize what the changes were. Unfortunately, that did not happen. It has happened recently. It didn't happen immediately.

Now, because it didn't happen immediately, I see no reason to say that because it didn't happen it shouldn't happen. As a matter of fact, it is happening

now. As a matter of fact, the standard that is now being used for determining who should be allowed intc the country and who should not be -- should not be deported is based upon the United Nations standard of well-founded fear of persecution which is now the United States standard, which is well-founded fear of persecution. We knew what we were doing.

It is time for the government to be told what it is the standard is, to be told that it can't say one thing and do something else -- that is what the problem is -- by saying two things are the same. They will do what they have continued to do previously and deny withholding to people who should get withholding based upon what the intention of our domestic law was. We stated that we intended to conform our domestic law with our obligations under the protocol. I would assume that we meant that.

Thank you very much.

CHIEF JUSTICE BURGER: Very well.

Mr. Geller, do you have anything further?

ORAL ARGUMENT OF KENNETH S. GELLER, ESQ.

ON BEHALF OF PETITIONER -- REBUTTAL

MR. GELLER: I would like just to answer the question that Justice Blackmun put to Ms. Ritter. If this court holds, as we think it must, cn the basis cf

the 1980 legislative history that Congress didn't mean to change the standard in 1980, it is not the end of the case. The case will go back to the Second Circuit which will then have to decide whether Mr. Stevic is entitled to withholding of deportation under the standard that has been consistently applied for 20 years. Perhaps he will be.

Ms. Ritter has mentioned some of the compelling circumstances, but if Mr. Stevic is entitled to withholding of deportation, it will be because he is able to meet the showing as thousands and thousands of other aliens have been able to over the last 20 years and not because Congress at any time intended to change the standard, all of the evidences to the contrary.

Thank you.

CHIEF JUSTICE BURGER: Thank you, Counsel.

The case is submitted.

We will hear arguments next in Sure-Tan, Incorporated v. National Labor Relations Board.

(Whereupon, at 1:58 p.m., the case in the above-entitled matter was submitted.)

CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represent an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of the United States in the Matter of:

82-973 - IMMIGRATION AND NATURALIZATION SERVICE, Petitioner v. PREDRAG STEVIC

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BY _____

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