SUPREME COURT, U.S.
WASHINGTON, D.C. 20543

OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 85-782

TITLE IMMIGRATION AND NATURALIZATION SERVICE, Petitioner V. LUZ MARINA CARDOZA-FONSECA

PLACE Washington, D. C.

DATE October 7, 1986

PAGES 1 - 47

ALDERSON REPORTING
(202) 628-9300

IN THE SUPREME COURT OF THE UNITED STATES

- -x

IMMIGRATION AND NATURALIZATION :

SERVICE, :

Petitioner :

v. : No. 85-782

LUZ MARINA CARDOZA-FONSECA :

- -x

Washington, D.C.

Tuesday, October 7, 1986

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:04 o'clock a.m.

APPEARANCES:

LAWRENCE G. WALLACE, ESQ., Washington, D.C.;
on behalf of Petitioner.

DANA MARKS KEENER, ESQ., San Francisco, Cal.;
on behalf of Respondent.

ALDERSON REPORTING COMPANY, INC.
20 F ST., N.W., WASHINGTON, D.C. 20001 (202) 628-9300

C O N T E N T S

P R O C E E D I N G S

CHIEF JUSTICE REHNQUIST: We will hear argument first this morning in No. 85-782, Immigration and Naturalization Service versus Luz Marina Cardoza-Fonseca. Mr. Wallace.

ORAL ARGUMENT OF

LAWRENCE G. WALLACE, ESQ.

ON BEHALF OF PETITIONER

MR. WALLACE: Mr. Chief Justice and may it please the Court:

In June of 1984 this Court held in INS against Stevic that an alien's burden of proving eligibility for withholding of deportation to a particular country under Section 243(h) of the Immigration and Nationality Act is to show that it is more likely than not that the alien would be subject to persecution if sent back to that country.

In the present case, the Court of Appeals for the Ninth Circuit correctly recognized that the Board of Immigration Appeals has consistently taken the position that essentially the same standard, although formulated in various ways, also applies to an alien's burden of proving eligibility for the greater benefit of asylum under Section 208(a) of the Act.

The Court of Appeals, however, rejected the

Board's interpretation and remanded the case for reconsideration by the Board under a standard devised by the Court of Appeals. This Court granted certiorari to resolve a conflict in circuits about whether the Board's interpretation of the statute is a permissible one, entitled to be upheld by the courts.

The Board of Immigration Appeals, whose interpretations are binding by regulation on district directors and other Immigration and Naturalization Service employees, has been recognized by this Court as the expert body whose interpretations of the immigration laws are entitled to judicial deference.

And after this Court's opinion in Stevic and the conflict in the circuits developed, the Board re-examined at some length its position with respect to Section 208(a) in an opinion which we reproduced in the appendix to the petition for certiorari, called Acosta, beginning on page 29A of the appendix to the petition for certiorari and taking up the remainder of the appendix. And I commend that opinion to the Court's attention.

There the Board carefully considered the legislative history of the Refugee Act of 1980, its international law background, the judicial opinions that have commented on it, and, as the Court knows, the Board

determined that its position had been correct all along, and it had good reasons for doing so.

The question is whether the Board's interpretation is a reasonable one that should be upheld, reasonable in the sense that it is not precluded by the statutory language or by the legislative history or by the sense of the statute.

And we submit that there are three categories of reasons why the Board's interpretation is a reasonable one, entitled to judicial deference.

QUESTION: Mr. Wallace, am I correct in understanding that in the Sevic case, whatever it is, the Court assumed the standards were different?

MR. WALLACE: It assumed for purposes of decision, but it expressly left the question open. You know, there is some commentary which suggests the possibility that the standards could be different, and the assumption was made for purposes of decision.

But this is the question that was expressly left open in Stevic.

QUESTION: Mr. Wallace, I'm also concerned by the fact that Congress considered an express requirement that applicants for asylum meet the same standard required for withholding deportation and rejected it. And is that something that we should consider in the

balance here of how much deference to give to the Board's present interpretation?

MR. WALLACE: Well, of course it can be considered, but there were no circumstances connected with that particular incident that indicated that Congress clearly thought a different standard did apply. And it's just part of the legislative background which the Board has considered as a whole.

I don't think there's any one incident that's dispositive. If I can --

QUESTION: At one juncture, at least, the Board didn't think there was any practical or meaningful distinction between probability and well-founded, did it not?

MR. WALLACE: That is still the Board's position. That has always been the Board's position, that a clear probability or likelihood or what this Court called in Stevic more likely than not, three formulations which the Court recognized as equivalent in Stevic, are for practical purposes the same as well-founded fear of prosecution; that while the verbal formulations differ, as the Board put it, for practical purposes the standards converged.

QUESTION: And do you still support the Board?

MR. WALLACE: That is our position. That has consistently been the Board's position. The Court of Appeals stated that that has consistently been the Board's position and correctly cited Board decisions starting in 1973 up through the Acosta case in which the Board has stated that position.

That is the Board's position.

As we see it, there are three categories of reasons why the Board's position is a reasonable interpretation of the statute. The first category is that the Board's position takes a coherent view of these interrelated provisions of the statute, so that they make sense considered as a whole.

It must be remembered that asylum provides greater benefits in two important respects than does what was before the Court in Stevic, the right to withholding of deportation to a particular country upon a proper showing.

In one respect asylum is broader because it grants a right not to be deported anywhere. Somebody who shows that he's entitled to withholding of deportation under Section 243(h) is only granted the right not to be sent back to that particular country. He may still be deported to some other country if there's another country willing to accept him, and that

as a matter of fact is happening with some frequency currently.

There are a number of persons who have been refugees from Afghanistan coming into our country --

QUESTION: Mr. Wallace, could I interrupt you for just a moment. Although it's true, of course, that asylum is a broader right than just the withholding of deportation to a particular country, is it not -- isn't also the converse true, that under 208(a) surviving the threshold to establish eligibility does not establish a right to asylum, but merely a right to have the Attorney General exercise his discretion and decide whether or not to grant asylum?

MR. WALLACE: That is entirely correct, and the Court pointed that out in Stevic. But it should be remembered that this is a highly structured exercise of discretion.

It is not an ad hoc determination about individuals by the Attorney General. In practice, this is an exercise of discretion dealing with more than 10,000 asylum claims per year, an exercise of discretion which is made by the 33 district directors and by the 60 immigration judges whose decisions are reviewable by the Board of Immigration Appeals.

And the discretion is exercised in accordance

with legal standards that are set forth in the Code of Federal Regulations and that have been developed in Board of Immigration Appeals decisions. So that --

QUESTION: Yes, but isn't it true that if your opponent's construction of the statute were taken as correct, that there then could be an opportunity for the Attorney General to decide exactly what standard should govern that newly --

MR. WALLACE: There certainly could, Mr. Justice, and there is a plausible argument to be made that a coherent way of looking at the statute would be to rely on that distinction. That does not mean that the Board's interpretation is not also a plausible, reasonable, coherent way of reconciling the provisions.

And the burden in attacking the Board's interpretation is to show that the Board's interpretation is the one that's precluded. We do not have the burden of showing that that interpretation is precluded.

I concede that it is not precluded, that perhaps the Board could have adopted it. But that is not the question.

QUESTION: Well, do you think, if Congress intended that there be two different standards, it would have been within the Board's discretion to say, well,

we'll just adopt the same standard for both? Do you think that kind of discretion is appropriate for an expert agency?

MR. WALLACE: No. What the Board has determined is whether Congress intended two different standards, a question that is subject to considerable debate.

QUESTION: Do they have any more expertise on a question like that than a court does?

MR. WALLACE: Well, the Board does have expertise on this, because over a period of years it has dealt with thousands of claims that --

QUESTION: Yes, but I mean expertise on what Congress meant, not expertise on handling claims. It surely has that, of course.

MR. WALLACE: Well, it has expertise because the Department of Justice was an active participant in the legislation as it developed. It has had the occasion to study the legislative background against the experience that it has had in applying the standards. It is closely familiar with what the administrative and judicial interpretations were that Congress was acting against the background of.

And it is the sort of question that expert agencies traditionally are recognized to have expertise

about. I mean, the National Labor Relaticns Board is interpreting the National Labor Relations Act constantly, and this Court has deferred tc its expert judgment about the meaning of the Act, which gains content through experience in its administration.

QUESTION: Mr. Wallace, I have a question that's along the same lines. What is the extent of the agency's discretion here?

Suppose we were to hold that there is indeed a difference between well-founded fear and substantial probability? Would it be within the powers of the Attorney General to issue a regulation simply saying that, yes, I have authority to grant asylum tc everycne where there's a well-founded fear, but as a matter of discretion I am only going tc grant it where there is a substantial probability?

MR. WALLACE: We certainly would argue that that would be within the Attorney General's authority. He has discretion under Section 208(a). I'm sure an attack would be made on the validity of a regulation because --

QUESTION: By these Respondents, do you think? Do you interpret the Respondents' as, when they say that this is just a discretionary call, does their interpretation of discretion go that far?

MR. WALLACE: Well, I'll have to let them speak for themselves on that. I'm sure the argument could be made that once the court determined that Congress intended two different standards to apply, it would be an abuse of discretion for the Attorney General to in effect repeal that difference by regulation.

We could argue that his discretion under Section 208(a) should be interpreted that broadly. But of course, it would be a more awkward way for the law to be administered, even if such a regulation were upheld, because then we would be in a position of deporting people to countries where they have shown that they meet the statutory standard of showing a sufficient probability that they would be persecuted in that country, and nonetheless we would be deporting them.

And we don't believe that the law requires the Attorney General to make that call.

QUESTION: Mr. Wallace, if your first answer to Justice Scalia is correct, then the Attorney General would have the power under the statute to adopt a regulation substantially adopting the standard, perhaps saying except in very exceptional cases on a particularized showing or something like that, you must meet the same standard.

What you're basically arguing for here is to

give your client less discretion than your opponent thinks he should have. So it's in kind of a strange position.

MR. WALLACE: Well, we recognize that. But there are virtues in this field of delicate international relations and international obligations to having the Attorney General being able to point to someone's failure to meet the statutory showing that is required in order to qualify for asylum status on the basis of fear of persecution.

And we don't invariably argue for broader discretion than we think the law confers on us.

QUESTION: So you also have retained a hole card, Mr. Wallace, because ultimately you're arguing you have discretion in interpreting the statute, so that in the future your client might exercise that discretion to interpret the statute differently if he wants to, I presume.

MR. WALLACE: Well, there is that possibility. Once the Court has upheld the present interpretation, there's a reduced likelihood that that interpretation would be changed in the absence of a change by the Congress.

Well, let me --

QUESTION: Well, Mr. Wallace, may I just ask

this question.

MR. WALLACE: Of course.

QUESTION: Does asylum usually lead to citizenship?

MR. WALLACE: That is the other major difference between asylum and deportation. Within one year after asylum has been granted, the alien is eligible to achieve legal permanent residency, which in turn then can lead to citizenship.

And the answer for practical purposes is yes. Whereas someone granted withholding of deportation is left standing in the same line he was standing in prior to that, waiting to come in under a quota. He doesn't in any way advance toward achieving permanent legal residency.

Those are the main differences, and they are the key to the coherence of the Board's position here, that aliens facing a lower probability of persecution than is required for withholding of deportation should not obtain the greater relief available to asylees while being ineligible for the lesser relief.

Rather, the greater relief is available within the Attorney General's discretion to a reduced category of those who qualify for the lesser relief. As I began to tell the Court, that has recently been done with

respect to refugees from Afghanistan who have entered this country from Pakistan on the basis of forged entry documents.

Because of the way they gained admittance to the country, the Attorney General through the Board has refused to grant them asylum, and these days a case like Stevic is a great rarity. Everyone asks for withholding of deportation or asylum, rather than just the withholding.

The Attorney General has refused to grant them asylum, but because this was not a serious crime he has granted them withholding of deportation to Afghanistan and the great majority of them have subsequently been deported back to Pakistan, where this is something worked out through international negotiations with Pakistan.

It depends on Pakistan's willingness to take them back. They have been willing to take back some 90 percent of them.

So that is a very meaningful difference between the two standards, which adds coherence to the Board's position. Now, the second category --

QUESTION: Excuse me, Mr. Wallace. I just didn't understand that argument. Wouldn't the same thing have been doable under the regime that Respondents

argue for? Why couldn't he have done the same thing?

MR. WALLACE: That's just an example of the difference. Of course the same thing could have been dcable with respect to the particular persons, but the point that I'm making, the coherence in the Board's position, is that those who do not even qualify for withholding of deportation should not be granted the greater benefit of asylum.

In some instances you might have -- if you had the thing the other way around, you might have persons who would not qualify for the withholding of deportation. And the whole question would be whether they would be granted asylum or deported.

Perhaps in the circumstances we might choose to deport them to Pakistan as well, if Pakistan would take them. But in the case of the ten percent that Pakistan wouldn't take, they would be deported back to Afghanistan.

QUESTION: But isn't it true that if they had satisfied the higher standard of proof and found to have a statutory right not to be deported back to Afghanistan, you still could have, under either approach, you could have exercised discretion and said, we'll ask them to go to Pakistan instead?

MR. WALLACE: That's right, the discretion

could be exercised. It's just an example of the difference in the benefit. If somebody qualifies for asylum, however, if there's a lower threshold and he qualifies for asylum, then he can't be sent back to Pakistan.

And our point is that --

QUESTION: Well, and if the Attorney General exercises discretion not to do so.

MR. WALLACE: Well, there's always the possibility that the Attorney General will achieve the same result we are saying the statute achieves, through an exercise of discretion that gets back to that point.

Let me rather briefly mention the other two categories of considerations that support the reasonableness of the Board's interpretation. One is the legislative history and background of the Refugee Act of 1980, and it's important to recognize that there were two propositions established in our law at the time Congress acted that are highly pertinent here.

One is, as we have recounted in our brief, asylum had been created by regulation prior to its first statutory recognition in the 1980 Act. And those regulations had been amended in 1979 to state explicitly, as we point out on page 17 of our brief, that the standard for proving asylum is the same as the

standard for proving withholding of deportation. The Court recognized this is Stevic.

And against that background, both the Senate report and expert testimony before Congress referred to asylum and the new provision as not changing the substantive standards.

Now, questions have been raised about the authoritativeness of these statements. It is true that the conference report didn't repeat that. The Senate's version of the bill on this subject wasn't the one adopted.

Nonetheless, there was no express repudiation of any of these considerations, and the Board has reasonably relief on this aspect of the law, of the legislative background, as indicating that Congress did not intend to digress from what had been the established law with respect to asylum at that point.

And the other thing that was established in our law is that the well-founded fear of persecution language had itself been interpreted prior to its use in the 1980 law. That was first interpreted by the Board in the Dunar case, where a claim was made that because of that language in the protocol the standards for withholding of deportation should be changed, and the Board said in effect that they concluded that it was

essentially the same standard as they had been applying in Section 3243(h) for withholding of deportation.

And two Courts of Appeals had upheld the Board's view on that, the Fifth Circuit and the Seventh Circuit. We recount that on page 25 of our brief. And no court at that time had held to the contrary. That was the state of the law at the time Congress adopted that very language in the Act, and Congress did not say it was using that language with any different meaning than had been established in the law at that time.

That too entitled the Board to rely on Congress' use of language that had been authoritatively interpreted as meaning the same thing as those authoritative interpretations, rather than attributing some other meaning to that language.

And the last category of reasons why the Board's interpretation is reasonable is because there is no authoritative source for any other interpretation to give content to the meaning of "well-founded fear of persecution."

The Court of Appeals merely says, well, it should be a subjective fear combined with some objective basis. Well, if the alien's country is persecuting any persons on the basis of their political views and the alien has applied for asylum, which could be interpreted

as a hostile act, there's always some objective basis. There isn't much guidance in the standard developed by the Court of Appeals on its own.

And the Board, with its vast experience in administering this statute, has concluded that the practical standard is the familiar one that it has utilized right along.

I'd like to reserve the balance of my time, if I may.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Wallace.

We'll hear from you now, Ms. Keener.

ORAL ARGUMENT OF

DANA MARKS KEENER, ESQ.

ON BEHALF OF RESPONDENT

MS. KEENER: Thank you, Mr. Chief Justice, and may it please the Court:

Understandably, the Government is putting considerable emphasis on their deference argument. That's because it's the only argument that it has. Unfortunately, there are some -- or fortunately for our side -- there are some considerable problems with deference to the agency in this particular context.

By reviewing the statutory canons that apply to deference, the first place you start is with the fact

that a court is the expert in terms of statutory construction. The meaning of the "well-founded fear" standard is an issue of law. It's clearly within the traditional function of this Court to interpret. It is not an area --

QUESTION: Ms. Keener, Mr. Wallace, in response to a question from, I believe it was, Justice Stevens, said that, for example, the National Labor Relations Board had been deferred to when it was construing even a provision of the Act, not that its view was final but that it was given deference.

Are you suggesting that the INS in this case should be given no deference simply because it is construing a term of the statute?

MS. KEENER: No. Of course the Court also looks at other factors, and deference cases talk about the fact, Chevron for example, that first always is Congress' intent.

QUESTION: Well, my question to you was, which I don't think you've yet answered, is is the agency entitled to no deference because what it is construing is a term of the statute?

MS. KEENER: I think that answer is probably correct. But in arriving at whether deference is considered or not, the courts usually look at several

factors, which include the legislative history, the plain language of the statute.

QUESTION: Well, is deference one of those factors or not?

MS. KEENER: Well, it can be if a standard is not a question of pure law, if it is an application of the law to a specific set of facts. And courts often look to the agency's expertise to decide whether or not that's the kind of situation presented. However, that's not the case here.

QUESTION: What was Chevron? Wasn't that a question of pure law? And didn't we say there that we, and in other cases, that we will accept the expert agency's interpretation of its governing statute where it's a reasonable one?

MS. KEENER: There was a technical gap in Chevron, and it was involved in the implementation. So it was construing a term involved in implementing a standard.

However, here the standard was explicitly set forth by Congress as a well-founded fear standard. But Congress went even further. Congress stated that this term, well-founded fear, is to be construed consistently with the United Nations protocol, with the international understanding of the term.

That's different from deferring the interpretation of a standard to an agency in the process of administering its law. There is no discretion in what the substantive standard is for asylum.

QUESTION: What you're arguing, if I understand you, is that the agency's interpretation is not a reasonable one.

MS. KEENER: It is unreasonable here.

QUESTION: All right. But that's different from saying we won't give any deference. We give deference to the agency. If it's interpretation is reasonable, we'll accept it, even though there are other reasonable ones.

You're saying this one is not a reasonable one.

MS. KEENER: That's correct. Because the standard was selected by Congress, because Congress specifically indicated the criteria it was to be evaluated by, any interpretation by the agency which does not carry out that explicit intent of Congress is therefore unreasonable.

Amicus in this case from the United Nations High Commissioner on Refugees has stated explicitly that the Government's interpretation here is not consistent with the United Nations protocol.

This is also not an area where there's the special expertise of the agency, as there are in some deference cases. This is an internationally accepted standard. It's a standard that has been in our law in various forms, not just since the 1973 case that the Government is relying on, but going back to the 1948 Displaced Persons Act.

The main flaw in the Government's reasoning here is the fact that they are not tracing the history of the standard, okay. United States law for 30 years has had separate refugee admissions policies and separate standards and statutes which relate to the deportation of refugees.

Since 1948, the refugee admission standards have been based on a good reason to fear formulation, and that was derived from the United Nations -- the grandfather of the United Nations protocol, which is the International Refugee Organization constitution, starting with a good reason to fear standard, a fear of persecution standard.

That fear of persecution standard is traced in our briefs and in amicus briefs to the predecessor provision to the current provision today of the 1965 Act. And in the 1965 Act, a provision under Section 203(a)(7), conditional entry, was admitted by this Court

in Stevic to be the predecessor provision to the asylum provision which was now codified, and also to be a standard available under good reason to fear.

The agency itself has recognized that good reason to fear is a more lenient and more generous standard than the standard under withholding of deportations. So far from being consistent, the Government now is taking a position which is inconsistent with that long historical development. It evidences a confusion on the part of the agency, rather than consistency.

Congress when it codified the Refugee Act of 1980 specifically stated that its purpose was to revise and to regularize refugee admissions. In doing that, it pointed out the kinds of relief that it was replacing. That was Section 203(a)(7), the good reason to fear admissions, the Attorney General's general parole obligations, and also it did mention the regulatory asylum standards.

However, in his introduction on the Senate floor the sponsor of the bill, Senatory Kennedy, explicitly said present regulations and provisions do not, simply do not conform with the spirit or the provisions of the United Nations protocol. That is clear. That is clear legislative intent.

QUESTION: Ms. Keener, do you agree that if you were to prevail here that the discretion of the agency would enable it to accomplish the same thing?

MS. KEENER: I do not. I felt my colleague stated my position very well, in essence, as he hypothesized how we would answer, that discretion has to be exercised on a case by case basis. And any time that the Attorney General would promulgate a blanket rule in this kind of this case would most likely violate that case by case determination or exercise of discretion, and it would violate the clear intent of Congress. The standard, again, was not delegated.

QUESTION: Well, Ms. Keener, is it your position that the Attorney General, in exercising his discretion in those situations, could not lay down any general rule?

MS. KEENER: Most likely that would be inconsistent. There are guidelines --

QUESTION: Inconsistent with what?

MS. KEENER: With a case by case determination.

QUESTION: Well, what is it in the statute that mandates a case by case determination, as opposed to a determination based on some more general guidelines?

MS. KEENER: It's inherent in the exercise of discretion that every case be evaluat on its individual facts. And to the extent that that individual determination has been omitted --

QUESTION: Well, Ms. Keener, how do you evaluate a case on its individual facts without knowing what rule to apply once you've ascertained what facts are there? There has to be some governing standard, doesn't there?

MS. KEENER: This Court will set the rule in this case. That will be the rule which applies. And as is traditional with any judicial standard, further cases will enrich and develop what that standard actually means.

QUESTION: Ms. Keener, let me interrupt you if I may. Why couldn't the Attorney General, for example, determine that in cases of refugees from Afghanistan, that if he sends them back to Pakistan they will not be persecuted because they're safe there, and adopt a policy on a country by country basis of one rule for one, one for another?

Why would that be an abuse of discretion, to take big categories of cases and treat them in similar ways? I don't see why. I don't understand your argument that every case has to start from scratch.

Discretion certainly, as the Chief Justice suggests, has got to work within certain --

MS. KEENER: I don't see a problem with the policy decision, as long as individual cases are then reviewed to see that they fall correctly within that policy. That would be appropriate.

QUESTION: So he could adopt regulations that would establish broad categories as a way to treat these cases, perhaps a different statement of proof on some?

MS. KEENER: The State Department now participates in evaluation of country conditions, which is a very important aspect of the asylum determination. The Government is very involved in helping find whether someone's fear of return to a particular locale is in fact an objective fear.

And of course, there could be policies developed that assist the tryer of fact in evaluating that case. From that perspective, it would be completely appropriate.

QUESTION: Would that discretion, whether you say it can be exercised generically or must be exercised case by case, either way, would that include the discretion to say, even though this individual or this category of individuals have good reason to fear within the minimal meaning of the statute, I'm still not going

to give them asylum?

MS. KEENER: That's what I think would be inappropriate.

QUESTION: Why? Isn't that inconsistent with your argument that -- the Government's big argument here is that it does seem irrational to provide a lower standard for the greater benefit of asylum than you provide for the lesser benefit of avoiding deportation.

MS. KEENER: That's not irrational.

QUESTION: Your response to that argument, your principal response in your brief, is no, it's not irrational because the standard for purposes of asylum is a discretionary one. It just establishes the threshold and the Attorney General doesn't have to use it.

But now you're telling us he does indeed have to use it, unless he has some very special factor. You're saying he can't say, even though you have good reason to fear, I'm not going to give you asylum. That's your position: He must give asylum if there is good reason to fear.

I don't consider that discretionary.

MS. KEENER: I didn't mean to be saying that. If that is what I was saying, then it's not correct. It seems to me that the Attorney General cannot on a

blanket situation say -- he can say everycne from Afghanistan has a well-founded fear of persecution. I think he would be abdicating his exercise of discretion to say everyone from Afghanistan will either be granted asylum or, maybe he'd say, will be denied asylum in the exercise of discretion.

But that's a factor to be analyzed on an individual case, as to whether there is a valid basis for the exercise of that discretion.

QUESTION: Well, but you're still saying that he cannot say, even though this category of people have a well-founded fear of persecution, I am not going to grant them asylum.

MS. KEENER: I believe that would fly in the face of Congress' clear intent. I believe it would fly in the face of the accepted international definitions, which go into great detail as to the individual factors of the particular case that must be developed.

And in fact, that's not what the Attorney General does. I don't expect that --

QUESTION: That's fine, that may well be true. But then it isn't discretionary in any significant sense.

MS. KEENER: It is discretionary, however. The Attorney General can promulgate guidelines that help

him decide whether or not someone has a well-founded fear. But I think there would have to be some kind of case by case determination as to whether or not an individual case has its merits, or otherwise a case is not being considered on its merits.

QUESTION: Well, how do you tell what the merits of a case are, Ms. Keener, without having some guideline?

MS. KEENER: Well, that's within the agency's expertise. And I suppose to the extent that regulations are consistent with its expertise of saying, look at factor A, look at factor B, look at factor C, that would be appropriate.

We're not trying to tell the Immigration Service how to administer their law. But we are saying that Congress was clear as to what that law is and what thah standard is. And beyond that, I suppose that's an issue for another case.

QUESTION: But the substantial probability standard is discretionary in that sense.

MS. KEENER: What the Attorney General is doing --

QUESTION: It's no more discretionary than the substantial probability standard. There also he has to decide case by case whether there is a substantial

probability or not.

So how is this determination any more discretionary than the deportation determination?

MS. KEENER: Because -- and it was pointed out in Stevic quite clearly -- by meeting the definition of refugee, someone who has a well-founded fear of persecution, that does not automatically require a grant of asylum.

That's in the Congressional history as well. That's what discretion means, that although the statutory formulation is met, it is not required. It's up to the Attorney -- but that doesn't mean that the Attorney General can then have a wooden formulation of who's going to qualify and who is not, because that violates the intent of Congress.

The history of this provision shows that the Congress was very concerned with the unfettered discretion of the executive. There is a very thorough law review article, Anker and Posner, that goes back on the history of various bills which were introduced into Congress which show that that was precisely what Congress was attempting to circumscribe, the unfettered discretion and the lack of uniformity of refugee admissions.

QUESTION: Ms. Keener, I think you're arguing

the next case rather than this case. I'm not sure you're very wise in doing so.

MS. KEENER: That seemed to be what Justice Scalia was interested in. I feel uncomfortable in the sense of I don't think that's an issue raised by this case as well.

I feel the issue today is what the standard is and did Congress choose a standard. And if Congress indicated a standard, how is it to be interpreted. Congress specifically -- the Government indicates in their brief also that Congress said the standard was to conform with the United Nations protocol. We agree on that.

Whether the Government's interpretation conforms or not is the essence of our dispute here, okay.

QUESTION: What do you do with their argument that there's a lot of material in the legislative history that says that conforming with the protocol really would not change the law?

MS. KEENER: The answer to that I believe is found also in Stevic, that because refugee admissions were not required our accession to the protocol back in 1967 did not affect our refugee admissions procedures. The fatal flaw in the Government's argument that

regulatory asylum should be adopted as the standard also goes back. There was no standard for regulatory asylum in 1965. In 1965, what Congress was talking about at that time, at the time of our accession, was the good reason to fear standard in the predecessory section of 203(a)(7), which is what we have been saying over and over and over.

That's what the legislative history shows, and the Government has never come up with an answer as to why the specific standard for regulatory asylum which they finally set forth in the 1979 regulations, that standard was expressly rejected by Congress in its actions.

And the Government has never come up for a justification how to avoid Congress' clear intent. In interpreting legislative history, again, it's a canon of construction that the court does not lightly disregard what Congress has considered and explicitly refused to do.

The Government, yes, they proposed a formulation of the bill and that formulation, which would have said in essence that if someone qualifies for, show a clear probability of persecution, then they are eligible for asylum. Congress took that out. Congress said if someone is a refugee.

And the other major flaw in the Government's argument, that they have never responded to in their briefs or in their argument today, is about the fact that there's another asylum provision, another refugee admissions provision that they are failing to discuss. And that's Section 207.

Section 208, which is the issue in this case, and Section 207 both go back to a definitional section in 101(a)(42). That is where "refugee" is defined. That is where the well-founded fear language comes from.

It does not apply, as this Court pointed out in its textual analysis in Stevic. That well-founded fear of persecution does not apply to the withholding of deportation provision. It does not mention it, it is not referred to, nor is the language comparable.

And the Government has never explained how it's going to apply two different statements to refugees. That is far more anomalous and far more unworkable than what we are proposing to do here today. The Government is going to treat refugees who are currently in Afghanistan differently from those who are at the United States borders.

And that again was explicitly discussed in the legislative history. It was that lack of uniformity of

procedures that Congress was hoping to address, was planning to address, and specifically did address. And that's what the Government seeks to ignore.

Another major flaw in the deference argument is the fact that the agency's interpretation which it relies so heavily on, the decision in Dunar, is sheer dicta. Dunar was a case very much like Stevic, which simply held that accession to the United States -- United Nations protocol did not alter the standard under Section 243(h), and any further discussion was dicta, and I think that's an important factor to remember.

QUESTION: Ms. Keener, I wonder of you would address one argument of the Government that troubles me some, which is that if this is a different standard from more likely than not, what does it consist of? How can you -- if it is a different standard and if there is as little discretion as you have described in the Attorney General's application of it -- that is, he can't say, even though ycu meet it I'm not going to let you in, or he can't say --

MS. KEENER: I don't want my comments to be characterized that way. On a case by case basis, he certainly can.

QUESTION: He can say, even though you have demonstrated a well-founded fear of persecution, I'm not

going to let you in?

MS. KEENER: Yes, he can. And that's not so illogical, to have a broad group be available for review by the Attorney General's discretion, then individual factors of how many other refugees came in in this particular year, what is the economic situation in the United States at that time.

Perhaps all those factors would be relevant and should be considered in the exercise of discretion in an individual case.

QUESTION: All right. Tell me what it is if it isn't more likely than not? What is a well founded fear?

MS. KEENER: A well-founded fear of persecution is really quite simply a reasonable person standard. Would a reasonable person in this same factual situation fear persecution upon return to their country?

QUESTION: Well now --

MS. KEENER: The courts --

QUESTION: -- let's assume that the persecution in the country you're talking about is very -- it's horrible persecution, it's torture; it isn't just incarceration. Now, suppose my chances of actually being subjected to that if I go back are one in a

thousand.

Would I have a well-founded fear of going back?

MS. KEENER: It depends on whether it would be reasonable to have that fear in view of the small chance that something is going to happen.

QUESTION: I know it would, and what's the answer?

MS. KEENER: The answer is that the tryer of fact should look at the specific facts which you put forth to show the objective situation.

QUESTION: You see, I don't know the answer to that. Is that a well-founded fear or not?

MS. KEENER: One in a thousand, I'm sure it's not.

QUESTION: I can tell more likely than not. That's a standard I can apply, more likely than not. But if you just tell me well-founded fear, am I to put my risk aversion? You know, maybe I can handle torture, so one in a hundred I'd go.

MS. KEENER: If you can handle torture you wouldn't be applying for asylum, all kidding aside. You would go back. That's not a person who would say, I have a reasonable fear. That's not a person who would convince a tryer of fact that they do have a genuine,

well-founded fear.

But the way to determine whether or not somebody qualifies for the well-founded fear standard -- you're not alone without support as to how to make that decision. There's a United Nations handwook which is the compilation of 30 years of experience of various factor.

And in fact, in a letter from the Assistant Attorney General Olson to the General Counsel of the Immigration Service which is part of the record of the 1981 House Judiciary Committee oversight hearings, it was specifically said that that's an appropriate aid to construction. We assume that Congress was aware of the criteria articulated in the handbook.

That United Nations handbook is of course an invaluable aid to construction. But the courts have already used the handbook and applied it. There are several cases --

QUESTION: Why do we assume that Congress was aware of the criteria set forth in the handbook?

MS. KEENER: That's what the Assistant Attorney General said.

QUESTION: Oh, you were just repeating his language?

MS. KEENER: Yes, that was a quote. That was

a quote from -- and I will mention that citation again -- the Assistant Attorney General Olson, in a letter to General Counsel Kraughlin, which was part of the additions to the 1981 House Judiciary Committee oversight hearings.

QUESTION: Do you know why he assumed it?

MS. KEENER: I don't know the basis for his remarks, I am sorry. The point is, the Court has applied the standard and it has not found it to be a difficult to apply standard. The courts have come out and said mere assertions of a possible fear are not enough; a genuine fear of widespread violence, of civil strife, that's not enough.

What the courts have said is a specific factual proof of an objective situation which demonstrates that persecution is a reasonable possibility. I would submit if the chances of persecution are one in a thousand it's not a reasonable possibility that you would be persecuted.

QUESTION: Your quarrel is with the agency's insistence that you establish a reasonable likelihood?

MS. KEENER: The focus on probability takes out of consideration the focus on subjective feelings and beliefs which is a critical element in the refugee status definition because of the fact that it recognizes

the everyday realities of refugees proving their cases.

These aren't tort cases. These aren't cases between two huge companies deciding who's going to be liable or who should foot the bill.

QUESTION: Well, wait a minute. As I understand it, the position urged by the agency itself, to which we're asked to give deference, is that the refugee has to establish a realistic likelihood that he will be persecuted on his return. And it's the likelihood --

MS. KEENER: Exactly.

QUESTION: -- language that you object to?

MS. KEENER: Because likelihood implies probability, and in fact in the history of the Immigration Act realistic likelihood has been a synonym for clear probability or more likely than not. It does not -- has never been associated with the good reason to fear standard.

And that good reason to fear standard, as I mentioned before, has been applied successfully by the Attorney General through his delegates since 1948. It's not a difficult standard to apply. It implies a lesser degree of certainty, and a judge can figure out what that means.

Again, the individual facts of an individual

case, based on who the applicant is, based on where he's going to be returned to, based on all kinds of factors, of course come into play and certainly would influence a decision.

QUESTION: You sure you wouldn't have a well-founded fear if the regime in question has systematically said, every Tuesday we are selecting one out of 1,000 people and shooting them, and that's the regime that I'm going to deport you back to?

MS. KEENER: I would say that most judges would assume that my fear --

QUESTION: Is not well-founded?

MS. KEENER: -- is not a reasoned -- it's not a reasonable possibility that I will be one in a thousand. That's my fear. If a judge feels that that's reasonable or a tryer of fact, that's also -- that's his decision to make.

But there are aids to construction. There is an established history of applying this term. And it simply is the agency's recalcitrance in recognizing that Congress wanted a different standard, and there seems that there is no basis to honor their interpretation which so clearly flies in the face of unequivocal Congressional intent.

Thank you.

CHIEF JUSTICE REHNQUIST: Thank you, Ms. Keener.

Mr. Wallace, do you have anything more?

MR. WALLACE: Please.

REBUTTAL ARGUMENT OF

LAWRENCE G. WALLACE, ESQ.

ON BEHALF OF PETITIONER

QUESTION: Mr. Wallace, before you start, I just want to give you a question to be sure you get time to answer it. I want you to tell us your position with regard to her argument based on Section 207, the processing of aliens abroad.

MR. WALLACE: We simply don't agree that a different standard applies. The claim of an inconsistency is based on an interpretation of Section 207 that we don't agree with.

QUESTION: You agree that the word "refugee" of course applies to both?

MR. WALLACE: Yes.

QUESTION: And what do you say to her argument that 207 was derived from 203(a)(7), in which there was a --

MR. WALLACE: We said it in our reply brief on pages 11 and 12. 203(a)(7) and the other early piecemeal statutes use the phrase "fear of

persecution." They did not use the phrase "well-fcunded fear of persecution."

QUESTION: Good reason, good reason to fear.

MR. WALLACE: That's right, but that's not well-founded. The only time -- there was nc reason to construe that phase, that had not been used prior to the Dunar case -- it had not been used in any of these early statutes --

QUESTION: So your view is 203(a)(7) had the same standard that you maintain is appropriate here?

MR. WALLACE: Well, we think there's some basis to that view. But 203(a)(7) had a fear of persecution standard, not a well-founded fear of persecution standard.

QUESTION: I just want to be sure I understand. Are you saying that's the same standard which you maintain now or it's a different standard?

MR. WALLACE: It's a different standard.

QUESTION: Different.

MR. WALLACE: Althcugh -- well, there's scme basis for thinking that in practice it was applied the same way. But it was not the same language.

QUESTION: Well, I understand that.

MR. WALLACE: That's our main pcint. And in footnote 14 of our reply brief, and this is on page 11

of our reply brief, we pointed out that the House report explicitly said at the time of the 1980 Act that the asylum provision was to provide a statutory basis for the part 108 regulatory asylum policy, not to provide a statutory basis to replace the old 203(a)(7) or the other earlier statutes.

And that was the policy that in the 1979 regulations said that the asylum standard was the same as the standard for the withholding of deportation.

QUESTION: Let me just be sure I understand, because it's going a little fast for me. 208 you agree today has the same standard as 207?

MR. WALLACE: 208 and 207, yes. 207 applies to aliens abroad.

QUESTION: And you also say that the 207 standard is the same as the old 203 --

MR. WALLACE: No, we never said that, nor do we say it now. That's just what the other side says. We never subscribed to that, so we don't have an inconsistency. The inconsistency is formulated on their interpretation of 207.

QUESTION: So that 207 adopted a different standard than prevailed previously with respect to refugees processed abroad.

MR. WALLACE: That is correct, that is

correct.

Now, I also want to point out to the Court that in its decision in Immigration and Naturalization Service against Jong How Wang, 450 U.S. 139, the Court deferred to the INS', to the Board's interpretation of a statutory term, "extreme hardship" under Section 244 of the Immigration and Naturalization Act -- Nationality Act.

And it not only deferred to the interpretation, but deferred to a categorical interpretation, that the Board was entitled to take the position that a mere showing of economic detriment is not sufficient to show extreme hardship within the meaning of that statutory provision.

And the last point I wish to make is that the mere fact that a reference is made in our statute to a term in the international protocol does not mean that this case presents a question of international law. It does not involve an international obligation. The only international obligation is the withholding of deportation obligation which was before the Court in Stevic.

This is a question of asylum, which is not required by international law, and the question is what did Congress mean by using the term in our domestic

law. We have shown in the latter part of our reply brief that there is in any event no uniform practice among other countries bound by the protocol to interpret the protocol more generously in their own practice than we do.

This is -- we have gone through in case by case, but it's also shown in an aggregate way by the statistics in footnote 25 on page 19 of our brief, because the fact is, as those show, in both 1984 and 1985 the United States provided a haven for more refugees and asylees, using our standard, than were accommodated in all of Europe and Canada combined, which certainly --

CHIEF JUSTICE REHNQUIST: Your time is expired, Mr. Wallace. Thank you.

The case is submitted.

(Whereupon, at 11:04 a.m., argument in the above-entitled matter was submitted.)

CERTIFICATION

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

#85-782 - IMMIGRATION AND NATURALIZATION SERVICE, Petitioner V.

LUZ MARINA CARDOZA-FONSECA

and that these attached pages constitutes the original transcript of the proceedings for the records of the court.

BY Paul A. Richardson

(REPORTER)