

24 AUG 1981

MEMORANDUM FOR THE ATTORNEY GENERAL

Re: Definition of "Refugee" Under the
Refugee Act of 1980

This responds to your request of August 3, 1981 for a memorandum setting forth the background and meaning of the definition of "refugee" adopted by Congress in the Refugee Act of 1980 (the Act). 1/ The following is a discussion of several issues which may arise in your testimony before Congress during the consultations on admission of refugees for the next year.

1. Prior to passage of the Act, admission of displaced persons was limited to "conditional entrants" who were individuals fleeing from "persecution or fear of persecution on account of race, religion, or political opinion" in the Middle East or a Communist-dominated country or who had been "uprooted by catastrophic natural calamity." 8 U.S.C. § 1152 (e)(7) (1979). The Act eliminated this status and created a new class of aliens called "refugee[s]." Act, § 201(a), to be codified at 8 U.S.C. § 1101(a)(42)(A). 2/

1/ This question flows out of a dispute between the Department of State and the Immigration and Naturalization Service (INS) over whether economic migrants in Southeast Asia qualify as refugees.

2/ The section defines a refugee as:

~~any person who is outside any country~~
of such person's nationality or, in the
case of a person having no nationality,
is outside any country in which such
person last habitually resided, and who
is unable or unwilling to return to,
and is unable or unwilling to avail
himself or herself of the protection

(continued)

Congress intended this definition to cover those who are persecuted. Congressmen repeatedly referred to the worldwide scope of oppression, with refugees and political detainees in Cuba, Vietnam, Russia, Chile and Argentina cited as examples of those whom the law was intended to cover. The comments of Representative Holtzman, chairman of the House subcommittee in charge of the bill, are typical: "The new definition . . . will give our Government the flexibility to deal with crises such as the evacuation of Vietnam in 1975 and to respond as well to situations in countries such as Cuba or Chile today where there are political detainees or prisoners of conscience." 126 Cong. Rec. H 1520 (daily ed. March 4, 1980). To achieve this end, Congress eliminated the geographic and ideological limits previously imposed. It also eliminated eligibility for victims of natural calamities - a group that may suffer severe economic dislocation but which is not subjected to persecution.

Congress adopted the definition of refugee found in the United Nations Convention and Protocol Relating to the Status of Refugees (Convention), 19 U.S.T. 6223, 6259. 3/

2/ (continued)

of that country because of persecution
or a well-founded fear of persecution
on account of race, religion, nationality,
membership in a particular social group,
or political opinion.

The section also permits the President, after appropriate consultation, to specify as refugees individuals who are still within their own country if they suffer from the same fear.

3/ Article 1(A)(2) of the Convention defines a refugee
as

"any person who ... owing to well-founded
fear of being persecuted for reasons of
race, religion, nationality, membership of
a particular social group or political
opinion, is outside the country of his
nationality and is unable or, owing to
such fear, is unwilling to avail himself of

(continued)

The legislative history of the Act makes it clear that the expansion of the definition was intended to conform our law to the Convention's definition.

"[T]he new definition will bring United States law into conformity with our international treaty obligations under the United Nations Protocol Relating to the Status of Refugees which the United States ratified in November, 1968, and the United Nations Convention Relating to the Status of Refugees which is incorporated by reference into United States law through the Protocol."

S. Rep. No. 256, 96th Cong., 1st Sess. 4 (1979). See also S. Rep. No. 590, 96th Cong., 2d Sess. 19 (1980); H.R. Rep. No. 781, 96th Cong., 2d Sess. 19 (1980); H.R. Rep. No. 608, 96th Cong., 1st Sess. 9 (1979); 126 Cong. Rec. S 12007 (daily ed. Sept. 6, 1979) (remarks of Sen. Kennedy, floor manager); id. at H 1520 (daily ed. March 4, 1980) (remarks of Rep. Holtzman, floor manager); id. at S 1754 (daily ed. Jan. 26, 1980). It was not intended to require us to accept for admission the millions of individuals who might qualify as refugees. H.R. Rep. No. 608, supra, at 10; 126 Cong. Rec. S 12007 (daily ed. Sept. 6, 1980); id. at H 1527-28 (daily ed. March 4, 1980). Instead, a cap of 50,000 was placed on annual admissions through 1982. Act, § 207(a)(1), to be codified at 8 U.S.C. § 1157(a)(1). 4/ Further,

3/ (continued)

the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it."

4/ After 1982, the President will set the limit. In an emergency situation, the President may now, after consultation with Congress, admit a fixed number of additional refugees. Act, § 207(b), to be codified at 8 U.S.C. § 1157(b).

all refugee admissions must "be allocated among refugees of special humanitarian concern to the United States in accordance with a determination made by the President after appropriate consultation [with Congress]." Id., § 207(a)(3), to be codified at 8 U.S.C. § 1157(a)(3). See also id., §§ 207(b), (c)(1), to be codified at 8 U.S.C. §§ 1157(b), (c)(1).

2. We do not believe that economic hardship is a basis for eligibility as a refugee under the Act. The plain language of the definition is limited to those who are persecuted for one of the five listed reasons: race, religion, nationality, membership in a particular social group, or political opinion. Political persecution may take the form of economic reprisals, such as denying individuals the opportunity to work. ^{5/} Likewise, an individual suffering economic hardship may also become the victim of political persecution because of political upheavals. Economic migrants, however, who are moved "exclusively" by economic conditions, are not refugees. Handbook on Procedures and Criteria for Determining Refugee Status under the Convention and Protocol § 63 (1979) (Handbook). ^{6/} Cheng Kai Fu v. INS, 386 F.2d 750, 753 (2nd Cir. 1967), cert. denied, 390 U.S. 1003 (1968). Determining an individual's motives for leaving his country may be an extremely complicated issue of fact.

^{5/} "The denial of an opportunity to earn a livelihood in a country such as the one involved here is the equivalent of a sentence to death by means of slow starvation and none the less final because it is gradual." Dunat v. Hurney, 297 F.2d 744, 746 (3d Cir. 1962). See also Berdo v. INS, 432 F.2d 824, 847 (6th Cir. 1970); Kovac v. INS, 407 F.2d 102, 106-07 (9th Cir. 1969); Soric v. Flagg, 303 F.2d 289, 290 (7th Cir. 1962); Handbook on Procedures and Criteria for Determining Refugee Status under the Convention and Protocol ¶ 63 (1979) (Handbook).

The Handbook was issued in 1979 by the United Nations High Commissioner for Refugees as a non-binding guide to aid signatory states in determining whether someone is a refugee. A basic rule of statutory construction is that a statute patterned after another statute "generally is presumed to be adopted with the construction which it has received." James v. Appel, 192 U.S. 125, 135 (1904). We assume that Congress was aware of the criteria articulated in the Handbook when it passed the Act in 1980, and that it is appropriate to consider the guidelines in the Handbook as an aid to construction of the Act.

^{6/} See note 5. The text of the relevant paragraphs is set out in Appendix A.

3. Individuals may become refugees once they are outside their country even though their initial departure had nothing to do with political oppression. Coups, for example, can change a country's ruling faction overnight and transmute diplomats, students and others outside their country into refugees. 7/

4. We believe that the act of leaving a country is not in and of itself sufficient to entitle an individual to refugee status. Nor does prosecution for the violation of a nation's travel laws rise to the level of "persecution on account of . . . political opinion." However, systematic and harsh punishment for the act of leaving a country may, in some circumstances, meet this standard. Whether a particular situation meets this standard is largely a factual matter which must be determined in individual situations depending on the extent to which a country punishes those who leave.

This conclusion is reflected in the source material. Our courts, 8/ the Immigration and Naturalization Service (INS) and the U.N. have all recognized that prosecution for violation of a nation's restrictive travel laws does not

7/ The U.N. refers to these people as refugees "sur place." Handbook, ¶¶ 94-96.

8/ Case law on the meaning of persecution on account of political opinion has developed from the courts' interpretations of 8 U.S.C. § 1253(h) (1979), which, from 1964 to 1980, permitted the Attorney General to withhold the deportation of any alien who "would be subject to persecution on account of race, religion, or political opinion." The Act amended this section to add "nationality" and "membership in a particular social group" as grounds for withholding so the language now tracks the definition of "refugee."

A statute that is repeated in an amendment to the statute, either in the same or equivalent words, is considered a continuation of the original law. 1A Sands, Sutherland on Statutory Construction § 22-33 (4th ed. 1972) (Sands). "[W]here, as here, Congress adopts a new law incorporating sections of a prior law, Congress normally can be presumed to have had knowledge of the interpretation given to the incorporated law, at least insofar as it affects the new statute." Lorillard v. Pons, 434 U.S. 575, 581 (1978). The amended provision, 8 U.S.C.A. § 1253(h)(1), should be construed together with the definition of "refugee". 2A Sands, supra, § 51.02. The cases are relevant, therefore, for determining what constitutes persecution based on political opinion under American law.

in itself constitute persecution. 9/ It is when the prosecutions are politically motivated that the alien will be protected. 10/ Berdo v. INS, 432 F.2d 824, 845-47 (6th Cir. 1970); Kovac v. INS, 407 F.2d 102, 104-05 (9th Cir. 1969); Sovich v. Esperdy, 319 F.2d 21, 28-29 (2nd Cir. 1963); In re Dunar, 14 I. & N. Dec. 310, 324 (1973); In re Nagy, 11 I. & N. Dec. 888, 891-92 (1966); Handbook, ¶ 61. If individuals leave a country for economic reasons, their behavior may be condemned by their country, but their disagreement with the State is presumably based on economics, not politics. Prosecution for violation of the State's travel laws when they return is not persecution unless the laws are applied for one of the proscribed reasons. In re Chumpitazi, 16 I. & N. Dec. 629, 633-34 (1978); In re Janus and Janek, 12 I. & N. Dec. 866, 876 (1968); Handbook, ¶ 61. Once the alien has proved that the laws are being applied for a proscribed reason, however, he is eligible to be recognized as a refugee. If the country treats the departure as a political act and punishes that act in a harsh and oppressive manner, we believe that such circumstances would place the alien within the definition of the Act. Henry v. INS, 552 F.2d 130, 131 (5th Cir. 1977) (Petitioners alleged that "anyone who had fled the regime [in Haiti] would be received with hostility by the present government. If proved such an allegation might form a sound basis for fear of persecution regardless of the placidity of an individual's political past.") 11/

Whether a particular alien has a valid fear of persecution cannot be resolved in the absence of information about factors such as whether the government is really enforcing the policy, whether the policy is being applied against all returnees or just some, whether the policy involves application of longstanding domestic travel laws or new restrictions and

9/ Coriolan v. INS, 559 F.2d 993, 1000 (5th Cir. 1977) ("If the immigration judge meant by this statement to assert that prosecution for the offense of illegal departure can never amount to political persecution, his view was inconsistent with decisions both of the courts and of the INS itself.")

10/ West Germany and Austria have adopted a somewhat broader interpretation. Prosecution for leaving certain countries will be assumed to be persecution if the alien left because of his political opinions. Memorandum to UNHCR Branch Office for the United States from Director of Protection Moussalli, January 21, 1981, ¶¶ 27-29, 32.

11/ For a more detailed discussion of these and other cases dealing with political persecution, see Appendix B.

whether it is likely that the alien's departure and subsequent return will even be noticed by his country. Compare Fleurinor v. INS, 585 F.2d 129, 134 (5th Cir. 1978), with Coriolan v. INS, 559 F.2d 993, 1002-04 (5th Cir. 1977). As the drafters of the Convention said, the definition of refugee is meant to cover a person who "has either been actually a victim of persecution or can show good reason why he fears persecution," U.N. Doc. E/1618 and Corr. 1, at 11 (1950), and the signatory state is the ultimate judge of the validity of that fear. 12/

5. An application for refugee status should normally be reviewed on an individual basis. One of the major purposes of the Act was to allow the President to select those refugees for admission who were of "special humanitarian concern to the United States." Act, § 207(a)(3), to be codified at 8 U.S.C. § 1157(a)(3). Thus, we are not required to accept an individual even if he does qualify as a refugee. Act, § 207(a)(3), (b), (c)(1), to be codified at 8 U.S.C. §§ 1157(a)(3), (b), (c)(1). Individual interviews would seem to be the best way to identify those who have an especially strong claim on us as well as to determine how "well-founded" the fear is in differently situated individuals. See Handbook, ¶¶ 44-45. A country may produce political refugees as well as economic migrants and the two groups must be distinguished. United States v. Esperdy, 234 F. Supp. 611 (S.D. N.Y. 1964) (Haiti); In re Williams, 16 I. & N. Dec. 697, 703 (1979) (same); In re Joseph, 13 I. & N. Dec. 70 (1968) (same). Group determinations are usually reserved for situations in which the need to provide assistance is extremely urgent and political reasons preclude an individual determination of status.

We are not in a position to evaluate the situation that now exists in Southeast Asia with regard to whether Laos, Kampuchea and Vietnam are persecuting those who leave because

12/ INS has expressed concern that the United States will be swamped with claims for asylum, 8 U.S.C. § 1253(h)(1), if a nearby country began to declare that leaving the country would constitute a political act. We believe that a solution to such a problem, to the extent it exists, must come from the Legislative Branch.

departure is viewed as a political act. 13/ We do believe, as the courts have recognized, that an alien outside his country may have a well-founded fear of persecution if his country is persecuting departure as a political act. Henry, supra. Whether the fear exists should, except in exceptional circumstances, be evaluated on an individual basis.

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13/ Letter from Acting Director Smyser, Bureau for Refugee Programs to Acting Commissioner Crosland, Immigration and Naturalization Service, February 27, 1981, at 3.

Appendix A

Handbook on Procedures and Criteria for Determining Refugee Status, ¶¶ 62-64: Economic migrants distinguished from refugees

62. A migrant is a person who, for reasons other than those contained in the definition, voluntarily leaves his country in order to take up residence elsewhere. He may be moved by the desire for change or adventure, or by family or other reasons of a personal nature. If he is moved exclusively by economic considerations, he is an economic migrant and not a refugee.

63. The distinction between an economic migrant and a refugee is, however, sometimes blurred in the same way as the distinction between economic and political measures in an applicant's country of origin is not always clear. Behind economic measures affecting a person's livelihood there may be racial, religious or political aims or intentions directed against a particular group. Where economic measures destroy the economic existence of a particular section of the population (e.g. withdrawal of trading rights from, or discriminatory or excessive taxation of, a specific ethnic or religious group), the victims may according to the circumstances become refugees on leaving the country.

64. Whether the same would apply to victims of general economic measures (i.e. those that are applied to the whole population without discrimination) would depend on the circumstances of the case. Objections to general economic measures are not by themselves good reasons for claiming refugee status. On the other hand, what appears at first sight to be primarily an economic motive for departure may in reality also involve a political element, and it may be the political opinions of the individual that expose him to serious consequences, rather than his objections to the economic measures themselves.

Appendix B

The following cases have considered whether individuals were entitled to relief under 8 U.S.C. § 1253(h). (1979)

Cases finding persecution based on political opinion:

1. Berdo v. INS, 432 F.2d 824 (6th Cir. 1970): Berdo had been a street fighter in Budapest during the Hungarian Uprising of 1956. He later joined the Communist Party under severe economic pressure. The Board of Immigration Appeals (BIA) was unpersuaded by the threat of "the certain arrest and conviction awaiting Berdo under the Hungarian law of return, with a resulting prolonged prison term, if not death," and denied his claim of political persecution. 432 F.2d at 845. The Sixth Circuit reversed. "Uncontroverted expert testimony in the case shows that he would probably be subjected to imprisonment and, because of his killing of a Russian soldier in the Revolution of 1956, would, in all probability face, a sentence of death." 432 F.2d at 847.

2. Kovac v. INS, 407 F.2d 102 (9th Cir. 1969): Kovac was a Yugoslavian seaman who had refused to become an informant for his government. As a result, he was singled out by the secret police and the only employment he could obtain was as a chef on board ship. He deserted the ship in the United States. The Ninth Circuit reversed the BIA's deportation order. The court noted the "critical difference" between "fear of punishment for having sought political asylum" and the "fear of punishment for having deserted his ship." 407 F.2d at 104. The proper test was whether an alien could show "that his departure was politically motivated and that any consequences he faces on return are political in nature, even though they take the form of criminal penalties for flight." Id., quoting In re Janus and Janek, 12 I. & N. Dec. 866, 876 (1968). The court found that Congress intended "to grant asylum to those who would, if returned, be punished criminally for violating a politically motivated prohibition against defection from a police state." Id.

3. Sovich v. Esperdy, 319 F.2d 21 (2nd Cir. 1963) 1/: Sovich was a Yugoslavian who fled to Italy and thence to the United States. The Court stated that the Attorney General's

1/ This case was decided under an even more restrictive version of 8 U.S.C. § 1253(h) (1964) which limited the withholding of deportation to those who feared physical persecution.

ruling that imprisonment for illegal departure could never constitute "physical persecution" was erroneous. 319 F.2d at 29.

We do not suggest that any incarceration for even political crimes, such as the one here involved, would constitute physical persecution under § 243(h). However repugnant to our own concept of justice, a brief confinement for illegal departure or for political opposition to a totalitarian regime would not necessarily fall within the ambit of Congress's special concern in enacting this provision. We are unwilling to believe, however, that Congress has precluded from relief under § 243(h) an alien threatened with long years of imprisonment, perhaps even life imprisonment, for attempting to escape a cruel dictatorship. Such a construction of the statute would attribute to Congress an insensitivity to human suffering wholly inconsistent with our national history.

4. In re Janus and Janek, 12 I. & N. Dec. 866 (1968): "We are not convinced that every travel restriction imposed by an Iron Curtain country and punished, in the breach, by imprisonment, is political persecution." 12 I. & N. at 876. The court recognized, however, that some prosecutions are politically motivated. They therefore granted the petitions of two Czech emigres, because (1) Janek had long opposed the Communist system and been harassed for it. His prosecution "would in effect be persecution for political opposition." Id. at 873. (2) Janus was a member of the Communist Party who was "genuinely afraid of reprisals" because he had betrayed his propaganda mission. Id. at 875.

5. In re Joseph, 13 I. & N. Dec. 80 (1968): A Haitian who presented evidence of long-term anti-Duvalier activity, and a history of imprisonment, beatings and assassination of family members was granted asylum. "[T]here exists a very real and present danger that [he] would be persecuted because of his political opinion if he should return to Haiti." 13 I. & N. Dec. at 74.

Cases finding no persecution based on political opinion:

1. Fleurinor v. INS, 585 F.2d 129 (5th Cir. 1975): Fleurinor, a Haitian, claimed that he had been jailed in Haiti for ten days in 1970 on accusations that he had taken part in an abortive raid on Haiti from the Bahamas. After bribing his way out of jail, he returned to the Bahamas and then entered the United States. "Absent from Fleurinor's proof is any basis for believing that the Haitian government has any interest in him today, eight years after the supposed arrest To prove probable political persecution today, Fleurinor would have to provide some evidence that the Haitian government remembers him." 585 F.2d at 134.

2. Henry v. INS, 552 F.2d 130 (5th Cir. 1977): Petitioners, Haitian citizens, alleged that Haiti "is waging a campaign of political oppression against citizens returning from abroad If proved, such an allegation might form a sound basis for fear of persecution regardless of the placidity of an individual's political past." 552 F.2d at 131. The court rejected the allegation, however, because petitioners offered "conclusory statements . . . and unauthenticated reports," failing to meet the burden of proving their claim by a preponderance of the evidence. Id. 2/

3. Kashani v. INS, 547 F.2d 376 (7th Cir. 1977): Kashani was an Iranian student who claimed that his vocal opposition to the Shah's regime would result in his persecution if he were returned. The court was unpersuaded by his affidavit. "[O]bjective evidence that the alien will be persecuted is necessary. The alien's own assertions, without corroboration, will not suffice." 547 F.2d at 379. 3/ The court also rejected his claim under the Convention, noting that the "'well founded fear' standard contained in the Protocol and the 'clear probability' standard which this court has engrafted onto section 243(h) will in practice converge." Id.

2/ See also Martineau v. INS, 556 F.2d 306, 307 (5th Cir. 1977); Daniel v. INS, 528 F.2d 1278, 1279-80 (5th Cir. 1976); Paul v. INS, 521 F.2d 194, 201 (5th Cir. 1975).

3/ See also Moghanian v. Department of Justice, 577 F.2d 141, 142 (9th Cir. 1978); Ishak v. District Director, 432 F. Supp. 624, 626 (N.D. Ill. 1967).

4. Cheng Kai Fu v. INS, 386 F.2d 750 (2d Cir. 1967), cert. denied, 386 U.S. 1003 (1968): Cheng Kai Fu and other Chinese aliens appealed orders of deportation to Hong Kong. They complained that conditions in Hong Kong were very harsh. "Their status in Hong Kong as exiles from the mainland of China will not distinguish them from thousands of others, and the physical hardship or economic difficulties they claim they will face will be shared by many others. Those difficulties do not amount to the kind of particularized persecution that justifies a stay of deportation." 386 F.2d at 753.

5. In re Nagy, 11 I. & N. Dec. 888 (1966): The BIA denied the petition of an Hungarian who claimed religious persecution. "[S]he is a politically unimportant person." 11 I. & N. at 891. The court acknowledged that she might be subjected to imprisonment for overstaying and seeking asylum. "[T]he possibility that she may be subjected to prosecution for violating Hungarian law and, consequently, to legal penalties which may be comparatively severe by United States standards of justice does not, in our opinion, establish the likelihood of 'persecution' within the contemplation of section 243(h) of the Immigration and Nationality Act." Id.

6. In re Dunar, 14 I. & N. Dec. 310 (1973): Dunar was an Hungarian who fled during the 1956 Uprising. "The immigration judge concluded that there was no reason to believe that the penalty imposed for illegal departure [and staying outside Hungary from 1956 to 1973] would be so severe as to constitute persecution." 14 I. & N. Dec. at 312. The BIA concurred.

7. In re Chumpitazi, 16 I. & N. Dec. 629 (1978): The BIA summarily rejected a claim that a tax levied on all Peruvians who traveled outside the country was a form of persecution. 16 I. & N. Dec. at 633-34.