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## In the Matter of Pearson: Partisan Politics and Political Pressure Contravene Congressional Intent

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# IN THE MATTER OF PEARSON:<sup>1</sup> PARTISAN POLITICS AND POLITICAL PRESSURE CONTRAVENE CONGRESSIONAL INTENT

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## I. OVERVIEW

Acts of terrorism on American soil<sup>2</sup> and the public's desire for safety and security prompted Congress to enact several major changes to immigration laws. Notably, on April 24, 1996, Congress enacted the Antiterrorist and Effective Death Penalty Act of 1996 ("AEDPA"),<sup>3</sup> and on September 30, 1996, President

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<sup>1</sup> In the Matter of Pearson, EOIR Case No. A: 72-472-870 (U.S.I.C. Mar. 27, 1997) [hereinafter *Pearson*] (unpublished opinion, on file with the *Pace International Law Review*).

<sup>2</sup> Acts of terrorism cited in legislative discussion include the World Trade Center bombing in 1993, and the bombing of the federal building in Oklahoma City in 1995. See H.R. Conf. Rep. No. 104-518, 104th Cong. 2d Sess. (1996).

<sup>3</sup> Pub. L. No. 104-132, 110 Stat. 1214 (1996) (codified in scattered sections of U.S.C., including sections 8, 15, 18, 22, 28, 40, 42, 50) [hereinafter AEDPA]. One week after Congress enacted the AEDPA, the Senate voted to amend certain provisions in the AEDPA, including the expedited procedures for removing undocumented aliens seeking entry into the United States. See Senate Votes to Amend Terrorism Bill, Criminal Aliens Feel Impact, 73 INTERPRETER RELEASES 650 (1996) (cited in Paul S. Jones, *Immigration Reform: Congress Expedites Illegal Alien Removal and Eliminates Judicial Review from the Exclusion Process*, 21 NOVA L. REV. 915, 916 (1997)). Ultimately, the legislature struck a compromise which

Clinton signed into law the Illegal Immigration Reform and Immigration Responsibility Act.<sup>4</sup> These changes and their effects on the practice of immigration law have been addressed thoroughly in other law review articles.<sup>5</sup>

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closely resembled the original version of the AEDPA. See *Clinton Vows Veto of Immigration Bill if Gallegly Amendment is Included*, 73 INTERPRETER RELEASES 1111, 1112 (1996). In its final result, the AEDPA modified the crime-related deportation grounds and procedures of the Immigration and Nationality Act ("INA") regarding alleged alien terrorists. See Carol Leslie Wolchok, *Demands and Anxiety: The Effects of the New Immigration Law*, 24 HUM. RTS. Q. 12 (1997). The AEDPA amends the INA with respect to its treatment of alien terrorists and is a law aimed at preventing and punishing acts of terrorism. See Christine Hsieh, *Antiterrorism and Effective Death Penalty Act of 1996*, 10 GEO. IMMIGR. L. J. 760 (1996).

In the AEDPA, Congress voted to have the provision barring asylum to terrorists apply to applications made *on, after and before* the date of enactment. Pub. L. No. 104-132, 110 Stat. 1214 (1996). For comprehensive and informative analysis regarding the retroactive nature of this Act and the issue of *ex post facto* law, see Anjali Parekh Prakash, Note, *Changing the Rules, Arguing Against Retroactive Application of Deportation Statutes*, 72 N.Y.U. L. REV. 1420 (1997); Michael Scaperlanda, *Are We that Far Gone?: Due Process and Secret Deportation Proceedings*, 7 STAN. L. & POL'Y REV. 23 (1996).

<sup>4</sup> Pub. L. No. 104-208, 110 Stat. 3009-546 (1996) (codified in scattered sections of 8 U.S.C.) [hereinafter IIRAIRA]. The IIRAIRA is Division C of the Defense Department Appropriations Act of 1997, Pub. L. No. 104-208, 110 Stat. 3009 (1996). The IIRAIRA effected a major overhaul of the INA, particularly concerning matters of admission or other entry, exclusion and deportation, discretionary relief from exclusion or deportation, and judicial review. See *infra* note 6 regarding the definition of deportable and excludable aliens. Under the past system of illegal alien removal, aliens who entered the country unlawfully were afforded greater constitutional rights in their removal than aliens who had presented themselves to the proper immigration authorities for entry and had their admission request denied or delayed. See 3A AM. JUR. 2D, ALIENS AND CITIZENS §§ 1135, 1149 (1986). But see 8 U.S.C. §§ 1225(b), 1226(b) (1994). For further information see Paul S. Jones, *Immigration Reform: Congress Expedites Illegal Alien Removal and Eliminates Judicial Review from the Exclusion Process*, 21 NOVA L. REV. 915, 917-919 (1997); Dulce Foster, Note, *Judge, Jury and Executioner: Immigration and Naturalization Service Summary Exclusionary Power Under the IIRAIRA of 1996*, 82 MINN. L. REV. 209 (1997); Mark Reiko Osaka, *New Limits Placed on Judicial Review of Administrative Orders Under the Immigration and Nationality Act*, 1 HAW. B.J. 12 (1997); Ellen G. Yost, *Immigration and Nationality Act*, 31 INT'L. LAW 589 (1997).

<sup>5</sup> See *supra* note 3. For more information addressing these changes in immigration laws and the practice of immigration law, see Wolchok, *supra* note 3; Thomas Martin, Note, *The Comprehensive Terrorism Prevention Act of 1995*, 20 SETON HALL LEGIS. J. 201, 205 (1996).

This Note will focus on the application of these changes in a recent deportation case in which requested asylum<sup>6</sup> was granted by the Immigration Court of New York, *In the Matter of Pearson*, seemingly in contravention of Congressional intent in enacting these statutory provisions. Section II of this Note provides the background of applicable law, procedures, statutory bars, and exceptions regarding claims for asylum. This will help the reader understand what a claim of asylum requires and thus, better understand what transpired in *Pearson*. Section III provides the background facts and circumstances of *Pearson*. Section IV provides an alternative analysis of the relevant law and legal principles as applied by the court in *Pearson*. Section V discusses the partisan politics and political pressures playing a role in this case. Section VI addresses the political and legal ramifications of the *Pearson* decision. Finally, section VII concludes with a summary of the possible significance of the *Pearson* interpretation of the changes in immigration law.

## II. ASYLUM CLAIMS

To qualify for asylum an alien must first demonstrate that he or she fits within the Immigration and Nationality Act<sup>7</sup> defi-

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<sup>6</sup> The rights of aliens vary according to their status under the INA. See *Jean v. Nelson*, 711 F.2d 1455, 1464 (11th Cir. 1983), *cert. granted*, 469 U.S. 1071, *aff'd*, 472 U.S. 846 (1984). Based on an alien's entry status there are two categories of aliens: deportable or excludable. If an alien had entered the United States, legally or otherwise, and upon a finding by the Immigration and Naturalization Service ("INS" or "Service") of statutory reasons for the alien's removal from this country, the alien was deportable and required a more extensive procedural course for removal. See 8 U.S.C. § 1251(a) (1994). Aliens who had not yet entered the United States and met the statutory requirements for removal under 8 U.S.C. § 1182 were excludable and were thus afforded less procedural due process rights. See *Jean*, 71 F.2d at 1467.

An alien may apply for asylum either affirmatively or defensively. Maureen O. Jurley, *The Asylum Process: Past, Present, and Future*, 26 NEW ENG. L. REV. 995, 1013 (1992). Asylum is affirmatively sought when an alien files the claim before the government is aware the applicant is in the United States illegally. See *id.* at 1013. A defensive claim of asylum is filed as a defense to deportation or exclusion charges. See *id.* *Pearson's* claim for asylum was in defense of the government seeking his deportation. See *Pearson*, at 2-3.

<sup>7</sup> Immigration and Nationality Act, 66 Stat. 163, 8 U.S.C. § 1101, *et seq.* (1952). The 1952 Act (also known as the McCarran-Walter Act) recodified existing immigration law into one comprehensive statute. There have been numerous amendments of the basic statute since its enactment in 1952. The INA with its subsequently adopted amendments and modifications, by the AEDPA and the IIRAIRA, to name two of the many acts, agreements and amendments, constitutes

nition of a "refugee."<sup>8</sup> The definition of "refugee" contains three broad elements, which must be satisfied before an alien is eligible for asylum. The alien must 1) generally seek asylum from outside his or her country of nationality;<sup>9</sup> 2) demonstrate inability or unwillingness to return to, and inability or unwillingness to avail himself or herself of the protection of his or her country of nationality because of persecution or a well-founded fear of persecution;<sup>10</sup> and 3) such persecution must be based on

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the main body of United States immigration law. This Note will cite to the Act as it exists as of October 1998, incorporating all amendments and modifications, and thus, with no reference to year.

<sup>8</sup> See INA § 101(a)(42), 8 U.S.C. § 1101(a)(42) (1994). See also 8 C.F.R. § 208.13 (1998).

<sup>9</sup> To apply for asylum, aliens must be physically present in the United States. INA § 208(a)(1), 8 U.S.C. § 1158(a) (1994). An applicant who has been in the United States for more than a year is ineligible for asylum unless there are special circumstances that prevented him or her from applying earlier. See INA § 208(a)(2)(B), 8 U.S.C. § 1158(a)(2)(B) (Supp. II 1996). An exception to the one-year time limit is if the alien can show "extraordinary circumstances." See *id.* at § 208(a)(2)(D), 8 U.S.C. § 1158(a)(2)(D).

<sup>10</sup> Asylum applicants must demonstrate a "credible fear" to establish well-founded fear of persecution. See INA § 101(a)(42)(A), 8 U.S.C. § 1101(a)(42)(A) (1994). The Service has refused to define a "credible fear of persecution" in its implementing regulations. See 62 Fed. Reg. 10,312, 10,317 (1997) (supplementary information). The INA does not define "persecution," but case law has defined persecution as harm or suffering inflicted upon an individual by the government of a country or by persons the government is unable or unwilling to control in order to punish him for possessing a belief or characteristic a persecutor finds offensive and seeks to overcome. See *Matter of Acosta*, 19 I. & N. Dec. 211, 222 (B.I.A. 1985). See also *INS v. Stevic*, 467 US 497 (1984). In order to meet the well-founded fear standard of likeliness that the alien will become the victim of persecution, "the evidence must demonstrate that: 1) the alien possesses a belief or characteristic a persecutor seeks to overcome in others by means of punishment of some sort; 2) the persecutor is already aware, or could easily become aware, that the alien possess this belief or characteristic; 3) the persecutor has the capability of punishing the alien; and 4) the persecutor has the inclination to punish the alien." *Acosta*, 19 I. & N. Dec. at 226. "The issue of whether an alien's facts demonstrate these four factors is one that must be decided on a case-by-case basis depends upon each alien's own particular situation." *Id.* at 227.

An alien's state of mind, supported by prevailing conditions in his home country, will indicate whether he reasonably fears persecution. See *INS v. Cardoza-Fonseca*, 480 U.S. 421, 430 (1987). Both subjective and objective evidence must be considered to determine if a well-founded fear exists. See *id.* See also *Blanco-Comarribas v. INS*, 830 F.2d 1039, 1043 (9th Cir. 1987). The subjective "fear" element of the refugee definition is closely linked to the applicant's personality and credibility. See UNHCR HANDBOOK ON PROCEDURES AND CRITERIA FOR DETERMINING REFUGEE STATUS UNDER THE 1951 CONVENTION AND 1967 PROTOCOL RELATING TO THE STATUS OF REFUGEES (Geneva 1979) ¶¶ 37, 40, 41 [hereinafter HANDBOOK]. See also *Carvajal-Munoz v. INS*, 743 F.2d 562, 574 (7th Cir. 1984). Fear is not

the alien's race, religion, nationality, political opinion or membership in a particular social group.<sup>11</sup> The asylum applicant carries the burden of establishing that a "reasonable person in his circumstances would fear persecution."<sup>12</sup>

Changes to immigration law now include three statutory bars to aliens seeking asylum, namely aliens are ineligible if they are found to have: 1) participated in the "persecution of others,"<sup>13</sup> 2) committed aggravated felonies,<sup>14</sup> or crimes of

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necessarily based on an individual's own experience of persecution but may stem from the harsh treatment of other similarly situated persons. See HANDBOOK ¶ 43. See also 8 C.F.R. § 208.13(b)(i) (1998). Evidence of general country conditions is not in itself sufficient and should be augmented with evidence relating to the applicant's personal plight whenever possible. See *Zavala-Bonilla v. INS*, 730 F.2d 562, 564-65 (9th Cir. 1984).

<sup>11</sup> See INA § 101(a)(42), 8 U.S.C. § 1101(a)(42) (1994). See also HANDBOOK, *supra* note 11, ¶ 57. Often an asylum seeker may experience persecution on several of these grounds, or the grounds may overlap. See HANDBOOK, *supra* note 11, ¶ 67.

<sup>12</sup> 8 C.F.R. § 208.3(a) (1998). See also *Matter of Mogharrabi*, 19 I. & N. Dec. 439, 445 (B.I.A. 1987). As an applicant may have difficulty in obtaining corroborating evidence, his testimony alone is acceptable if it "is believable, consistent, and sufficiently detailed to provide a plausible and coherent account of the basis for his fear." *Mogharabbi*, 19 I. & N. Dec. at 445. However, regarding general practices in the home country, the asylum applicant must produce supporting evidence to the extent that it is available. See *Matter of Dass*, 20 I. & N. Dec. 120 (B.I.A. 1989). Careful consideration should be given to the target country's record of persecuting others; "a well-founded fear, in other words . . . can be based on what happens to others who are similarly situated." *Mogharabbi*, 19 I. & N. Dec. at 446.

<sup>13</sup> INA § 101(a)(42)(B), 8 U.S.C. § 1101(a)(42)(B) (1994). "The term 'refugee' does not include any person who ordered, incited, assisted or otherwise participated in the persecution of any person on account of race, religion, nationality, membership in a particular social group, or political opinion." (emphasis added).

<sup>14</sup> See INA § 101(a)(43)(F), 8 U.S.C. § 1101(a)(43)(F) (1994), as amended by IIRAIRA § 321(a)(3) (1996), 8 U.S.C. § 1101(a)(43)(F) (Supp. II 1996). An aggravated felony is defined to include "a crime of violence (as defined in section 16 of title 18, United States Code, but not including a purely political offense) for which the term of imprisonment [is] at least one year." 8 U.S.C. § 1101(a)(43)(F) (Supp. II 1996) (emphasis added). "The term [aggravated felony] applies to an offense . . . whether in violation of Federal or State law and applies to such an offense in violation of the law of a foreign country for which the term of imprisonment was completed within the previous 15 years." INA § 101(a)(43), 8 U.S.C. § 1101(a)(43) (1994). The new definition of the term applies to convictions entered "before, on, or at the date of enactment." *Id.*, as amended by IIRAIRA § 321(b) (1996), 8 U.S.C. § 1101(a)(43)(F) (Supp. II 1996) (emphasis added). See also *In re Yeung*, Int. Dec. 3297 (B.I.A. 1996). The IIRAIRA definition further limited the definition in the AEDPA, § 440(e) (1996), enacted only several months before IIRAIRA, (also amending INA § 101(a)(43), 8 U.S.C. § 1101(a)(43) (1994)). The AEDPA defined aggravated felonies to include "murder, drug trafficking, arms trafficking, money

moral turpitude,<sup>15</sup> or 3) committed acts of terrorism.<sup>16</sup> Congress enacted these statutory bars to make clear their intention

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laundering, or any crime of violence when the sentence is at least one year." AEDPA, § 440(e) (1996), 110 Stat. 1214, 1276-8 (1996) (emphasis added). The language in IIRAIRA, which amended both the INA and AEDPA definitions, indicated that the definition would apply to "actions taken on or after the date of enactment of this Act, regardless of when the conviction occurred . . . ." IIRAIRA, Pub. L. No. 104-208, § 321(c) (1996), 110 Stat. 3009, 3009-627 (1996) (amending INA § 101(a)(43), 8 U.S.C. § 1101(a)(43) (1994) as amended by AEDPA, Pub. L. No. 104-132, § 441(e) (1996)) (emphasis added). The IIRAIRA definition would bring the Respondent within this new definition of an aggravated felon, only if "actions taken" is interpreted as meaning the initiation of deportation proceedings.

An alien may also face disqualification if "there are serious reasons for considering" that the alien has committed a serious non-political crime prior to entering the United States. See INA § 241(b)(3)(B)(iii), 8 U.S.C. § 1231(b)(3)(B)(iii) (Supp. II 1996). While the statute does not define "serious nonpolitical crime," the United Nations construct defines a "serious crime" as a "capital crime or a very grave punishable act." See HANDBOOK, *supra* note 11, ¶ 155. For an act to be political, it must be closely connected to a political purpose. See *McMullen v. INS*, 788 F.2d 591, 595 (9th Cir. 1986). See also HANDBOOK, *supra* note 11, ¶ 152. It must be more of a political act than a common law crime. See *McMullen*, 788 F.2d at 596. The Board of Immigration Appeals ("BIA" or "Board") has held that "in evaluating the political nature of a crime, we consider it important that the political aspect of the offense outweigh its common-law character. This would not be the case if the crime is grossly out of proportion to the political objective or if it involves acts of an atrocious nature." *Matter of McMullen*, 19 I. & N. Dec. 90, 97-98 (B.I.A. 1984) (former PIRA terrorist barred asylum as the BIA found "serious reason" for concluding his participation in campaign of violence "randomly directed against civilians represents acts of an atrocious nature out of proportion to the political goal of achieving a unified Ireland"). For further information see Cecelia M. Espenosa, *Crimes of Violence by Non-Citizens and the Immigration Consequences*, 26 COLO. LAW. 89 (1997).

<sup>15</sup> See INA § 241(a)(2)(A)(i)(II), 8 U.S.C. 1251(a)(2)(A)(i)(II) (1994), as amended by IIRAIRA, Pub. L. No. 104-208, 110 Stat. 3009-598 (1996), transferred to INA § 237(a)(2)(A)(i), 8 U.S.C. § 1227(a)(2)(A)(i) (Supp. II 1996). An alien is deportable as having been convicted of a crime of moral turpitude if, among other requirements, he "is convicted of a crime for which a sentence of one year or longer may be imposed." INA § 237(a)(2)(A)(i)(II), 8 U.S.C. § 1227(a)(2)(A)(i)(II) (Supp. II 1996).

<sup>16</sup> See INA § 208(b)(2)(A)(v), 8 U.S.C. § 1558 (Supp. II 1996) (rewritten in its entirety by IIRAIRA § 604, 110 Stat. 3009 (1996)). Acts of terrorism are defined in INA § 212(a)(3)(B), 8 U.S.C. § 1182(a)(3)(B) (Supp. II 1996). Actual statutory language requires an alien to be "a danger to the security of the United States" to be ineligible for asylum. See INA § 208(b)(2)(A)(v), 8 U.S.C. § 1158 (Supp. II 1996). The sentence concerning terrorists was added by the AEDPA § 413(a) (1996), 110 Stat. 1269 (1996). Only "reasonable grounds" are needed for believing that a danger to U.S. security exists, not a showing of actual danger. See INA § 208(b)(2)(A)(v), 8 U.S.C. § 1558(b)(2)(A)(v) (Supp. II 1996). Thus, if an alien is found to have engaged in terrorist activity he would be ineligible for asylum, unless the court, in its discretion, determines that there are not reasonable grounds for regarding the alien as a danger to the security to the United States. See INA

to take a tough stance on terrorism and to keep criminals from immigrating to the United States.<sup>17</sup> However, there are exceptions to these statutory bars. An exception to the statutory bars for aggravated felonies and crimes of moral turpitude is the "political offense" exception, which goes to the political purpose or motivation behind the crime.<sup>18</sup> An exception to the statutory bar for terrorist activity is a waiver contained in the language added by the AEDPA, namely if the court finds no reasonable grounds to regard the Respondent as a danger to the security of the United States.<sup>19</sup>

An application for asylum is also deemed to constitute an application for withholding of deportation.<sup>20</sup> The applicant for asylum and withholding of deportation has the burden of proof of establishing he/she has been subject to past persecution,<sup>21</sup> has a well-founded fear of persecution, or has established a

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§ 208(a), 8 U.S.C. § 1558(a) (Supp. II 1996), *as amended by* AEDPA § 421(a) (1996).

<sup>17</sup> See *In re Yeung*, Int. Dec. 3297 (B.I.A. 1996).

<sup>18</sup> See INA § 101(a)(43)(F), 8 U.S.C. § 1101(a)(43)(F) (1994) (aggravated felony) and INA § 237 (a)(2)(A)(i), 8 U.S.C. 1227 (a)(2)(A)(i) (Supp. II 1996) (moral turpitude). Criminal prosecution is not persecution. See *Matter of Janus and Janek*, 12 I. & N. Dec. 866, 876 (B.I.A. 1968). The political offenses exception doctrine, derived from extradition law, states generally that a person may not be extradited to face prosecution in the requesting state for crimes committed in furtherance of a political uprising, movement or rebellion. See *Ornelas v. Ruiz*, 161 U.S. 502 (1896). See also *supra* note 15 for information regarding the political nature of a crime.

<sup>19</sup> See INA § 208(b)(A)(iv), 8 U.S.C. § 1158(b)(2)(A)(iv) (Supp. II 1996).

<sup>20</sup> See 8 C.F.R. § 208.3(b) (1998). Withholding of deportation is now also known as withholding of removal. Section 305 of the IIRAIRA enacted in 1996 rewrote INA § 243 in its entirety; the provisions of the former 'withholding of deportation' can be found in INA § 241. See INA § 241, 8 U.S.C. § 1231 (Supp. II 1996). See also IIRAIRA § 305 (1996). As INA § 243(h) existed prior to April 1, 1997 an application for asylum also constituted an application for asylum. See 8 C.F.R. § 208.3 (1998). After April 1, 1997, it is still "deemed to constitute both at the same time unless adjudicated in deportation or extradition proceedings commenced prior to April 1, 1997." *Id.*

Note that withholding of deportation (or withholding of removal) is only a different form of relief, and grants no status to the individual requesting it.

<sup>21</sup> An alien who has demonstrated past persecution is presumed to have a well-founded fear of future persecution. See 8 C.F.R. § 208.13(b)(1) (1998). Well-founded fear of persecution is presumed unless it is demonstrated by a preponderance of the evidence that, since the time the persecution occurred, conditions in the applicant's country have changed to such an extent that the applicant no longer has a well-founded fear. *Id.* See also INA § 208(a)(2)(D), 8 U.S.C. § 1158(a)(2)(D) (Supp. II 1996). The Service has the burden to rebut the presumption. See 8 C.F.R. § 208.13(b)(1)(i) (1998). See also *In re H-*, Int. Dec. 3276 (B.I.A. 1976).



clear probability of persecution.<sup>22</sup> The applicant has the burden of establishing that he/she merits a favorable exercise of discretion.<sup>23</sup> Asylum is a discretionary remedy.<sup>24</sup> As such, statutory and regulatory eligibility for asylum, whether based on past persecution or a well-founded fear of future persecution, does not necessarily compel a grant of asylum.<sup>25</sup> Asylum may be denied, if the totality of the circumstances indicate that the adverse factors outweigh the fear of persecution and positive factors in the asylum application.<sup>26</sup> If, however, asylum is granted, the asylee can then apply for more permanent types of status in the United States.<sup>27</sup>

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<sup>22</sup> See 8 C.F.R. §208.13(b)(2) (1998). See also *Matter of Mogharrabi*, 19 I. & N. Dec. 439 (B.I.A. 1987). One seeking withholding of deportation must demonstrate that it is "more likely than not" that his life or freedom would be threatened in the proposed country of deportation on account of his race, nationality, membership in a particular social group, or political opinion. See 8 C.F.R. § 208.16(b) (1998).

<sup>23</sup> See *Matter of Pula*, 19 I. & N. Dec. 467 (B.I.A. 1987).

<sup>24</sup> See *INS v. Cardoza-Fonseca*, 480 U.S. 421, 443 (1987).

<sup>25</sup> See *id.*

<sup>26</sup> See *Matter of Soleimani*, 20 I. & N. Dec. 99, 107 (B.I.A. 1989). Favorable factors include the alien's conduct while in this country, whether the individual has relatives residing in the United States, and humanitarian concerns, such as an individual's tender years or poor health. See *Pula*, 19 I. & N. Dec. at 474. A serious *non-political* crime outside the United States serves as a negative discretionary factor. 8 C.F.R. § 208.16(c)(2)(iii) (1998); 53 Fed. Reg. 11,301 (Apr. 6, 1988) (emphasis added). Another adverse factor is if the alien engaged in fraud to circumvent orderly refugee procedures, however, the seriousness of the fraud is considered. See *Pula*, 19 I. & N. Dec. at 474.

In determining whether an alien should be granted asylum when the alien has a serious criminal conviction, the court weighs the gravity of the crime against the persecution facing the alien if returned to his or her country of nationality. See HANDBOOK, *supra* note 11, ¶ 156-58. If the persecution is found to be severe, then the alien should be found ineligible for asylum only if the crime was very grave. See *id.* at ¶ 156. See also *Pula*, 19 I. & N. Dec. at 473-74; Arthur C. Helton, *Criteria and Procedures for Refugee Protection in the United States*, 964 PLI/CORP. 21, 34 (1996).

<sup>27</sup> See INA § 209(a), 8 U.S.C. § 1159(a) (Supp. II 1996). Asylum is a temporary status granted for a year. See *id.* "Every alien classified as a refugee [pursuant to 8 C.F.R. §207] whose status has not terminated, must apply to the Service after one year to determine his or her admissibility." 8 C.F.R. § 209.1(a) (1998). A grant of asylum does not convey a right to remain permanently in the United States, and such may be revoked under certain circumstances. See 8 U.S.C. § 1158(c)(2) (Supp. II 1996). After refugee status is approved, the asylee refugee "shall, at the end of such year period, return or be returned to the custody of the Service for inspection and examination for admission . . . [and] if found to be admissible . . . as an immigrant . . . shall be regarded as lawfully admitted to the United States for permanent residence as of the date of such alien's arrival into the United States." INA § 209(a)(1), (2), 8 U.S.C. § 1159(a)(1), (2) (Supp. II 1996). One

III. *IN THE MATTER OF PEARSON*

*Pearson* is a recent case decided by the Immigration Court of New York on March 27, 1997. The Respondent, Brian Pearson, a native of Northern Ireland and citizen of the United Kingdom, entered the United States through New York City's John F. Kennedy International Airport on October 3, 1988, under the Visa Waiver Pilot Program.<sup>28</sup> He had just been released from Long Kesh Prison<sup>29</sup> in August,<sup>30</sup> having served 12 years of a 25 year sentence for driving the getaway car<sup>31</sup> follow-

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type of permanent status which could then be applied for is Adjustment of Status, under INA § 245(a), such as the Respondent requested in his original application to the Service. *See Pearson*, at 2. If after the year waiting period the country to which the asylee was to be deported becomes safe, asylum can be withdrawn. *See* INA § 208(a)(2)(D), 8 U.S.C. § 1158(a)(2)(D) (Supp. II 1996). If the applicant never applied for Adjustment of Status during the year waiting period following the grant of asylum, he could at that time be deported. *See* INA § 209(b)(2), 8 U.S.C. 1159(a)(1)(B) (1994).

<sup>28</sup> *See Pearson*, at 2. The Visa Waiver Pilot Program [hereinafter VWPP] enables individuals from certain countries to visit the U.S. for up to 90 days. *See* INA § 217, 8 U.S.C. § 1187 (1994), as amended by the Immigration Act of 1990, Pub. L. No. 101-649, § 201(a), 104 Stat. 4978; Miscellaneous and Technical Immigration and Naturalization Amendments of 1991, Pub. L. No. 101-232, §§ 303(a), 307(1)(3), 105 Stat. 1773. Individuals seeking entry as tourists under the VWPP are waived the requirement that they first obtain a non-immigrant visa of some form. *See* INA § 212(a), 8 U.S.C. § 1187 (1994). *See also* INA § 212(a)(7)(B)(i)(II), 8 U.S.C. § 1182(a)(7) (Supp. II 1996). In return for the waiver of this requirement, the individual waives any right to contest excludability or deportability, excepting claims for asylum. *See* INA § 217(b)(2), 8 U.S.C. 1187 (b)(2)(1994). The "pilot program period means the period beginning on October 1, 1988 and ending on April 30, 1998." INA § 217(F), 8 U.S.C. § 1187 (1994).

The Respondent entered the U.S. on October 3, 1988, within the pilot program period. *See Pearson*, at 2. He was authorized to remain in the U.S. only until January 21, 1989. *See id.*

<sup>29</sup> Renamed, Maze Prison, it is located near Belfast, Northern Ireland. *See infra* note 176.

<sup>30</sup> Pearson's actual date of release was August 23, 1988. *See Pearson*, at 27.

<sup>31</sup> Respondent was duly convicted by the Crown Court in Northern Ireland on April 19, 1977 on several criminal charges related to two separate Irish Republican Army ("IRA") bombings of Royal Ulster Constabulary ("RUC") barracks; one on October 18, 1975, the other on December 27, 1995. *See id.* In total, Pearson was convicted of ten separate crimes, relating to explosive substances, the possession of explosive substances, the hijacking of a car, the unlawful possession of a rifle, and membership in a proscribed organization, namely the IRA. *See id.* As a result of these convictions, Pearson was sentenced to numerous terms of imprisonment, ranging from 5 to 25 years, all to be served concurrently. *See id.* at 27.

ing two Irish Republican Army ("IRA") bombings of Royal Ulster Constabulary ("RUC") barracks.<sup>32</sup>

Pearson had authorization to remain in the U.S. only until January 21, 1989.<sup>33</sup> However, Pearson remained in the U.S. long past that authorized date, during which time he married a U.S. citizen, Doris Pearson,<sup>34</sup> and had a child.<sup>35</sup> As the immediate relative of a U.S. citizen, Pearson applied for Adjustment of Status<sup>36</sup> on May 17, 1995.<sup>37</sup> At an appointment with the Immigration and Naturalization Service ("INS" or "Service") on April 9, 1996, the Respondent was served with the Service's decision denying his adjustment application.<sup>38</sup> Simultaneously, Pearson was served with an Order to Show Cause<sup>39</sup> charging

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<sup>32</sup> See *Pearson*, at 27, 34, 35. In Northern Ireland, the RUC is Northern Ireland's official police force. See Jonathan Stevenson, *The IRA Doesn't Deserve Asylum*, WALL ST. J. EUR., May 21, 1997, at 8. RUC barracks are not only the police station where residents come to address complaints and where suspects would be brought and detained; the RUC Constables often reside in these barracks as well. RUC barracks and police forces have been favored targets of the IRA. Destroying the barracks not only puts a halt to police business, it effectively renders the facilities uninhabitable. Furthermore, because a Constable "wears the uniform of the Crown there is always the military justification for the killing." See PADRAIG O'MALLEY, *THE UNCIVIL WARS: IRELAND TODAY*, 290-91 (1983). Pearson acknowledged this view in his testimony as he stated that "the RUC Barracks is the embodiment of British rule, and represents the very thing the Republicans seek to rid themselves of." *Pearson*, at 33-34.

<sup>33</sup> See *Pearson*, at 2.

<sup>34</sup> See *id.* at 16.

<sup>35</sup> See *id.* at 16.

<sup>36</sup> See 8 C.F.R. § 212.2(e) (1998). See generally INA § 245, 8 U.S.C. § 1255 (1994) for adjustment of status. A waiver of rights under the VWPP generally includes all non-asylum forms of relief. See VWPP, *supra* note 28. However, an individual admitted as a visitor under the VWPP is not eligible to apply for adjustment of status to that of a lawful permanent resident alien pursuant to INA § 245A(b), other than as an immediate relative as defined in INA § 201(b) or under the provisions of INA § 245(i). See 8 C.F.R. §§ 245.1(b), 245.1(b)(8) (1998). Thus, the only way an alien entering under the VWPP can adjust his status is as the immediate relative of a U.S. citizen.

<sup>37</sup> See *Pearson*, at 2.

<sup>38</sup> See *id.* The Service denied Respondent's adjustment of status application because the ground of excludability contained in INA § 212(a) applied to the Respondent, namely, that because of his activities in Northern Ireland he had engaged in terrorist activity, as defined in INA § 212(a)(3)(B), 8 U.S.C. § 1182(a)(3)(B) (1994). See *Pearson*, at 8.

<sup>39</sup> See generally 8 C.F.R. §§ 3.14, .15 (1998) [hereinafter OSC]. If an alien admitted under the VWPP requests asylum, the subsequent proceedings against him must commence with an OSC. See 8 C.F.R. § 217(b) (1998); *Matter of L*, 20 I. & N. Dec. 553, 554 (B.I.A. 1992). Deportation proceedings are commenced with the issuance of an OSC, which may only be issued by the Service. See 8 C.F.R. § 3.14

him with deportation.<sup>40</sup> The Service charged Pearson with deportation, not only because he had over-stayed the original VWPP's terms<sup>41</sup> and was an excludable alien at the time of entry,<sup>42</sup> but more significantly, because the Service alleged he was an alien convicted of a crime involving moral turpitude.<sup>43</sup> Therefore, Pearson was precluded from remaining in the United States.

In response to the OSC and its attempt to establish deportability,<sup>44</sup> Pearson again claimed Adjustment of Status<sup>45</sup> based on his marriage to a U.S. citizen.<sup>46</sup> Pearson also raised

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(1998). Authority to deport/remove aliens under the INA is granted to the Attorney General. *See* INA § 242, 8 U.S.C. § 1252 (Supp. II 1996). In deportation proceedings, the Service, through its subordinate immigration officers and officials, bears the burden of proving by clear, convincing and unequivocal evidence that the alien it wishes to remove is deportable. *See* *Woodby v. INS*, 385 U.S. 276, 286 (1966).

<sup>40</sup> *See Pearson*, at 2.

<sup>41</sup> *See generally* INA § 241, 8 U.S.C. § 1227 (Supp. II 1996) (permits deporting aliens who have remained in this country for a time longer than permitted).

<sup>42</sup> The respondent, at the time of entry into the U.S. was not in possession of a valid immigration visa. *See generally* INA § 212, 8 U.S.C. § 1182 (Supp. II 1996). Note that the 1996 legislative amendments to the INA substituted language of "is inadmissible" for "is excludable." IIRAIRA § 308(d)(1)(B), (C) (1996).

<sup>43</sup> *See* INA § 212(a)(2)(A)(i)(I), 8 U.S.C. § 1182 (Supp. II 1996).

<sup>44</sup> *See Pearson*, at 2. At the master calendar hearing held on August 2, 1996, the Respondent conceded proper service of the OSC and admitted allegations regarding nationality, entering under the VWPP, that he had remained longer than the time permitted and that he did not then possess a valid immigrant visa. *See id.* The respondent, however, denied all charges of deportability. *See id.*

<sup>45</sup> *See id.* at 7. To be eligible for adjustment of status, which grants permanent residency status, the alien must show he was inspected and admitted or paroled into the United States; he is eligible to receive an immigrant visa and is admissible for permanent residence; and that an immigrant visa is immediately available at the time the application is filed. *See* INA § 245(a), 8 U.S.C. § 1255 (1994). Even if the alien meets this criteria, the application may be denied in the discretion of the court. *See* *Matter of Lam*, 16 I. & N. Dec. 432, 434 (B.I.A. 1978). *See also* INA § 245(a), 8 U.S.C. § 1225 (Supp. II 1996). The exercise of discretion involves the weighing of favorable and adverse factors in a particular case. *See Lam*, 16 I. & N. Dec. at 434.

<sup>46</sup> The most important favorable factor in the exercise of discretion regarding adjustment of status is that the alien is a relative of a United States citizen. *See* *Matter of Ibrahim*, 18 I. & N. Dec. 55 (B.I.A. 1981). "Other favorable factors include family ties to the United States; lengthy residence in the United States, an approved preference petition, hardship if the Respondent were forced to apply for an immigrant visa through consular processing, payment of taxes, community service, good moral character, employment history and business and property ties to the United States." *Pearson*, at 8 (citing *Matter of Blas*, 15 I. & N. Dec. 626 (A.G. 1976)). A range of positive and adverse factors includes "age, family ties and

the claim of asylum,<sup>47</sup> based on his political beliefs.<sup>48</sup> He fur-

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length of residence in this country, immigration or criminal violations, the interests of society, and the hardship of removal." See *In re Michel*, Int. Dec. 3335 (B.I.A. 1998) (citing *Matter of Mendez*, Int. Dec. 3272 (B.I.A. 1996)). Even if an alien's criminal conviction may not be a statutory bar, it "may properly be a factor to be considered in the exercise of discretion." *Id.* Another adverse factor is the circumventing of orderly refugee procedures. See *Matter of Soleimani*, Int. Dec. 3118 (B.I.A. 1989).

<sup>47</sup> See *Pearson*, at 2. An individual may apply for asylum to an asylum officer or an immigration judge. See 8 C.F.R. § 208.1(a) (1998). However, when an alien applies for asylum in the course of deportation hearings the immigration judge has jurisdiction over the asylum application. See 8 C.F.R. §§ 208.2(b), 3.14(b) (1998). *Pearson* also argued for alternative relief of suspension of deportation and voluntary departure, but the court determined these forms of relief were contrary to what Congress intended under the Immigration and Nationality Act. See *Pearson*, at 2-3. See generally Helton, *Criteria and Procedures for Refugee Protection in the United States*, 964 PLI/CORP. 21 (1996) (for further information on the procedural process of applying for asylum).

The applicant's burden of proof of establishing the likelihood of persecution is a "lesser burden of proof [and] . . . is less stringent than the 'clear and convincing evidence' standard which the government must meet to establish that the alien is not legally present in the United States." *Bolanos-Hernandez v. INS*, 767 F.2d 1277, 1281 n.5 (9th Cir. 1985). The BIA has held that the applicant's burden is to establish the likelihood of persecution by a preponderance of the evidence. See *Matter of Acosta*, 19 I. & N. Dec. 211 (B.I.A. 1985); 8 C.F.R. § 208.13 (1998) ("more likely than not" burden). See also *supra* notes 21-25, and accompanying text.

<sup>48</sup> See *Pearson*, at 32. The Respondent, a Catholic, testified to the discrimination he and his family experienced in Ireland, which he asserts was on account of their religion, and the political beliefs which were attached to Catholics, namely the desire to expel the British and reunite Northern Ireland with the Republic of Ireland. See *id.* Thus, the Respondent's political beliefs are for reunification of Ireland.

In 1921-22 Ireland a country comprised of 32 counties was divided into two parts. See *id.* at 18. The southern 26 counties became the Republic of Ireland, which is independent of British rule, having its own Parliament and governmental structure. See *id.* The 6 northern counties became known as Northern Ireland and remained part of the United Kingdom. See *id.* at 18. Both Irish Catholics and English Protestants live in Northern Ireland, but in a state of discord as most Catholics there are Republicans who wish to rid Northern Ireland of British rule and most Protestants are Loyalists who want Northern Ireland to remain part of the United Kingdom. See *Pearson*, at 18. The Irish Republican Army originated in 1916 with its goal being to remove British presence from all of Ireland. See *id.* at 24. Thus, the IRA has targeted British forces, places and people, in its attempts to drive the British out of Ireland. See *id.* British forces in Northern Ireland, including the RUC are often the targets of violence by those who strive to re-unify Ireland, free of British rule. See *id.* The IRA has a general headquarters, with an army council, and orders are given and obeyed like in an army. See *id.* at 24.

ther requested withholding of deportation,<sup>49</sup> suspension of deportation,<sup>50</sup> and, in the alternative, voluntary departure.<sup>51</sup>

On November 18, 1996, the Service filed a superceding OSC.<sup>52</sup> While the second OSC closely mirrored the original, it included several additional factual allegations, and two addi-

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<sup>49</sup> See *Pearson*, at 2. Pearson declined to designate a country of deportation. See *id.* at 5. As at least one country must be designated if deportation is deemed necessary, the Service designated the Republic of Ireland as the country of deportation, with the United Kingdom as in the alternative. See *id.* at 5-6. Pearson specifically requested withholding of deportation to the United Kingdom and to the Republic of Ireland as indicated in the Service's OSC. See *id.* at 2-3.

<sup>50</sup> See *Pearson*, at 3. Suspension of deportation, INA § 243(h), 8 U.S.C. § 1254 (1994), was repealed by IIRAIRA § 308(b)(7) (1996). Cancellation of removal (withholding of deportation) is provided by INA § 240A, 8 U.S.C. § 1229b (Supp. II 1996) as redesignated by IIRAIRA § 308(b) (1996). In order to establish statutory eligibility, "aliens must prove they have been physically present in the United States for a continuous period of at least 7 years, that they have been persons of good moral character during such period, and that their deportation would result in extreme hardship to themselves or to their spouse, parent, or child who is a citizen or lawful permanent resident of the United States." *In re Pilch*, Int. Dec. 3298 (B.I.A. 1996). "Extreme hardship is not a definable term of fixed and inflexible meaning, and the elements to establish extreme hardship are dependent upon the facts and circumstances of each case." *Id.* The Board has determined the following factors to be relevant to the issue:

the length of the alien's presence over the minimum requirement of 7 years; the alien's age, both at entry and at the time of application for relief; the presence of lawful permanent resident or United States citizen family ties to this country; the alien's family ties outside the United States; the conditions in the country or countries to which the alien is returnable and the extent of the alien's ties to such countries; the financial impact of departure from this country; significant conditions of health, particularly when tied to an unavailability of suitable medical care in the country to which the alien will return; and lastly, the possibility of other means of adjustment of status or future entry into this country.

*Mendez*, Int. Dec. 3298 (citing *Matter of Anderson*, 16 I. & N. Dec. 596 (B.I.A. 1978)).

Note that cancellation of removal now calls for "exceptional and unusual hardship." See INA § 240A(b)(1)(D), 8 U.S.C. § 1229b(b)(1)(D) (Supp. II 1996).

<sup>51</sup> See *Pearson*, at 2-3. Under voluntary departure, Pearson would, on his own volition, leave the United States. See INA § 244(B), 8 U.S.C. § 1229(c) (Supp. II 1996).

<sup>52</sup> See *Pearson*, at 3. The effect of a superceding OSC is that it cancels the originally filed OSC and substitutes the superceding OSC in its place. See 8 C.F.R. § 240.20(e) (1998). The Service argued it had the right to file additional factual allegations and grounds of deportation at any time. See *Pearson*, at 3. See also 8 C.F.R. § 240.10(e) (1998).

tional charges of deportability.<sup>53</sup> While the court ultimately did not allow the superceding OSC to replace or supplant the original OSC,<sup>54</sup> it decided to treat the superceding OSC document as a Notice of Lodging Additional Charges by which to amend the originally filed OSC.<sup>55</sup> Thus, these additional charges of deportability, namely, as an alien excludable at the time of en-

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<sup>53</sup> See *Pearson*, at 3. The additional allegations within the superceding OSC "charged the Respondent with deportability, . . . as an alien excludable at the time of entry, . . . as an alien convicted of two or more offenses (other than purely political offenses) for which the aggregate sentences to confinement actually imposed was more than five years, otherwise known as crimes of moral turpitude, and . . . as an alien who has engaged in terrorist activity . . . ." *Id.*

<sup>54</sup> See *Pearson*, at 4. Originally, the court had accepted the superceding OSC over the objections of the Respondent. See *id.* at 3. The respondent objected to the submission of the document, but did acknowledge "receipt" of the superceding OSC. See *id.* Upon motion from the Respondent, the court adjourned proceedings to allow the Respondent an opportunity to review and respond, given that the hearing date was only two days from the issuance of the superceding OSC. See *id.* On January 7, 1997, the court, *sua sponte*, amended its decision and held that jurisdiction had become vested in its court, thereby limiting the Service's motion to cancel the originally filed OSC. See *Pearson*, at 3. See also 8 C.F.R. § 239.2(c) (1998). As jurisdiction had vested and proceedings begun, the Service could only make a motion to cancel the originally filed OSC, pursuant to 8 C.F.R. §239.2(a) (1998), by alleging one of the following: the Respondent is 1) a national of the United States; 2) not deportable under immigration laws; 3) deceased; 4) not in the United States; 5) the Respondent failed to file a waiver; or 6) the OSC was not properly served. See *Pearson*, at 3. See also 8 C.F.R. § 239.2(a) (1998) (additional provisions, added since the *Pearson* decision, provide for alleging changed circumstances in the case or that an issuing officer can cancel the notice to appear under (2) or (6) unless impracticable). The Service did not make such a motion, and it was not able to allege any of the required reasons for canceling a previously filed OSC. See *Pearson*, at 3-4. The court noted that "the case law the Service cites in support of its argument [to supercede the OSC] is inclusive as to whether the Service may file a 'superceding OSC' without first establishing a defect in the original OSC." *Id.* at 4. The court held there was no flaw in the April 9, 1996 OSC. See *id.* Thus, the court did not allow the Service to file a "superceding" OSC. See *id.*

<sup>55</sup> See *id.*

try,<sup>56</sup> and as an alien who has engaged in terrorist activity,<sup>57</sup> were included as part of the originally filed OSC.<sup>58</sup>

The court found the Respondent was deportable from the U.S. because of his overstay of the VWPP.<sup>59</sup> Although the Service requested the court make a finding as to all of the charges of deportability against the Respondent, the court then determined to hold a full merits hearing in which testimony and other evidence could be presented to make a finding as to all of the charges of deportability and forms of possible relief from deportation, if applicable.<sup>60</sup> Ultimately, the court determined that

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<sup>56</sup> See *Pearson*, at 3. See also INA § 212(a)(2)(B), 8 U.S.C. § 1182 (Supp. II 1996).

<sup>57</sup> The importance of this superceding OSC becomes apparent in examining the language in IIRAIRA § 321 (1996) regarding the definition of aggravated felony. Section 321(a) indicates that "notwithstanding any other provision of law [including any effective date], the term applies regardless of whether the conviction was entered before, on, or after the date of enactment of this paragraph." IIRAIRA § 321(a) (1996). While that sentence would bring the Respondent within the definition of aggravated felony, Judge Williams stressed that section 321(c) of IIRAIRA indicates that "[t]he amendments [to the aggravated felony definition] shall apply to actions taken on or after the date of the enactment of this Act, regardless of when the conviction occurred . . . ." *Pearson*, at 11 (quoting IIRAIRA § 321(c) (1996)). Thus, the court held that the new aggravated felony definition did not apply to the Respondent as the original OSC was filed on April 9, 1996, whereas IIRAIRA was enacted on September 30, 1996. See *id.* Had the court accepted the Service's definition of "action" as that used in a traditional civil proceeding, then the Service would have effectively re-initiated deportation proceedings on the date the superceding OSC was filed, November 18, 1996, and thus fall within IIRAIRA definition adopted on September 30, 1996. Judge Williams even hypothesized that this was what the Service had attempted by filing the superceding OSC. See *Pearson*, at 11. However, as Judge Williams did not allow the additional charges to constitute a superceding OSC, that argument was rendered moot. See *id.* The Board of Immigration Appeals specifically held that the new definition of the term applies to convictions entered on, before or after the date of enactment. See *Yeung*, Int. Dec. at 3297. As the Respondent's case was still pending before the court on the date of enactment, September 30, 1996, Judge Williams held the new definition of aggravated felonies applied to the Respondent. See *Pearson*, at 27.

<sup>58</sup> See *Pearson*, at 4.

<sup>59</sup> See *id.* at 5. The Respondent had admitted to staying in the U.S. for a time longer than permitted under VWPP, and documentation established his entry and failure to timely depart. See *id.* Thus, the court found Respondent's overstay met the *Woodby* standard of clear, convincing, and unequivocal evidence. See *Pearson*, at 5. See also *Woodby*, 385 U.S. 276. Also, the Respondent was deemed deportable as an alien who remained in the U.S. for a time longer than permitted. See *Pearson*, at 5.

<sup>60</sup> See *Pearson*, at 5. First, Judge Williams ruled it would be impossible to make a determination on all of the charges of deportability filed against the Re-



the only forms of relief from deportation available<sup>61</sup> to the Respondent were adjustment of status,<sup>62</sup> asylum, and withholding of deportation.<sup>63</sup>

The court's finding in *Pearson* broke new ground in holding a convicted felon was not statutorily precluded from being found eligible for asylum under the three main statutory bars. Although *Pearson* appeared to fall within each of the three statutory bars, Immigration Judge Williams found that *Pearson* qualified as a political refugee.<sup>64</sup> Judge Williams determined that *Pearson*, due to his political beliefs, namely, for being a Roman Catholic, supporting Sinn Fein<sup>65</sup> and the unification of

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spondent as related to his activities in Northern Ireland until a full hearing on the merits could be presented with a full assessment of the events which took place. *See id.* Without such an assessment, Judge Williams thought it impossible to make a proper determination of the Respondent's deportability according to the *Woodby* standard, and to reach a determination of the Respondent's eligibility for relief. *See Pearson*, at 5. The court particularly did not want to incur the great expenditure of resources and time to bifurcate the proceedings, which would only have to be repeated if the Respondent were found to be eligible for the forms of relief requested. *See id.*

<sup>61</sup> The court pretermitted the Respondent's applications for suspension of deportation and voluntary departure, in the alternative, due to the "clear and unambiguous language of both the Act and the regulations which specifically limit the forms of relief an individual who entered under the VWPP is entitled to apply for." *Id.* at 7. *See* INA § 217, 8 U.S.C. § 1987 (1994).

<sup>62</sup> *See Pearson*, at 7. *See also supra* note 45.

<sup>63</sup> *See Pearson*, at 7. *See also supra* note 20.

<sup>64</sup> *See Pearson*, at 40-42. *See supra* note 8 regarding "refugee" status. The Respondent argued his arrest by the RUC in February 1976 and subsequent alleged cruel treatment and torture constituted past persecution. *See Pearson*, at 39. The court held that while the Respondent may have been mistreated, that did not equal persecution. *See id.* Thus, Judge Williams did not find that the Respondent had been persecuted in the past. *See id.* *See also* 8 C.F.R. § 287.6 (1998). Moreover, the Board has held, "mistreatment by authorities in the course of an investigation does not amount to persecution when the purpose of the mistreatment was to elicit information relating to a militant organization and specific criminal acts, rather than to persecute the individual on account of a protected ground." *Matter of R-*, 20 I. & N. Dec. 621, 625 (B.I.A. 1992). Therefore, the court held it would not question the process under which the Respondent was convicted, and it accepted the duly certified Record of Convictions from a foreign sovereign, which indicated the Respondent's conviction of numerous crimes related to two separate bombings in Northern Ireland. *See Pearson*, at 39. Finding the Respondent did not suffer past persecution, and was therefore ineligible for the statutory presumption of well-founded fear of future persecution, the court had to determine if the Respondent had a well-founded fear of persecution. *See Pearson*, at 39. *See also* INA § 101(a)(42)(A), 8 U.S.C. § 1101(a)(42)(A) (1994).

<sup>65</sup> Sinn Fein is the political arm of the Irish Republican Army. *See* Dan Balz, *IRA's Political Arm Renounces Violence*, WASH. POST, September 10, 1997, at A15.

Ireland<sup>66</sup> and due to the worldwide notoriety of the case,<sup>67</sup> had a reasonable subjective fear of persecution,<sup>68</sup> even if deported to the Republic of Ireland.<sup>69</sup> Judge Williams further found that Pearson's acts on behalf of the IRA in Northern Ireland were "legitimate political violence,"<sup>70</sup> and, therefore, bypassed the

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<sup>66</sup> See *Pearson*, at 39. The Respondent testified as to his fears for his life or for convictions on false charges because he is known as an ex-political prisoner and because he supports Sinn Fein and the unification of Ireland. See *id.* The Respondent also states he is Catholic and believes this mere fact also forms a basis for his fear. See *id.*

<sup>67</sup> See *id.* at 40. The court noted that numerous witnesses testified that the notoriety the Respondent gained during the course of the proceedings would "undoubtedly make him identifiable to numerous opponents if he were to return to any part of Ireland." *Id.*

<sup>68</sup> See *Pearson*, at 40. Judge Williams found that the Respondent established he possessed beliefs and characteristics which Loyalist paramilitary groups, the RUC and British government, find offensive. See *id.* As such, the court found that the Respondent had a "well-founded fear of persecution." *Id.*

<sup>69</sup> See *id.* at 39-40. The Respondent stated that "Ireland is a small country and people can and do cross the borders regularly, and that he would not be safe merely because he was in the Republic of Ireland." *Id.* at 40.

<sup>70</sup> See *Pearson*, at 36, 40. According to Judge Williams, the phrase "political offense," as defined in U.S. jurisprudence, is the same as "legitimate political violence" as defined by the Service's expert witness, Professor Wilkinson. See *id.* at 36. "Implicit in the understanding of the term [legitimate political offense] is the belief that there is a contradictory term, referring to 'illegitimate political violence'; to wit, terrorism." *Id.* Professor Wilkinson testified that "there are occasions when it is legitimate and reasonable to use violence; to wit, when violence is the *only* way to protect civilians." *Id.* at 32.

Judge Williams held that all of the Respondent's convictions fall within the political offense exception as that term is contemplated by the various sections of the INA. See *id.* at 35. The court determined that the Respondent's participation in the bombing of the RUC barracks was a 'political offense' as "[t]he attack was in the context of a conflict and/or insurrection, and was clearly in furtherance of the objectives of that conflict." *Pearson*, at 34. Judge Williams held "[t]he attack was also not out of proportion to the political objective sought nor was it of an atrocious nature." *Id.* Of particular emphasis by the Judge was the fact that warnings were given to avoid personal injuries. See *id.* Furthermore, Judge Williams stated that "the target of the attack was a legitimate military target as a combattant [sic] in the conflict." *Id.* Also, the Judge reasoned that "[g]overnment property, as opposed to 'the indiscriminate bombing of a civilian populace' was the target of said attack . . . [a]ccordingly, the Respondent's offenses relating to that event would be deemed 'political . . .'" *Id.*

three statutory bars regarding persecution of others,<sup>71</sup> aggravated felonies,<sup>72</sup> and terrorist acts.<sup>73</sup>

While this decision is from the lowest level Immigration and Naturalization Service court, and thus, it does not have precedential value or weight in the strictest sense,<sup>74</sup> it is signifi-

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<sup>71</sup> See *Pearson*, at 39. Judge Williams found that "neither the Respondent's mere membership in the IRA, nor his participation in bombing campaigns against the RUC, constituted 'persecution' within the meaning of the Act." *Id.* See also INA § 101(a)(42)(B), 8 U.S.C. § 1101(a)(42)(B) (1994). As Judge Williams found no evidence that the Respondent targeted individuals based on their opposition to the IRA. See *Pearson*, at 38. Furthermore, Judge Williams determined that "the Service had not established that the Respondent was directly involved or acted in complicity with an indiscriminate bombing campaign of civilian populations, which would amount to terrorism, and could arguably be considered 'persecution of others.'" *Id.* Judge Williams noted that the Board has specifically held that indiscriminate bombing campaigns do not, "involve persecution based on political opinion." *Id.* (citing *Matter of McMullen*, 19 I. & N. Dec. 90, 96 (1984)).

<sup>72</sup> See *id.* at 27-28. The Court found that the aggravated felony definition (as amended by IIRAIRA § 321(b) (1996)) did apply to the Respondent. See *id.* at 27. However, as the Respondent's acts were deemed to fall within the "political offense" exception, the court held he could not be deemed to have been convicted of an aggravated felony for committing a crime of violence. See *Pearson*, at 27-28.

<sup>73</sup> See *id.* at 37. In finding the Respondent had not engaged in terrorist activity, Judge Williams held "the terrorist bar added by the AEDPA was inapplicable." *Id.* Judge Williams noted that even if that provision did apply, then he held "the Respondent fits within the waiver contained therein, as there are no reasonable grounds for regarding the Respondent as a danger to the security of the United States." *Id.* The court determined the Respondent fit within the waiver due to the numerous character witnesses attesting to his reputation for honesty and integrity. See *id.* at 37. Judge Williams noted that he listened to testimony, given on behalf of the Respondent, from "two members of Congress, as well as a New York State Supreme Court Justice and Assemblyman, and current and former members of the New York City Police Department attesting that, in their opinion, the Respondent poses no threat to safety or security in this country." *Pearson*, at 37. To further substantiate its determination that the waiver would apply to the Respondent, the court noted that "[t]he Respondent has not been involved in any criminal activity in this country, is married to a United States citizen, has a United States citizen daughter, owns a home, and pays his taxes." *Id.*

<sup>74</sup> Immigration courts are akin to federal district courts, however the rules of evidence do not apply in the immigration court. See 8 C.F.R. §§ 3.12, 3.43(c) (1998); see also *Matter of Wadud*, 19 I. & N. 182, 187 (B.I.A. 1984). The broad scope of the Immigration Court rules of procedure are to "assist in the expeditious, fair and proper resolution of matters." 8 C.F.R. §3.12 (1998). However, testimony of witnesses must be under oath or affirmation. See 8 C.F.R. § 3.34 (1998). In credible fear determinations, evidence must be "material and relevant to any issue in review." 8 C.F.R. §3.43(c) (1998). Either the alien or the INS may appeal the decision of the Immigration Judge directly to the Board of Immigration Appeals in Virginia. See 8 C.F.R. §§ 3.1(b), 3.3(a)(1) (1998). The Board, comprised of 15 members, can remand a case to the immigration judge with instructions to undertake appropriate action, or in appropriate cases, grant relief outright. See 8 C.F.R. § 3.1

cant in many ways. *Pearson* is one of the first cases to address the issue of asylum and refugee status following the recent changes in immigration law. Also, it is highly significant as to how Judge Williams ultimately found the Respondent not to be within any of the statutory bars. While the judge took great pains to state that this decision was particular to *Pearson* and his circumstances,<sup>75</sup> it seems likely that this court's reasoning provides a toe hold for other similar cases.<sup>76</sup> Lastly, this deci-

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(1998). Decisions of the Board, unless modified or overruled by the Attorney General, are binding on all Immigration Judges and Service officers and employees. See 8 C.F.R. § 3.1(g) (1998). Selected decisions voted upon by the permanent Board may be designated as precedents. See *id.*

A decision of the BIA resulting in a final order of deportation may be appealed to the appropriate federal court of appeals for judicial review, and ultimately to the United States Supreme Court. See INA § 106(a)(10), 8 U.S.C. § 1105(a)(10) (Supp. II 1996) as amended by AEDPA § 440(a) (1996) (restricting certain classes of criminal convictions from judicial review).

An appeal to the BIA may be requested by filing a Notice of Appeal in a timely fashion directly with the Board in Virginia, together with the filing fee. See 8 C.F.R. § 3.3(a)(1) (1996), as amended by 61 Fed. Reg. 18,900 (Apr. 29, 1996) (filing notice directly with BIA); 8 C.F.R. § 3.8 (1996), as amended by 61 Fed. Reg. 18,900 (Apr. 29, 1996) (enclosing filing fee). The notice of appeal must include a brief description of the request based on any questions of fact or conclusions of law at issue in the case. See 8 C.F.R. § 3.3(b) (1998). Failure to do so may result in summary dismissal of the appeal. See *id.*, as amended by 61 Fed. Reg. 18,900, 18,906 (Apr. 29, 1996).

<sup>75</sup> See *Pearson*, at 36, 42. There are other former IRA members in the U.S. who applied for adjustment of status under similar, if not identical circumstances, to that of *Pearson* and subsequently filed for asylum when the INS moved to deport them. See Richard Willing, *Ruling Gives Ex-IRA Bomber Hope of an American Dream*, USA TODAY, April 14, 1997, at O3A. These five other men are Robert McErlean, Matthew Morrison, Gabriel Megahey, Noel Gaynor and Gerald McDade. See *id.* The men's stories are similar, in that they are all Irish nationals who joined the IRA in the 1970s, were later convicted of felonies, committed on behalf of the IRA, and served sentences in Long Kesh Prison near Belfast, Northern Ireland. See *id.* After being released the men entered the U.S. on the VWPP, overstayed their time, held down jobs, paid taxes, and stayed out of trouble while living in the States. See *id.* Several of them have married U.S. citizen women and had U.S. citizen children. See Willing, *supra*. An exception is Gabriel Megahey who, unlike the others, was convicted in the U.S. and served five years in the U.S. for attempting to provide weapons to the IRA. See Cassandra Burrell, *Administration Stops Deportation Proceedings To Further Peace Talks*, ASSOC. PRESS, September 9, 1997.

<sup>76</sup> See *supra* note 75 for other similar cases. See also *supra* note 74 for information about precedent decisions. "In addition to Attorney General and Board decisions referred to in § 3.1(g) . . . , designated Service decisions are to serve as precedents in all proceedings involving the same issue(s)." 8 C.F.R. § 103.33(c) (1988). "Except as these decisions may be modified or overruled by later precedent decisions, they are binding on all Service employees . . . ." *Id.* As the other cases

sion lends political legitimacy to the acts of the IRA by finding that an IRA member should be classified as a legitimate military combatant<sup>77</sup> rather than a terrorist, and that the IRA bombing of RUC barracks constituted a political act,<sup>78</sup> not an act of terrorism. Judge Williams further found the RUC's "atrocious acts"<sup>79</sup> against Northern Catholics made the barracks bombed a "legitimate target" as that term is considered in international law and the laws of war."<sup>80</sup>

Following the trial, Judge Williams ruled that anti-terrorism legislation recently passed by Congress,<sup>81</sup> which precluded convicted felons from applying for political asylum, did not apply to Pearson.<sup>82</sup> To find the attack a "political offense" the court considered the nature of the political situation in Northern Ireland at the time, as well as the "context, mode, target and purpose of the attack."<sup>83</sup> Judge Williams held that "[t]he attack was also not out of proportion to the political object sought, nor was it of an atrocious nature."<sup>84</sup> Judge Williams determined that the adverse affect of Pearson's act of driving the getaway car following two bombings of RUC barracks was mitigated by the fact that "[s]ufficient warnings were given to avoid personal injuries, and the target of the attack was a legitimate military target as a combatant in the conflict."<sup>85</sup> Furthermore, the court emphasized that the target of the attack was a

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involving former IRA men are in different Immigration Courts, the *Pearson* case would have only persuasive, not binding authority, unless it was designated to serve as precedent on the same issue(s). *See id.* However, the many factual similarities between the cases in combination with *Pearson* being the first case following the major changes in immigration law (the AEDPA and the IIRAIRA), make it likely that Judge William's analysis and decision would be relied on by other defendants in presenting their cases. The respondent's attorney, Mr. Galvin, stated that "Pearson's case was the first to be decided under the immigration law passed by Congress in 1996 and could set a precedent for the six other cases involving former IRA men now pending in courts." Ronald Powers, *The Clinton Administration Appealed a New York . . .*, ASSOC. PRESS. POL. SERV., April 25, 1997.

<sup>77</sup> *See Pearson*, at 34.

<sup>78</sup> *See id.* at 32.

<sup>79</sup> *Id.* at 34.

<sup>80</sup> *Id.*

<sup>81</sup> Alluding to the AEDPA and the IIRAIRA, *see supra* notes 3 and 4.

<sup>82</sup> *See Pearson*, at 35.

<sup>83</sup> *Id.* at 34.

<sup>84</sup> *Id.*

<sup>85</sup> *Id.* *See also supra* note 14 (information regarding the political nature of a crime).

military barracks used by the RUC and that “[g]overnment property, as opposed to ‘the indiscriminate bombing of a civilian populace’ was the target of said attack.”<sup>86</sup>

In addition to finding that Pearson could not be deported and was not a terrorist, Judge Williams granted him permission to remain in the United States under two provisions of federal immigration law.<sup>87</sup> Under one provision Pearson was found to be a refugee eligible for asylum as the court found Pearson had a well-founded fear of persecution for his political beliefs.<sup>88</sup> Thus, the court granted Pearson asylum.<sup>89</sup> The other provision was that Pearson had married a U.S. citizen and had a U.S. citizen daughter of “tender years.”<sup>90</sup> Thus, the court found Pearson eligible for Adjustment of Status as the immediate relative of a U.S. citizen.<sup>91</sup>

On April 25, 1997, the Service appealed Judge Williams’ decision granting the Respondent asylum.<sup>92</sup> The appeal chal-

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<sup>86</sup> *Pearson*, at 34 (citing *Eain v. Wilkes*, 641 F.2d 504 (7th Cir.), *cert. denied*, 454 U.S. 894 (1981)).

<sup>87</sup> See INA § 245(a), 8 U.S.C. § 1255 (1994) (adjustment of status as the immediate relative of a U.S. citizen); INA § 101(a)(42)(A), 8 U.S.C. § 1101(a)(42)(A) (1994) (refugee with a well-founded fear of persecution for political beliefs).

<sup>88</sup> See *Pearson*, at 39-41.

<sup>89</sup> See *id.* at 43. Thus, Pearson could remain in the U.S. under temporary status as an asylee. See 8 C.F.R. § 209.1(a) (1998). See also *supra* note 27 for information about asylee status.

<sup>90</sup> See *Pearson*, at 38.

<sup>91</sup> See *id.* See *supra* note 50 regarding standard for hardship. Although Judge Williams did not refer to the statutory standard for hardship, it seems clear that Judge Williams, in finding Pearson eligible for Adjustment of Status, did look at the ‘extreme and unusual hardship’ to the respondent’s wife and daughter were they to live in Ireland with the respondent. Mrs. Pearson testified that the Respondent is a good husband and has an extremely close relationship with his young daughter. See *id.* at 17. Judge Williams noted that Doris Pearson had testified that after the family tragedies she has endured (her adult son was murdered and her mother had recently undergone brain surgery) she would have a “nervous breakdown” if her husband had to leave the country. *Id.* at 17. She also testified that she was unsure she would leave the country with the Respondent if he were forced to leave, stating “I do not think I should have to make that decision—I have been a model citizen.” *Id.* Judge Williams did note that Mrs. Pearson works as a computer administrator earning \$50,000 a year, that she and the Respondent jointly own a home, and that her family is in New York, including an adult daughter from her first marriage. See *id.* Furthermore, Mrs. Pearson testified she was afraid to go to either Northern Ireland or the Republic of Ireland based on the accounts she has heard of attacks on people there. See *Pearson*, at 17.

<sup>92</sup> See John W. Barry, *Political Asylum? IRA Man Would be Sent Back*, VILLAGE VOICE, July 1, 1997, at 26. The Service’s appeal barely met the 30-day win-

lenged the finding that Pearson's convictions were political rather than criminal, disputed that Pearson had a well-founded fear of persecution if deported and whether he had engaged in terrorist activities.<sup>93</sup> However, Secretary of State Madeleine Albright, succumbing to political pressure regarding Sinn Fein's participation in the Stormont Peace Talks,<sup>94</sup> intervened<sup>95</sup> and Attorney General Janet Reno suspended Pearson's appeal proceedings.<sup>96</sup> Reno also suspended deportation proceedings against several other former IRA members requesting asylum in the United States.<sup>97</sup>

#### IV. DISCUSSION

##### A. *Asylum*

The court held that the Respondent met the initial three elements to show that he was a refugee and therefore eligible for asylum.<sup>98</sup> The Respondent clearly met the first element as he filed for asylum outside his country of nationality.<sup>99</sup> The second element has two components which the applicant must demonstrate: 1) inability or unwillingness to return to the coun-

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dow allowed by law by which to appeal. See *supra* note 74 for a discussion of the procedural process by which to file an appeal with the Board.

<sup>93</sup> See Tara Peterman, *Pearson to Counter-Appeal INS*, IRISH VOICE, May 6, 1997, at 7.

<sup>94</sup> These all-party talks were headed by Senator Mitchell. See Balz, *supra* note 65, at A15.

<sup>95</sup> See Burrell, *supra* note 75. Attorney General Janet Reno acted at the request of Secretary of State Madeleine Albright, who said suspension of the proceedings would advance the peace process in Northern Ireland. See *id.* Albright's letter to Reno detailing her request stated:

We do not approve or condone any past acts of terrorism in which they may have been involved . . . nor do we accept the legal arguments against deportation that have been advanced in some of their cases. But, in light of our interest in achieving a lasting, overall settlement in Northern Ireland, we request that as a matter of discretion and without prejudice to the administration's legal position, you take action . . . to ensure that these individuals will not be deported from the United States at this time.

*Id.*

<sup>96</sup> See Susan Benkelman, *Reno Suspending IRA Deportations/Move Made to 'Advance the Peace'*, NEWSDAY, September 10, 1997, at A15.

<sup>97</sup> See Burrell, *supra* note 75. See also *supra* note 75 for information on these individuals.

<sup>98</sup> See *Pearson*, at 39-43; see also *supra* Section II for a discussion of refugee eligibility.

<sup>99</sup> See INA § 101(a)(42), 8 U.S.C. § 1101(a)(42) (1994).

try of nationality because of past persecution or a well-founded fear of persecution; and 2) inability or unwillingness of the country of nationality to protect the alien from possible persecution.<sup>100</sup> Respondent met the first component, as he demonstrated an inability or unwillingness to return to either Northern Ireland or the Republic of Ireland.<sup>101</sup> Judge Williams found the Respondent met the second component as the Respondent had established a well-founded fear of persecution if removed to either Northern Ireland or the Republic of Ireland.<sup>102</sup> Judge Williams also determined that the Respondent met the third component since he “established that the British government is unwilling or unable to prevent possible persecution, and that the persecutors have the capability of striking at the Respondent.”<sup>103</sup>

### 1. *Well-founded Fear of Persecution*

Changed conditions in the country designated for deportability can affect the reasonableness of an alien’s well-founded fear of persecution.<sup>104</sup> Such changed conditions are also grounds on which a move to reopen a case with the BIA may be based.<sup>105</sup> Respondent’s own expert witness, Sean

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<sup>100</sup> See *supra* note 99.

<sup>101</sup> See generally *Pearson*, at 39-42.

<sup>102</sup> See *id.* at 41. However, as a criminal prosecution is not persecution (see *supra* note 19), Judge Williams did not find the Respondent had suffered past persecution. See *id.* at 39.

<sup>103</sup> *Pearson*, at 40. The court relied upon expert testimony detailing the practice of “collusion” between the authorities and Loyalist groups to show that Loyalist groups are or can easily become aware of the Respondent’s acts, and thereby making him an immediate target. See *id.* The court also cited to the HELSINKI WATCH REPORT, HUMAN RIGHTS IN IRELAND, p. 49 [hereinafter HELSINKI REPORT] detailing the collusion between security forces and paramilitary forces involved in the “shoot-to-kill” policy of suspected terrorists. See *Pearson*, at 40. Judge Williams clarified that he could not state the British government is unwilling to prevent attacks on Catholic Republicans, but noted that “the previous 25 years are replete with examples of how the government is unable to prevent such attacks.” *Id.*

<sup>104</sup> See *In re H-*, Int. Dec. 3276 (B.I.A. 1996). See also INA § 208(a)(2)(D), 8 U.S.C. § 1158(a)(2)(D) (Supp. II 1996).

<sup>105</sup> See *In re L-O-G-*, Int. Dec. 3281 (B.I.A. 1996); *In re E-P-*, Int. Dec. 3311 (B.I.A. 1997). The BIA has authority to conduct an independent review of the record, and of the exercise of discretion in granting asylum. See *In re H-M-*, 20 I. & N. Dec. 683, 688 (B.I.A. 1993). “The Board is not bound by the immigration judge’s conclusions but rather has plenary power to review the record de novo and to make



Cronin, self-admitted former Chief of Staff of the IRA for several years, testified that he has never had any trouble upon his visits to Ireland within the past 10 years.<sup>106</sup> It is more than likely the Loyalist groups knew of Cronin's past elevated position within the IRA and also of his comings and goings to Ireland; yet Cronin did not testify as to any 'persecution' during his many visits. The court relied heavily on the *Helsinki Watch Report, Human Rights in Ireland*, which detailed that between 1969-1989 there were 329 deaths associated with political unrest, with over one-half being civilians with no known connections to paramilitary groups, and a disproportionate amount being Catholics and Republican paramilitaries.<sup>107</sup> However, since that time, the IRA via its political branch, Sinn Fein, has entered into several long-term cease-fires.<sup>108</sup>

Subsequently, Sinn Fein received further political recognition by being invited to participate in the all-party talks.<sup>109</sup> Sinn Fein agreed to participate, renouncing violence and committing to a democratic process for resolving the conflict. Indeed, Sinn Fein agreed to support the: "total disarmament' of all paramilitary groups on both sides of the sectarian divide and to abide by the terms of resolutions reached through the negotiations and to not attempt to change them except through democratic means."<sup>110</sup> Thus, it is this writer's opinion that, were a review of this case to take place, the circumstances would be found sufficiently changed. Such change would support a finding that the Respondent no longer has a well-founded fear of

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its own independent determinations on questions of law and fact." *Matter of Lok*, 18 I. & N. Dec. 101, 106 (B.I.A. 1981).

<sup>106</sup> See *Pearson*, at 24-25. Cronin estimated that he has spent 4-5 weeks in Northern Ireland and approximately 20 weeks in the Republic of Ireland, all without incident. See *id.* at 25.

<sup>107</sup> See *id.* at 40. The court noted that the Helsinki Report indicated that "of the 329 people killed between 1969 and 1989 . . . 149 were Catholics while 25 were Protestants." *Id.* at 41. "Additionally, the Helsinki Report notes that 123 of the 329 persons killed between 1969 and 1989 were Republican paramilitaries while only 13 were Loyalist paramilitaries." *Id.* Note that these figures date back from 1989 and nothing more current was cited by the court.

<sup>108</sup> There have been several long-term cease-fires negotiated between the IRA and British authorities, such as the one renewed by the IRA on July 20, 1997. See Balz, *supra* note 71, at A15.

<sup>109</sup> See *id.*

<sup>110</sup> *Id.*

persecution and should be deported at least to the Republic of Ireland, if not Northern Ireland.<sup>111</sup>

## 2. *Persecution Based on Political Beliefs*

The Respondent was found eligible for asylum based on his political opinion.<sup>112</sup> However, the U.S. Supreme Court has addressed the importance of establishing the nexus between the political opinion of the applicant and the persecution; namely establishing that the feared persecution is on account of the applicant's political opinion, rather than something else.<sup>113</sup> The fact that a persecutor acts out of a "generalized 'political' motive" is not sufficient; the persecution must be based on the applicant's political views or perceived political views.<sup>114</sup> Here, the Respondent "testified vehemently" that he never took an oath of allegiance to the IRA, and was never sworn into the IRA.<sup>115</sup> As such, the Respondent was not a member of the IRA.

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<sup>111</sup> Respondent's expert witness on the violations of civil and human rights in Northern Ireland, Oliver Kearney, admitted that the RUC had prevented Protestants from attacking civil rights protesters on certain occasions. *See Pearson*, at 21. Kearney also stated that he was unaware of any person deported to the Republic of Ireland who was killed by Loyalists. *See id.*

*See also In re E-P-*, Int. Dec. 3311 (B.I.A. 1997). The BIA denied asylum to an Haitian woman, who claimed persecution by the Haitian military based on her church membership and support of Father Aristide. Even though members of the woman's family were killed by the military as they left their church, the BIA found conditions in Haiti substantially changed. *See id.* The Board stated it was not concluding Haiti was an untroubled country, but that the rise to power by democratic forces and the significant efforts made to dismantle the former military structures have a direct impact on asylum claims of Haitian refugees. *See id.* The Board further held that her claim was based on her status as a member of the general public who supported President Aristide, and therefore the Board did not find adequate evidence to support a finding of past persecution or a well-founded fear of persecution. *See id.*

<sup>112</sup> *See Pearson*, at 39-42.

<sup>113</sup> *See INS v. Elias-Zacarias*, 502 U.S. 478 (1992) (Board denied asylum to an applicant who faced forced recruitment into anti-government guerrilla forces as applicant had not shown his refusal to join the guerrillas was based on his own political opinion, rather than on the persecutor's political opinion).

<sup>114</sup> *Id.* at 482.

<sup>115</sup> *See Pearson*, at 33, 35. The Respondent's expert witness Sean Cronin described the IRA's practice of having volunteers make a "declaration" that they wish to be in the IRA. *See id.* at 24. Cronin testified that "if a person does not make the declaration, then he would not be considered a member, asserting that a person does not become a member of the IRA merely through his actions." *Id.* The respondent testifies his involvement only involved being asked, "Do you want to help us out?" and "Like to do a run?" *Id.* at 33. It seems naive indeed to this writer to

Thus, any persecution to which the Respondent would be vulnerable would not be because of his own beliefs (beyond the fact that he is Roman Catholic, has the accent and mannerisms of such, and believes in the unification of Ireland) but because of the beliefs of his persecutors.<sup>116</sup>

### 3. *Political Offenses Exception*

Even if the Respondent were to be found eligible for asylum by meeting the three elements qualifying him as a refugee, his prior criminal convictions could statutorily bar him from asylum if deemed aggravated felonies<sup>117</sup> and crimes of moral turpitude.<sup>118</sup> Were his crimes classified as such, the respondent could avoid these bars if he were to fall under the political offense exception to these bars.<sup>119</sup> Judge Williams determined the Respondent fell within the political offenses exceptions for each of these bars, and therefore did not pretermitt the Respondent's asylum application.<sup>120</sup> Judge Williams accomplished this by applying an extradition doctrine<sup>121</sup> to immigration law, and

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think that the Respondent was not considered a member of this organization, as he was part of two well-planned bombings. See *Pearson*, at 27. See also *supra* note 31 for more details of the Respondent's criminal convictions. In this writer's opinion, it is unlikely that a clandestine, paramilitary group such as the IRA would allow just anyone to "help out" in such a high-risk mission. This is especially true considering the number of people involved in these incidents (5 on at least one occasion), the high risk of danger, the need for coordination of efforts, and concerns for secrecy.

<sup>116</sup> See *supra* note 111.

<sup>117</sup> See INA §§ 208(b)(2)(A)(ii), (b)(2)(B)(i), 8 U.S.C.A. §§ 1158(b)(2)(A)(ii), (b)(2)(B)(i) (1998). See generally INA § 208(b)(2), 8 U.S.C.A. § 1158(b)(2) (1998). This bar deems the alien a danger to the U.S. community because of a final judgment of conviction of a particularly serious crime. See INA § 208(b)(A)(ii), 8 U.S.C.A. § 1158(b)(2)(A)(ii) (1998). See also *supra* note 64 and accompanying text regarding submission of the Respondent's Record of Convictions.

<sup>118</sup> See INA § 237(a)(2)(A)(i), 8 U.S.C. § 1227(a)(2)(A)(ii) (Supp. II 1996).

<sup>119</sup> See INA § 101(a)(43)(F), 8 U.S.C. § 1101(a)(43)(F) (1994).

<sup>120</sup> See *Pearson*, at 35.

<sup>121</sup> See *Pearson*, at 28-29. Judge Williams compared the purposes of extradition treaties with the purposes of immigration laws. The former allows the surrender of an individual from one state for that person to face criminal prosecution for an act allegedly committed, while the latter determines who should be allowed to enter and/or remain in this country to live and work. He determined that since the Respondent had already been duly convicted, served time and released for having committed certain crimes that the purposes of extradition would not be met. See *id.* at 28-29. Judge Williams then determined "[t]hat is the context in which this Court must consider the 'political offense' exception and decide whether the Re-

by further stretching the definition of a "purely" political offense<sup>122</sup> to include common crimes.<sup>123</sup>

Even if the Respondent's convictions did not statutorily bar asylum, once persecution is established<sup>124</sup> they weigh significantly as an adverse factor in the court's discretionary balancing.<sup>125</sup> However, the Respondent introduced numerous witnesses to attest to his good moral character.<sup>126</sup> He further demonstrated his "exemplary conduct" during his presence in the United States by showing he owns property, pays taxes, is married with a child, has a good paying job, and has not been involved in any criminal conduct in this country or had continued involvement with the IRA.<sup>127</sup> Judge Williams downplayed the significance of the Respondent's criminal convictions, noting that the Respondent's criminal convictions occurred over 21 years ago and that at the time of trial the Respondent had been released from his sentence for 9 years.<sup>128</sup> While Judge Williams acknowledged that the Respondent had been illegally in this country those 9 years, after outstaying the terms of the VWPP,

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spondent, by virtue of his conviction abroad, should be barred from this country." *Id.*

<sup>122</sup> "Purely political offense" is only referenced in but not defined in the INA. See INA §§ 212(a)(2)(A)(i)(I), (a)(2)(B), 8 U.S.C. §§ 1182(a)(2)(A)(i)(I), (a)(2)(B) (1994). The Service urged the Court to apply the concept of "pure" political offense because the INA sections referenced "purely political offense." See *Pearson*, at 29. The Service contended that "pure" political offenses are acts aimed at the government with none of the elements of ordinary crime and do not violate the rights of individuals, and include such crimes as treason, sedition and espionage. See *id.* at 29-30. Judge Williams agreed with the Service's definition of "pure" political offenses. See *id.* at 30. However, Judge Williams determined that "crimes of violence [aggravated felonies] and crimes involving moral turpitude *do* contain those characteristics, and *are* generally considered "common crimes." *Id.* Judge Williams cited examples of crimes of moral turpitude, as determined by the Board, including the willful setting of an explosive. See *id.* Crimes of violence, referred to in INA § 101(h), are defined as (i) "the use, attempted use, or threatened use of physical force against the person or property of another," or (ii) a felony offense that "involves a substantial risk that physical force . . . may be used in the course of committing the offense." 18 U.S.C. § 16 (1994).

<sup>123</sup> See *Pearson*, at 30-31.

<sup>124</sup> See *supra* note 10 for establishment of persecution.

<sup>125</sup> See *Matter of Soleimani*, Int. Dec. 3118 (B.I.A. 1989). See *supra* note 46 setting forth positive and adverse factors to be considered in discretionary adjudications.

<sup>126</sup> But see INA § 101(f)(8), 8 U.S.C. § 1101(f)(8) (Supp. II 1996) (conviction of an aggravated felony bars finding of good moral character).

<sup>127</sup> See *Pearson* at 42.

<sup>128</sup> *Id.*

Judge Williams did not appear to give either of those adverse factors much weight.<sup>129</sup> In this writer's opinion, the Respondent's criminal convictions should have been a mandatory bar to asylum.<sup>130</sup> But even if the Respondent did not fall within the mandatory denial, the adverse factors in combination with the Respondent's criminal convictions should have been enough to deny asylum.<sup>131</sup>

Assuming the Respondent had been granted asylum and withholding of deportation, then the Respondent would then be allowed to stay in the U.S.<sup>132</sup> until there were changed country

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<sup>129</sup> *See id.*

<sup>130</sup> Mandatory denials for applications made before April 1, 1997, such as the Respondent's, are required pursuant to 8 C.F.R. § 208.13(c) (1998), if the alien had been convicted of an aggravated felony (as defined in INA §101(a)(43)) or "ordered, incited, or otherwise participated in the persecution of any person on account of race, religion, nationality, membership in a particular social group, or political opinion." 8 C.F.R. § 208.13(c)(2)(E) (1998). "If the evidence indicates that one of the above grounds apply to the applicant, he or she shall have the burden of proving by a preponderance of the evidence that he or she did not so act." 8 C.F.R. § 208.13(c)(2)(E)(ii) (1998).

<sup>131</sup> "Unless otherwise prohibited in § 208.13(c), an immigration judge may grant or deny asylum in the exercise of discretion to an applicant who qualifies as a refugee under section 101(a)(42) of the Act [INA]." 8 C.F.R. § 208.14(a) (1998).

<sup>132</sup> *See supra* note 27 and accompanying text regarding the temporary status of asylum. Note that withholding of deportation only prohibits the removal of the alien to the proposed country(ies) of removal. *See* 8 C.F.R. n 208.16(b) (1998). Therefore, it is possible that such an alien could be deported (removed) to another country willing to accept him, unless the alien applied for withholding of removal to the new country and could also establish that more likely than not that this would threaten his life or freedom. *See* 8 C.F.R. § 208.16(b)(1) (1998).

conditions in the proposed removal country(ies)<sup>133</sup> or until our law(s) changed.<sup>134</sup>

### B. *Adjustment of Status Claim*

This form of relief was particularly important to the Respondent, as being granted Adjustment of Status provided the Respondent with the permanent right to legally remain in the United States.<sup>135</sup> Again, the weighing of adverse factors would have included a significant emphasis on the Respondent's entry into this country, his subsequent overstay, and his criminal con-

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<sup>133</sup> See INA § 208(a)(2)(D), 8 U.S.C. § 1158(a)(2)(D) (Supp. II 1996). Following 22 months of negotiations between eight parties, the Stormont Talks resulted in a peace agreement known as the "Good Friday Agreement" ("GFA"). See Lionel Shriver, *Northern Ireland's Fragile Assembly*, WALL ST. J. EUR., June 30, 1998, at 10; Tom Squitieri, *N. Ireland Tries Out Self-Rule Security Tight as Voters Pick New Assembly*, USA TODAY, June 26, 1998, at 11A. A referendum ratifying the GFA was passed in May 1998 by 71 percent of voters in Northern Ireland and 94 percent in the Republic of Ireland. See Squitieri *supra* at 11A. Peaceful elections were held in June 1998, filling Northern Ireland's newly formed 108-member regional assembly. See Shriver *supra*, at 10. "The assembly will sit at the center of Northern Ireland's new political structure and return to the province a degree of self-rule." Squitieri *supra*, at 11A. The assembly will "select a 12-member administration of Protestants and Catholics that oversees government departments and cooperates formally with the Irish Republic." *Id.* "By 1999, the assembly will have authority over all matters in the province except taxes, police, defense and foreign affairs." *Id.* "[A]ll the main armed guerrilla groups are represented through parties in the election. The politicians will be allowed to stay in the assembly only if the gunmen allied to them maintain their cease-fires and eventually turn over their arms." *Id.* Thus, conditions in both Northern Ireland and the Republic of Ireland may be such that concern for the safety of the Respondent, and others like him, may soon be moot.

Furthermore, on October 16, 1998, David Trimble and John Hume, leaders of the largest Protestant and Catholics parties, respectively, were both awarded the Nobel Peace Prize for their efforts in bringing about the historic accord. See Doug Mellgren, *Irish Leaders Win Nobel / / Hume, Trimble Share Peace Prize*, CHI. SUN-TIMES, October 16, 1998, at 1. In this writer's opinion, this is another strong indication of changed circumstances in both Northern Ireland and the Republic of Ireland.

<sup>134</sup> Since the inception of the *Pearson* case, the INA has been subject to numerous amendments and modifications. In 1997 alone there were seven overhauls to the United States Code dealing with immigration (8 U.S.C.). Given how often immigration law, in all its incarnations, changes, it is conceivable that the applicable law might change, and possibly even before country conditions. Also, the AEDPA and the IIRAIRA have been attacked as unconstitutional on a variety of fronts, including the retroactive date of applicability contained in each, and the changes in allowable review of decisions, which may provoke lawmakers to further amend those Acts. See *supra* notes 3 and 4.

<sup>135</sup> See *supra* note 45.

victions.<sup>136</sup> Even if Pearson had been deemed as having engaged in terrorist activity,<sup>137</sup> the Service would still have had to show that there were reasonable grounds to find the Respondent a risk to the safety of the United States.<sup>138</sup> Judge Williams found the Respondent and his witnesses credible,<sup>139</sup> and since there were no reasonable grounds to find the Respondent a danger to the U.S., Judge Williams easily bypassed the claim of the Respondent having engaged in terrorist activity.<sup>140</sup> However, withholding of deportation and adjustment of status requires a further step, namely the alien has to establish "that removal would result in *exceptional and extremely unusual hardship* to the alien's spouse, . . . or child, who is a citizen of the United States."<sup>141</sup> Judge Williams found that the Respondent's wife "relies on him for emotional and financial support"<sup>142</sup> and in combination with the Respondent's other equities,<sup>143</sup> found the Respondent merited for adjustment of status in the exercise of discretion.<sup>144</sup>

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<sup>136</sup> See *supra* note 46 for positive and adverse factors.

<sup>137</sup> See INA § 240A(b)(1)(C), 8 U.S.C. § 1229b(b)(1)(C) (Supp. II 1996) (acts of terrorism as bar to asylum).

<sup>138</sup> See *supra* note 16.

<sup>139</sup> See *Pearson*, at 26. As the immigration judge has the advantage of observing the alien as he testifies, the Board ordinarily will not disturb an immigration judge's finding concerning the credibility of a witness. See *In re V-T-S-*, Int. Dec. 3308 (B.I.A. 1997). Here, Judge Williams made an explicit credibility finding, so this, likely, would not be disturbed.

<sup>140</sup> See *Pearson*, at 37.

<sup>141</sup> INA § 240A(b)(1)(D), 8 U.S.C. § 1229b(b)(1)(D) (Supp. II 1996)(emphasis added). See also *supra* note 47.

<sup>142</sup> See *Pearson*, at 38. See also *supra* notes 47 and 91 regarding the hardship standard and applying the standard to the Respondent's wife.

<sup>143</sup> See *Pearson*, at 38. See also *supra* note 73 for a listing of the Respondent's other equities.

<sup>144</sup> See *Pearson*, at 38. But see *In re Mendez*, Int. Dec. 3272 (B.I.A. 1996). The Board did not find extreme and unusual hardship to grant suspension of deportation to a Mexican national who had served a suspended sentence of one year. This was so even though he was the sole financial supporter of his two U.S. children, his 9 year-old stepson, and his U.S. wife of 8 years. See *id.* The respondent's wife testified he had been a loving father and that the children were emotionally close to him. See *id.* The respondent had other family ties in the U.S., including several legal permanent resident siblings and his parents, all of whom were self-supporting. See *id.* Hardship was not found even though the respondent's wife received psychiatric treatment for depression, had attempted suicide following initiation of criminal charges against her husband, had not worked for four years, and had a medical condition involving her spine and hips that precluded her from lifting things. See *Mendez*, Int. Dec. 3272. Poor economic conditions in Mexico made it

## V. PARTISAN POLITICS AND POLITICAL PRESSURES

Clearly partisan U.S. politics were at play, both during and after the *Pearson* trial. During the pendency of the case, Respondent Pearson, his wife, and their attorney, Mr. Galvin,<sup>145</sup> were called before the Congressional Ad Hoc Committee for Irish Affairs<sup>146</sup> to address deportation proceedings against the Respondent and other individuals.<sup>147</sup> The two leading members of the Committee, Congressmen Benjamin Gilman<sup>148</sup> and Peter

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clear the 40 year-old agricultural worker and mechanic respondent would probably have trouble finding employment there, and also make it likely he would not be able to afford to stay in contact with his U.S. children. *See id.* However, the Board held that "financial difficulty or emotional disruption was not sufficient to grant suspension." *Id.* Also, the Board balanced the respondent's equities with his adverse factors. *See id.* Given the seriousness of his crime and lack of evidence of rehabilitation, the respondent was denied suspension in the exercise of discretion. *See id.*

By contrast, the Respondent's wife, Doris Pearson, is in good health, has a job with a salary of \$50,000 a year, owns a home (with the Respondent), and has family in the area, including her mother and an adult child from her first marriage. *See Pearson*, at 17. No mention is made in the record regarding the Respondent's family ties, either in the U.S. or in either part of Ireland. The Respondent, a 45 year-old carpenter earns \$70,000 per year. *See id.* at 17, 25. Neither he nor his wife have significant medical conditions. *See id.* Judge Williams found that the Respondent had a well-founded fear regarding return to either part of Ireland, and this, taken in combination with the emotional and financial impact on the Respondent's U.S. citizen wife and child, seems to be how the Judge determined extreme and unusual hardship to merit the exercise of discretion. If the Board were to review this case *de novo* and under the current 'exceptional and unusual hardship' standard it is very possible the result would come out quite differently.

<sup>145</sup> "Mr. Galvin is a co-founder of Noraid, which has raised money for the IRA in the U.S. and has lobbied heavily for the cause of Irish unity." Stevenson, *supra* note 32, at 8.

<sup>146</sup> This special Congressional hearing was held in February 1997. *See Pearson*, at 22.

<sup>147</sup> *See id.*

<sup>148</sup> Congressman Gilman, who represents the 20th District in New York in the United States House of Representatives, testified as a character witness for the Respondent. *See id.* at 15, 22. At the time of the trial, he served as Chair of the House Foreign Affairs Committee, and as a senior member of the House Oversight Committee. *See id.* at 22. Congressman Gilman also co-chaired an informal group of Congressional members, the Irish Caucus, who research and explore mechanisms to bring peace to Northern Ireland. *See Pearson*, at 14. Congressman Gilman stated that "the Respondent lives within his Congressional District and that he has met the Respondent on many occasions, having first met the Respondent at an Irish-American dinner before the proceedings were initiated." *Id.* at 15. It was Congressman Gilman's opinion that "the Respondent poses no threat or danger to the security of the United States." *Id.* While Congressman Gilman testified as to the interpretation of Congressional intent regarding the aggravated fel-



King,<sup>149</sup> also appeared as character witnesses on behalf of Respondent Pearson at his trial.<sup>150</sup> Following these testimonials at the Ad Hoc Committee, Committee members publicly excoriated the INS for pursuing former IRA prisoners and urged that proceedings against them be dropped.<sup>151</sup> As a result of that special Congressional hearing, a letter was sent to President Clinton asking him to intervene on behalf of the Respondent.<sup>152</sup>

Although the congressional hearing had no legal weight, it has been suggested that it would be naive to dismiss its political influence.<sup>153</sup> Documentation regarding the conditions in Ireland was requested by the court from the Department of State's Bureau of Democracy, Human Rights and Labor, but was never received.<sup>154</sup> Needing information regarding the conditions in

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any definition, *as amended* by the IIRAIRA, Judge Williams made it clear that he could not accept Gilman's interpretation as the binding interpretation of Congressional intent. Instead, he would look to the plain meaning of the law and other established means of statutory interpretation regarding the newly enacted the IIRAIRA. *See id.*

<sup>149</sup> Congressman King, who represents the 3rd District in Nassau County on Long Island was at the time of the trial serving his third consecutive term in the U.S. House of Representatives. *See Top Ten Irish Americans of 1997*, IR. AM., April 30, 1997, at 49. At the time of the trial, Congressman King served on the Committee on International Relations and co-chaired of the Congressional Ad Hoc Committee for Irish Affairs. *See id.* Congressman King testified on behalf of the Respondent as a character witness, and stated that he had known the Respondent for 4-5 years. *See Pearson*, at 22. Congressman King distinguished random acts of terror aimed at civilian targets from attacks on non-civilian targets, and stated that "the acts the Respondent committed do not change his view of the Respondent as being of the highest moral character and known in the community for great honesty." *Id.* His opinion was that the Respondent poses no threat to the safety or security of this country. *See id.* Congressman King also testified about the effective date of provisions of IIRAIRA, but again Judge Williams made clear he would not consider that testimony in rendering a decision on those issues. *See Pearson*, at 22.

<sup>150</sup> *Id.* at 14-15, 22.

<sup>151</sup> *See Stevenson*, *supra* note 32, at 8.

<sup>152</sup> *See Pearson*, at 22. Note that the Congressional hearing and the subsequent sending of the letter are all legally permissible.

<sup>153</sup> *See Stevenson*, *supra* note 32, at 8. Following the ruling, twelve members of Congress wrote to Attorney General Janet Reno urging her to use her discretion and not file an appeal of Judge Williams' decision. *See Darina Molloy*, *Good News for Brian Pearson*, IR. AM., June 30, 1997, at 15.

<sup>154</sup> *See Pearson*, at 8. The Department of State is charged with offering a profile of prevailing conditions in the country from which the applicant is seeking asylum, and may provide more individualized comments at its option. 8 C.F.R. § 208.11(a) (1998). However, the judge may request comments from the Department of State. *See id.*

Ireland in order to make his decision, the court allowed the Respondent to introduce testimonials of various kinds, thus providing the Judge with the Respondent's version of life in Ireland.<sup>155</sup> Numerous high profile character witnesses testified on behalf of Pearson. Such witnesses encompassed many realms: the political,<sup>156</sup> judicial,<sup>157</sup> literary,<sup>158</sup> and the reli-

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<sup>155</sup> The Service could also have introduced evidence regarding country conditions in either part of Ireland and, for reasons not stated in the record, did not do so.

<sup>156</sup> Congressmen Benjamin Gilman and Peter King appeared as character witnesses. *See supra* notes 148 and 149. Also, Sam Coleman, a New York State Assemblyman from the 93rd District in the State of New York testified as a character witness on behalf of the Respondent. *See Pearson*, at 14. Assemblyman Coleman met the Respondent a year before the trial and "was the initiating sponsor of a non-binding resolution in the New York State Assembly expressing support for the Respondent in his bid to gain lawful immigration status in this country." *Id.* Assemblyman Coleman testified the Assembly unanimously passed the resolution on April 6, 1995. *See id.* Assemblyman Coleman also characterized the Respondent as of the highest moral character, was an asset to the community and noted that the Respondent was honored in the Pearl River, New York St. Patrick's Day parade that year. *See id.* Assemblyman Coleman testified that he knew of the Respondent's past activities with the IRA, but believed that the Respondent's acts were political in nature and asserted that even the United Kingdom classified the Respondent's acts as political. *See id.* Assemblyman Coleman stated that he "would sponsor a similar resolution in support of Hamas, a terrorist Palestinian organization, if that individual's circumstances were similar to the instant Respondent's; however, [h]e . . . testified that he would have more faith in an Israeli Court than the court in which the Respondent was convicted in." *Pearson*, at 14.

<sup>157</sup> Judge William Kelly, a Justice of the Supreme Court of the State of New York for the past 10 years, sits in Rockland County, the county where both he and the Respondent live. *See id.* at 13. Judge Kelly testified that he had known the Respondent for seven years. *See id.* Judge Kelly stated that he "held numerous law enforcement positions in the Bronx, New York District Attorney's Office between 1969 and 1982, and from 1982-1987 as a Town Justice for the Town of Clarkstown, New York." *Id.* at 13. Judge Kelly testified to the Respondent's excellent moral character, stating that based upon the Judge's own personal knowledge and experience in examining the character of individuals, he was convinced that the Respondent poses no threat to the community or to the security of the United States. *See Pearson*, at 13. Judge Kelly testified that he generally considers crimes against law enforcement officers particularly "heinous." *Id.* Judge Kelly reconciled the Respondent's conviction of crimes in Northern Ireland with his belief that the Respondent's confessions were tortured out of him, and that "the acts the Respondent committed were not 'garden variety', but rather must be examined in the context of a long historical nationalist struggle for independence in the North of Ireland." *Id.*

<sup>158</sup> Oistin McBride testified on behalf of the Respondent, as an expert witness as to the nature of the conflict in Northern Ireland. *See Pearson*, at 17. McBride, a 34-year old photo-journalist, stated that he had written articles under pseudonyms for, and submitted photographs to all of the major Irish newspapers, as well as for

major American newspapers and the BBC. *See id.* McBride had taken part in prestigious photo-journalist exhibitions, including one at the U.S. Congress. *See id. at 18.* This witness summarized for the court the history of the division of Ireland and how most Catholics in Northern Ireland are Republicans who seek to rid Northern Ireland of British Rule, and how most Protestants are Loyalists, who want Northern Ireland to remain a part of the United Kingdom. *See id.* McBride stated it is "possible to discern between a Nationalist and a Loyalist by appearance, schooling, accent and language used." *Pearson*, at 18. McBride further testified that in Northern Ireland the Catholics are the minority and Protestants the majority. *See id.* McBride testified as to the discrimination that resulted from this disparity. *See id.* McBride testified that on many occasions in the 1960s, Catholic protesters in a civil rights movement, which sought to end employment, voting, and housing discrimination and to protest British rule, were attacked by the RUC, the British Army, and Loyalist groups. *See id.* McBride testified that such attacks culminated in a January 1972 event in which 14 unarmed Catholic Republicans were killed by British paratroopers in Northern Ireland (known as "Bloody Sunday"). *See id.* Thereafter, McBride stated that peaceful resolution gave way to use of the Irish Republican Army to achieve the Republican's goals of ending British rule and discrimination in Northern Ireland. *See Pearson* at 18.

McBride testified as to the Special Powers Act, "which was implemented [by the British] in an attempt to prevent terrorism, which allowed for arbitrary arrest, searches [sic] and seizure." *Id.* McBride testified about "collusion," charging that information on Republican individuals gathered by RUC or other British sources is handed over to Loyalist groups, who then "target" those Republicans by seeking them out and killing them. *See id.* at 19. McBride stated that from 1989-94, 13 Sinn Fein members were killed, and as these members had a history of being abused and harassed before their ultimate deaths, McBride testified he believed that they were 'targeted'. *See id.* From his personal experience, McBride testified that his father was targeted and killed in 1972. *See id.* at 19. Furthermore, McBride stated the same happened to his brother in 1974. *See Pearson*, at 19. McBride testified that 'collusion' and 'targeting' of individuals continues to this day, citing the case of a naturalized U.S. citizen who returned to Ireland. *See id.* McBride testified that this individual, Liam Ryan, was told by the RUC that Loyalist groups had information on him and that he would be killed. *See id.* According to McBride, Ryan was assassinated in November of 1989, but the record does not indicate whether that was in Northern Ireland or the Republic of Ireland. *See Pearson*, at 19. McBride testified that "even if an investigation implicated a member of the RUC or a Loyalist group [as being responsible for doing something to Republicans], that the individual would not be prosecuted for such acts." *Id.*

McBride cited to the deaths of several individuals, whom he alleges were killed because of family members being members of the IRA or Sinn Fein (the political wing of the IRA). *See id.* at 19-20. Notably, McBride referenced the July 1994 death of a pregnant mother of 5, Kathleen O'Hagan, in an attack at her home which McBride believed was intended to kill her husband. *See id.* at 19. McBride believed that Mr. O'Hagan had been targeted by a Loyalist group, the Ulster Freedom Fighters, because of his past activities against the RUC. *See Pearson*, at 19. While McBride testified that there were "similar incidents within 15 days of his testimony in February, 1997," no specific names or locations of these attacks were noted in the record. *See id.* McBride testified that the Respondent has reason to fear returning to Northern Ireland, due to his appearance, the profile he has gained from the INS proceedings, and his past links with the IRA; thus, McBride

gious.<sup>159</sup> Sympathy factors played high in the Respondent's choice of character witnesses.<sup>160</sup> Several witnesses, who qualified as experts, had decidedly personal connections with the IRA<sup>161</sup> or the Republicans.<sup>162</sup>

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concluded that the Respondent would be targeted by Loyalists. *See id.* McBride testified that attacks occur on Sinn Fein and IRA members (and their families) even in the Republic of Ireland. *See id.* Therefore, McBride opined that the Respondent would not be safe even there. *See id.* at 20. McBride also testified he believed it reasonable for the Respondent to fear for the safety of his wife and daughter were they to return to any part of Ireland. *See Pearson*, at 19.

McBride testified regarding his personal experience, namely that he is a Nationalist but not a member of the IRA. *See id.* at 20. McBride testified that he had been arrested on numerous occasions because of his work, held in prison, but never charged for any crime. *See id.* at 19. McBride "also testified that due to his high profile he has been attacked on several occasions, that he wears a bullet proof vest, and does not own a car for fear of a bomb being placed in it." *Id.* at 19-20. McBride testified that a "fellow journalist," Eddie Copeland, "very recently" had his leg blown off by a bomb planted in his car. *Id.* at 20. Copeland had been injured when a bomb exploded underneath his car outside his Northern Ireland home on December 22, 1996. *See* Toby Harnden, *Army Woman Who Shot RUC Officer Will Not Be Charged*, DAILY TELEGRAPH LONDON, February 2, 1998, at 02. However, he was not just a "fellow journalist," but is a leading republican/IRA supporter known as the "Irish Republican Party godfather." Lionel Shriver, *Northern Ireland's Fragile Peace*, WALL ST. J., December 31, 1996, at 6 (emphasis added).

<sup>159</sup> The Court received a "passionate plea" from Cardinal John O'Connor of New York on the Respondent's behalf. *Pearson*, at 42. The cardinal expressed his "concern for humanitarian reasons," and proffered a character reference for the Respondent, opining *Pearson* "has led an upstanding life in the company of his family." *Id.*

<sup>160</sup> The Respondent called several Irish-American police officers. Especially sympathetic was Steven McDonald, Detective 3rd grade, a 12 year veteran with the New York City Police Department (NYPD), and "a quadriplegic as a result of an incident which took place in 1986 while he was working as a plain clothes officer in Central Park, New York." *Id.* at 13. Detective McDonald testified he had known the Respondent for three years and that while aware of the activities the Respondent was convicted of, Detective McDonald stated that he never discussed the incidents with the Respondent. *See id.* at 13-14. Detective McDonald's "duties include representing the NYPD by speaking at schools and other venues spreading a message of non-violence." *Id.* at 13. Detective McDonald claimed to be against all violence. *See Pearson*, at 13.

The Respondent also called retired NYPD Assistant Chief and veteran of 37 years, Thomas Gallagher, as a character witness. *See Pearson*, at 16. Gallagher testified he had known the Respondent and his family for years, seeing them socially at family events and social gatherings, and attested to the Respondent's high moral character. *Id.*

<sup>161</sup> Sean Cronin, Respondent's expert on Irish Republicanism and the nature of the conflict in Northern Ireland stated that he was the "Chief of Staff of the IRA between 1956-31 [sic]." *Id.* at 24.

<sup>162</sup> The Respondent's expert witness on the violations of civil and human rights in Northern Ireland, Oliver Kearney, was at the time of trial "the Secretary Gen-

Following Judge Williams' March 27, 1997 ruling, further political pressures were exerted. During March and April, the Justice Department was flooded with phone calls and letters in support of Pearson.<sup>163</sup> On March 31, 1997, 12 members of Congress wrote to Attorney General Janet Reno, urging her to "use [her] discretion and not challenge Judge Williams' decision, which is consistent with the public safety goals of the INA and furthers the administration's goals of promoting peace and reconciliation in Northern Ireland."<sup>164</sup> The mobilization of Irish-American groups, members of Congress, the New York State Assembly, and use of editorials in Irish-American newspapers appealing to the President and the Attorney General not to appeal Judge Williams' decision, pressured the Clinton Administration into letting the asylum ruling stand.<sup>165</sup> At a foreign affairs discussion in mid-April, 1997, Congressman Gilman publicly appealed on Pearson's behalf to the President, the Secretary of State, Madeleine Albright, and the National Security Adviser, Sandy Berger.<sup>166</sup>

Then on April 25, 1997, the INS appealed the verdict, challenging the claim that Pearson's actions were political and that he would suffer reprisals if deported.<sup>167</sup> Following more political pressure, Assistant Attorney General Andrew Fois responded in a May 23, 1997 letter to the 12 members of Congress

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eral of 'Equality,' a group which works for the promotion of economic and social justice, and the elimination of discrimination in Northern Ireland." *Id.* at 20. Oistin McBride, the Respondent's expert witness as to the nature of the conflict in Northern Ireland, testified that his father and brother were targeted by Loyalist groups (those who wish Northern Ireland to remain part of the United Kingdom, mostly Protestants) and were subsequently killed in 1972 and 1974, respectively. *See Pearson*, at 18-19. *See also supra* note 158.

<sup>163</sup> *See* Tara Peterman, *Justice Dept. Backs INS Pearson Appeal*, IRISH VOICE, June 10, 1997 at 3.

<sup>164</sup> Darina Molloy, *Good News for Brian Pearson*, IRISH AMERICA, June 30, 1997, at 15. This letter was signed by three senators, Christopher Dodd (D-Conn), Alfonse D'Amato (R-NY) and Robert Torricelli (D-NJ), and nine members of the House of Representatives, including Ben Gilman (R-NY), Peter King (R-NY), Tom Manton (D-NY), Richard Neal (D-Mass.) and James Walsh (R-NY). *See id.* In the letter they also asserted that the INS targeted Pearson and other Irish nationals for their beliefs. *See* Tara Peterman, *supra* note 163, at 3. In the letter it was also asserted that Pearson was not a public safety threat. *See id.*

<sup>165</sup> *See* Joe Carroll, *Decision This Week on Whether to Deport Ex-IRA Man*, IRISH TIMES, April 21, 1997, at 3.

<sup>166</sup> *See id.*

<sup>167</sup> *See* Peterman, *supra* note 163, at 3.

that "serious criminal convictions, even after the sentence is served, will preclude relief in many cases."<sup>168</sup> He further stated that in cases of less serious crimes the law does permit the "balancing of the conviction against other favorable factors in reaching a determination."<sup>169</sup>

## VI. POSSIBLE RAMIFICATIONS: LEGAL AND POLITICAL

There are six other former IRA members in the U.S., fighting similar deportation attempts by the Federal immigration authorities.<sup>170</sup> All are currently on hold as Attorney General Janet Reno suspended the proceedings on September 9, 1997,<sup>171</sup> and the Service will not further pursue Pearson's appeal or those cases for the indefinite future.<sup>172</sup> Reno's announcement came as Sinn Fein announced in Belfast that it would embrace the "Mitchell Principles," a six-point renunciation of violence that was a prerequisite for the party's admission to the all-party peace talks<sup>173</sup> scheduled to begin in mid-September, 1997.<sup>174</sup>

"Hard cases, it is said, make bad law."<sup>175</sup> Judge Williams' decision is not entirely shocking, as the U.S. protects individual

<sup>168</sup> *Id.*

<sup>169</sup> *Id.*

<sup>170</sup> See *supra* note 75, discussing these other cases at length.

<sup>171</sup> See Cassandra Burrell, *Administration Stops Deportation Proceedings To Further Peace Talks*, ASSOCIATED PRESS, September 9, 1997. Note that Noel Gaynor and Gabriel Megahey had been turned down for asylum and ordered deported. See Richard Willing, *Ruling Gives Ex-IRA Bomber Hope of an American Dream*, USA TODAY, April 14, 1997, at O3A.

<sup>172</sup> See Burrell, *supra* note 171. The language in Albright's letter requesting action "*without prejudice to the administration's legal position*" and "to ensure that these individuals will not be deported from the United States *at this time*" indicates that these deportation cases are not at their final resting spot. *Id.* (emphasis added). Thus, the U.S. government has reserved the right to take up these cases again at a later date.

<sup>173</sup> See Dan Balz, *IRA's Political Arm Renounces Violence; Sinn Fein Move Sets Stage for N. Ireland Peace Talks Monday; Unionists Remain Skeptical*, WASH. POST, September 10, 1997, at A15. Sinn Fein had been invited into the all-party talks on September 1, 1997, after the new Labor Party government of Prime Minister Tony Blair concluded that the cease-fire announced by the IRA in July was genuine. See *id.* The talks included nine other parties in Northern Ireland that represent the Protestant majority and the Roman Catholic majority, plus the British and Irish governments. See *id.*

<sup>174</sup> See Susan Benkelman, *Reno Suspending IRA Deportations / Move Made to 'Advance the Peace'*, NEWSDAY, September 10, 1997, at A15.

<sup>175</sup> *Ex parte Long*, 3 W.R. 19 (1854) decision by John Campbell, Lord Chief Justice.

rights with great vigor, and case-by-case adjudication is always vulnerable to outside influences and sympathies. Here the Respondent, a 45 year old married man with a U.S. citizen wife and young child who depended on him, was a very sympathetic character. His crime, if one ever deems to call it that, was committed years ago and he served his sentence in a notoriously harsh prison in Northern Ireland, known commonly as "The Maze."<sup>176</sup>

This decision seemed to proceed from sympathy rather than law. It seems clear to this writer that the decision to stay the appeal was definitely based on concern for a higher goal of peace in Northern Ireland, and not on the law. Admittedly, concerns for peace involving two countries should take precedence over the concern of one person; however, neither of the countries-at-risk is governed by U.S. laws nor do the laws of those countries govern U.S. citizens when in the U.S. While this writer believes discretion is necessary in diplomacy, and when allowed by statute or case law in judicial decisions, it should not become the norm. For once an exception for discretion is first made, where would the deluge end? Here, an exception was made where a strong political branch of a powerful faction in Northern Ireland, a country with whom America has strong ties, used its threat of non-participation in peace talks as leverage to have the U.S. relinquish its claims.

In this author's opinion, it is likely that Sinn Fein would have participated in the peace talks regardless of the interven-

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<sup>176</sup> The official name is the Maze Prison, formerly known as Long Kesh Prison, located near Lisburn, about ten miles from Belfast, Northern Ireland. See PADRAIG O'MALLEY, *THE UNCIVIL WARS: IRELAND TODAY* 264 (1983). Richard Harvey, Respondent's expert witness on "special category status" [hereinafter SCS], testified that SCS was instituted by Lord Whitehall, the Secretary of State for Northern Ireland, in exchange for a cease-fire, in 1972. See *Pearson*, at 22-23. Harvey testified that "SCS prisoners still served their time in prison, but in a different fashion, which included better living conditions. Specifically, SCS prisoners did not wear prison uniforms." *Id.* at 23. Harvey testified that when special category status was abolished as of March 1, 1976, those prisoners incarcerated prior to that date retained their status. See *id.* Harvey stated that he believed the Respondent was a SCS prisoner for his April 1977 conviction of crimes relating to two separate bombing incidents in Northern Ireland. See *id.* Harvey conceded on cross-examination that the statutes under which the Respondent had been convicted were criminal statutes. See *id.* Harvey "further conceded that the British never used the term 'prisoner of war' or 'political prisoner' when referring to SCS prisoners." *Pearson*, at 23.

tion of the Secretary of State and subsequent decision of the U.S. Attorney General to stay the appeal of Pearson's and other cases. Sinn Fein saw a moment by which to gain another advantage, and took it. While the capitulation on the part of the U.S. may in the grand scheme be minor, as it involves only 6 individuals; there are many other cases which do not enjoy political influence or media attention. Their claims for asylum and/or withholding of deportation, based on changes in the AEDPA and IIRAIRA, will be subject to the full statutory interpretation of the law. At moments like these, it seems to this writer that justice is for sale. Justice in this instance appears to be a question of whom one knows and what influence can be exerted in order to circumvent the law, which was intended to apply equally towards all.

Judges should "administer justice according to law. Justice in a larger sense, justice according to morality, is for Congress and the President to administer, if they see fit, through the creation of a new law."<sup>177</sup> If every judge were to decide each case according to what that judge thought to be fair or just, without regard to the law, then certainly judicial anarchy would result.

However one may view Judge Williams' decision, the decision by the Attorney General to forego appeal of this case was very clearly politically motivated.<sup>178</sup> Partisan politics played a significant role throughout this case. Political pressures continued even after this decision was rendered. That prevailing political attitudes affect the judicial and administrative functions of government is an unavoidable reality.<sup>179</sup> However, it should not, in this author's opinion, be the guiding force.

Justice Oliver Wendell Holmes stated that "[t]he life of law has not been logic: it has been experience."<sup>180</sup> As he explained, "[t]he law embodies the story of a nation's development through many centuries, and it cannot be dealt with as if it contained

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<sup>177</sup> ROBERT H. BORK, *THE TEMPTING OF AMERICA—THE POLITICAL SEDUCTION OF THE LAW* 6 (1989).

<sup>178</sup> U.S. officials themselves described the decision to suspend the deportation proceedings as a gesture to encourage the peace process in Northern Ireland. See Balz, *supra* note 173, at A15.

<sup>179</sup> See Jonathan Stevenson, *The IRA Doesn't Deserve Asylum*, WALL ST. J. EUR., May 21, 1997, at 8.

<sup>180</sup> OLIVER W. HOLMES, JR., *THE COMMON LAW* 1 (1881).



only the axioms and corollaries of a book of mathematics.”<sup>181</sup> The trend of the Board of Immigration Appeals, in recent decisions toward application of the refugee standard, reflects the complex political and social situations in the world today.<sup>182</sup>

The most notable factors the BIA looks at to determine whether the applicant suffered due to motivation by an actual or imputed political opinion, include: whether anti-terrorism laws were being used to suppress political opinion and whether political opponents were being subjected to arbitrary arrest, prosecution, detention or mistreatment.<sup>183</sup> It could be that with the BIA's retreat from the past narrow decisions limiting asylum eligibility that *Pearson* would be upheld on appeal.<sup>184</sup>

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<sup>181</sup> *Id.*

<sup>182</sup> See *In re H—*, Int. Dec. 3276 (B.I.A. 1996) (asylum applicant who demonstrated past persecution need not only demonstrate compelling reasons for being unwilling to return to his or her country of nationality; need only arises if the presumption of future persecution is rebutted by a demonstration that the conditions in the country of nationality have changed to such an extent that a future fear of persecution is not reasonable). See *In Matter of S—P—*, Int. Dec. 3287 (B.I.A. 1996) (asylum applicant established eligibility by demonstrating past persecution for imputed reasons; Board recognized persecutors may have a mix of motivations for engaging in persecution). See also Terry J. Helbush, *New Developments in Asylum 1996*, 964 PLI/CORP. 59 (1996).

<sup>183</sup> See Helbush, *supra* note 182, at 61. See also *In Matter of S—P—*, Int. Dec. 3287 (political opinion can also be imputed).

<sup>184</sup> “The Board has retreated from its earlier decisions and ‘reaffirms’ that an applicant can establish asylum eligibility by demonstrating past persecution for imputed reasons, including imputed political opinion.” Helbush, *supra* note 182, at 62. The doctrine of imputed political opinion allows applicants to qualify for asylum based on past persecution or future persecution they fear on account of political opinion which has been or will be imputed to them by their persecutors, usually governmental agents. See *id.* at 61-62; see also *Hernandez-Ortiz v. INS*, 777 F.2d 509 (9th Cir. 1985). Until 1996 and *In Matter of S—P—*, the BIA had been reluctant to apply the doctrine to situations of internal conflicts. The BIA found that the persecutors were not motivated by any political opinion ascribed to the applicants, but by the government's legitimate need to investigate and obtain information related to terrorist activity. See *In Matter of S—P—*, Int. Dec. 3287 (BIA found a Sri Lankan Tamil applicant to be persecuted at least in part because he was believed to be a member of an alleged terrorist organization, the Liberation Tigers). See also Helbush, *supra* note 186, at 62; *In re H—*, Int. Dec. 3276 (B.I.A. 1996) (BIA found persecution in the context of an ethnic civil war on account of membership in a particular social group, the Marehan subclan of the Darood clan in Somalia). “[W]hile interclan violence may fall within general category of civil strife, that does not preclude certain acts from being persecutory and does not change the fact that certain types of harm constitute persecution.” *In re H—*, at 11. See also *Matter of Villata*, 20 I. & N. Dec. 142 (B.I.A. 1990) (Board found a well-founded fear of harm from paramilitary groups on account of political affiliation).

However, the BIA conforms to statutory amendments regarding new definitions of crimes of violence, namely an aggravated felony.<sup>185</sup> Within *In re Yeung*, the BIA stated that “[n]othing could be more clear than Congress’ desire in recent years to limit, rather than extend, the relief available to aliens who have been convicted of crimes.”<sup>186</sup> “Congress voted overwhelmingly for the recent legislative changes to immigration law and sent a clear message of zero tolerance to those who violate the immigration laws.”<sup>187</sup> This power has been recognized repeatedly by the Supreme Court.<sup>188</sup>

## VII. CONCLUSION

In pursuing this case, the INS was fulfilling its responsibilities as dictated by changes in immigration law pursuant to the Illegal Immigration Reform and Immigration Responsibility Act<sup>189</sup> and the Antiterrorism and Effective Death Penalty Act.<sup>190</sup> It is argued that the court can judge and develop procedural mechanisms by which Congress’ immigration policy is implemented,<sup>191</sup> in accordance with the development of Congress’ plenary power.<sup>192</sup> However, the court’s role is confined to ensuring that “procedures meet the essential standard of fairness under the Due Process Clause and do not extend to imposing procedures that merely displace congressional choices of policy.”<sup>193</sup>

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<sup>185</sup> See *Helbush*, *supra* note 182, at 66.

<sup>186</sup> *In re Yeung*, Int. Dec. 3297.

<sup>187</sup> Carol Leslie Wolchok, *Demands and Anxiety: The Effects of the New Immigration Law*, 24 HUM. RTS. Q. 12, 13 (1997). “The House Immigration Subcommittee has launched an aggressive schedule of oversight hearings to drive home the point that it is monitoring the INS closely and expects the agency to ‘fully execute the will of Congress.’” *Id.*

<sup>188</sup> See *Fiallo v. Bell*, 430 U.S. 787, 792 (1977); *Reno v. Flores* 507 U.S. 292 (1993). See also *Kleindienst v. Mandel*, 408 U.S. 753, 766 (1972). “[The Supreme] Court without exception has sustained Congress’ ‘plenary power to make rules for the admission of aliens and to exclude those who possess those characteristics which Congress, has forbidden.’” *Id.*

<sup>189</sup> See *IIRAIRA*, *supra* note 4.

<sup>190</sup> See *AEDPA*, *supra* note 3.

<sup>191</sup> See Michael Scaperlanda, *Are We That Far Gone?: Due Process and Secret Deportation Proceedings*, 7 STAN. L. & POL’Y REV. 23, 24 (1996).

<sup>192</sup> See *supra* note 188 (citing to cases regarding Congress’ plenary power recognized by the United States Supreme Court). But see Richard Boswell, *Throwing Away the Key: Limits on Plenary Power?*, 18 MICH. J. INT’L L. 689 (1997).

<sup>193</sup> *Landon v. Plasencia*, 459 U.S. 21, 35 (1982).

It was within the Immigration Judge's discretion whether or not to grant asylum.<sup>194</sup> However, without an appellate review of Judge Williams' weighing of the various factors in granting asylum<sup>195</sup> there is no check on this judicial process. However, the lawmakers, the Senators and Congressmen, who enacted the AEDPA and the IIRAIRA to reflect their constituent's views, may wish to make certain that their roles as lawmakers have not been circumvented by the judiciary.<sup>196</sup> Otherwise Congressional intent inherent in statutory language can be interpreted by the judiciary as only a posture and not a position which must be followed. While statutory language can never be exact, as it will be subject to interpretation and evolution throughout its lifetime, lawmakers can insure that their constituents' views are accurately reflected by the judiciary in careful phrasing of laws and in making clear their intention in Legislative records. Here, it seems clear to this writer what bars to asylum the Legislature intended in the AEDPA and the IIRAIRA, but that political influence and partisan politics interceded to contravene such intentions.

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<sup>194</sup> See *supra* notes 24-26 and accompanying text discussing discretion of a judge in an asylum case and various factors that play a part in that decision.

<sup>195</sup> The BIA's review extends to the law, the facts, and the exercise of discretion. See generally 8 C.F.R. § 3.1(d) (1998). See also *supra* note 105 (regarding the scope of the Board's review).

<sup>196</sup> INS Spokesman Brian Jordan said the Service would abide by the Republican-sponsored anti-terrorism law as enacted. See Ronald Powers, *Lawmakers Call on Administration to Block IRA Deportation*, ASSOC. PRESS POL. SERV., May 15, 1997. Jordan further stated that "[i]f there are concerns about that, then we respectfully request Congress to make amendments to the anti-terrorism act." *Id.*

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