IS THERE A SUBJECTIVE ELEMENT IN THE REFUGEE CONVENTION'S REQUIREMENT OF "WELL-FOUNDED FEAR"?

James C. Hathaway[*]
William S. Hicks[**]

I. CRITIQUE OF THE TRADITIONAL APPROACHES 510
A. *Fear as One of Two Essential Elements: The Bipartite Approach* 510
1. The Risk of Unwarranted Denials of Protection 514
2. The Challenge of Implementation 517
B. *Fear to Supplement an Objectively Weak Claim* 534
II. "FEAR" AS FORWARD-LOOKING EXPECTATION OF RISK 535
A. *Taking Account of the Convention's Object and Purpose* 536
B. *"Craignant avec raison . . . ."* 538
C. *Internal Consistency* 540
III. ENSURING ATTENTION TO THE APPLICANT'S CASE 543
A. *Admissibility of the Applicant's Evidence* 546
B. *Taking the Applicant's Evidence Seriously* 549
C. *Attention to Particular Susceptibilities* 551
IV. CONCLUSIONS 560

* James E. and Sarah A. Degan Professor of Law and Director, Program in Refugee and Asylum Law, University of Michigan Law School. This paper draws on research and analysis undertaken by students enrolled in the advanced seminar components of the Program in Refugee and Asylum Law during 2003–2004, including Ali Ahmad, Lisa Bagley, Umbreen Bhatti, David Burkoff, Omar Chaudhary, Taylor Garrett, Anthony Gill, Carsten Hoppe, Wonda Joseph, Wondwossen Kassa, Ummni Khan, Niketa Kulkarni, Erin Meek, Louise Moor, Patrick Peters, Troy Peterson, Julie Pfluger, Matthew Pryor, Erin Quinn, Hana Sato, Azadeh Shahshahani, Joseph Simpson, Sarah Sterken, Larissa Wakim, and Dawson Williams. We acknowledge also the invaluable advice of participants in the Third Colloquium on Challenges in International Refugee Law, convened in Ann Arbor in March 2004, which tested and clarified the analysis presented here and which produced the *Michigan Guidelines on Well-Founded Fear*, 26 MICH. J. INT'L L. 491 (2005). We thank Louise Moor and Larissa Wakim for their tireless work as associate editors of the Background Study, prepared in anticipation of the Colloquium, and Daria Fisher for her dedicated and professional editing. We are particularly grateful for the contributions of Rodger P.G. Haines, Q.C., who both assisted in the design of the research project while the Visiting DeRoy Professor of Law at the University of Michigan Law School and chaired the Colloquium.

** J.D., University of Michigan Law School (2004), presently an associate at Lewis and Roca, LLP (Phoenix).

> *"The expression 'well-founded fear' is not a precise one; in particular, it invites debate as to the extent to which the fear depends upon objective facts and the extent to which it reflects the subjective state of the person concerned."*[1]

Linguistic ambiguity in the refugee definition's requirement of "well-founded fear" of being persecuted[2] has given rise to a wide range of interpretations. There is general agreement that a fear is "well-founded" only if the refugee claimant faces an actual, forward-looking risk of being persecuted in her country of origin (the "objective element"). But it is less clear whether the well-founded "fear" standard also requires a showing that the applicant is not only genuinely at risk, but also stands in trepidation of being persecuted.[3]

Beyond vague references to the subjective quality of "fear," few courts or commentators have undertaken the task of explaining what justifies recognition of a subjective element in the first place. What, in the end, does subjective fear or trepidation have to do with the goals of refugee law? Reasoned explanations are in short supply. This shortfall in critical thinking has greatly complicated efforts to formulate a coherent understanding of the subjective element, and clearly to articulate its role in the analysis of well-founded fear.

Semantic difficulties add an additional layer of complexity to the debate. Discussions related to the subjective element frequently resort to indefinite language, itself susceptible to multiple interpretations. This confusion is evident, for example, in the United Nations High Commissioner for Refugee's (UNHCR) *Handbook on Procedures and Criteria*

---

1. Chan v. Minister for Immigr. and Ethnic Aff., [1989] 169 C.L.R. 379, 405 (Austl. 1989) (Toohey J.).

2. Under the 1951 Convention relating to the Status of Refugees the term "refugee" applies

> to any person who . . . [a]s a result of events occurring before 1 January 1951 and owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his formal habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.

Convention relating to the Status of Refugees, *adopted* July 28, 1951, art. 1(A)(2), 189 U.N.T.S. 150 [hereinafter Refugee Convention]. The 1967 Protocol *inter alia* removed the Convention's temporal limitations, omitting the words "[a]s a result of events occurring before 1 January 1951 and . . ." and the words "as a result of such events." Protocol relating to the Status of Refugees, *done* Jan. 31, 1967, art. 1(2), 606 U.N.T.S. 267.

3. From a strictly textual perspective, this interpretation is understandable. On one reading, "fear" connotes "[t]he emotion of pain or uneasiness caused by the sense of impending danger. . . ." 5 OXFORD ENGLISH DICTIONARY 780 (2d ed. 1989).

for Determining Refugee Status Under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees (UNHCR Handbook),[4] which contains passages that support almost every imaginable understanding of the subjective element.[5] Because non-textual justifications for the subjective element are few and far between, the proliferation of discrete understandings has been unconstrained by policy-driven reasoning.

In contrast to prevailing views, we take the position that there is no subjective element in the well-founded fear standard. The Convention definition's reference to "fear" was intended simply to mandate an individuated, forward-looking appraisal of actual risk,[6] "not to require an examination of the emotional reaction of the claimant."[7] Rather than predicating access to protection on the existence of "fear" in the sense of trepidation, the Convention refugee definition requires only the demonstration of "fear" in the sense of a forward-looking expectation of risk. Once fear so conceived is voiced by the act of seeking protection, it falls to the state party assessing refugee status to determine whether that expectation is borne out by the actual circumstances of the case. If it is, the applicant's fear (that is, his or her expectation) of being persecuted should be adjudged well-founded. Grahl-Madsen rightly observed that "[e]very person claiming . . . to be a refugee has 'fear' ('well-founded' or otherwise) of being persecuted . . . irrespective of whether he jitters at the very thought of his return to his home country, is prepared to brave all hazards, or is simply apathetic or even unconscious of the possible dangers."[8]

This understanding of "fear" as forward-looking expectation of risk is fully justified by one of its plain meanings. While "fear" is most commonly understood in the sense of trepidation, the term may also be defined as "a particular apprehension of some future evil . . . (an) [a]pprehensive feeling towards anything regarded as a source of danger, or towards a person regarded as able to inflict injury or punishment."[9]

4. OFFICE OF THE HIGH COMMISSIONER FOR REFUGEES, HANDBOOK ON PROCEDURES AND CRITERIA FOR DETERMINING REFUGEE STATUS UNDER THE 1951 CONVENTION AND THE 1967 PROTOCOL RELATING TO THE STATUS OF REFUGEES, U.N. Doc. HCP/IP/4/Eng/REV.1 (1979, reedited 1992)[hereinafter UNHCR HANDBOOK].

5. See, for instance, the confusing and seemingly contradictory positions taken in the UNHCR Handbook at ¶¶ 37–42, 52.

6. Refugee Appeal No. 71404/99 (Refugee Status Appeals Auth. 1999) (Haines, Deputy Chair) (N.Z.) ("[T]he inquiry into refugee status is concerned only with the prospective assessment of the risk of persecution.").

7. *See* JAMES C. HATHAWAY, THE LAW OF REFUGEE STATUS 67 (1991) ("The concept of well-founded fear is rather inherently objective. . . .").

8. ATLE GRAHL-MADSEN, THE STATUS OF REFUGEES IN INTERNATIONAL LAW 174 (1966).

9. 5 OXFORD ENGLISH DICTIONARY, *supra* note 3, at 780.

Understood in this sense, "fear" merely denotes the refugee's expectation of impending persecution. This understanding is consistent with a common usage of "fear" in standard English, as in expressions such as: "I fear you are mistaken," "I fear I have bad news for you," "I fear it may come to that," and "I fear I won't be able to make it to the party." It is also noteworthy that the verb "craindre," as used in the equally authoritative French language version of the Refugee Convention,[10] like "fear"—its English language equivalent[11]—can be interpreted either in the sense of expectation or trepidation.[12]

The determination of whether an applicant's "fear" (in the sense of forward-looking expectation of risk) is, or is not, "well-founded" is thus purely evidentiary in nature. It requires the state party assessing refugee status to determine whether there is a significant risk that the applicant may be persecuted. While the mere chance or remote possibility of being persecuted is insufficient to establish a well-founded fear, the applicant need not show that there is a clear probability that he or she will be persecuted. Only a "real chance" or "reasonable possibility" of being persecuted needs to be demonstrated.[13]

Because the sole focus of the well-founded fear inquiry is the assessment of an applicant's individuated risk of being persecuted, and because all evidence relevant to that risk can be considered without a

---

10. The French version of the Refugee Convention at Article 1(A)(2) reads:

> Aux fins de la présente Convention, le terme « réfugié » s'appliquera à toute personne . . . [q]ui, par suite d'événements survenus avant le premier janvier 1951 et craignant avec raison d'être persécutée du fait de sa race, de sa religion, de sa nationalité, de son appartenance à un certain groupe social ou de ses opinions politiques, se trouve hors du pays dont elle a la nationalité et qui ne peut ou, du fait de cette crainte, ne veut se réclamer de la protection de ce pays ; ou qui, si elle n'a pas de nationalité et se trouve hors du pays dans lequel elle avait sa résidence habituelle à la suite de tels événements, ne peut ou, en raison de ladite crainte, ne veut y retourner . .

Refugee Convention, *supra* note 2, art. 1(A)(2).

11. "Craignant avec raison" is the French language equivalent of "well-founded fear."

12. "Craindre" may be used in the sense of "appréhender," as in expressions such as: "Il ne viendra pas, je le crains"; "Ne craignez rien"; "Vous n'avez rien à craindre"; "Il est à crainte que cet élève n'échoue à l'examen"; and "Il y a lieu de craindre qu'un orage se prépare." *See* 3 LE GRAND ROBERT DE LA LANGUE FRANÇAISE: DICTIONNAIRE ALPHABÉTIQUE ET ANALOGIQUE DE LA LANGUE FRANCAISE 11 (Alain Rey ed., 2d ed. 1985).

13. *See, e.g.*, INS v. Stevic, 467 U.S. 407, 425 (1987) (requiring a "reasonable possibility" of being persecuted); R. v. Sec'y of State for the Home Dep't, *Ex parte* Sivakumaran, [1988] A.C. 958 (H.L. 1988) (U.K.) (setting the standard as a "reasonable degree of likelihood"); and Chan v. Minister for Immigr. and Ethnic Aff., [1989] 169 C.L.R. 379, 507 (Austl. 1989) (Toohey, J.) (requiring a "real chance" as distinguished from a "remote" chance of being persecuted). The relevant question is thus effectively ". . . whether a reasonable person in the asylum applicant's circumstances would fear persecution. . . ." Morales v. INS, 208 F.3d 323, 330 (1st Cir. 2000) (quoting Aguilar-Solaris v. INS, 168 F.3d 565, 572 (1st Cir. 1999)).

subjective element, we maintain that continued reference to distinct subjective and objective elements of the well-founded fear standard is unhelpful. Indeed, persistent references in the jurisprudence and scholarly literature to such abstract concepts as objectivity and subjectivity are at least partly responsible for the conceptual confusion that, to this point, has frustrated the emergence of a shared understanding of the well-founded fear standard. The analysis that follows elaborates our argument that there is no subjective element in "well-founded fear." For the sake of clarity, we avoid resort to the misleading labels ("objective" and "subjective") traditionally associated with the well-founded fear inquiry.

In section I, we set out our view that the traditional bipartite approach to "well-founded fear" is unjustified as a matter of principle and also impossible practically to implement in a fair and consistent manner. In particular, there is simply no principled way for decisionmakers to evaluate an applicant's state of mind for evidence of trepidation. Because of the consequent need to rely on largely artificial, surrogate indicators of trepidation, the bipartite approach as applied results in the denial of refugee status to persons who face the risk of being persecuted in their country of origin, some of whom may, in fact, be fearful. Even when a more seemingly benign approach to the subjective element is adopted—with evidence of trepidation considered only as a means of "topping up" a claim that is insufficiently established on objective grounds—a real injustice is still likely to occur. Under such an approach, persons whose fear is readily recognized as such by decisionmakers, as well as those who are simply more demonstrative, will be advantaged in securing refugee status for reasons that have nothing to do with the actual risk faced.

In section II, we suggest that the protection risks associated with the bipartite test, as well as the fairness concerns raised by use of trepidation as an essential element or as a "plus factor," can both be avoided by interpreting "fear" in its alternative sense of forward-looking expectation. We argue moreover that this linguistically sound interpretation is supported by the object and purpose of the Refugee Convention, and is confirmed by state practice under the equally authoritative French language version of the refugee definition. An interpretation of "fear" as forward-looking expectation of risk is also more consistent with the internal structure of the Refugee Convention, in particular with the approach taken in Articles 1(C)(5–6) and 33.

In section III, we demonstrate that an understanding of "well-founded fear" that focuses exclusively on actual risk in no way undermines the critical importance of conducting a particularized inquiry into risk. All evidence relevant to a given applicant's actual risk of being persecuted—including his or her testimony and other individuated

evidence—is admissible for the purpose of establishing a "well-founded fear." This is true whether evidence unique to the applicant is treated as part of a subjective inquiry, an objective inquiry, or simply the inquiry into actual risk. If, in contrast, the goal of the subjective element is not just to secure admission of an applicant's evidence, but instead to require that it be given categorical priority over all other evidence of risk, we argue that it should be rejected as inconsistent with the responsibility of the decisionmaker to assign weight to each piece of evidence solely as a function of its real probative worth. If, on the other hand, the rationale for maintenance of a subjective element is the need to take account of evidence of an applicant's particular physical or psychological traits that result in subjection to harm greater than that experienced by other persons, then the subjective element is superfluous. These types of vulnerabilities can, and should, be considered as part of the analysis of whether the anticipated harm rises to the level of "being persecuted," and without regard to a subjective element.

I. CRITIQUE OF THE TRADITIONAL APPROACHES

The dominant view worldwide is that the test for well-founded fear is comprised of two essential elements. This bipartite approach requires the applicant to demonstrate a significant, actual risk of being persecuted ("objective element") as well as an emotional state of trepidation with respect to that risk("subjective element"). A second approach with some support in current practice treats subjective fear not as an essential element of refugee status, but rather as a "top-up" factor which may be relied upon to grant refugee status to a person who has failed to show a significant actual risk of being persecuted.

A. *Fear as One of Two Essential Elements: The Bipartite Approach*

While there is some support for a more extreme position—namely, that the applicant's trepidation is the primary,[14] or even the exclusive,[15] focus of analysis—most courts require evidence of objective risk as well,

14. "That the fear must be 'well-founded' does not alter the obvious focus on the individual's subjective beliefs . . . ." INS v. Cardoza-Fonseca, 480 U.S. 421, 431 (1987). Lower courts, however, have generally required a demonstration of significant risk as well as subjective fear as a prerequisite to refugee status.

15. Theodore N. Cox, *Well-Founded Fear of Being Persecuted: The Sources and Application of a Criterion of Refugee Status*, 10 BROOK. J. INT'L. L. 333, 349 (1984) ("The focus of inquiry [under the Refugee Convention] is directed towards a person's actual fear and his real and natural motivation for desiring protection. . . . [I]f a person's fear is enough to make him flee, it is well-founded"); *See also* R. v. Sec'y of State for the Home Dep't, *Ex parte* Sivakumaran, [1988] A.C. 958, 991 (H.L. 1987) (Keith, L.J.) (U.K.) quoting the analysis of Sir John Donaldson in the Court of Appeal at [1987] 3 W.L.R 1047, 1052–1053. The House of Lords rejected this approach.

and therefore decline to find that trepidation alone is sufficient to engage the Convention obligations of States. Under this bipartite approach there are two essential elements, each of which must be proved: a finding of objective risk, and a determination of subjective fear or trepidation.

The articulation of the well-founded fear standard in the UNHCR Handbook offers clear support for the bipartite approach:

> To the element of fear—a state of mind and a subjective condition—is added the qualification "well-founded." This implies that it is not only the frame of mind of the person concerned that determines his refugee status, but that this frame of mind must be supported by an objective situation. The term "well-founded fear" therefore contains a subjective and an objective element.[16]

The UNHCR position has been adopted by leading courts with only slight modification. The High Court of Australia, for instance, has noted that the well-founded fear standard "has both subjective and objective elements and necessitates consideration of the mental and emotional state of the individual and, also, the objective facts relating to the conditions in the country of his or her nationality."[17] Most senior courts of the common law world—including the House of Lords,[18] United States Supreme Court,[19] Supreme Court of Canada,[20] and Irish High Court[21]—have taken the same position.[22]

Despite its wide following, there is increasing recognition that the bipartite approach poses protection risks that are incompatible with the object and purpose of the Refugee Convention. Most significantly, the

---

16. UNHCR HANDBOOK, *supra* note 4, ¶ 38.

17. *Re* Minister for Immigr. and Multicultural Aff., *Ex parte* Miah, [2001] H.C.A. 22, ¶ 62 (Austl. 2001) (Gaudron, J.).

18. R. v. Sec'y of State for the Home Dep't, *Ex parte* Sivakumaran, [1988] A.C. 958, 1000 (H.L. 1988) (Goff, L.) (U.K.) ("[T]he expression 'well-founded' . . . cannot be read simply as 'qualifying' the subjective fear of the applicant—it must, in my opinion require that an inquiry should be made whether the subjective fear of the applicant is objectively justified.").

19. The U.S. Supreme Court—while declining to elaborate a detailed test for "well-founded fear"—has clearly indicated that the standard is comprised of both objective and subjective elements. Regarding the objective element, the Court has noted that an actual risk of persecution is required, though "[o]ne can certainly have a well-founded fear of an event happening when there is less than a 50% chance of the occurrence taking place." Cardoza-Fonseca, 480 U.S. at 431. But the standard is not exclusively objective, according to the Court, because "the reference to 'fear' . . . obviously makes the eligibility determination turn to some extent on the subjective mental state of the alien." *Id.* at 430–31.

20. "Both the existence of the subjective fear and the fact that the fear is objectively well-founded must be established on a balance of probabilities." Chan v. Can. (Minister of Employment and Immigr.), [1995] 3 S.C.R. 593, ¶ 120 (Can. 1995).

21. Zgnat'ev v. Minister for Justice, Equality and Law Reform, [2001] I.E.H.C. 70 (Ir. H. Ct. 2001) ("[F]ear must be well founded and this implies that the applicant's frame of mind must be supported by an objective situation. The phrase therefore contains a subjective and an objective element.") (referencing UNHCR HANDBOOK, *supra* note 4, ¶ 38).

22. There is some minimal support for the bipartite approach in civil law jurisdictions as well. *See*, *e.g.*, Up-78/00 (Constitutional Ct. 2000) (Slovn.), *available at* http://www.us-rs.si/en/index.php?sv_path=9.

bipartite approach can lead to denial of refugee status to at-risk applicants who either are not fearful, or whose trepidation is not identified as such by decisionmakers. This concern arises most obviously in the assessment of refugee claims made by children and mentally disabled persons, who may be unable to experience or to articulate the requisite emotional state. Most courts have been sensitive to such cases, and have exempted children and mentally disabled persons from the duty to demonstrate trepidation as a precondition for refugee status. There are serious practical challenges to identifying precisely when a lack of capacity exists, however, such that dispensation from the usual approach to "well-founded fear" is warranted. There are moreover other categories of persons not encompassed by presently recognized exceptions who face comparable dilemmas in satisfying the subjective prong of the two-part test. The extraordinary diversity among applicants in terms of culture, language, and temperament (which may or may not be impacted by prior incidents of persecution) makes it difficult, at times impossible, for decisionmakers reliably to detect the presence of trepidation, even under the best of circumstances.

Perhaps with these concerns in mind, Grahl-Madsen observed:

> The adjective "well-founded" suggests that it is not the frame of mind of the person concerned which is decisive for his claim to refugeehood, but that his claim should be measured with a more objective yardstick. . . . In fact . . . the frame of mind of the individual hardly matters at all.[23]

In line with this understanding, Kälin has noted that "[d]uring the last decades, a trend has developed to put the main emphasis on the objective elements."[24] For example, the House of Lords observed in *Adan* that "[t]he use of the term 'fear' was intended to emphasize the forward-looking nature of the test, and not to ground refugee status in an assessment of the refugee claimant's state of mind."[25] Similarly, the New Zealand Refugee Status Appeals Authority has held that "the bipartite

23. GRAHL-MADSEN, *supra* note 8, at 174.

24. Walter Kälin, *Well-Founded Fear of Persecution: A European Perspective*, *in* ASYLUM LAW AND PRACTICE IN EUROPE AND NORTH AMERICA: A COMPARATIVE ANALYSIS 21, 28 (Jacqueline Bhabha & Geoffrey Coll eds., 1992) (However, because he believes that psychological suffering is often not appropriately validated as part of the "objective" inquiry and that "freedom from fear is a value in itself," Kälin hopes that "states, without neglecting objective factors, would take subjective factors more into account. . . ." An evaluation of the "subjective element" (in the sense of evidence of particularized vulnerability), he argues, will lead to an increase in the grants of refugee status, furthering the humanitarian aims of the Refugee Convention.)

25. Adan v. Sec'y of State for the Home Dep't, [1999] 1 A.C. 293, 307 (H.L. 1998) (Lloyd L.J.) (U.K.) (quoting JAMES C. HATHAWAY, THE LAW OF REFUGEE STATUS 69 (1991)).

test may have outlived its usefulness. It might even on occasion lead to a material misdirection as to the nature of the objective component of the refugee definition."[26] Commentators have expressed similar sentiments.[27]

Despite the ever-increasing awareness of the real protection risks associated with the duty to show subjective fear in order to establish a well-founded fear of being persecuted, many courts and commentators have nonetheless resisted the notion that well-founded fear does not involve a subjective element of some kind, perhaps because of the perceived imperative of the "fear" language, or simply because subjectivity has traditionally been assumed to be relevant to qualification as a refugee. Some courts have reconciled these competing imperatives by adopting mechanisms which effectively eviscerate the subjective element of any substantive role in the well-founded fear inquiry, but without formally disavowing the legitimacy of the bipartite test or the duty to demonstrate trepidation. For instance, the existence of trepidation may be inferred whenever it is determined that an applicant faces a significant risk of being persecuted in his or her country of origin.[28] Other courts formally adhering to the bipartite test marginalize the subjective element by simply declining to perform an analysis of the applicant's emotional state.[29] Although these approaches may minimize the risks associated with a rigorous inquiry into the subjective element, it seems intellectually dishonest to apply one standard while purporting to apply another. Moreover, because these approaches do not provide a satisfying justifica-

---

26. *See, e.g.*, Refugee Appeal No. 70074/96, *Re* ELLM (Refugee Status Appeals Auth. 1996) (Haines, Deputy Chair) (N.Z.).

27. Jean-Yves Carlier, *General Report*, *in* WHO IS A REFUGEE? COMPARATIVE CASE LAW STUDY 697 (Jean-Yves Curlier et al. eds., 1997) ("A detailed examination of the subjective element does not seem necessary when evaluating the risk of persecution."); HATHAWAY, *supra* note 7, at 67.

28. *See* Savchenkov v. Sec'y of State for the Home Dep't, No. 11513, HX/71698/94 (Immigr. App. Trib. 1994) (unpublished) (U.K.) (on file with author). ("The plausibility of the risk objectively assessed will be relevant to (and may dictate) whether or not the appellant is believed to have a fear of risk."); Adjei v. Minister of Employment and Immigr., [1989] 2 F.C. 680, ¶ 4 (Fed. Ct. App. 1989) (MacGuigan, J.) (Can.) ("In light of the uncontradicted evidence . . . as to [the] objective basis for such fear, the Board's reluctance to acknowledge even the applicant's subjective fear reads strangely."); Al-Harbi v. INS, 242 F.3d 882, 890–91 (9th Cir. 2001) ("Because the strong evidence as to the objective component of a 'well-founded fear of persecution' claim is therefore relevant in establishing petitioner's subjective fear, to the extent that any question exists with respect to the genuineness of petitioner's fear, it is answered by our decision regarding the objective component.") (quoting Aguilera-Cota v. INS, 914 F.2d 1375, 1378 (9th Cir. 1990)).

29. *See* Thompson v. Sec'y of State for the Home Dep't, No. 18848, HX/78032/1996 (Immigr. App. Trib. 1998) (unpublished) (U.K.). ("The occasions upon which it would ever be necessary to decide whether a claimant does actually have an apprehension would, we have thought, be rare."); Yusuf v. Can. (Minister of Employment and Immigr.), [1992]1 F.C. 629 (Fed. Ct. App. 1992) (Can.) ("I find it hard to see in what circumstances it could be said that a person who, we must not forget, in by definition claiming refugee status could be right in fearing persecution and still be rejected because it is said that fear does not actually exist in his conscience.").

tion for bypassing the inquiry into an applicant's state of mind, the formalistic retention of the subjective element leaves open the possibility that judicial decisions will be misunderstood and misapplied.

1. The Risk of Unwarranted Denials of Protection

Because the bipartite approach posits the existence of two *essential* elements, it necessarily follows that refugee status must be denied where an applicant fails to establish that he or she is subjectively fearful. The simple logic of this observation has not been lost on courts. The Canadian Federal Court Trial Division, for instance, noted that "[t]he lack of evidence going to the subjective element of the claim is a fatal flaw which in and of itself warrants dismissal of the claim, because both elements of the refugee definition—subjective and objective—must be met."[30] Similarly, the U.S. Tenth Circuit Court of Appeals has held that "[i]f an objective basis is shown, the applicant must then show his subjective fear is genuine."[31]

The inescapable, and deeply unsatisfying, consequence of the insistence on proof of trepidation is that an applicant found not to be fearful must be denied refugee status, *despite a finding that he or she faces a real chance of being persecuted* if returned to the country of origin. Although seemingly improbable, the Supreme Court of Canada appears to have offered a chilling endorsement of this very result. In considering the case of a Chinese national who had fathered two children in violation of China's "one child policy" and who therefore risked forcible sterilization, Mr. Justice Major observed:

> [T]he evidence of the appellant with respect to his subjective fear of forced sterilization is equivocal at best. However, in the absence of an explicit finding by the Board on this point, it would not be appropriate for this Court to determine that the appellant did not have a subjective fear of forced sterilization.[32]

In other words, a negative finding with respect to the applicant's subjective fear of forced sterilization would have constituted valid grounds for denying refugee status.

30. Kamana v. Can. (Minister of Citizenship and Immigr.), IMM 5998-98, ¶ 10 (Fed. Ct. Trial Div. 1999) (Tremblay-Lamar J.) (Can.). *See also* Maqdassy v. Can. (Minister of Citizenship and Immigr.), [2002] F.C.T. 182, ¶ 10 (Fed. Ct. Trial Div. 2002) (Tremblay-Lamer, J.) (Can.) ("[T]he lack of evidence going to the subjective element of the claim is in itself sufficient for the applicant's claim to fail.").

31. Nasir v. INS, 30 Fed. Appx. 812, 814 (10th Cir. 2002) (Briscoe, J.).

32. Chan v. Can. (Minister of Employment and Immigr.), [1995] 3 S.C.R. 663, ¶ 132 (Can. 1995) (Major, J.).

The High Court of Australia has similarly held that even those applicants facing a significant risk of being persecuted are properly denied status where found to lack the required trepidation. In *Chan*,[33] the Court found that the first instance tribunal had erred in determining that the applicant, who had suffered past persecution, did not face a significant prospective risk of being persecuted. In returning the case for further consideration, the Court instructed:

> If the material before the delegate showed the applicant to be extraordinarily brave or foolhardy it might reasonably be found that his persecution engendered no fear. But if it were accepted that [his past persecution] engendered a fear of being persecuted then it would be unreasonable to characterize that fear as other than well-founded . . . On that latter basis, Mr. Chan's claim to a well-founded fear of persecution if returned to China *might reasonably be rejected if it were found that he no longer held that fear*.[34]

To make matters worse, when refusing claims for lack of fear, first instance decisionmakers commonly treat trepidation as a threshold requirement that must be satisfied before an inquiry into risk is even undertaken.[35] In this way, at-risk applicants can be denied protection without so much as an acknowledgment of their plight. In *Thuraisamy*,[36] the Full Federal Court of Australia expressly sanctioned this approach:

> [I]t is important to note that, at this stage of his reasoning, the Tribunal member was not addressing issues such as the cause of any fear of persecution—that is, whether it stemmed from a mat-

33. Chan v. Minister for Immigr. and Multicultural Aff., [1989] 169 C.L.R. 379 (Austl. 1989).

34. *Id.* (emphasis added).

35. Naremanov v. Refugee Status Appeals Auth., CP 354/98, ¶ 32 (H.C. 2000) (unpublished) (Gendall, J.) (N.Z) (on file with author) ("[T]he applicant for refugee status must establish that there is firstly actual fear of return to a country for a Convention reason, that being an actual subjective element, and, secondly that objectively the fear is justified."), *available at* http://www.refugee.org.nz/Casesearch/HighCourt/nvrsaa.html.; Maqdassy v. Can. (Minister of Citizenship and Immigr.), [2002] F.C.T. 182 (Fed. Ct. Trial Div. 2002) (Can.) (denying refugee status based on lack of subjective fear without consideration of objective evidence of risk); Farah v. Can. (Minister of Citizenship and Immigr.), 1999 F.T.R. 161, ¶ 24 (Fed. Ct. Trial Div. 1999) (Blais J.) (Can.) ("By failing to demonstrate that she had a subjective fear of persecution, the applicant failed to meet the test established by the Supreme Court of Canada in *Ward*, so the panel had no obligation to go further."); Refugee Appeal No. 1/91, *Re* TLY, and 2/91, *Re* LAB (Refugee Status Appeals Auth. 1991) (Nicholson, Chairman) (N.Z.) (stating that the fear must be ascertained first, and only then can it be asked whether the fear is well-founded), *available at* http://www.refugee.org.nz/rsaa/text/docs/1-91.htm.

36. Thuraisamy v. Minister for Immigr. and Multicultural Aff., [1999] F.C.A. 1632 (Full Fed. Ct. 1999) (Austl.).

> ter referred to in the Convention definition . . . The Tribunal was concerned, at this stage, simply with the question whether or not the fear existed. If it answered that question adversely to the applicant's claim, as it did, that was the end of the matter.[37]

Similarly, the Canadian Federal Court Trial Division has found that "lack of subjective fear constitutes a critical barrier to a refugee claim which, on its own, justifies non-recognition."[38] Moreover, because reviewing courts typically accord great deference to the impressions of first instance decisionmakers in matters related to demeanor, credibility, and veracity, applicants found not to be subjectively fearful (and without consideration of actual risk) are unlikely to receive meaningful appellate review.[39]

Paradoxically, the subjective fear requirement can even impair an applicant's prospects for obtaining a favorable result on review where his or her claim was originally rejected for lack of objective risk. For example, in the Australian Federal Court case of *Suleiman*[40] the first level tribunal denied refugee status on the grounds that applicant did not face an objective risk of being persecuted for reasons of his political activities. The claim on review was that the tribunal erred in failing to consider all relevant evidence, including that which indicated a risk of being persecuted because of his membership in a particular social group. Noting that the tribunal had not considered all evidence pertinent to the applicant's membership in the relevant social group, the Federal Court nevertheless upheld the denial of refugee status:

> [I]t is necessary not merely that there be objectively a fear of persecution by reason of membership of a particular social group, but that the applicant actually had that fear. It is hard to imagine how the question of the existence of a particular social

37. *Id.* ¶ 8.

38. Anandasivam v. Can. (Minister of Citizenship and Immigr.), IMM-4748-00, ¶ 23 (Fed. Ct. Trial Div. 2001) (Lemieux, J.) (Can.).

39. This is especially true in the United States. *See, e.g.,* Dia v. Ashcroft, 353 F.3d 228, 252 n.23 (3rd Cir. 2003) ("We note that the IJ did not rely on her personal observations of Dia's demeanor or any other observations to which we must accord an even greater degree of deference."); Mendoza Manimbao v. Ashcroft, 329 F.3d 655, 662 (9th Cir. 2003) ("[W]e grant special deference to the IJ's eyewitness observations regarding demeanor evidence."); Cordero-Trejo v. INS, 40 F.3d 482, 487 (1st Cir. 1994) ("[C]redibility findings resting on analysis of testimony rather than on demeanor may 'deserve less than usual deference.' ") (quoting Consolidation Coal v. NLRB, 669 F.2d 482, 488 (7th Cir. 1982)). *See also* R. v. Sec'y of State for the Home Dep't, *Ex parte* Sourbah, [1999] Imm. A.R. 452 (Q.B. 1999) (Eng.) (deferring to the special adjudicator's findings regarding credibility and subjective fear).

40. Suleiman v. Minister for Immigr. and Multicultural Aff., [2001] F.C.A. 752 (Full Fed. Ct. 2001) (Austl.).

> group could arise unless there is some evidence that the applicant . . . had a subjective fear of persecution on the grounds of membership of that social group.[41]

In this case, the failure of the applicant to voice his subjective fear of being persecuted on the grounds of social group membership effectively excused the tribunal from considering evidence indicative of his risk of persecution for that particular Convention reason. This result is all the more remarkable given that the tribunal never made a specific finding as to the applicant's subjective fear.

As the *Suleiman* discussion illustrates, the bipartite approach, by its very nature, admits of the possibility that genuinely at-risk persons will be denied refugee status. Consequently, the subjective element cannot be viewed as a mere benign accessory to a well-founded fear inquiry fundamentally concerned with risk. In stealth, it can deny international protection to persons who are clearly in need of it.

2. The Challenge of Implementation

The normative concerns raised by the bipartite approach are moreover exacerbated by the inherent practical challenges associated with implementation. Assuming *arguendo* that it comports with the goals of refugee law to deny protection to at-risk individuals who, for whatever reason, are not subjectively fearful, the fundamental illogic of insistence on proof of trepidation is exposed by the fact that it is generally difficult, if not impossible, for decisionmakers to determine in a formal hearing process whether an applicant is genuinely fearful or not.

The bipartite approach clearly assumes the ability of decisionmakers accurately and reliably to ascertain whether an applicant is subjectively fearful. The crude investigative tools available to decisionmakers, however, are often ill-suited to unraveling the mysteries of an applicant's psyche. The analysis of a person's emotional state—an inherently problematic exercise even in the best of circumstances—is especially difficult in the context of refugee law.[42] Indeed, the subjective fear inquiry is so difficult and fraught with uncertainty that erroneous determinations are virtually assured. This is especially true where an effort is made to assess subjective fear based on an applicant's outward demeanor and the content of his or her testimony.

---

41. *Id.* ¶¶ 15–16.

42. *See* Andjongo v. Sec'y of State for the Home Dep't, No. 12341, HX 7491/94 (Immigr. App. Trib. 1995) (U.K.) ("Assuming for the moment that it is a correct statement of law that the subjective element in the claim for refugee status is the presence of actual fear, because it is a state of mind and exceedingly difficult to contradict, it will be rare indeed for a finding to be made that it did not exist.").

One factor complicating the inquiry is the considerable diversity among applicants. Persons of "different nationalities, educations, trades, experience, creeds and temperaments" are bound to manifest fears in divergent and unpredictable ways.[43] In particular, persons whose culture discourages the open display of emotion may present an outwardly stoic demeanor, despite intense, internal feelings of distress and anxiety. Such persons are therefore especially likely to be denied refugee status for failure to demonstrate a subjective fear of being persecuted (regardless of their actual risk). As Adjin-Tettey has argued, some applicants "may not appear 'fearful enough' for refugee decisionmakers measuring emotional reaction against a Western male standard,"[44] with the result that they could be excluded "from international protection even though they may have an objectively strong case."[45] She contends that the duty to demonstrate trepidation particularly disadvantages women required to testify to sexual violence, as "[w]omen fleeing gender-related harms have often not been successful in communicating their subjective fear of persecution even in the face of strong objective indicators because they have difficulty relating their claims . . . to asylum decisionmakers who are predominantly men."[46]

More generally, "[u]nderstandable anxiety affects most claimants compelled to recount painful facts in a formal and foreign environment."[47] Thus, irrespective of culture or gender, a genuinely fearful applicant might be disinclined openly to display his or her most intimate emotions in the presence of total strangers and in the sterile atmosphere of a refugee status hearing. Further complicating the inquiry into an applicant's emotional state are problems related to communication. Uneducated or inarticulate applicants may be fearful, yet unable to put their feelings into words.[48] Similarly, fearful applicants forced to communicate through an interpreter may be seen to lack fear where their

43. Kasolo v. Sec'y of State for the Home Dep't, [1996] U.K.I.A.T. 13190 (Immigr. App. Trib. 1996) (U.K.) *cited in* MARK SYMES, CASELAW ON THE REFUGEE CONVENTION: THE UNITED KINGDOM'S INTERPRETATION IN THE LIGHT OF THE INTERNATIONAL AUTHORITIES 31 (2000); *see also* R. v. Sec'y of State for the Home Dep't, *Ex parte* Patel, [1986] Imm. A.R. 208 (Q.B. 1986) (Eng.) (noting the difficulties common with translations and interpreters).

44. Elizabeth Adjin-Tettey, *Reconsidering the Criteria for Assessing Well-Founded Fear in Refugee Law*, 25 MAN. L. J. 127, 131 (1997).

45. *Id.*

46. *Id.* at 132.

47. Kopalapillai v. Minister for Immigr. and Multicultural Aff., [1997] F.C.A. 1510 (Fed. Ct. 1997) (Merkel, J.) (Austl.).

48. Adjin-Tettey, *supra* note 44, at 133 ("Only eloquent and articulate women, who are likely to be part of the elite, may be able to secure refugee protection while the majority may be denied . . . because of their inability to express their subjective fear.").

words and expressions are translated in ways that fail fully to convey the extent of their trepidation.[49]

In three common factual scenarios, the subjective fear inquiry has proved either so difficult to conduct in practice, or simply so fraught with normative risks, that decisionmakers routinely dispense with the subjective fear requirement altogether. One such scenario is where the applicant for refugee status is believed to be suffering from a mental disability or trauma, in particular where the applicant is experiencing Post-Traumatic Stress Disorder (PTSD).[50] Persons suffering from PTSD often do not exhibit outward signs of trepidation, but rather "dissociate" themselves from their reality. It is widely recognized that dissociation is a central characteristic of PTSD,[51] and that persons who dissociate are extremely fearful, despite their outward demeanor. A person suffering the effects of PTSD

> may feel as though the event is not happening to her, as though she is observing from outside her body, or as though the whole experience is a bad dream from which she will shortly awaken. These perceptual changes combine with a feeling of indifference, emotional detachment, and profound passivity in which the person relinquishes all initiative and struggle.[52]

As Bossin and Demirdache conclude, this state of dissociation "is not one that leads to the type of actions [refugee decisionmakers] typically associate with a genuine subjective fear. Yet these are the actions—or inactions—of people who are afraid."[53]

In addition to affecting demeanor, PTSD may also adversely impact a traumatized person's ability orally to express information related to his or her emotional state. Specifically, "trauma may lead to a 'speechless

---

49. R. v. Sec'y of State for the Home Dep't, *Ex parte* Patel, [1986] Imm. A.R. 208 (Q.B. 1986) (Webster, J.) (Eng.) ("Although the [doubts cast on demeanor evidence by MacKenna J.] . . . overstate the difficulty of assessing the demeanour of a witness in an ordinary case, when the witness is English speaking, they do not, I feel, overstate the difficulty and may even understate it . . . when most, if not all, of the witnesses would have to give evidence through an interpreter.").

50. PTSD is common among persons who have experienced the types of trauma frequently found in refugee claims, for instance: assault, detention, kidnapping, torture (mental and physical), and sexual assault (including rape). Michael Bossin & Laila Demirdache, *A Canadian Perspective on the Subjective Component of the Bipartite test for "Persecution": Time for Re-evaluation,* 22 REFUGE 111 (Mar. 2004).

51. *Id.* at 112 (citing Bessel A. van der Kolk, *The Complexity of Adaptation to Trauma: Self-Regulation Stimulus Discrimination, and Characterological Development, in* TRAUMATIC STRESS: THE EFFECTS OF OVERWHELMING EXPERIENCE ON MIND, BODY, AND SOCIETY 182, 192 (Bessel A. van der Kolk et al. eds., 1996)).

52. Bossin & Demirdache, *supra* note 50, at 112 (quoting JUDITH HERMAN, M.D., TRAUMA AND RECOVERY 42 (2d ed. 1997)).

53. Bossin & Demirdache, *supra* note 50, at 112.

terror,' which in some individuals interferes with the ability to put feelings into words, leaving emotions to be mutely expressed by dysfunction of the body."[54] All told, individuals suffering from PTSD may be among the most fearful asylum applicants, yet they are acutely disadvantaged in their ability to communicate that trepidation to decisionmakers. To the extent that such persons are unable to communicate their trepidation, faithful application of the subjective fear requirement would, of course, result in denial of refugee status.

Recognizing the potential for exclusion, there is widespread agreement that persons suffering from PTSD and other forms of mental disability should be deemed eligible for refugee status notwithstanding their inability to satisfy the subjective fear requirement.[55] The UNHCR Handbook, for instance, instructs that in such cases "it may not be possible to attach the same importance as is normally attached to the subjective element of 'fear,' which may be less reliable, and it may be necessary to place greater emphasis on the objective situation."[56] In assessing claims of mentally disabled persons, courts have generally attempted to adhere to this guidance. The Federal Court of Canada, for instance, has held that "a person's mental condition at the time of a hearing should not normally be used against him to argue that he cannot establish a subjective fear of persecution. . . . [I]t is the factual evidence that must be relied upon to prove the qualifications for Convention refugee status."[57] Similarly, the English Court of Appeal endorsed a first instance adjudicator's decision to attach "less weight to the subjective element of fear of persecution . . . but . . . greater weight to the objective element" in considering the claim of a mentally ill applicant.[58]

54. *Id.* at 112 (citing van der Kolk, *supra* note 51, at 193).

55. *See* Raza v. Minister for Immigr. and Multicultural Aff., [2002] F.C.A. 350 (Full Fed. Ct. 2002) (Austl.) ("[T]he Tribunal must first determine whether the applicant . . . has the requisite "well-founded fear" of persecution. This requires the Tribunal to be satisfied that there is a subjective fear and an objective basis for it. Absent any subjective fear then (*infants and incapable persons apart*) there can be no question whether there is a well-founded fear.") (emphasis added); Minister for Immigr. and Multicultural Aff. v. Mohammed, [2000] F.C.A. 576 (Full Fed. Ct. 2000) (Austl.) (ruling that an applicant must hold the relevant fear except in the case of an infant or mentally incapable person); *See also* UNHCR HANDBOOK, *supra* note 4, ¶ 207 (addressing analysis of the subjective element in cases where the applicant for refugee status is mentally disabled) and ¶ 213 (discussing the challenges associated with unaccompanied minors as relates to analysis of the subjective element).

56. UNHCR HANDBOOK, *supra* note 4, ¶ 211.

57. Rosales v. Can. (Minister of Employment and Immigr.), [1993] 72 F.T.R. 1, ¶ 14 (Fed. Ct. Trial Div. 1993) (Rothstein, J.) (Can.); *see* Canadian Immigration and Refugee Board, *Guideline 3: Child Refugee Claimants: Procedural and Evidentiary Issues* (Sept. 30, 1996), *available at* http://www.irb-cisr.gc.ca/en/about/guidelines/child_e.htm.

58. R. v. Sec'y of State for Home Dep't, *Ex parte* Ghaly, [1998] E.W.H.C. 621 (Admin.) (C.A. 1998) (Eng.).

Yet it must be recognized that efforts of this kind do not completely obviate concerns that a mentally disabled applicant facing a real risk of being persecuted will be denied refugee status for failing to demonstrate trepidation, despite his or her inability to communicate that trepidation. In reality, it may well be next to impossible for decisionmakers consistently to distinguish mentally ill applicants (particularly those suffering from PTSD) from applicants who are simply not fearful.[59] And to the extent that PTSD goes unrecognized, a traumatized applicant is likely to be found not fearful, and hence, ineligible for refugee status.[60]

A second type of case that has caused problems for decisionmakers attempting to undertake an inquiry into subjective fear is where the claim to refugee status is made by younger children. To the extent that a child is unable effectively to communicate his or her trepidation (or to connect it to the relevant risk), a strict application of the bipartite test would, of course, result in the denial of refugee status. As with mentally ill applicants, however, it is generally agreed that a child who lacks capacity to satisfy the subjective prong of the two-part test should not be denied refugee status for failing to demonstrate trepidation.

One strategy that allows decisionmakers to sidestep a child's inability to communicate subjective fear is to impute parental fear to the child. According to the UNHCR, "[i]f there is reason to believe that the

---

59. While the diversity among asylum applicants makes it difficult for decisionmakers to detect the presence of trepidation in healthy individuals, the same diversity poses even greater challenges when the task is to determine whether or not a given applicant suffers from PTSD. According to Carlson:

> Although all of the core, secondary, and associated trauma symptoms can occur as part of a post-traumatic disorder, all of these will not necessarily occur. Different symptoms may predominate in a client's symptom picture as a result of the influence of various individual and situational factors and the length of time that has passed since the trauma.

Bossin & Demirdache, *supra* note 50, at 111 (quoting EVE B. CARLSON, TRAUMA ASSESSMENTS: A CLINICIAN'S GUIDE 39 (1997)).

Not surprisingly, culture is a key factor complicating diagnosis of PTSD. Carlson notes:

> As with all psychological disorders, we should expect culture to greatly influence how symptoms are expressed. Although the bulk of research and clinical reports relating to trauma responses has focused on white, middle and upper-middle class Americans, the research on trauma responses of persons from other cultures (and U.S. subcultures) that is available indicates that there may be considerable variation in the symptoms observed following trauma in different cultures.

Id.

60. To some extent, decisionmakers can rely on psychological or psychiatric reports to help inform their determination as to the existence of PTSD in a given applicant. But such reports are expensive and not always available. Even where a psychological report is available, an expert diagnosis of PTSD does not necessarily foreclose the possibility that a traumatized applicant could be denied refugee status for lack of subjective fear.

parents wish their child to be outside the country of origin on grounds of well-founded fear of persecution, the child himself may be presumed to have that fear."[61] Where this is not an option, the UNHCR Handbook recommends that "[w]here the minor has not reached a sufficient degree of maturity to make it possible to establish well-founded fear in the same way as for an adult, it may be necessary to have greater regard to certain objective factors."[62]

But who qualifies for this special treatment? By what method are decisionmakers to determine which children have reached a sufficient age of maturity that they should be required to establish a subjective fear of being persecuted? UNHCR suggests that, in making this determination, courts should consider a child's age, level of education, and understanding of need to tell the truth.[63] But age and level of education may not be accurate indicators of a child's capacity to express his or her trepidation, especially in an alien environment and to a complete stranger. Similarly, a child's willingness to tell the truth—while relevant in other areas of law to the issue of whether a child has capacity to testify in court—seems to have very little to do with his or her capacity to express trepidation. The absence of any principled method of determining which minors should be exempted from the subjective fear requirement injects a degree of arbitrariness into the refugee status determination that is unacceptable given the extraordinary cost of error.

A third scenario in which decisionmakers have found the subjective fear requirement too difficult to implement in practice occurs when systematic persecution of a specific group has resulted in a mass influx of similarly situated persons. In such situations, authorities often cope with the surge in asylum applications by *prima facie* group status determination. Under this approach, once the at-risk group is identified, the only real requirements faced by individuals seeking recognition of refugee status are to prove membership in the at-risk group, and that none of the cessation or exclusion clauses is applicable. Assuming these requirements are met, refugee status is routinely recognized without any inquiry whatsoever into whether or not the applicant is experiencing subjective trepidation.

The magnitude of this exception calls into question whether there can be said, in practice, to be any general requirement to show subjective fear. In the developing world, where the majority of the world's refugees are located, group status determinations are the norm rather than the ex-

61. UNHCR HANDBOOK, *supra* note 4, ¶ 218.

62. *Id.* ¶ 217.

63. BRIAN GORLICK, COMMON BURDENS AND STANDARDS: LEGAL ELEMENTS IN ASSESSING CLAIMS TO REFUGEE STATUS (UNHCR New Issues in Refugee Research, Working Paper No. 68, Oct. 2002).

ception. The UNHCR's *Statistical Yearbook 2002* reveals that, between 1993 and 2002, 85% of Asia's total refugee population (3,553,305) was granted refugee status on the basis of group status assessment.[64] In Eastern Europe, the figure was 93%.[65] Indeed, the practice is so common in Africa[66] that Article 1(2) of the Organization of African Unity (OAU) Convention specifically identifies affirmative group status recognition as an alternative means of attaining Convention refugee status.[67] Thus, in what amounts to a majority of refugee status determinations worldwide,[68] subjective fear is simply not required.[69]

---

64. Office of the High Commissioner for Refugees, *UNHCR Statistical Yearbook 2002: Trends in Displacement, Protection and Solutions* (Bely Hovy ed. 2004), Statistical Annex II, at 147, *available at* http://www.unhcr.ch/cgi-bin/texis/vtx/statistics.

65. *Id.* Statistical Annex II, at 167.

66. Between 1993 and 2002, for instance, 91% of refugees were recognized on the basis of prima facie group status determinations (3,027,639). *See id.* Statistical Annex II, at 166.

67. Convention Governing the Specific Aspects of Refugee Problems in Africa, *done* Sept. 10, 1969, 1001 U.N.T.S. 45 (*entered into force* June 20, 1974).

68. Between 1993 and 2002, 68% of the world's refugees were recognized on the basis of prima facie group status determinations (over seven million people all told). *See UNHCR Statistical Yearbook 2002*, *supra* note 64, Statistical Annex II, at 145.

69. The practice of group status recognition is widely perceived as a legitimate and effective way to deal with major humanitarian crises, even in the minority of states which operate formal status determination systems. The European Union Joint Position of 1996, for instance, states that:

> [e]ach application for asylum is examined on the basis of the facts and circumstances put forward in each individual case and taking account of the objective situation prevailing in the country of origin. In practice it may be that a whole group of people are exposed to persecution. In such cases, too, applications will be examined individually, although *in specific cases this examination may be limited to determining whether the individual belongs to the group in question*.

Council of the European Union, Joint Position Defined by the Council on the Basis of Article K.3 of the Treaty on European Union on the Harmonized Application of the Definition of the Term "Refugee" in Article 1 of the Geneva Convention of 28 July 1951 Relating to the Status of Refugees, ¶ 2, 1996 O.J. (L 63) 2, (emphasis added).

Thus, in the case of no.97-1627/F797, the Belgian Commission held that the applicant's status as an ethnic Albanian was sufficient to establish a well-founded fear of being persecuted. Case no. 97-1627/F797(Commission Permanente de Recours des Réfugiés, Apr. 14, 1999)(Belg.)("[D]ans le contexte qui prévaut actuellement au Kosovo, le seul fait d'appartenir au groupe national albanais peut justifier une crainte raisonnable d'être persécuté du fait de sa nationalité au sens de la Convention de Genève."). In Switzerland, Hullmann notes a comparable approach:

> The measures taken against the Yizides in Turkey, as well as their intensity, involved persecution of the group that made it possible to say that 'every member of this minority could expect to be persecuted at any time.' . . . *[S]imply belonging to this group was evidence of having a well-founded fear of persecution* . . . .

Klaus Hullmann, *Switzerland*, *in* WHO IS A REFUGEE? COMPARATIVE CASE LAW STUDY 128 (Jean-Yves Carlier et al. eds., 1997) (emphasis added).

In sum, despite the widely held belief that trepidation is an essential qualification for refugee status, decisionmakers are hard pressed accurately and reliably to ascertain which applicants are, in fact, subjectively fearful. In a variety of common situations, the practical impediments involved in making a subjective fear determination are so great that decisionmakers routinely dispense with the requirement and grant refugee status solely on the basis of an applicant's actual risk of being persecuted. All this begs the question: What does subjective fear actually have to do with being a refugee? And if decisionmakers are compelled by practical considerations to deviate from the standard with such frequency that a majority of refugees worldwide are recognized without insistence upon proof of subjective fear,[70] can it really be said that trepidation is an essential element of "well-founded fear"?

Decisionmakers attempting to assess subjective fear, despite the inherent difficulties described above, have devised a host of artificial mechanisms to aid in the determination. These coping strategies are born of necessity. If subjective fear is truly an essential element of well-founded fear, but is in reality next to impossible to detect on a reliable basis simply by the assessment of oral evidence and demeanor, decisionmakers have little choice but to resort to more "objective" indicators of subjective fearfulness.

a. Would a Reasonable Person be Fearful?

One way courts objectify the inquiry into subjective fear is by asking whether a "reasonable person" would experience fear in the face of the risk identified. According to the U.S. Court of Appeals for the Fifth Circuit, "[a]n alien possesses a well-founded fear of persecution if a reasonable person in her circumstances would fear persecution if she were to be returned to her native country."[71] This formulation has been adopted by the U.S. Board of Immigration Appeals[72] and, at least tacitly,

70. It could be argued that the prevalence of group status determination is dictated simply by the practical imperatives associated with humanitarian crises and mass migration flows that cannot be managed any other way. It might therefore be said that determinations relying exclusively on group affiliation to establish a well-founded fear either represent mere exceptions to the general norm (requiring trepidation) or that, in such determinations, trepidation is simply assumed from the fact of the applicant's membership in an at-risk group. In response to these hypotheses, however, it is worth noting that judgments based on group status determinations seldom make note of the fact that they are effectively bypassing an "essential" element for recognition of refugee status. If subjective fear were truly thought to be an essential qualification for recognition of refugee status, it is surprising that there would not be at least some acknowledgment that an exception is being made, or at least that the existence of trepidation is assumed. The absence of such references is more consistent with an approach that does not regard trepidation as an essential element.

71. Guevara v. INS, 786 F.2d 1242, 1249 (5th Cir. 1986) (Brown, J.).

72. Matter of Mogharrabi, 19 I. & N. Dec. 439, 445 (B.I.A. 1987).

approved by the U.S. Supreme Court.[73] As Anker observes, this approach to some extent obviates the worst risks associated with the duty to show subjective fear:

> If properly understood and applied, the Board's formulation "a reasonable person in the circumstances of the [applicant]" can reconcile the concerns [that it raises]. The subjective and objective elements should not be sharply dichotomized; rather, the subjectivity of the standard means that the applicant's perspective, or that of a reasonable person in her circumstances is the lens through which the adjudicator must evaluate the reasonableness of her flight.[74]

But in truth, the reasonable person inquiry dispenses with a requirement of subjective fear altogether. To satisfy the subjective element under this approach, the applicant need only establish an objective risk of being persecuted of a kind that would engender fear in a "reasonable person"—his or her own fear, or lack thereof, is completely irrelevant.

b. Inferences from Pre-Application Conduct

Other decisionmakers have objectified the inquiry in ways that seem more genuinely calculated to ascertain whether the applicant is actually fearful. A common strategy involves examining a person's pre-application conduct for indications of fear. Where the applicant has behaved in a way that seems inconsistent with the presence of fear, at least in the opinion of the decisionmaker, the subjective element is deemed not satisfied, and refugee status is denied. Regrettably, however, the mechanisms employed in practice often have no logical correlation to the existence of fear.

For example, some courts have inferred a lack of fear from an applicant's delay in claiming refugee status.[75] The Federal Court of Canada explained that "delay points to a lack of subjective fear of persecution, the reasoning being that someone who was truly fearful would claim

73. INS v. Abudu, 485 U.S. 94, 104 n.9 (1988) (Stevens, J.) (citing the reasonable person formulation from both the *Mogharrabi* and the *Guevara Flores* opinions, but stating, "We express no opinion on . . . [that] formulation.").

74. DEBORAH E. ANKER, THE LAW OF ASYLUM IN THE UNITED STATES 27 (1999).

75. *Re* Minister for Immigr. and Multicultural Aff., *Ex parte* PT, 178 A.L.R. 497 (Austl. 2001); Cruz v. Can. (Minister of Employment and Immigr.) IMM 3848–93 (Fed. Ct. Trial Div. 1994) (Simpson, J.) (Can.) *cited in* Dcruze v. Can. (Minister of Citizenship and Immigr.) [1999] 171 F.T.R. 76 (Fed. Ct. Trial Div. 1999) (Can.); Castillejos v. Can. (Minister of Citizenship and Immigr.), IMM 1950–94 (Fed. Ct. Trial Div. 1994) (Cullent, J.) (Can.); Kamana v. Can. (Minister of Citizenship and Immigr.), IMM 5998–98 (Fed. Ct. Trial Div. 1999) (Tremblay-Lamar, J.) (Can.).

refugee status at the first opportunity."[76] Similarly, the High Court of Australia has held that significant delays can negate a finding of subjective fearfulness.[77] Yet, it is difficult to discern how evidence of delay logically relates to the presence or absence of subjective fear. In fact, applicants who delay claiming refugee status may actually be more fearful than those who make their claim immediately. Aware of the severe consequences if status is not recognized, it seems completely plausible that genuinely fearful persons might postpone making a claim until they have learned something about the country's status determination system, retained counsel, or otherwise sought to minimize their risk of rejection. Indeed, the Canadian Immigration and Refugee Board held in one case that the applicant's "delay in claiming refugee status added to the alleged subjective fear, since the claimant feared being returned to France with the children."[78]

A second means by which courts sometimes rely on pre-application conduct to objectify the inquiry into subjective fear is to equate the applicant's failure to claim asylum in an intermediate country with a lack of fearfulness.[79] In the English case of *JS*, an Indian applicant's route to England included a four month stay in Moscow, fifteen to twenty days in an unknown country, and travel through other countries by train.[80] The English Court of Appeal upheld the denial of refugee status on grounds that the applicant's failure to claim asylum in any of the intermediate countries "ill accord[ed] with his claim to have fled India for fear of his life."[81] Similarly, the U.S. Court of Appeals for the First Circuit recently ruled that a Colombian applicant's failure to claim asylum in any of the three countries he visited on a business trip before coming to America "undermined his claim that he genuinely feared persecution at home,"[82] leading to the denial of refugee status. In a slightly more nuanced examination, some courts afford the applicant an opportunity to explain why he or she did not claim asylum in intermediate countries. The underlying presumption, however, is that only a particularly persuasive

76. Castillejos v. Can. (Minister of Citizenship and Immigr.), IMM 1950–94 (Fed. Ct. Trial Div. 1994) (Cullen, J.) (Can.).

77. *Re* Minister for Immigr. and Multicultural Aff., *Ex parte* PT, 178 A.L.R. 497 (Austl. 2001).

78. CRDD No. M99-07094 (Immigr. and Refugee Bd., May 31, 2001) (Can.).

79. *See, e.g.*, *Case Abstract IJRL/0032*, 2 INT'L J. REFUGEE L. 138 (1990); JS v. Sec'y of State for the Home Dep't, [1996] E.W.C.A. Civ. 832 (C.A. 1996) (Eng.); Pelaez v. INS, 2003 U.S. App. LEXIS 10305 (1st Cir. May 22, 2003).

80. JS v. Sec'y of State for the Home Dep't, [1996] E.W.C.A. Civ. 832 (C.A. 1996) (Eng.).

81. *Id.* (Pill, L.J.).

82. Pelaez, 2003 U.S. App. LEXIS 10305, at *8 (Lipez, J.).

explanation[83] can rebut the usual inference that delay is indicative of a lack of subjective fear.[84]

Yet it is not immediately evident why an applicant's decision not to claim asylum in an intermediate country necessarily correlates to the absence of subjective fear. Presence of family members, employment possibilities, religious toleration, and ethnic affiliations are just a few reasons why an asylum seeker might choose to stay in one country for a time before moving on to another.[85] Indeed, the U.S. Court of Appeals for the Ninth Circuit recently acknowledged that it would be quite legitimate for an individual from the Abkhaz region of Georgia to pass through Russia without claiming refugee status in view of his inability legally to secure work there. More generally, the court rejected the logic of any presumption that genuine refugees should seek protection in the first country in which they arrive:

> [A] refugee need not seek asylum in the first place where he arrives. . . . Rather, it is "quite reasonable" for an individual fleeing persecution "to seek a new homeland that is insulated from the instability [of his home country] and that offers more promising economic opportunity" . . . [We have previously held that] "[w]e do not find it inconsistent with a claimed fear of persecution that a refugee after he flees his homeland, goes to the country where he believes his opportunities will be best."[86]

In any event, the bipartite approach is purportedly concerned with the applicant's fear of being persecuted in her country of origin. An applicant's prolonged stay in an intermediate country might (at most) indicate a lack of fear with respect to conditions in that country. A less

---

83. Among the factors recognized by most courts as adequate explanations for a failure to claim protection in an intermediate country are the lack of impending harm at the time of the stay there; a desire to distance oneself from the risk of incursion by the agent of persecution; and concerns regarding the commitment and ability of the intermediate country to provide truly adequate and durable protection. Some courts are more generous in their approach, recognizing also such concerns as the desire to make a claim in a country where one speaks the language, or where friends or family are present. *See generally* HATHAWAY, *supra* note 7, at 46–50.

84. *See, e.g.*, R. v. Immigr. App. Trib., *Ex parte* Parra, [2000] E.W.H.C. 377 (Admin.) (Q.B. 2000) (Eng.); Owusu-Ansah v. Can. (Minister of Employment and Immigr.), 8 Imm. L.R. (2d) 106 (Fed. Ct. App. 1989) (Can.); Z. v. Minister for Justice, Equality and Law Reform [2002] I.E.S.C. 12, ¶ 60 (Ir. S.C. 2002).

85. *See, e.g.,* Owusu-Ansah v. Can. (Minister of Employment and Immigr.), [1989] 8 Imm. L.R. (2d) 106 (Fed. Ct. App. 1989) (Can.) (finding that the Ghanaian claimant's failure to claim refugee status in intermediate states was reasonable in view of his desire to put a substantial distance between himself and his persecutors, to make his claim in a country with a sound human rights record, and to live in an English-speaking country); *See also* HATHAWAY, *supra* note 7, at 46–50.

86. Melkonian v. Ashcroft, 320 F.3d 1061, 1071 (9th Cir. 2003) (citations omitted).

lengthy stay would not signify even that much. In neither instance would the applicant's failure to claim refugee status in the intermediate state be necessarily indicative of his or her level of fear with respect to persecution in the country of origin.

A third way that courts sometimes use evidence of pre-application conduct to negate a finding of subjective fear is by inferring a lack of fear from the applicant's delay in fleeing the country of origin.[87] In the Australian case of *Gomez*,[88] for example, the first instance decisionmaker denied asylum to a Sri Lankan family based on evidence that they delayed departure for twelve days after receiving visas to enter Australia, noting that "[h]ad [the family] indeed been in fear for their lives, I consider that they would have left Sri Lanka as soon as they could, by any means they could." The Australian Federal Court endorsed this method of analysis, finding twelve days "an unusually long delay" after receiving travel visas.[89]

In truth, however, while evidence of delayed flight *may* be probative of an applicant's lack of fear, even truly fearful applicants are not always able to depart their country of origin at the earliest possible moment. The applicant may have been in hiding or under the surveillance of his or her persecutors.[90] She may have been sick or injured.[91] She may have had family to tend to, or otherwise been trapped by circumstances that rendered departure physically or psychologically difficult.[92] Each of these circumstances could naturally delay the applicant's flight without signaling an absence of fear.

A fourth strategy is to infer a lack of fearfulness from evidence that the applicant engaged in preflight conduct which increased his of her

87. *See* Gomez v. Minister for Immigr. and Multicultural Aff., [2002] F.C.A. 480 (Fed. Ct. 2002) (Austl.); Mejia v. Can. (Minister of Citizenship and Immigr.), IMM 1040–95 (Fed. Ct. Trial Div. 1996) (Can.); Singh v. Can. (Minister of Citizenship and Immigr.), 160 F.T.R. 288 (Fed. Ct. Trial Div. 1998) (Can.); Farahmandpour v. Can. (Minister of Citizenship and Immigr.), IMM 92–97 (Fed. Ct. Trial Div. 1997) (Can.).

88. Gomez v. Minister for Immigr. and Multicultural Aff., [2002] F.C.A. 480 (Fed. Ct. 2002) (Austl.).

89. *Id.*

90. *See* Mejia v. Can. (Minister of Citizenship and Immigr.), IMM 1040–95 (Fed. Ct. Trial Div. 1996) (Can.) (excusing the applicant's delay on grounds that she was in hiding prior to her departure).

91. *See* Farahmandpour v. Can. (Minister of Citizenship and Immigr.), IMM 92–97 (Fed. Ct. Trial Div. 1997) (Can.) (finding that applicant's delay was caused by her poor health).

92. *See* Cazak v. Can. (Minister of Citizenship and Immigr.), IMM 1110-01 (Fed. Ct. Trial Div. 2002) (Can.) (where the tribunal denied refugee status because applicant did not leave the country immediately after being beaten by husband and receiving threats against her family but, on appeal, the Federal Court found delay was justified based on the psychology and dependence of those subject to domestic violence).

risk of being persecuted. In the American case of *Singh v. Moschorak*,[93] for instance, the applicant was an Indian national of the Sikh faith who, prior to claiming asylum, had worked for the All India Sikh Student Federation. The applicant claimed to have been detained and beaten by the Indian police on multiple occasions as a result of his affiliation with the group. The first instance decisionmaker rejected Singh's application on the assumption that a truly fearful person would have discontinued his involvement with the Student Federation after the first incidents of persecution. The Ninth Circuit Court of Appeals reversed, noting that the immigration judge had failed "to distinguish fortitude in the face of danger from absence of fear."[94]

Indeed, one might well ask whether it is even *possible* to distinguish "fortitude" from "absence of fear." In any case, it is clear that an applicant does not lack subjective fear merely because he or she has risked hardship in furtherance of a social or political cause. More fundamentally, the denial of refugee status based on this misconception seems difficult to reconcile with the basic goals of refugee law. As Grahl-Madsen observed, "The Convention seeks to protect persons who would be subject to political persecution through no fault of their own. In this connection the struggle for certain political conviction is not to be regarded as a fault but as a right founded in the Law of Nature."[95]

A fifth way that courts sometimes use inferences from pre-application conduct to negate a finding of subjective fear is by treating any return travel by an applicant to the country of origin as evidence that he or she does not fear being persecuted there.[96] In *Maqdassy*,[97] for example, the Canadian Federal Court Trial Division considered the case of an Iraqi applicant who had once returned home in order to sell her house. Finding that the applicant's reasons for returning to Iraq were insufficiently "pressing," the court found her to lack subjective fear, and therefore denied refugee status.

Yet while evidence of return may have some logical correlation to the presence of fear, it cannot be said that fearful applicants never travel to their country of origin. The decision to return to a situation of great peril may be dictated by the necessity of tending to sick or dying

93. Singh v. Moschorak, 53 F.3d 1031 (9th Cir. 1995).

94. *Id.* at 1034.

95. GRAHL-MADSEN, *supra* 8, at 223.

96. *See, e.g.,* Thuraisamy v. Minister for Immigr. and Multicultural Aff., [1999] F.C.A. 1632 (Full Fed. Ct. 1999) (Austl.); Maqdassy v. Can. (Minister of Citizenship and Immigr.), [2002] F.C.T. 182 (Fed. Ct. Trial Div. 2002) (Can.); Caballero v. Can. (Minister of Employment and Immigr.), No. A-266-91 (Fed. Ct. App. 1993) (Can.).

97. Maqdassy v. Can. (Minister of Citizenship and Immigr.), [2002] F.C.T. 182 (Fed. Ct. Trial Div. 2002) (Can.).

relatives.[98] Indeed, as in *Maqdassy*, even a truly fearful applicant may be compelled by financial necessity to travel to her country of origin. There is a wide variety of personal emergencies that could lead even acutely fearful applicants to risk persecution by traveling to their homeland. As such, it would be unwise to hold that evidence of return may routinely be assumed to indicate whether a given applicant fears the possibility of being persecuted.

The practice of denying refugee status based on evidence of return also raises legal concerns. The legal significance of return is expressly addressed by Article 1(C)(4) of the Convention, which contemplates cessation of refugee status not as the result of *return* but only upon the applicant's *re-establishment* in his or her country of origin.[99] Under generally accepted understandings of the re-establishment criteria, an individual does not forfeit refugee status unless he or she returns to the country of origin "with a view to permanently resid[e] there," and not simply for a "temporary visit."[100] While, strictly speaking, Article 1(C) of the Convention applies to a person who has already been recognized as a refugee, it would be extraordinary for an act insufficient to justify cessation of refugee status nonetheless to be deemed a proper basis to deny refugee status in the first place.[101]

Despite all of the concerns raised in this article regarding the risks of surrogate indicators of subjective fear, proponents of the subjective element might nonetheless reply that even if the subjective fear requirement were to be eliminated, decisionmakers would continue to rely upon the sorts of mechanisms described above to deny refugee status. Rather than treating such evidence as probative of a lack of fearfulness, they would simply rely upon it to determine that an applicant is not actually at risk

98. Indeed, in another Canadian case the Federal Court of Appeal overturned a first instance decision to deny refugee status because the applicant's return to Sri Lanka to care for her sick mother showed that she was not fearful. Shanmugarajah v. Can. (Minister of Employment and Immigr.), No. A-609-91 (Fed. Ct. App. 1992) (Can.).

99. Refugee Convention, *supra* note 2, art. 1(C)(4) ("This Convention shall cease to apply to any person falling under the terms of section A if . . . [h]e has voluntarily re-established himself in the country which he left or outside which he remained owing to fear of persecution."). The original draft of this clause, which would have revoked the refugee status of any person who "returns to his country of former nationality," was rejected by the Ad Hoc Committee on the ground that it might bar persons who had been forcibly repatriated to their state of origin, as well as those who had chosen to return to their country of origin only temporarily. *See, e.g.*, U.N. ESCOR, Ad Hoc Committee on Statelessness and Related Problems, *Statement of the Director of the International Refugee Organization*, at 2, U.N. Doc. E/AC.32/L.4 (1950).

100. UNHCR HANDBOOK, *supra* note 4, ¶ 134.

101. This is doubly true in light of the long delays involved in processing asylum claims. Particularly where an applicant has long awaited a determination of refugee status, decisionmakers undermine the strictures of the cessation clause by using evidence of return as part of a less constrained subjective fear analysis.

of being persecuted. In other words, an adverse finding as to subjective fear under the current bipartite approach would simply be replaced by an identically grounded finding that there is not a real chance of being persecuted in the country of origin. As such, elimination of a subjective fear requirement would make little practical difference to the outcome of a case.

The flaw in this reasoning is not that the various concerns presently relied upon as objective indicators of subjective fear—evidence of delay in flight, of failure to claim protection in an intermediate country or at least immediately upon arrival in the asylum state, of voluntary assumption of risk in the home state, or of return to the country of origin—are never relevant to the assessment of actual risk. To the contrary, when considered only as part of the assessment of actual risk, these factors are weighed together with all other evidence of risk. But when these factors are considered in order to determine whether the applicant meets a separate and distinct subjective fear requirement, they may lead in and of themselves to a rejection of the claim *without any examination of risk*. This is because under the bipartite approach, the absence of subjective fear as borne out by one of these surrogate indicators leads automatically to denial of the claim.

c. Treating Credibility as Fearfulness

The most complete capitulation to the difficulties of assessing fear is the growing practice of equating any lack of credibility with absence of subjective fear, and hence, with disqualification from refugee status. Under this approach, an applicant deemed credible is assumed to be fearful.[102] But an applicant found not to be credible *in relation to any matter* is deemed to lack subjective fear, and hence, not entitled to recognition of refugee status.[103]

---

102. *See* Ward v. Attorney General, [1993] 2 S.C.R. 689, ¶ 54 (Can. 1993) (La Forest, J.) ("The Board here found Ward to be credible in his testimony, thus establishing the subjective branch."); Maximilok v. Can. (Minister of Citizenship and Immigr.), [1998] F.T.R. 461, ¶ 17 (Fed. Ct. Trial Div. 1998) (Joyal, J.) (Can.) ("The subjective basis for the fear of persecution rests solely on the credibility of the applicants."); Mario v. Sec'y of State for the Home Dep't, (Immigr. App. Trib. 1998) (U.K.) (UNHCR RefWorld 2004 CD-ROM, issue 13) ("We find as a fact (a) that it is reasonably likely that the core of what [the applicant] described in his evidence happened; and (b) that in consequence it is reasonably likely that he has a subjective fear of persecution."); Mgoian v. INS, 184 F.3d 1029, 1035 (9th Cir. 1999) ("An alien satisfies the subjective component by credibly testifying that she genuinely fears persecution."); Abankwah v. INS, 185 F.3d 18, 22 (2d Cir. 1999) (Sweet, J.) ("The subjective component may be satisfied by the applicant's credible testimony that she fears persecution."); Carranza-Hernandez v. INS, 12 F.3d 4 (2nd Cir. 1993).

103. *See, e.g.*, Duarte v. Can. (Minister of Citizenship and Immigr.) 2003 F.C. 988, ¶ 15 (Fed. Ct. 2003) (Kelen, J.) (Can.) ("[T]he Refugee Division did not err in considering delay as a factor in assessing the applicant's credibility with respect to her claim of a subjective fear of

For example, it is common practice in the United States to invoke inconsistencies in an applicant's statements to find him or her not to be credible, therefore necessarily lacking subjective fear, and consequently disentitled to protection.[104] In *Ramsameachire*,[105] a Sri Lankan applicant of the Tamil ethnic group based his asylum claim on evidence of widespread persecution of Tamils by governmental authorities.[106] The immigration judge held, however, that inconsistencies between the applicant's testimony at the asylum hearing and his statements at the initial airport interview indicated a lack of credibility, and hence, a lack of trepidation. He was, therefore, denied refugee status without any account being taken of evidence of widespread persecution of Tamils.[107] On appeal, the applicant argued that the first level decisionmaker was obliged to consider his evidence of risk, despite the adverse credibility determination. Both the BIA and the Second Circuit Court of Appeals disagreed. Judge Sotomayor of the Second Circuit stated:

> Ramsameachire's argument overlooks the fact that, in order to establish his eligibility for asylum, he had to demonstrate both that he subjectively feared future persecution and that his fear was objectively reasonable. Although his pattern or practice evidence was relevant to the objective reasonableness of his fear of persecution, the BIA's adverse credibility determination precluded him from establishing the subjective prong of the well-founded fear standard. *The BIA was therefore justified in not considering Ramsameachire's proffered evidence of widespread*

persecution if forced to return to Cuba."); Emiantor v. Minister for Immigr. and Multicultural Aff., [1998] F.C.A. 1186 (Full Fed. Ct., 1998) (per curiam) (Austl.) ("Because [the Tribunal] did not believe [the applicants'] evidence about their Convention-based claim, it must have concluded that they did not have a Convention-based subjective fear."); Chudinov v. Can. (Minister of Citizenship and Immigr.), IMM 2419–97, ¶ 19 (Fed. Ct. Trial Div. 1998) (Can.).

104. *See, e.g.*, Valderrama v. INS, 260 F.3d 1083, 1085 (9th Cir. 2001) ("Because we hold that substantial evidence supports the BIA's denial of asylum on the basis of its adverse credibility finding [based on discrepancies between the applicant's first and second petitions], we do not reach the issue whether the record supports the BIA's finding that [the petitioner] also lacks an objective, well-founded fear of persecution."); Berroteran-Melendez v. INS, 955 F.2d 1251, 1257–58 (9th Cir. 1991) (affirming lower court ruling that "because [petitioner] failed to present 'candid, credible and sincere testimony' demonstrating genuine fear of persecution, he failed to satisfy the subjective component of the well-founded fear standard") (citations omitted). *But see* Zubeda v. Ashcroft, 333 F.3d 463, 476 (3d. Cir. 2003) (cautioning against placing too much weight on inconsistencies between an asylum affidavit and subsequent testimony); Al-Harbi v. INS, 242 F.3d 882 (9th Cir. 2001) (finding that applicant must be fearful in light of strong evidence of risk, despite some inconsistencies in his testimony).

105. Ramsameachire v. Ashcroft, 357 F.3d 169 (2nd Cir. 2004).

106. *Id.*

107. *Id.*

> *persecution of Tamils before rejecting his asylum application* (emphasis added).[108]

Yet the premise that applicants found not to be credible necessarily lack subjective fear is fundamentally illogical, as it erroneously assumes that fearful applicants do not lie or exaggerate in the course of relating their story. This assumption defies common sense. As the Australian Federal Court correctly observed, "[G]enuine refugees are often at a dire disadvantage as to their capacity to bring their cases and are . . . 'engaged in an often desperate battle for freedom, if not life itself.' Exaggeration and lies are accordingly to be expected from some of them."[109] Out of desperation to avoid being returned to a situation of risk, even truly fearful applicants may lie and exaggerate.[110] Thus, some applicants found to lack credibility may in fact be subjectively fearful.

Moreover, the equation of non-credibility with an absence of trepidation, and hence, with disentitlement to refugee status, is fundamentally at odds with the generally accepted view that credibility is not a *per se* requirement for refugee status.[111] This point was clearly made by the Full Federal Court of Australia in *Perchine:*

> [T]here will be some cases where, although an applicant is disbelieved, or indeed the Tribunal might be positively satisfied on the balance of probabilities that the applicant's account of events did not occur, nevertheless an inquiry ought to be made as to whether there is a real and substantial possibility that something like what the applicant is saying, may have occurred in his or her case. A positive conclusion on that question may bear on the conclusion as to whether there is a real chance of persecution.[112]

---

108. *Id.* at 183.

109. Kalala v. Minister for Immigr. and Multicultural Aff., [2001] F.C.A. 1594, ¶ 3 (Full Fed. Ct. 2001) (Austl.) (applying the reasoning in *Re* Minister for Immigr. and Multicultural Aff. of the Commonwealth of Australia, *Ex parte* Abebe, [1999] 162 A.L.R. 1 (Austl. 1999)).

110. Minister for Immigr. and Multicultural Aff. v. Rajalingam, [1999] F.C.A. 719, ¶ 83 (Fed. Ct. 1999) (Sackville, J.) (Austl.). The tribunal found the applicant to be lacking in credibility, and thus found no subjective fear and denied asylum. The Federal Court overruled, questioning whether credibility should play any role in the decision and sympathizing with the willingness of the applicant's grandmother to "do anything to improve her granddaughter's life chances, including, if necessary, exaggerating or fabricating events." *Id.*

111. *See, e.g.*, Lai v. Can. (Minister of Employment and Immigr.), 8 Imm. L.R. (2d) 245, ¶ 3 (Fed. Ct. App. 1989) (Marceau, J.A.) (Can.) ("Having looked at the Applicant's testimony and found that part of it was not quite credible, [the court of first instance] concluded that the subjective element was lacking, thus bringing the matter to an end. This was not a proper approach.").

112. Perchine v. Minister for Immigr. and Multicultural Aff., [2001] F.C.A. 1254, ¶ 8 (Full Fed. Ct. 2001) (Austl.).

While the testimony of a non-credible applicant cannot be relied upon to establish an actual risk of being persecuted, the required evidence of risk frequently exists separately, and apart from, the applicant's testimony. In such cases, there is a clear legal duty to recognize refugee status.[113] But when evidence of non-credibility is relied upon to dismiss a claim for absence of subjective fear, there is no opportunity even to consider other evidence of actual risk.

All told, the various mechanisms designed artificially to validate subjective fear are, at best, unreliable, and at worst violate established protection principles.

B. *Fear to Supplement an Objectively Weak Claim*

While the bipartite understanding of "well-founded fear" is predominant in contemporary practice, some present support exists as well for the view that evidence of intense trepidation, while not an essential element, may (where present) be used to supplement weak evidence of actual risk. This entirely different form of subjective element is, in essence, a "top-up" mechanism in that it allows refugee status to be recognized, at least in extreme cases, despite evidence of risk that would otherwise be insufficient.

The UNHCR Handbook seems to endorse this use of a subjective element. At paragraph 41, it instructs that "[f]ear must be reasonable. Exaggerated fear, however, may be well-founded if, in all the circumstances of the case, such a state of mind can be regarded as justified."[114] In other words, evidence of extreme trepidation ("exaggerated fear") that is understandable in light of an applicant's background and the surrounding circumstances is a factor capable of overcoming an insufficiency of actual risk. At paragraph 42, the UNHCR Handbook seems to use the notion of "intolerability" as a short-hand for extreme trepidation: "[T]he applicant's fear should be considered well-founded if he can establish, to a reasonable degree, that his continued stay in his country of origin has become intolerable to him for the reasons stated in the definition, or would for the same reasons be intolerable if he returned there."[115]

Despite the obvious appeal of this understanding from the perspective of refugees and their advocates, reliance on evidence of subjective trepidation as a "plus factor" may be quite unfair, as it results in the disparate treatment of applicants identically situated with respect to their

113. *See* Attakora v. Can. (Minister of Employment and Immigr.), A-1091-87, ¶ 13 (Fed. Ct. App. 1989) (Hugessen, J.) (Can.) ("Whether or not the applicant was a credible witness . . . does not prevent him from being a refugee if his political opinions and activities are likely to lead to his arrest and punishment.").

114. UNHCR HANDBOOK, *supra* note 4, ¶ 41.

115. *Id.* ¶ 42.

actual risk of being persecuted. Whenever subjective fear is thought relevant to the assessment of refugee status, persons who are more timid or demonstrative, or who are simply more able to articulate their trepidation in ways recognizable as such by decisionmakers, are advantaged relative to others who face the same level of actual risk, but who are more courageous, more reserved, or whose expressions of trepidation are not identified as such. The result is that applicants viewed by decisionmakers as fearful may be granted refugee status, whereas applicants facing identical risks of being persecuted, but who are deemed not to be sufficiently fearful, may be denied protection. Disparate treatment of identically situated claimants based solely on a decisionmaker's impressions regarding the presence or absence of fear is difficult to square with refugee law's fundamental goal of providing surrogate protection to persons who are truly at risk.[116]

II. "FEAR" AS FORWARD-LOOKING EXPECTATION OF RISK

We earlier observed that there are two linguistically plausible interpretations of "fear."[117] Although the term may signify an emotional reaction of trepidation on the part of the applicant for refugee status, "fear" can equally refer to his or her forward-looking expectation of risk. We argue here that in view of the duty to interpret a treaty based not solely on text, but also to take account of its context, object, and purpose,[118] the latter understanding of "fear" as forward-looking expectation of risk is more legally authentic. This understanding of "fear" as mandating only an anticipatory appraisal of risk is moreover fully consistent with a second principle of treaty interpretation, namely that equal attention must be given to all legally authoritative versions of the treaty. Therefore, in the context of the Refugee Convention, equal attention must be given to the French language version of the treaty and to the general practice of courts interpreting "craignant avec raison" (the French language counterpart to "well-founded fear") not to make substantive use of trepidation in assessing "well-founded fear." Finally, a treaty should be interpreted to the extent possible in a way that avoids internal inconsistency. In the case of the Refugee Convention, this means reconciling the approach to "well-founded fear" with Articles 1(C)(5–6),

116. *See infra* Part II.A.

117. *See supra* pp. 506–508.

118. Vienna Convention on the Law of Treaties, *opened for signature* May 3, 1969, art. 31(1), 1155 U.N.T.S. 331, 8 I.L.M. 679 ("A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose.")[hereinafter Vienna Convention].

which authorize the cessation of refugee status without regard to an applicant's mental state, and with the clear concern of Article 33's duty of *non-refoulement* to ensure that refugees are not exposed to the actual risk of harm.

A. *Taking Account of the Convention's Object and Purpose*

The Refugee Convention was designed to provide surrogate protection to persons at risk of being persecuted in their country of origin for one of the five enumerated reasons, and only to such persons. As the Supreme Court of Canada held in *Ward*:

> The international community was meant to be a forum of second resort for the persecuted, a "surrogate", approachable upon failure of local protection. The rationale upon which international refugee law rests is not simply the need to give shelter to those persecuted by the state, but, more widely, to provide refuge to those whose home state cannot or does not afford them protection from persecution.[119]

In *Horvath*, the House of Lords similarly adopted the view that "[t]he general purpose of the Convention is to enable the person who no longer has the benefit of protection against persecution for a Convention reason in his own country to turn for protection to the international community."[120]

Given the Convention's risk-oriented focus, it would be anomalous indeed to ascribe to "fear" a meaning that encourages states to distinguish between applicants identically situated with respect to risk, and solely on the basis of individual temperament. Yet when subjective fear is deemed an essential qualification for refugee status, and even when it is used as a "plus factor," the result is to advantage the claims of applicants whose trepidation can be readily identified by decisionmakers and to disadvantage individuals who, for whatever reason, do not project fearfulness. The disparate treatment of applicants identically situated with respect to their actual risk of being persecuted is difficult to square with the human rights-based goals of refugee law. As the Australian Federal Court eloquently explained:

> The Convention aims at the protection of those whose human dignity is imperiled, the timorous as well as the bold, the inarticulate as well as the outspoken, the followers as well as the

119. Ward v. Attorney General, [1993] 2 S.C.R. 689, ¶ 40 (Can. 1993) (La Forest, J.).

120. Horvath v. Sec'y of State for the Home Dep't, [2000] 3 All E.R. 577, 581 (H.L. 2000) (U.K.).

> leaders in religious, political, or social causes, in a word, the ordinary person as well as the extraordinary one.[121]

The United Kingdom Immigration Appeal Tribunal has similarly observed that "[i]t may be inadvisable to place too much weight upon the subjective element . . . in order to avoid different treatment of persons similarly placed, and in order to avoid penalizing the courageous."[122]

Our concern is that the bipartite understanding of "well-founded fear" requires that an applicant who either is not fearful, or whose fear is not identified as such, be denied refugee status; yet an identically situated applicant who appears from a decisionmaker's standpoint to look fearful is to be found eligible for international protection. Even assuming that decisionmakers are able reliably and accurately to identify trepidation (an assumption earlier refuted at length),[123] this result cannot be reconciled to the object of the Refugee Convention. As the Canadian Federal Court of Appeal has noted, "the definition of a refugee is certainly not designed to exclude brave or simply stupid persons in favor of those who are more timid or more intelligent."[124]

Though clearly less problematic from a protection standpoint, the view that evidence of trepidation is appropriately used to supplement an otherwise weak case also runs afoul of the Convention's object and purpose. In *Chan*, the High Court of Australia observed that "the object of the Convention is not to relieve fears which are all in the mind, however understandable, but to facilitate refuge for those who are in need of it."[125] While there may be compelling reasons for wanting to be generous to intensely fearful persons who do not face a genuine risk of being persecuted in their country of origin, the Refugee Convention was not intended as an all-encompassing source of humanitarian relief.[126]

---

121. Win v. Minister for Immigr. and Multicultural Aff., [2001] F.C.A. 132, ¶ 20 (Full Fed. Ct. 2001) (Madgwick, J.) (Austl.).

122. *See* Ali v. Sec'y of State for the Home Dep't, No. 17300, HX 62265/96, (Immigr. App. Trib. 1998) (U.K.).

123. *See supra* Part I.A.2 for a detailed discussion of the inherent difficulties associated with determining whether an applicant is or is not fearful.

124. Yusuf v. Can. (Minister of Employment and Immigr.), [1991] 1 F.C. 629, ¶ 5 (Fed. Ct. App. 1992) (Hugessen, J.) (Can.); *see also* HATHAWAY, *supra* note 7, at 69 ("[I]t would be anomalous to define international legal obligations in such a way that persons facing the same harm would receive differential protection."); DAVID JACKSON, IMMIGRATION: LAW AND PRACTICE 447 (1999) ("An applicant should not be banned from refugee status because of his bravery or foolhardiness, nor should he receive an advantage for timidity.").

125. Chan v. Minister for Immigr. and Ethnic Aff., [1989] 169 C.L.R. 379, 397 (Austl. 1989).

126. Butler v. Att'y Gen'l, [1999] N.Z.A.R. 205 (C.A. 1997) (N.Z.) ("The test [for recognition of refugee status] is for instance sharply different from the humanitarian tests provided for in the Immigration Act. . . . It does not in particular range widely over the rights

States are, of course, free to act in ways that go beyond the requirements of the Refugee Convention, but only persons who truly face the risk of being persecuted are eligible for Convention refugee status.

In short, the object and purpose of the Convention as adumbrated by senior courts strongly support an interpretation of "fear" that emphasizes its anticipatory rather than emotive qualities. The substantive consideration of subjective fear as part of the "well-founded fear" inquiry is inconsistent with established protection principles, and is otherwise out of keeping with the goals of refugee law. In contrast, the risk-oriented understanding of "fear" as forward-looking expectation, and as mandating only a prospective appraisal of an applicant's risk, is very much in harmony with the Convention's central goals.

B. *"Craignant avec raison . . . ."*

Dominant practice under the equally authoritative French language version of the Refugee Convention[127] also supports the view that the well-founded fear requirement neither conditions access to refugee status on a showing of trepidation, nor allows evidence of trepidation (where present) to override otherwise insufficient evidence of actual risk. The "well-founded fear" requirement is articulated in the French language text as "craignant avec raison."[128] Like its English language counterpart, the French verb "craindre" may be understood either in the sense of trepidation, or to signal forward-looking expectation.[129] While either is a linguistically plausible interpretation, practice in Francophone states more commonly conforms to the latter meaning. Courts applying "craignant avec raison" do not require a demonstration of trepidation; indeed, the test for "craignant avec raison" generally does not seem to require any consideration at all of the applicant's subjective state of mind.

In France, for example, the inquiry into well-founded fear seems singularly focused on the applicant's risk of being persecuted. In the recent jurisprudence, there have been no decisions that deny status for lack of subjective fear. When courts find the evidence of risk compelling, refugee status is routinely recognized without an inquiry into the applicant's emotional state,[130] even where the applicant's behavior might have

---

and interests in respect of the family: the refugee inquiry is narrowly focused on the persecution and protection of the particular claimant. . . .").

127. Vienna Convention, *supra* note 118, art. 33(1) ("When a treaty is authenticated in two or more languages the text is equally authoritative in each language, unless the treaty provides or the parties agree that, in case of divergence, a particular text shall prevail.").

128. *See* Refugee Convention, *supra* note 2, art. 1(A)(2).

129. *See* 3 LE GRAND ROBERT DE LA LANGUE FRANÇAISE, *supra* note 12, at 11.

130. Case no. 140222, Straravecka (Commission des Recours des Refugiés, Oct. 22, 1990) (Fr.). *See also* Case no. 312811, Chiporev (Commission des Recours des Refugiés, June

aroused suspicion that he or she was not in fact fearful.[131] Likewise, French courts do not recognize refugee status on the basis of trepidation (or personal "intolerability") where the evidence of risk is otherwise lacking. Even faced with highly sympathetic applicants having suffered severe past persecution, French courts remain focused on the actual risk of being persecuted; in such cases, an applicant's trepidation does not, for example, trump evidence of changed circumstances.[132]

Swiss courts have adopted an approach that is also squarely directed to analysis of actual risk.[133] Although the jurisprudence acknowledges a subjective component in "craignant avec raison," this aspect of the test is confined to analysis of particularized evidence of risk and involves no substantive consideration of subjective fear.[134] Neither do Francophone courts in Belgium require subjective fear as a prerequisite to refugee status. In the vast majority of cases, the applicant's prospective risk of being persecuted is the decisive factor in the "craignant avec raison" inquiry.[135] Only in exceedingly rare cases do Belgian courts seem inclined to use evidence of intense fear to supplement an otherwise weak case.[136]

17, 1997) (Fr.) (UNHCR RefWorld 2004 CD-ROM, issue 13) (granting refugee protection after citing strong objective evidence, without any genuine inquiry into subjective fear); Case no. 226842, Hoyam Tawfig (Commission des Recours des Refugiés, Sept. 15, 1992) (Fr.) (examining only objective evidence to find that well-founded fear has been established); Case no. 313783, Tshikuta Nyamabo (Commission des Recours des Refugiés, Nov. 5, 1997) (Fr.) (UNHCR RefWorld 2004 CD-ROM, issue 13).

131. In *Straravecka*, for instance, the Commission observed that the applicant had left Albania with a valid passport and visa—a circumstance that other jurisdictions have seized on to assert that the applicant lacked the required subjective fear. Nevertheless, the Commission recognized refugee status, noting that the applicant "doit être regardé eu égard à la gravité des persecutions subies, comme craignant avec raison. . . ." Case no. 140222, Straravecka (Commission des Recours des Refugiés, Oct. 22, 1990) (Fr.).

132. The 2002 *Miry* case is illustrative of this approach. In *Miry*, an Afghani applicant had been subjected to horrible persecution, including torture, under the Taliban regime. The applicant was nevertheless denied protection as a refugee in France on grounds that the Taliban regime had since fallen from power. ("[N]i les pieces de dossier ni les déclarations faites en séances publique . . . ne permettent de tenir pour fondées les craintes actuelles et personnelles de persécutions énoncées par le requerant en cas de retour dans son pays d'origine, compte tenu des changements politiques qui ont eu lieu en Afghanistan et qui se sont traduits par la chute des régimes auxquels il impute les persécutions dont il aurait été victime."). Case no. 400706, Miry (Commission des Recours des Refugiés, June 14, 2002) (Fr.).

133. Kälin, *supra* note 24, at 28.

134. *See, e.g.*, N.K. et famille, EMARK 1997/10 66, at 73 (Asylum App. Comm., Oct. 21, 1996) (Switz.) (In identifying the relevance of both subjective and objective components to the "craignant avec raison" standard, concerning the subjective inquiry, the court instructed that account should be taken of the applicant's personal history, in particular of past persecution, and of his or her membership of ethnic, religious, social or political groups that exposed him to such measures. The court made clear that these "subjective" factors were to be considered (alongside "objective" factors) in determining whether a reasonable person in the applicant's position would fear persecution.).

135. Gaetan de Moffarts, *Report from Belgium* (Permanent Appeals Commission for Refugees, Jan. 29, 2003) ("In the great majority of cases treated by the Commission, the no-

It is of course true that the usual practice of civil law courts not to elaborate legal reasoning at length makes it difficult to discern with precision the rationale for the commitment of Francophone jurisprudence to a fundamentally risk-oriented interpretation of "craignant avec raison." Yet it is unmistakable that courts interpreting the equally authoritative version of the Convention have not undertaken the "trepidation journeys" which characterize practice in most jurisdictions where the English language text is relied upon. Francophone courts have clearly adopted an interpretation of "craindre" that emphasizes its anticipatory rather than its emotive qualities.

Prevailing practice under the French language text is an important factor to be considered in determining the meaning to be given to the notion of "well-founded fear." The terms in the refugee definition "are presumed to have the same meaning in each authentic text."[137] Thus, if "craindre" and "fear" have the same meaning, and if subjective trepidation is not considered relevant to satisfaction of the French language test, it follows that the textual argument for seeing use of the term "fear" as necessarily predicating refugee status on the existence of trepidation is significantly weakened. This, in turn, should direct attention back to the object and purpose of the Refugee Convention which,[138] as noted above, are oriented to an understanding of refugee status that is focused on protection from actual risk of being persecuted.

C. *Internal Consistency*

An understanding of "fear" as forward-looking expectation of harm is further confirmed by the structure of the Convention, in particular Article 1(C)(5–6),[139] which authorizes the cessation of refugee status

---

tion 'well-founded fear' encompasses as well an objective as a subjective dimension. Most decisions will thus be based on an analysis, a balancing of both elements. *It has to be said that the objective dimension remains a determinant factor in the decision process to grant or not to grant the refugee status*.") (emphasis added); *See also* Case no. 02-1456/E458 (Vaste Beroepscommissie voor Vluchtelingen, Dec. 13, 2002) (Belg.) (considering both objective and subjective elements, but relying principally on strong objective evidence to assess well-founded fear); Case No. 00-1530/F1191 (Commission Permanente de Recours des Réfugiés, Apr. 6, 2001) (Belg.) (assessing risk based on individuated, objective evidence without discussing subjective fear); Case No. 00-0749/F1093 (Commission Permanente de Recours des Réfugiés, Dec. 14, 2000) (Belg.) (stating that the strong objective evidence in this case is sufficient to establish well-founded fear, without a genuine discussion of subjective fear).

136. *See* Case No. 00-1561/F1091 (Commission Permanente de Recours des Réfugiés, Dec. 8, 2000) (Belg.).

137. Vienna Convention, *supra* note 118, art. 33(3).

138. *Id.* art. 33(4).

139. Refugee Convention, *supra* note 2, art. 1(C)(5–6), which state that the Convention ceases to apply if:

without regard to an applicant's mental state. Under this cessation clause, states may revoke protection where the conditions that gave rise to the need for protection have "ceased to exist."[140]

It is particularly noteworthy that Article 1(C) does not provide for cessation of refugee status upon dissipation of the applicant's subjective fear. If the drafters had intended the test for well-founded fear to require a demonstration of both objective risk *and* subjective fear, they would logically have provided for cessation of status where either essential element of the well-founded fear test was no longer met. The fact that cessation is authorized only where the evidence points to the elimination of the objective risk of harm, and not where an applicant ceases to have a subjective fear of being persecuted, offers strong support for an understanding of "well-founded fear" fundamentally oriented to actual risk.[141]

More generally, the notion that subjective fear should play no substantive role in the assessment of well-founded fear is bolstered by the fact that the cessation criteria under Article 1(C)(5–6) do not contemplate a dispensation from cessation due to change of actual circumstances to accommodate persons who remain subjectively fearful of return.[142] While UNHCR has proposed that the humanitarian proviso established in the case of pre-World War II refugees[143] should be ex-

---

> (5) He can no longer, because the circumstances in connexion with which he has been recognized as a refugee have ceased to exist, continue to refuse to avail himself of the protection of the country of his nationality;
>
> (6) Being a person who has no nationality he is, because of the circumstances in connexion with which he has been recognized as a refugee have ceased to exist, able to return to the country of his former habitual residence;

140. Refugee Convention, *supra* note 2, art. 1(C)(5–6); *see also* U.N. High Commissioner for Refugees, *The International Protection of Refugees: Interpreting Article 1 of the 1951 Convention relating to the Status of Refugees*, 20 REFUGEE SURV. Q. 77, 93 (Oct. 2001) ("Cessation of refugee status may be understood as, essentially, the mirror of the reasons for granting such status found in the inclusion elements of Article 1(A)(2). When those reasons disappear, in most cases so too will the need for international protection.")[hereinafter *Interpreting Article 1*].

141. *See* R. v. Sec'y of State for the Home Dep't, *Ex parte* Yogathas, [2002] 4 All E.R. 800, 830 (H.L. 2002) (Scott, L.J.) (U.K.) ("Refugee status is a temporary status for as long as the risk of persecution remains.").

142. HATHAWAY, *supra* note 7, at 69 ("[The fundamentally objective focus] is buttressed by the fact that the Convention provides for the cessation of refugee status upon the establishment of safe conditions in the country of origin, whether or not the refugee continues to harbour a subjective fear of return.").

143. Article 1(C)(5–6) allows statutory refugees to retain their refugee status under certain conditions: "Provided that this paragraph shall not apply to a refugee falling under section A(1) of this article who is able to invoke compelling reasons arising out of previous persecution for refusing to avail himself of the protection of the country of nationality." Refugee Convention, *supra* note 2, art. 1(C)(5–6). Such a position has been incorporated in the contemporary approaches of Canada and the United States, where asylum law or regulations

tended to contemporary refugees as well,[144] there is no requirement in the Refugee Convention to do so. The English Court of Appeal has recently considered precisely this question and concluded that although "[i]t would be understandable if some states had decided to apply the ["compelling reasons"] principle to all Convention refugees for admirable humanitarian reasons[,] that does not amount to a recognition of a legal obligation to do so . . . Aspirations are to be distinguished from legal obligations."[145]

Beyond the fact that subjective fearfulness appears irrelevant both to the cessation of refugee status and to exemption from cessation based upon the dissipation of actual risk, it is noteworthy that the most important right that accrues to refugees—the protection from *refoulement* (return) under Article 33 of the Convention[146]—also has no relation to subjective fear. Article 33 limits its protection to persons whose "life or freedom would be threatened" for a Convention reason. As Weis affirms, the drafters intended this expression to serve as a shorthand for the full refugee definition set out in Article 1(A)(2) of the Convention.[147] The decidedly objective thrust of this core duty therefore affords further support for an interpretation of the notion of well-founded fear that is oriented to the protection of persons actually at risk.

---

provide all refugees with continued refugee protection, despite a change in their home country, if the refugee can show compelling reasons arising from past persecution for refusing to return to their home country. *See* U.S. Immigration Regulations, 8 C.F.R. § 208.13(b)(1)(iii)(a) (2005); Immigration and Refugee Protection Act, ch. 27, S.C. 2001, § 108(4) (Can.).

144. UNHCR HANDBOOK, *supra* note 4, ¶ 136 ("The reference to Article 1A (1) indicates that the exception applies to 'statutory refugees.' At the time when the 1951 Convention was elaborated, these formed the majority of refugees. The exception, however, reflects a more general humanitarian principle, which could also be applied to refugees other than statutory refugees.").

145. R. v. Sec'y of State for the Home Dep't, *Ex parte* Hoxha, [2002] E.W.C.A. Civ. (C.A. 2002) (Keene, L.J.) (Eng.).

146. In relevant part, Article 33 provides: "No Contracting State shall expel or return ('refouler') a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion." Refugee Convention, *supra* note 2, art. 33(1).

147. "The words 'where their life or freedom was threatened' may give the impression that another standard is required than for refugee status in Article 1. This is, however, not the case. The Secretariat draft referred to refugees 'escaping from persecution' and to the obligation not to turn back refugees 'to the frontier of their country of origin, or to territories where their life or freedom would be threatened on account of their race, religion, nationality, or political opinions.' In the course of drafting the words 'country of origin', 'territories where their life or freedom was threatened' and 'country in which he is persecuted' were used interchangeably . . . [T]here was no intention to introduce more restrictive criteria than that of 'well-founded fear of persecution' used in Article 1(A)(ii)." PAUL WEIS, THE REFUGEE CONVENTION, 1951 303 (1995).

III. Ensuring Attention to the Applicant's Case

Each of the understandings of a subjective element critiqued in Part I views an applicant's subjective *fear* as a factor worthy of consideration, either as an essential element or as a "plus factor." In contrast, some support exists for a more diffuse form of subjective *element* intended merely to particularize the inquiry into actual risk, without substantive consideration of fear. Indeed, there are three distinct approaches which accept that the sole focus of the well-founded fear inquiry is an analysis of the actual risk of being persecuted, yet which posit the necessity of a subjective element to give pride of place to the unique circumstances of persons claiming Convention refugee status.

One such understanding sees the subjective element as necessary to ensure the substantive admissibility of evidence adduced by an applicant, including his or her testimony (the assumption being that without a subjective element, only externally generated evidence of risk would be taken into account). At the core of this understanding of the subjective element is a presumed categorical distinction between evidence adduced by the applicant, deemed "subjective" evidence, and evidence from other, "more objective" sources. The Swiss case of *N.K. et famille* is illustrative of this approach. The court there observed that the subjective element allowed "account [to] be taken of the applicant's personal history, in particular of past persecution, and of his or her membership in ethnic, religious, social or political groups that exposed him to such measures."[148] The court made clear that these "subjective" factors were to be considered (alongside "objective" factors) in determining whether a "reasonable person" in the applicant's position would fear being persecuted.[149]

A second way that a subjective element may be thought to particularize the inquiry into well-founded fear is by prioritizing the applicant's testimony. Under this approach, the subjective element functions not just to ensure the admission of the applicant's testimony, but actually requires that such evidence be accorded enhanced weight in the assessment of risk. The UNHCR Handbook offers some support for this understanding of the subjective element:

148. N.K. et famille, EMARK 1997/10 66, at 73 (Asylum App. Comm., Oct. 21, 1996) (Switz.) (unofficial translation). Goodwin-Gill has similarly observed that "[w]hat seems to be intended [by the subjective element] is not so much . . . subjective fear, as evidence of the subjective aspects of an individual's life, including beliefs and commitments." Guy Goodwin-Gill, The Refugee in International Law 40–41 (2d. ed. 1996).

149. N.K. et famille, EMARK 1997/10 66, at 73–74 (Asylum App. Comm., Oct. 21, 1996) (Switz.) (unofficial translation).

> Determination of refugee status will therefore *primarily* require an evaluation of the applicant's statements rather than a judgment on the situation prevailing in his country of origin. To the element of fear—a state of mind and a subjective condition—is added the qualification "well-founded." This implies that it is not only the frame of mind of the person concerned that determines his refugee status, but that this frame of mind must be supported by an objective situation.[150]

The rationale for this understanding of the subjective element appears to be that the applicant's testimony constitutes the "best evidence" of risk.[151] Thus, so long as credibility is established and the applicant's testimony shows that he or she meets the substantive requirements of the refugee definition, status should ordinarily be recognized. In essence, this understanding of the subjective element aims to protect individuals who face a *real but unverifiable risk* of future persecution. The implicit assumption is that such persons would be denied refugee status but for the existence of a subjective element.

A third version of the thesis that there is a subjective element—though not one that involves consideration of subjective fear—suggests that a subjective element is the means by which an applicant's particular vulnerabilities (psychological or physical) are afforded substantive consideration in determining whether the anticipated harm rises to the level of persecution. The subjective element is conceived as the means to personalize the inquiry into well-founded fear by allowing decisionmakers to distinguish between applicants facing the same treatment, but whose particular physical or psychological make-up render them differentially at-risk of being persecuted. A subjective element that allows for consideration of particularized susceptibilities is said to be necessary so that decisionmakers can properly estimate the probability that a specific applicant will be subject to adverse treatment amounting to persecution if returned to his or her country of origin:

> There may be instances where . . . objective circumstances in themselves do not appear to be compelling, but taking into account the individual's own background, belief system, and

150. REFUGEE HANDBOOK, *supra* note 4, at ¶¶ 37–38.

151. In theory, this premise applies with equal force to every case, even those in which persuasive non-testimonial evidence of risk is available. As a practical matter, however, it would be unnecessary to give greater weight to an applicant's testimony unless evidence from "more objective" sources is ambiguous or incomplete. The UNHCR Handbook accordingly instructs that "[d]ue to the importance that the definition attaches to the subjective element, an assessment of credibility is indispensable where the case is not sufficiently clear from the facts on record." *Id.* ¶ 41.

> activities, the circumstances may well indeed be considered as substantiating a well-founded fear for that individual, although the objective circumstances might not be so considered for another.[152]

The need for a subjective element to validate particularized vulnerabilities has been posited in particular where an applicant seeks to establish a well-founded fear of being persecuted based on restrictions on his or her religious freedom. In such cases, UNHCR regards the existence of a subjective element as the means by which account can be taken of an applicant's background and beliefs to determine whether the inability to practice his or her religion amounts to persecution:

> Fear . . . is the subjective element of the definition. To assess whether it is present or not, it is important to interview in depth—to obtain all possible information about the applicant's background. Do not forget that two persons, in the same "objective" situation, may react differently; for example, the inability to practice one's religion may make life intolerable for one individual, but not for another of the same religion. (UNHCR Handbook paras. 40, 22). In this case, fear is clearly present.[153]

Underlying this approach is the assumption that, without a subjective element, refugee status would be denied to applicants who risk harm grave enough to qualify as persecution only because of the way in which a given phenomenon impacts on a person with specific vulnerabilities.

In this section, we elaborate our view that a subjective element is not needed in order to particularize the well-founded fear inquiry in any of the ways described above. All evidence probative of an applicant's risk of being persecuted is admissible to establish a well-founded fear, regardless of its origin. Thus, a subjective element is not needed in order to ensure that evidence adduced by the applicant is taken into account. As regards the second approach, existing doctrine already establishes an appropriate level of deference to the applicant's testimony and other evidence. A subjective element that would go farther still, actually requiring substantive prioritization of the applicant's testimony, is not needed and may amount to over-compensation. Nor is a subjective element needed to enable decisionmakers to take account of the way in which an applicant's particular susceptibilities affect the determination of what treatment rises to the level of persecution. While such factors are rarely relevant to the well-founded fear inquiry, the applicant's particular

152. *Interpreting Article 1*, *supra* note 140, at 80.

153. OFFICE OF THE HIGH COMMISSIONER FOR REFUGEES, DETERMINATION OF REFUGEE STATUS 22–23 (1989).

physical or psychological vulnerabilities are appropriately taken into account as part of the analysis of whether the harm anticipated rises to the level of a risk of "being persecuted."

A. *Admissibility of the Applicant's Evidence*

Implicit in the view that a subjective element is needed to allow for the admission of individuated evidence of risk is an assumption that evidence adduced by the applicant is qualitatively different than externalized evidence garnered from more detached sources. Likewise, it is assumed that without a subjective element refugee status would be denied to persons who, for whatever reason, face a risk greater than would be revealed by the so-called objective (externally generated) evidence alone. It is thus predicated on a categorical distinction between so-called "subjective evidence" and externally generated evidence from "more objective" sources.

In truth, however, no such categorical distinctions among different forms of evidence exist. Rather, all evidence probative of an applicant's risk of being persecuted is to be admitted as part of the assessment of actual risk and accorded the weight due it on the merits. The only appropriate distinction is between relevant evidence, which is admissible, and irrelevant evidence, which is inadmissible. The source of that evidence is simply immaterial. This point was made by Sedley L.J. in the English Court of Appeal decision in *Karanakaran:*

> [D]ecision-makers, on classic principles of public law, are required to take everything material into account. Their sources of information will frequently go well beyond the testimony of the applicant and include in-country reports, expert testimony and—sometimes—specialized knowledge of their own (which must of course be disclosed). No probabilistic cut-off operates here: everything capable of having a bearing has to be given the weight, great or little, due to it.[154]

By way of endorsing the lower court's method of analysis, Brooke L.J. observed in *Karanakaran:*

> What [the tribunal in *Kaja*][155] decided was that when assessing future risk decisionmakers may have to take into account a whole bundle of disparate pieces of evidence: (1) evidence they are certain about; (2) evidence they think is probably true;

154. Karanakaran v. Sec'y of State for the Home Dep't, [2000] 3 All E.R. 449, 479 (C.A. 2000) (Sedley, L.J.) (Eng.).

155. Kaja v. Sec'y of State for the Home Dep't, [1995] Imm. A.R. 1 (Immigr. App. Trib. 1994) (U.K.).

> (3) evidence to which they are willing to attach some credence, even if they could not go so far as to say it is probably true; (4) evidence to which they are not willing to attach any credence at all.[156]

This understanding is firmly in line with the general approach to evidence adopted across common law jurisdictions. For example, the U.S. Federal Rules of Evidence state that "[a]ll relevant evidence is admissible."[157] "Relevant" evidence is defined as "[e]vidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable that it would be without the evidence."[158] The Australian approach is similar, with the Evidence Act 1995 codifying the position that "[e]vidence that is relevant in a proceeding is evidence that, if it were accepted, could rationally affect (directly or indirectly) the assessment of the probability of the existence of a fact in issue in the proceeding. . . . [E]vidence that is relevant in a proceeding is admissible in the proceeding."[159] The approach of the United Kingdom is analogous:

> [E]vidence is that which may be placed before the court in order that it may decide the issues of fact. . . . [T]he facts which may be proved in a judicial inquiry are *facts in issue* and *facts relevant to the issue,* and any facts, whether relevant to the issue or not, which affect the legal reception or weight of the evidence tendered. [Facts relevant to the issue] . . . are facts which tend, either directly or indirectly, to prove or disprove a fact in issue.[160]

This basic principle is likewise reflected in Canadian law, where "[a] fact will be relevant not only where it relates directly to the fact in issue, but also where it proves or renders probable the past, present or future existence (or non-existence) of any fact in issue."[161] Because these gen-

156. Karanakaran v. Sec'y of State for the Home Dep't, [2000] 3 All E.R. 449, 459 (C.A. 2000) (Brooke, L.J.) (Eng.). This paper does not consider the argument that evidence that has no credence should be considered admissible.

157. FED. R. EVID. 402.

158. *Id.* at 401.

159. Evidence Act, 1995, §§ 55–56 (Austl.).

160. L.C. PHIPSON, PHIPSON ON EVIDENCE §§ 1.03, 6.01, 6.03 (M.N. Howard et al. eds., 15th ed. 2000). *See also* RUTH CANNON & NIALL NELIGAN, EVIDENCE 1 (2002) ("An item of evidence may be defined as something that tends to prove or disprove a particular fact, in the sense that it makes the existence or non-existence of that fact more likely. An alternative definition of evidence describes it as information that may be used to help prove or disprove the truth or existence of some matter in legal proceedings.").

161. JOHN SOPINKA ET AL., THE LAW OF EVIDENCE IN CANADA 24 (1992). *See also* JAMES C. MORTON, POCKET GUIDE TO EVIDENCE 4 (2d ed. 2002) (citing R. v. Arp, [1998] 3 S.C.R. 339, ¶ 38 (Can. 1998) ("The basic rule is that all relevant evidence is admissible. Relevance depends directly on the facts in issue in any particular case . . . The evidence must

eral principles of evidence are logically applied to refugee law, it is clear that—even without a subjective element—evidence adduced by the applicant must be considered (along with all other probative evidence) in an analysis of the forward-looking risk of being persecuted.[162]

Not only is a subjective element unnecessary to secure the substantive admissibility of evidence adduced by the applicant, but there is a real concern that continued reference to "subjective" and "objective" evidence may actually interfere with the duty of decisionmakers to devote equivalent attention to all forms of evidence, regardless of their origin,[163] and to accord weight to each piece of evidence based only on its probative worth. Properly understood, evidence adduced by the applicant and evidence from "more objective" sources are different in kind, but not in quality. Yet, the classification of evidence as subjective or objective based on its source creates *de facto* an evidentiary hierarchy under which decisionmakers may be led to overvalue "objective" evidence and devalue evidence labeled "subjective."

Fundamentally, "objective" and "subjective" are not neutral adjectives used merely as a matter of convenience.[164] This is obvious even

simply tend to 'increase or diminish the probability of the existence of a fact in issue.' . . . As a consequence, there is no minimum probative value required for evidence to be relevant.").

162. The New Zealand approach to well-founded fear is illustrative. In 1996, that jurisdiction adopted an approach solely concerned with risk under which subjective fear is not required and no other substantive role is accorded to a subjective element. Even without a subjective element, New Zealand decisionmakers routinely consider all information probative of the risk of being persecuted. Moreover, under the New Zealand Immigration Act, it is irrelevant to the issue of admissibility whether evidence is adduced by the applicant in the form of oral testimony or documents, or whether it comes from more "independent" sources such as NGO or government reports concerning country conditions:

> For the purpose of determining a claim [for refugee status], an officer—
>
> (a) May seek information from any source; but
>
> (b) Is not obliged to seek any information, evidence, or submissions further to that provided by the claimant; and
>
> (c) May determine the claim on the basis of the information, evidence, and submissions provided by the claimant.

New Zealand Immigration Act, 1987, § 129(G)(6) (N.Z.).

163. For instance, the High Court of Australia in *Wu Shan Liang* acknowledged that "the decision-maker must not, by a process of factual findings on particular elements of the material which is provided, foreclose reasonable speculation upon the chances of persecution emerging from a consideration of the whole of the material." Minister for Immigr. and Ethnic Aff. v. Wu Shan Liang, [1996] 136 A.L.R. 481, 507 (Austl. 1996) (Kirby, J.).

164. "The Western legal tradition sees the world in dichotomous terms, such as: rational/irrational; thought/feeling; objectivity/subjectivity; abstract thinking/contextual thinking. Law adopts this dualism, and in each of these cases it gives preference to the former over the latter. In other words, 'the rational, the intellectual, the objective and the abstract decision is the preferred and superior style of decision making.'" LOCATING LAW: RACE/CLASS/GENDER CONNECTIONS 24 (Elizabeth Cormack ed., 1999) (citing NGAIRE NAF-

from a strictly linguistic perspective. "Objective" is defined as "external to the mind; real."[165] The word "subjective," by contrast, is defined as "existing in the mind only; . . . illusory, fanciful."[166] If there is truly a meaningful distinction between evidence labeled as "objective" and evidence labeled as "subjective," it must be because the former is, by nature, more rational, more reliable, and more probative than the latter. It would therefore be understandable that the legal mind might be inclined to prefer the "objective" over the "subjective." Yet it surely follows that the result of a decision to classify evidence adduced by applicants for refugee status as "subjective" is that it is unlikely to receive the weight due it on the basis of a non-categorical appraisal of its probative worth.

B. *Taking the Applicant's Evidence Seriously*

To say that all evidence, regardless of its source, is entitled to be considered based on its actual probative worth is not, of course, to say that every piece of evidence must be accorded the same weight in the assessment of actual risk. The English Court of Appeal, in *Karanakaran*, clarified that "[w]hat the decision-makers ultimately make of the material is a matter for their own conscientious judgment, so long as the procedure by which they approach and entertain it is lawful and fair, and provided their decision logically addresses the Convention issues."[167] In contrast, the second variant of a (non-fear-based) subjective element suggests that it is appropriate for an applicant's credible testimony not only to be taken into account, but actually to be treated as a stronger or more reliable form of evidence.

In part, this approach raises the same concerns just addressed. While the intent here is to advantage the evidence adduced by refugees by means of a categorical distinction that favors their evidence, it is still a formalist, categorical distinction not predicated on a qualitative assessment of the actual probative worth of the evidence. As such, it runs afoul of the duty of decisionmakers to give equal attention to all forms of ad-

---

FINE, LAW AND THE SEXES: EXPLORATIONS IN FEMINIST JURISPRUDENCE 26 (1990)). *See also* ROY L. BROOKS, STRUCTURES OF JUDICIAL DECISION-MAKING FROM LEGAL FORMALISM TO CRITICAL THEORY 31 (2002) ("[Max] Weber believed that highly evolved legal systems are in this sense "rational" rather than "irrational". They are, in other words, legal systems with value-free judicial processes."); ANDREI MARMOR, POSITIVE LAW AND OBJECTIVE VALUES 147(2001) ("One of Marx's main insights about the law is the twofold claim that the law must present itself as an objective, unbiased arbitrator of disputes and that it systematically fails to meet this challenge. According to Marx and later Marxists, law's claim to objectivity in this respect is one of its main ideological aspects").

165. 10 OXFORD ENGLISH DICTIONARY, *supra* note 2, at 643.

166. 8 OXFORD ENGLISH DICTIONARY, *supra* note 2, at 33.

167. Karanakaran v. Sec'y of State for the Home Dep't, [2000] 3 All E.R. 449, 477 (C.A. 2000) (Sedley, L.J.) (Eng.).

missible evidence, and to assign weight based solely on their "conscientious judgment" of the relative value of each item of evidence to the overall assessment of risk.

Advocacy of this variant of the subjective element thesis is likely rooted in a desire to overcome what may be thought to be the predisposition of some decisionmakers to give short shrift to claims in which the applicant's testimony constitutes most or all of the evidence of risk. A clear answer has already emerged in the jurisprudence, however, and, in some cases, codified laws of state parties: it is now generally recognized that an applicant's credible oral testimony may constitute the whole of the evidence in support of his or her claim.[168] Canadian courts, for instance, recognize that by swearing to the truth of her statements, the applicant creates "a presumption that [her] allegations are true unless there be reason to doubt their truthfulness."[169] Similarly, New Zealand refugee decisionmakers do not require external corroboration if the applicant's testimony is plausible, credible and frank.[170] U.S. Immigration Regulations state that "the testimony of the applicant, if credible, may be sufficient to sustain the burden of proof without corroboration,"[171] a position which has led the Ninth Circuit Court of Appeals repeatedly to assert the duty to consider whether an applicant's "credible testimony alone [is] sufficient to establish her eligibility for asylum and/or withholding removal."[172] In view of such clear affirmations of the real value of an applicant's testimonial evidence, it is difficult to understand the propriety of going farther still to insist that a subjective element is needed in order to ensure that such evidence effectively trumps other evidence adduced. In some cases, official or non-governmental reports on human rights conditions may be more probative of an applicant's risk than information supplied by the applicant, if only because the applicant's range of experience or depth of knowledge provides only a partial picture of overall risk.[173] Similarly, an applicant's evidence of what has

168. HATHAWAY, *supra* note 7, at 84.

169. Sathanandan v. Can. (Minister of Employment and Immigr.), No. A-645-90, ¶ 3 (Fed. Ct. App. 1991) (Mahoney, J.) (Can.) (quoting Moldonado v. Can. (Minister of Employment and Immigr.), [1980] 2 F.C. 302, 305 (Fed. Ct. App. 1979) (Can.)).

170. In *Refugee Appeal No. 265/92*, the Refugee Status Appeals Authority acknowledged that it is unreasonable "to attack [an applicant's] credibility on the basis that documentary evidence in support of the claim [is not] produced." The Authority further held: "[C]learly there must be valid reasons to doubt the credibility of an applicant and there is no requirement that testimony which is plausible, credible and frank must be supported by external corroboration." Refugee Appeal No. 265/92, *Re SA* (Refugee Status Appeals Auth.) (Haines, Deputy Chair) (N.Z.).

171. U.S. Immigration Regulations, 8 C.F.R. § 208.13(a) (2005).

172. Abdule v. Ashcroft, 47 Fed. Appx. 463, 465 (9th Cir. 2002).

173. In *Dudar v. Canada*, for instance, the Federal Court of Canada rightly held that "[i]t was open to the Board to prefer the documentary evidence over that of the Applicant," so long

occurred to him or her will logically be of less value than general human rights data where the issue in a case is whether conditions in the applicant's country of origin have changed since his or her departure, such that a risk that was once clearly well-founded may presently be unsubstantiated.[174]

C. *Attention to Particular Susceptibilities*

A subjective element has also been said to be necessary in order to enable decisionmakers to take account of particularized vulnerabilities (both physical and psychological) that may result in a given applicant experiencing more severe harm than other persons subject to the same objective circumstances. In our view, such concerns are relevant, but not normally pertinent to the well-founded fear inquiry. Rather, evidence of an applicant's susceptibility to increased harm is appropriately considered as part of the analysis of whether the substantive harm feared amounts to a risk of "being persecuted." In contrast to the well-founded fear determination, which essentially speaks to the degree of risk, the evaluation of whether the harm is or is not persecutory is oriented precisely to the ascertainment and evaluation of the impact of a given act or threat of action on the well-being of the applicant.

In this section, we elaborate our position that an analysis of "being persecuted" grounded in international human rights law allows decisionmakers fully and adequately to take account of particularized risks of harm, without any need for a subjective element. International human rights law recognizes that individuals facing the same external phenomenon may experience harm differently, and thus may be differentially at risk of being persecuted because of their unique characteristics. In particular, international human rights law's recognition that extreme forms of psychological harm amount to "cruel, inhuman or degrading treatment" allows such harms to be classified as forms of persecution. There is therefore no need to invoke a fungible subjective element to do justice to the protection needs of persons at risk of such forms of harm.

Refugee law emerged from, and is situated within, the broader context of international human rights law. As much is clear from the

---

as it gave clear reasons why it had chosen to do so. Dudar v. Can. (Minister of Citizenship and Immigr.), [2002] F.C.T. 1277, ¶ 20 (Fed. Ct. Trial Div. 2002) (Snider, J.) (Can.).

174. "A judgment must be made as to what may happen in the future, including any change in current circumstances . . . . There may be no current risk of persecution on a Refugees Convention ground, yet a change in circumstances may readily be foreseen that would create a significant risk of persecution on such a ground." Minister for Immigr. & Multicultural Aff. v. Jama, [1999] F.C.A. 1680, ¶ 24 (Full Fed. Ct. 1999) (Branson & Sackville, JJ.) (Austl.).

Preamble to the Refugee Convention, which constitutes a key part of the treaty's context to be taken into account in its interpretation:[175]

> Considering that the Charter of the United Nations and the Universal Declaration of Human Rights approved on 10 December 1948 by the General Assembly have affirmed the principle that human beings shall enjoy fundamental rights and freedoms without discrimination; Considering that the United Nations has, on various occasions manifested its profound concern for refugees and endeavored to assure refugees the widest possible exercise of these fundamental rights and freedoms . . . Have agreed as follows . . .[176]

Indeed, the House of Lords expressly relied on the Refugee Convention's Preamble to determine that when assessing the viability of a refugee applicant's claim, it is crucial that the international human rights context frames the process. After quoting the first four sections of the preamble of the Refugee Convention, Lord Steyn wrote in the leading case of *Shah and Islam* that:

> The relevance of the preambles is twofold. First, they expressly show that a premise of the Convention was that all human beings shall enjoy fundamental rights and freedoms. Secondly, and more pertinently, they show that counteracting discrimination, which is referred to in the first preamble, was a fundamental purpose of the convention. That is reinforced by the reference in the first preamble to the Universal Declaration of Human Rights . . . .[177]

Leading refugee jurisprudence of other states confirms the centrality of international human rights law to an authentic understanding of refugee law. In one of the earliest formulations, the Supreme Court of Canada held in its seminal decision of *Ward* that "[u]nderlying the Convention is the international community's commitment to the assurance of

175. "An obvious internal source of reference is the preamble to the treaty. The preamble is a principal and natural source from which indications can be gathered of a treaty's objects and purposes even though the preamble does not contain substantive provisions. Article 31(2) of the Vienna Convention sets this out specifically . . . [and] this Court . . . has made substantial use of it for interpretational purposes." Arbitral Award of 31 July 1989 (Guinea-Bissau v. Senegal), 1991 I.C.J. 53, 142 (Mar. 2, 1990) (Weeramantry, J., dissenting). The decisions cited in which the International Court of Justice has relied upon the preamble to a treaty for interpretive purposes include: Rights of Nationals of the United States in Morocco (Fr. v. U.S.), 1952 I.C.J. 176, 196 (Aug. 27); and Asylum Case (Colom. v. Peru) 1950 I.C.J. 266, 282 (Nov. 20).

176. Refugee Convention, *supra* note 2, Preamble.

177. R v. Immigr. App. Trib., *Ex parte* Shah, [1999] 2 All E.R. 545, 551 (H.L. 1999) (Steyn, L.) (U.K.).

basic human rights without discrimination."[178] Similarly, Gleeson, C.J., of the High Court of Australia has also affirmed that refugee law must be interpreted within the broader context of international human rights law, stating:

> The purpose and content [of the Convention] can, in turn, only be understood by reference to the history and broad humanitarian object of the Convention .... [I]ts meaning should be ascertained having regard to its object, bearing in mind that the Convention is one of several important international treaties designed to redress "violation[s] of basic human rights demonstrative of a failure of state protection."[179]

In practice, the anchoring of refugee law in the human rights context has proved particularly valuable in facilitating an evolving understanding of the core construct of a risk of "being persecuted."[180] In the *Ward* decision, for example, the Supreme Court of Canada observed that " '[p]ersecution' . . . undefined in the Convention, has been ascribed the meaning of 'sustained or systemic violation of basic human rights demonstrative of a failure of state protection.' "[181] Lord Bingham recently observed in the House of Lords that the concept of persecution must be understood within the greater context of international human rights, specifically that "it is necessary to investigate whether the treatment which the applicants reasonably fear would infringe a recognized human right."[182] The new European Union Qualification Directive similarly defines a risk of being persecuted as involving the risk of acts which are

178. Ward v. Attorney General, [1993] 2 S.C.R. 689, ¶ 71(Can. 1993) (La Forest, J.).

179. Minister for Immigr. and Multicultural Aff. v. Khawar, [2002] 67 A.L.D. 577, ¶ 111 (Austl. 2002) (quoting HATHAWAY, *supra* note 7, at 104–105).

180. For example, Australia, Canada, the United Kingdom, and the United States have all produced guidelines that advance the notion that the interpretation of gender-based persecution in refugee law should be informed by fundamental human rights. *See* Deborah E. Anker, *Refugee Law, Gender, and the Human Rights Paradigm*, 15 HARV. HUM. RTS. J. 133, 139 (2002). *See also* Australian Department of Immigration and Multicultural Affairs, *Refugee and Humanitarian Visa Applicants: Guidelines on Gender Issues for Decision Makers* (July 1996), *available at* http://refugeelawreader.org/files/pdf/172.pdf; Canadian Immigration and Refugee Board, *Guideline 4: Women Refugee Claimants Fearing Gender-Related Persecution* (updated Nov. 13, 1996), *available at* http://www.irb-cisr.gc.ca/en/about/guidelines/women_e.htm; Nathalia Berkowitz & Catriona Jarvis, *Immigration Appellate Authority: Asylum Gender Guidelines* (Nov. 2000), *available at* www.iaa.gov.uk/gender.pdf; Memorandum from Phyllis Coven, Office of International Affairs, *Considerations For Asylum Officers Adjudicating Asylum Claims From Women* (May 26, 1995), *available at* http://sierra.uchastings.edu/cgrs/law/guidelines/us.pdf.

181. Ward v. Attorney General, [1993] 2 S.C.R. 689, ¶ 72(Can. 1993) (La Forest, J.) (quoting HATHAWAY, *supra* note 7, at 104–05).

182. Sepet v. Sec'y of State for the Home Dep't, [2003] 3 All E.R. 304, 312 (H.L. 2003) (Bingham, L.) (U.K.).

"sufficiently serious by their nature or repetition as to constitute a severe violation of basic human rights, in particular the rights from which derogation cannot be made."[183] And in a particularly thoughtful passage, Justice Kirby of the High Court of Australia recently reversed his own position on the meaning of "being persecuted" to come into line with the international trend to ground determinations of persecution in the norms of human rights law:

> I am now inclined to see more clearly than before the dangers in the use of dictionary definitions of the word 'persecuted' in the Convention definition . . . . Dictionary definitions can . . . incorrectly direct the mind of the decisionmaker to the intention of the persecutor instead of to the effect on the persecuted . . . .
>
> . . . [The Refugee Convention's] meaning should be ascertained having regard to its object, bearing in mind that the Convention is one of several important international treaties designed to redress 'violation[s] of basic human rights, demonstrative of a failure of state protection.' It is the recognition of the failure of state protection, so often repeated in the history of the past hundred years, that led to the exceptional involvement of international law in matters concerning individual human rights.[184]

While international human rights law is fundamentally concerned to set common, universally applicable norms, the General Comments adopted by United Nations human rights treaty bodies make clear that the assessment of compliance with human rights obligations must take account of the unique situations of all, in particular of those who are most vulnerable.[185] For example, the United Nations Human Rights

183. Council Directive 2004/83/EC on Minimum Standards for the Qualification and Status of Third Country Nationals or Stateless Persons as Refugees or as Persons Who Otherwise Need International Protection and the Content of the Protection Granted, art. 9(1)(a), 2004 O.J. (L 304) 12 [hereinafter Council Directive on Minimum Standards].

184. Minister for Immigr. and Multicultural Aff. v. Khawar, [2002] H.C.A. 14 (Austl. 2002) (Kirby, J.) (citations omitted).

185. Vulnerable groups such as women, children, older persons, people with disabilities, religious, ethnic, and cultural minorities, accused and incarcerated individuals, indigenous people, and non-citizens often face particular and unique obstacles that can thwart their enjoyment of fundamental human rights. In their respective recommendations, the U.N. supervisory bodies suggest specific remedies and programs that are tailored to address various groups' specific vulnerabilities. It can be extrapolated from this approach that the protection of universal human rights does not entail identical treatment, nor is the infringement of human rights assessed without consideration of the identity of the complainant. The human rights treaty bodies consist of the Committee on Economic, Social and Cultural Rights; the Human Rights Committee; the Committee on the Elimination of Racial Discrimination; the Commit-

Committee has affirmed that in order to assess whether particular actions violate the International Covenant on Civil and Political Rights (Civil and Political Covenant), one must examine "all circumstances of the case such as the duration and manner of the treatment, *its physical or mental effects as well as the sex, age and state of health of the victim* (emphasis added)."[186] The Committee on the Elimination of Racial Discrimination has similarly emphasized that racial discrimination can manifest itself in unique ways depending on the identity of the complainant, and, in particular, on his or her gender:

> There are circumstances in which racial discrimination only or primarily affects women, or affects women in a different way, or to a different degree than men. Such racial discrimination will often escape detection if there is no explicit recognition or acknowledgment of the different life experiences of women and men, in areas of both public and private life.[187]

A similar attentiveness to the ways in which particular characteristics can affect the question of whether human rights are violated can be seen at the regional level. The European Court of Human Rights has determined that consideration of whether there has been a violation of the European Convention on Human Rights requires consideration of "the age, sex, and health condition of the person exposed to [the treatment]."[188] In a precedent-setting decision, Zekia J. expounded on this notion by giving an example that dramatically illustrates the relevance of individuated vulnerabilities in determining the existence of a human rights violation:

> I can refer to the case of an elderly sick man who is exposed to a harsh treatment—after being given several blows and beaten to the floor, is dragged and kicked on the floor for several hours. I would say without hesitation that the poor man has been tortured. If such treatment is applied on a wrestler or even a young

tee on the Elimination of Discrimination against Women; the Committee against Torture; and the Committee on the Rights of the Child.

186. Vuolanne v. Finland, *Views of the Human Rights Committee under article 5, paragraph 4 of the Optional Protocol to the International Covenant on Civil and Political Rights (thirty fifth session) concerning Communication No. 265/1987*, at ¶ 9.2, U.N. Doc. CCPR/C/35/D/265/1987 (1989) (emphasis added).

187. *Gender-Related Dimensions of Racial Discrimination, General Recommendation XXV*, Committee on the Elimination of Racial Discrimination, 56th sess. at 152, U.N. Doc. A/55/18 (2000).

188. Ireland v. United Kingdom, 2 Eur. H.R. Rep. 25, 109 (1978) (Zekia, J.).

> athlete, I would hesitate a lot to describe it as an inhuman treatment and I might regard it as a mere rough handling.[189]

This approach has been imported into refugee law. The European Union, for example, has determined that

> [i]n assessing an applicant's fear of being persecuted or exposed to other serious and unjustified harm, Member States shall take into account . . . the individual position and personal circumstances of the applicant, including factors such as background, gender, age, health and disabilities so as to assess the seriousness of persecution or harm.[190]

The duty to consider particularized impact in assessing refugee status is moreover anchored in the Convention's language, which speaks to a well-founded fear of "being persecuted," in the passive voice. As Heerey J. of the Australian Federal Court has noted:

> The use of the passive voice conveys a compound notion, concerned both with the conduct of the persecutor and the effect that conduct has on the person being persecuted. In assessing the probable impact of a persecutor's conduct, decisionmakers can readily consider an applicant's unique characteristics—such as age, health, disability, or past experience—that render him or her especially vulnerable to being persecuted.[191]

Of particular relevance to the present discussion, a human rights-based approach to "being persecuted" allows for consideration of an applicant's psychological vulnerabilities. Indeed, international human rights law recognizes that psychological harm, if sufficiently severe, can amount to a human rights violation. Article 5 of the Universal Declaration of Human Rights decrees that "no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment."[192] This declaration is codified in binding terms in the Civil and Political Covenant, Article 7 of which provides that "no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment."[193] In its General Comment on Article 7, the Human Rights Committee makes clear that "[t]he prohibition in Article 7 relates not only to acts that cause

189. *Id.*

190. Council Directive on Minimum Standards , *supra* note 183, art. 10(2).

191. Minister for Immigr. and Multicultural and Indigenous Aff. v. Kord, [2002] 125 F.C.R. 68, 69 (Full Fed. Ct. 2002) (Heerey, J.) (Austl.).

192. Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. GAOR, 3d Sess., art. 5, U.N. Doc. A/810 (1948).

193. International Covenant on Civil and Political Rights, *adopted* Dec. 16, 1966, 999 U.N.T.S. 171 (*entered into force* Mar. 23, 1976).

physical pain, but also to acts that cause mental suffering to the victim."[194]

In applying this standard, the Committee has determined, for example, that the mental suffering caused by the mysterious disappearance of her daughter violated the mother's human rights:

> [There was] anguish and stress caused to the mother by the disappearance of her daughter and by the continuing uncertainty concerning her fate and whereabouts. The author has the right to know what has happened to her daughter. In these respects, she too is a victim of the violations of the Covenant suffered by her daughter in particular, of article 7.[195]

Similarly, the Human Rights Committee has found that when a state abducts someone and refuses to provide any information or allow any outside contact with the abducted person for an inordinate amount of time, "the removal of the victim and the prevention of contact with his family and with the outside world constitute cruel and inhuman treatment, in violation of article 7 of the Covenant."[196] Cruel and inhuman treatment thus encompasses extreme psychological pain, regardless of whether physical injury was sustained.

Interpreting the notion of "being persecuted" as involving serious harm which is in breach of international human rights law should therefore result in the recognition of cases in which there is a forward-looking expectation of subjection to serious psychological harm, assuming of course that this is for a Convention reason and that the state of origin will not or cannot be relied upon to counter the risk. As the caselaw on point demonstrates, there is no need to rely on a "subjective element" to achieve this goal. In *Katrinak*, for example, the English Court of Appeal considered the claim of a Roma man who had been attacked and injured by skinheads, as had his visibly pregnant wife in a separate attack. Schiemann L.J., in considering the question of whether the man had suffered persecution (additional to his own injuries) because of the attack on his wife, observed that

---

194. *General Comment 20, Article 7*, U.N. Human Rights Committee, *reprinted in* Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies at 129, 5, U.N. Doc. HRI/GEN1/Rev.7 (2004).

195. Quinteros Almeida v. Uruguay, *Views of the Human Rights Committee under article 5, paragraph 4 of the Optional Protocol to the International Covenant on Civil and Political Rights (nineteenth session) concerning Communication No. 107/1981*, at ¶ 14, U.N. Doc. CCPR/C/19/D/107/1981 (1981).

196. N'goya v. Zaire (Democratic Republic of Congo), *Views of the Human Rights Committee under article 5, paragraph 4 of the Optional Protocol to the International Covenant on Civil and Political Rights (fifty-sixth session) concerning Communication No 542/1993*, at ¶ 5.5, U.N. Doc. CCPR/C/56/D/542/1993 (1993).

> the attacks also potentially evidence the appellants' vulnerability in the future. An activity which would not amount to persecution if done to some people may amount to persecution if done to others. It is easier to persecute a husband whose wife has been kicked in a racial attack whilst visibly pregnant than one whose family has not had this experience. What to others may be an unbelievable threat may induce terror in such a man.[197]

The judgment further observed that

> [i]t is possible to persecute a husband or a member of a family by what you do to other members of his immediate family. The essential task for the decision taker in these sort of circumstances is to consider what is reasonably likely to happen to the wife and whether that is reasonably likely to affect the husband in such a way as to amount to persecution of him.[198]

Similarly, the U.S. Board of Immigration Appeals in *Y-T-L* held that the infliction of a forced sterilization on one spouse may amount to past persecution of the other spouse.[199] While the majority finding does not elucidate the basis for this finding, the dissent thoughtfully suggested that "such persecution must be personal to the applicant, although the harm to the persecuted individual may also result in grievous harm to the applicant . . . [for example] the loss of consortium of his spouse (including the opportunity to have children)."[200] Under this analysis, a loss of consortium can be seen as a psychological harm amounting to persecution directly experienced by the applicant.

Most recently, the view that the risk of serious psychological harm can be a form of persecution has been affirmed by the Federal Court of Australia in *SCAT*, a case involving a family who were members of the Sabean Mandean religious minority in Iran. The court observed that "[i]nsofar as psychological harm to the appellant's family members, rather than directly to himself, might have been in issue, that could plainly be taken into account as an element of harm to the appellant himself. To harm a child may also be to harm its custodial parents."[201] Thus, in line with the approach taken in international human rights law generally, there is clear support in refugee jurisprudence for the view that severe psychological harm, even if experienced as the indirect conse-

197. Katrinak v. Sec'y of State for the Home Dep't, [2001] E.W.C.A. Civ. 832, ¶ 21 (C.A. 2001) (Shiemann, L.J.) (Eng.).

198. *Id.* ¶ 23.

199. *In re* Y-T-L, 23 I. & N. Dec. 601 (B.I.A. 2003).

200. *Id.*

201. SCAT v. Minister for Immigr. and Multicultural and Indigenous Aff., [2003] F.C.A. 80, ¶ 23 (Full Fed. Ct. 2003) (Madgwick & Conti, JJ.) (Austl.).

quence of harm done to others, is a form of serious harm amounting to persecution.

The psychological impact of threats of violence and murder has also been considered in refugee law. While threats alone are rarely found to be extreme enough to constitute persecution, in the case of *Ramos-Ortiz* the U.S. Court of Appeals for the Third Circuit acknowledged that extreme and plausible threats may, in and of themselves, amount to persecution. In that case, a thirty-one year old man from Guatemala alleged that he was threatened with death if he refused to join the guerrillas in their fight against the government. Rather than risk this fate, he fled to the United States. The court stated in *obiter dicta* that "[t]hreats alone are generally not sufficient to constitute past persecution; instead, only those threats that are so menacing in themselves that they cause significant actual suffering or harm rise to the level of persecution."[202] The implication is therefore that where death threats are sufficiently terrorizing that they cause genuine and extreme mental suffering, they may fall within the ambit of persecution.

The intangible, but acute, psychological harm of discrimination has been similarly recognized by refugee jurisprudence as amounting to persecution if it is extreme enough. This question was considered in the previously cited case of *SCAT.* The discriminatory treatment experienced by the Sabean Mandean minority included the denial of the right to handle food, prejudicial insults, deprivation of physical contact in greetings, exclusion from clubs, denigration of their religion, and the possibility of forced marriage for the women with Muslim men. The consequences of such lifelong treatment involved feelings of insecurity and lack of control over one's life that created a grave risk of suicide. The Federal Court of Australia found that when discrimination is extreme and relentless from childhood, "the cumulative effect of this was likely to entail severe psychological harm"[203] sufficient to give rise to a well-founded fear of *being persecuted.*

In sum, refugee law—in line with the principles of international human rights law, which comprise part of its legal context—recognizes both that the analysis of the gravity of harm risked by an applicant must take account of his or her particular susceptibilities, and also that serious forms of psychological harm may, in and of themselves, be forms of persecution. In light of these critical developments, there is today no need to

202. Ramos-Ortiz v. Ashcroft, 70 Fed. Appx. 68, 71 (3rd Cir. 2003). *See also* Navas v. INS, 217 F.3d 646, 658 (9th Cir. 2000) ("[D]eath threats alone can constitute persecution.").

203. SCAT v. Minister for Immigr. and Multicultural and Indigenous Aff., [2003] F.C.A. 80, ¶ 23 (Full Fed. Ct. 2003) (Austl.).

advocate a subjective element in "well-founded fear" in order to embrace concerns of this kind as part of the refugee status inquiry.

IV. CONCLUSIONS

The subjective element of the duty to show a "well-founded fear" of being persecuted is both widely accepted and widely misunderstood. Conceptual and linguistic confusion has resulted in a range of specific understandings that is breathtaking in its diversity. While the initial impetus to posit such a requirement may well have been to mandate clear attention to each individual refugee claimant's case, or to ensure that his or specific susceptibilities be taken into account in determining whether a sufficiently grave risk might accrue upon return, normative developments in refugee law have rendered each of these goals superfluous. In particular, an applicant's evidence—including his or her own credible testimony—is now understood to be at the center of the refugee status inquiry, and to be a sufficient basis for the recognition of refugee status, at least where corroboration is not reasonably available. The clear embrace of a human rights-based approach to the interpretation of the core construct of a risk of "being persecuted" has moreover facilitated reliance on the risk of claimant-specific harms, including those of a psychological nature, as legitimate grounds for the recognition of refugee status. If these were the reasons for traditional insistence on a subjective element, the requirement may today be considered essentially an anachronism.

But in fact, the dominant understanding of the subjective element is not nearly so benign. To the contrary, the usual approach is to insist that even clearly at-risk claimants must also demonstrate their subjective trepidation in order to be granted refugee status. As we have shown, this requirement results in the denial of international protection to a variety of applicants who, by reason of their age, mental health, stoic nature, gender, or culture are unable either to experience or effectively to communicate their subjective fear to the decisionmaker. The various efforts to compensate for the clear dangers of insistence on the demonstration of subjective fear are partial, and difficult to apply with accuracy. In particular, the several objective indicators relied upon as surrogates for the existence of subjective trepidation are in most cases of doubtful relevance to the existence of fear, and in some instances lead to results which contradict established principles of refugee law. In the end, there is now clear evidence that applicants well within the class of persons intended to the benefit from the Refugee Convention are, in practice,

denied status as refugees by reason of the duty to show their subjective fear.

This, then, brings us back to the fundamental question of why one might persist in asserting a bipartite understanding of the well-founded fear standard instead of recognizing—as we advocate here—that the standard requires only evidence of a forward-looking expectation of actual risk.

In part, the answer seems simply to be that the word "fear" is most commonly used to refer to trepidation. Yet as we have shown, an understanding of "fear" (and of the equally authoritative French language notion of "craindre") that connotes forward-looking apprehension is squarely within the accepted ordinary meaning of those terms. This more objective understanding is moreover compelled by rules of treaty interpretation, because it both facilitates an application which coincides much more closely with dominant practice in Francophone jurisdictions and supports the underlying goals of the Refugee Convention itself.

Beyond the literal explanation, the primary reason for maintenance of a two-part understanding of "well-founded fear" seems to be little more than habit. The bifurcated position has been adopted, at least formally, in most UNHCR position papers and in the jurisprudence of leading courts. While the breadth and depth of the attachment to the bifurcated position is no small obstacle, we believe that the increasingly clear evidence of the serious harm it does to genuinely at-risk persons compels a fundamental reconsideration of the established view.

There is, in fact, no textual or principled impediment to adoption of an understanding of "well-founded fear" focused exclusively on forward-looking apprehension; to the contrary, it is a view that is fully supported by language and by the context, object, and purpose of the Refugee Convention. There is moreover no evidence whatsoever that a move in this direction poses any downside risk for refugees—as practice in New Zealand, which has rejected any duty to show subjective fear or trepidation, and adopted an understanding of "well-founded fear" focused exclusively on prospective apprehension, makes clear.[204] This result is not surprising, as the interpretation advanced in this Article merely eliminates one of

204. In 1996, New Zealand formally disavowed the existence of a subjective element in well-founded fear. The present standard, which focuses exclusively on the applicant's actual risk, has been formulated as follows: "On the facts as found by the decision-maker: 1. Objectively, is there a real chance of the refugee claimant being persecuted if returned to the country of nationality? 2. If the answer is Yes, is there a Convention reason for that persecution?" Refugee Appeal No. 70074/96, *Re* ELLM (Refugee Status Appeals Auth. 1996) (N.Z.).

By adopting this test, New Zealand courts have effectively simplified the analysis of well-founded fear without sacrificing the ability to personalize the inquiry into risk or take account of particular susceptibilities.

what are now said to be two essential elements of the well-founded fear test, rather than imposing a new or more exacting test.

The challenge, then, is to move beyond routinized deference to tradition in order to eliminate a clear and present danger to the ability of the Refugee Convention to serve its core purpose of protecting at-risk persons from being persecuted. Whether a person is, or is not, subjectively fearful of return to actual risk should be recognized as legally immaterial.