

PEER  
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ARTICLE

**SUBJECTIVITY OF  
“WELL FOUNDED FEAR OF BEING PERSECUTED”  
CRITERIA AS A KEY FACTOR FOR DETERMINING THE  
REFUGEE STATUS  
 (“Haklı Nedenlere Dayanan Zulme Uğrama Korkusu”  
Kriterinin Mülteci Statüsünün Belirlenmesinde Belirleyici Bir  
Faktör Olarak Öznelliği)**

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### ÖZET

Mültecilerin Hukuki Statüsüne İlişkin 1951 Sözleşmesi'nin I-A(2) maddesine göre mültecilik statüsünün belirlenmesinde anahtar kriter olan “haklı nedenlere dayanan zulme uğrama korkusu”, bir nesnel bir de öznel öge barındırmaktadır ve zulme uğrama korkusunun varlığına yönelik değerlendirme yapılırken her iki öge birlikte dikkate alınmalıdır.

Bu çalışmada mülteci statüsünün “haklı nedenlere dayanan zulme uğrama korkusu” ile tanımlanmasının öznelliği incelenmeye çalışılacak ve bu problemi çözmeye ilişkin çoğunlukla uygulamaya yönelik öneriler getirilecektir.

**Anahtar kelimeler:** Mülteci Hukuku, İnsan Hakları, Haklı Nedenlere Dayalı, Güncel Tehlike, Mülteci Statüsü.

### ABSTRACT

As a key factor for determining the refugee status according to the Article I-A(2) of the 1951 Convention Relating to the Status of Refugees the term “well-founded fear” contains a subjective and an objective element and in determining whether well-founded fear exists, both elements must be taken into consideration.

In this paper, it will be tried to observe the subjectivity of the definition of refugee status with the phrase of “well-founded fear of being persecuted” and to make suggestions to deal with this problematic mostly in the manner of implementation.

**Key words:** Refugee Law, Human Rights, Well Founded, Actual Risk, Refugee Status.

**INTRODUCTION:**

With Article I-A(2) of the 1951 Convention Relating to the Status of Refugees<sup>1</sup> and related articles of 1967 Protocol<sup>2</sup> which removed the Convention's temporal limitations, it is aimed to determine the status of refugees on the basis of human rights with the purpose of balancing this basis with the interests of state parties. Because determining this status widely, will cause abuse of provided assurances which granted to refugees and thus will load a heavy burden to the state parties. On the other hand, a narrower determination will prepare the ground for widespread human rights violations by excluding some asylum seekers who will face to persecution without the protection of refugee status.

In this context, it's examined that all of the sub-criterias (race, religion, nationality, etc.) are bounded with the main criteria of "*well-founded fear of being persecuted*". With this bounding role, it can be easily argued that the criteria of well-founded fear of being persecuted is the key phrase of the definition.<sup>3</sup>

Because, the "word" fear includes subjectivity both in the dictionary meaning of the word and in the legal characteristic of it, with the purpose of eliminating this subjectivity, the definition had been strengthened by the phrase of "well-founded". Thus the convention aims to establish a balance of objective and subjective factors when determining the refugee status by supporting the state of mind of the asylum seeker with an objective situation.

According to the Handbook of The Office Of The High Commissioner For Refugees On Procedures and Criteria For Determining The Status of Refugees (By this it will be mentioned as "Handbook") "The term "well-founded fear" therefore contains a subjective and an objective element, and in determining whether well-founded fear exists, both elements must be taken into consideration."<sup>4</sup> Soever, the phrase of "well-founded" adds measurability and applicability in the definition, the subjective nature of the phrase of "fear" still exists. Because, again as stated in the Handbook, determination of refugee status with this definition still primarily require an evaluation of the applicant's statements rather than a judgement on the situation prevailing in his or her country of origin.<sup>5</sup>

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<sup>1</sup> U.N. Convention Relating to the Status of Refugees, July 28, 1951, 19 U.S.T. 6577, 189 U.N.T.S. 2545.

<sup>2</sup> U.N. Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 8791.

<sup>3</sup> 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' (Here and after Handbook) , U.N. Doc. Hcp/Ip/4/Eng/Rev.1 (1979, Reedited 1992), para. 37.

<sup>4</sup> Ibid., paras. 37, 38.

<sup>5</sup> Ibid., para. 37.

With continuing on this point of view, when it's accepted 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, it becomes less clear whether the well-founded "fear" standard also requires a demonstration of the fear of being persecuted.<sup>6</sup>

There seems to be two main approaches for interpreting the definition when dealing with the subjectivity. The dominant view worldwide is that the test for well-founded fear is comprised of two essential elements. This 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".<sup>7</sup> Therefore, in most jurisdictions, in order to have a well-founded fear under the Convention, applicants for refugee status must establish that an objective risk based on their civil or political status exists in the country from which they fled, and that they subjectively have this fear in their minds.<sup>8</sup>

The other approach 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.<sup>9</sup>

Whether the second approach seems to have released from the disadvantages of the subjectivity of the word "fear", in fact it denies to implement one of the main rules of interpretation by ignoring one of the critical words of the original text. In fact the two main approaches are in the same misunderstanding of counting the "well-founded" phrase as a totally objective one. For example as it observed in the case of *Cardoso-Fonseca*<sup>10</sup>, determining the risk as actual when it is 1/10 of probability, both of the approaches includes the probability of the risk in to the equation to be able to count it as probable or not. The dilemma starts here. Because when the probability is included in to the equation at the same time quantity of it is also added too. Who can count a 1/10 risk of discrimination equal to a 1/20 risk of death? Or is it utopic that the evaluation of risk don't change from state to state or culture to culture. Thus it can easily be argued that the phrase of "well-founded" has also a subjective side because in the final analysis evaluation of depends on the view of implementers. More fundamentally if in the country of asylum abuses of human rights occur

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<sup>6</sup> James C. Hathaway, William S. Hicks, 'Is There a Subjective Element in the Refugee Convention's Requirement of "Well-Founded Fear?"', [2004-2005] 26 Mich. J. Int'l L. 505, 506

<sup>7</sup> Ibid. 510.

<sup>8</sup> Bridgette Ann Carr, 'We Don't Need to See Them Cry: Eliminating the Subjective Apprehension Element of the Well-Founded Fear Analysis for Child Refugee Applicants' [2005-2006] 33 Pepp. L. Rev. 535, 540

<sup>9</sup> J. Hathaway, Ibid. 510.

<sup>10</sup> *INS v. Cardozo-Fonseca* [1987] [U.S. Supr. Ct] 480 U.S. 421, 431.

(not necessarily approaching the level of “being persecuted”), the refugee decision-maker may be blind or indifferent to refugee claims based on similar abuses in the claimants country of origin, or may be deterred from recognising refugee status in case this is seen as a judgment on the refugee decision-maker’s own country.<sup>11</sup>

In this paper, it will be tried to observe the subjectivity of the definition of refugee status with the phrase of “well-founded fear of being persecuted” and to make suggestions to deal with this problematic mostly in the manner of implementation.

### **FEAR:**

The subjectivity of the word “fear” basically is caused of it’s meaning which demonstrates a feeling. Because feeling is a phenomenon which is expressed in every person individually. When observed with dictionary meaning there can be two main explanations. First it demonstrates the feeling of trepidation. Secondly it may be used as an expectation of something undesirable as we mentioned before in the words of Hathaway as; “actual, forward-looking risk”<sup>12</sup>.

It is obvious that both of the different meanings of the word “fear” tends to affect interpretation. Especially when 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. (It also should be accepted that the risk of misapplication decreases when the meaning of “actual risk” accepted but subjectivity still exists.)<sup>13</sup> As seen in the practical example of the case of *Del Valle v. INS* that the well-founded fear standard has a subjective component that requires an assessment of an applicant's mental state.<sup>14</sup> Again in the case of *Cardoso-Fonseca* when characterizing the well-founded fear standard, the Supreme Court stated that the reference to fear implied the decision will depend at least partly on the subjective mental state of the applicant.<sup>15</sup>

When this subjectivity and its effects on interpretation combined with the extraordinary diversity among applicants in terms of culture, language, and temperament makes it really difficult, sometimes impossible, for decisionmakers reliably to detect the

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<sup>11</sup> New Zealand Refugee Status Appeals Authority (1999) [2000] NZLR 545 (Refugee Appeal No. 71427/99) para. 38.

<sup>12</sup> J. Hathaway, *Ibid.* 506.

<sup>13</sup> *Ibid.* 514.

<sup>14</sup> *Del Valle v. INS*, [1985] (9th Cir.) 776 F.2d 1407, 1411.

<sup>15</sup> *INS v. Cardozo-Fonseca* [1987] [U.S. Supr. Ct] 480 US 430, 431.

presence of trepidation, even under the best of circumstances.<sup>16</sup> 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.<sup>17</sup>

As realted, persons whose culture discourages the open display of emotion may be in a firm presence, despite intense, internal feelings of distress and anxiety. This situation may cause denial of refugee status for failure of demonstrating a subjective fear of being persecuted (regardless of their actual risk).<sup>18</sup>

Similarly, this has potentially harmful outcomes for women from different cultures who may not "appear fearful" enough for refugee status decision-makers measuring emotional reaction against a Western male standard, and result in their exclusion from international protection even though they may have an objectively strong case.<sup>19</sup>

Another misleading can be caused by persecution itself which is admitted by the Handbook by suggesting to take the nature and degree of the applicant's "fear" into consideration, since some degree of mental disturbance is frequently found in persons who have been exposed to severe persecution.<sup>20</sup>

Again by the Handbook it is admitted that when it is necessary to determine the refugee status of a minor, problems may arise due to the difficulty of applying the criteria of "well-founded fear" in his case.<sup>21</sup> It is also noteworthy here that there is no special provision in the 1951 Convention regarding the refugee status of persons under age. The same definition of a refugee applies to all individuals, regardless of their age.

Examples may be reproduced. (Post-Traumatic Stres Disorder, Women, Mentally-Ill Persons etc.) But the main idea is not only the feeling of fear but also demonstration of it is subjective, and potentially this subjectiveness has the capacity to affect the decisions of determining the status of refugee which can be crucial sometimes.

For example, in the Australian Federal Court case of *Suleiman* decided the denial of refugee status:

"It 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

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<sup>16</sup> J. Hathaway, *Ibid.* 512.

<sup>17</sup> *Ibid.* 517.

<sup>18</sup> *Ibid.* 518.

<sup>19</sup> Elizabeth Adjin-Tettey, 'Reconsidering the Criteria for Assessing Well-Founded Fear in Refugee Law' , [1997-1998] 25 *Man. L.J.* 127, 131.

<sup>20</sup> Handbook, *Ibid.* para. 209.

<sup>21</sup> *Ibid.* para. 213.

to imagine how the question of the existence of a particular social 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."<sup>22</sup>

In this case, considering evidence indicative of his risk of persecution for that particular Convention reason is superseded by the failure of the applicant to voice his subjective fear of being persecuted on the grounds of social group membership effectively.

As the Suleiman discussion illustrates, because of the failure in demonstrating subjective fear, it is quite possible 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.<sup>23</sup> Again as a underlying consequence it may cause denying the good-faith principle of interpreting as determining this failure as an excuse too.

#### **SUGGESTIONS:**

There are some suggestions to prevent the shortcomings of subjectiveness which are developed by both implementers and doctrinaries.

Gaining information from where the applicant may be sought elsewhere, e.g. from friends, relatives and other persons closely acquainted with the applicant, or from his or her guardian instead of the applicant<sup>24</sup>, obtaining expert medical advice for mentally-ill applicants<sup>25</sup>, examining a person's preapplication conduct for indications of fear where the applicant has behaved in a way that seems inconsistent with the presence of fear<sup>26</sup> or objectifying the inquiry into subjective fear by asking whether a "reasonable person" would experience fear in the face of the risk identified<sup>27</sup> etc.

When observing these suggestions at a glance we can point out a number of shortcomings. If the decision makers try to gain information about the applicant from his or her social environment about his or her fear they will face to the fact that it is really rare that the applicant have guardians and very difficult issue to find and reach his or her social environment. Simply, he or she is an applicant because he or she has fled to be an applicant.

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<sup>22</sup> Suleiman v. Minister for Immigr. and Multicultural Aff., [2001] [FC.A.] 752.

<sup>23</sup> J. Hathaway, *Ibid.* 517.

<sup>24</sup> Handbook, *Ibid.* para. 210.

<sup>25</sup> *Ibid.* para. 211.

<sup>26</sup> J. Hathaway, *Ibid.* 525.

<sup>27</sup> *Ibid.* 525.

When trying to obtain a medical expert for determining the degree of fear of mentally-ill applicants it is an undeniable fact that such reports are expensive and not always available.<sup>28</sup> Also it is suggested by the Handbook according to the results of the medical examination 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.<sup>29</sup> In contrary where there are indications that the fear expressed by the applicant may not be based on actual experience or may be an exaggerated fear, it may be necessary, in arriving at a decision, to lay greater emphasis on the objective circumstances, rather than on the statements made by the applicant.<sup>30</sup>

As a good example to this approach The English Court of Appeal expresses an opinion when endorsing 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.<sup>31</sup>

This view means, in fact, a total denial of the necessity of the subjective element. Because when observing the situation in the opposite view it also means if objective elements are convincing, the decision-makers will be able to focus on the subjective element including attaching less weight on it. On the other hand if objective elements are not convincing there's no need to focus on subjective fear because of exaggerating. Both ways of thinking demonstrates how the subjective element is eliminated in practice.

As an example to the suggestion of examining a person's preapplication conduct for indications of fear where the applicant has behaved in a way that seems inconsistent with the presence of fear 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 refugee status at the first opportunity."<sup>32</sup>

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

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<sup>28</sup> Ibid. 521.

<sup>29</sup> Handbook, Ibid. para. 211.

<sup>30</sup> Ibid. para. 209.

<sup>31</sup> R. v. Sec'y of State for Home Dep't, Ex parte Ghaly, [1998] [E.W.H.C.] 621.

<sup>32</sup> Castillejos v. Can. (Minister of Citizenship and Immigr.) [1994] [Fed. Ct. Trial Div.] IMM 1950-94.



making a claim until they have learned something about the country's legal system related to refugee claims to minimize their risk of rejection.<sup>33</sup>

In this context it seems to be a reasonable suggestion that objectifying the inquiry into subjective fear by asking whether a "reasonable person" would experience fear in the face of the risk identified. 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.<sup>34</sup> In fact it's only another way to eliminate the subjective element of fear by putting it in the equation as a part of evaluating actual risk.

Consequently it seems to be a common concern which should be resulted from objections to these suggestions is, these suggestions may be helpful when considered only as part of the assessment of actual risk and when these factors are weighed together with all other evidence of risk.<sup>35</sup> In contrary reliance on a subjective element to particularize the inquiry into well-founded fear may result in the devaluation of evidence of real value to the assessment of actual risk of being persecuted.<sup>36</sup>

In fact, 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) which authorizes the cessation of refugee status without regard to an applicant's mental state. Hathaway suggests here that if it was intended by the article 1(A) that the test for well-founded fear requires a demonstration of both objective risk and subjective fear, it would logically be a condition which is necessary for cessation too.<sup>37</sup>

When the discussions leads us to the assessment of actual risk as an objective criteria we will face another question which includes subjectivity in itself :”according to who”?

#### **“WELL-FOUNDED” CRITERIA:**

The determination of whether an applicant's "fear"-in the sense of forward-looking expectation of risk-is, or is not, "well-founded", requires the state party assessing refugee status to determine whether there is a significant risk that the applicant may be persecuted.<sup>38</sup>

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<sup>33</sup> J. Hathaway, *Ibid.* 526.

<sup>34</sup> *Ibid.* 525.

<sup>35</sup> *Ibid.* 531.

<sup>36</sup> Third Colloquium on Challenges in International Refugee Law: The Michigan Guidelines on Well-Founded Fear, [2004-2005], 26 *Mich. J. Int'l L.* 495.

<sup>37</sup> J. Hathaway, *Ibid.* 541.

<sup>38</sup> Colloquium *Ibid.* 497.

The critical issue here is whether the claimant might be persecuted if returned to the country of origin. Within this context, there is no need to justify fears entertained by a claimant as there is objective evidence pointing to a risk of persecution. This ensures an element of uniformity in the system of refugee protection.<sup>39</sup>

The notion of "well-founded" suggests an objective inquiry into the actual risk that confronts a refugee claimant. A single objective assessment of risk finds support in the fact that a person might be granted Convention refugee status, even though he or she had not already been persecuted, but might be in risk of it if returned to the home country. In such situations, the grant of refugee status would be determined by the objective conditions in the country of origin, rather than any past persecution. It would also prevent the tendency of decision-makers' over reliance on past experiences to establish a genuine fear of persecution.<sup>40</sup> Since refugee status is a forward-looking solution, past persecution is not required to establish the need for protection, although it may be a good indication of why a person fears persecution.<sup>41</sup>

In *I.N.S. v. Cardoza-Fonseca*<sup>42</sup>, the United States Supreme Court stated that so long as an objective situation has been established by evidence, it need not be shown that the situation will probably result in persecution, but is enough that persecution is a reasonable possibility.

This line of argumentation is approved by the British House of Lords in the case *Sivakumaran*:

"...the general purpose of the convention is surely to afford protection and fair treatment to those for whom neither is available in their own country and does not extend to the allaying of fears not objectively justified, however reasonable these fears may appear from the point of view of the individual in question....Fear of persecution, in the sense of the convention, is not to be assimilated to a fear of instant personal danger arising out of an immediately presented predicament...The question is what might happen if he were there. Whether that might happen can only be determined by examining the actual state of affairs in that country."<sup>43</sup>

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<sup>39</sup> E. Adjin-Tettey, *Ibid.* 136.

<sup>40</sup> *Ibid.* 134.

<sup>41</sup> U.N. High Commissioner for Refugees, 'The International Protection of Refugees: Interpreting Article I of the 1951 Convention relating to the Status of Refugees', [Oct. 2001] 20 REFUGEE SURV. Q. para. 45

<sup>42</sup> *INS v. Cardozo-Fonseca* [1987] [U.S. Supr. Ct] 480 US 430, 431.

<sup>43</sup> *Regina v. Home Secretary, ex parte Sivakumaran* [1988] AC 958; [1987] UKHL 1; [1988] 1 All ER 193,196; [1988] Imm AR 147; [1988] 2 WLR 92; [2002] INLR 310 per Lord Keith of Kinkel

It follows then that while there need not be a probability that persecution will occur, there must be more than a minimal or mere possibility of the claimant being persecuted. In *Ponniah v. Canada (M.E.I.)* Madam Justice Desjardin noted that: "Good grounds or reasonable grounds is defined as occupying the field between upper and lower limits. It is less than 50 percent chance but more than a minimal-or mere possibility. There is no intermediate ground: what falls between the two limits is "good grounds." If the claimant... may face slightly more than a mere possibility of persecution, he had crossed the lower limit and made his case of good grounds for fearing persecution."<sup>44</sup>

In *Emnet v. Canada (M.E.I.)*<sup>45</sup> the claimant, an Ethiopian woman, had served as chair of a local woman's association under the former Mengistu regime. In upholding the IRB's decision on the absence of an objective risk of harm, the Federal Court noted that the likelihood of persecution occurring had been reduced and therefore the applicant did not have a well-founded fear, stating, "most of the ten thousand persons arrested following the fall of the Mengistu government had been released [and that] only five hundred were held in detention for political reasons." The position of the Court seems to suggest that it is unwilling to view a one in twenty risks as sufficient to meet the threshold for well-founded fear.

Of course there is not a totally true proportion here. Who can count a 1/10 risk of discrimination equal to a 1/20 risk of death? In this point it is reasonable as Goodwin-Gill notes that the degree of persecution and the degree of likelihood ought to be linked: the more serious the harm the individual fears, the less likely the risk of harm has to be in order to warrant refugee status.<sup>46</sup> Because when the probability is included in to the equation at the same time quantity of it is also added too.

As a general rule, the determination of whether a given risk amounts to a risk of "being persecuted" must enquire into the personal circumstances and characteristics of each applicant, recognizing that by virtue of such circumstances and characteristics some persons will experience different degrees of harm as the result of a common threat or action.<sup>47</sup>

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<sup>44</sup> *Ponniah v. Canada (M.E.I.)* [1991] (Fed. C.A.) 132 N.R. 32 at 34.

<sup>45</sup> *Emnet v. Canada (M.E.I.)* [1993] (F.C.T.D.) 855.

<sup>46</sup> Guy S. Goodwin-Gill, Jane McAdam, 'The Refugee in International Law' (3rd edn, Oxford University Press, Oxford 2007), 56.

<sup>47</sup> *Colloquium Ibid.* 501.

**CONCLUSION:**

International Law aims to protect all the people in need of protection which have justified reasons without distinction. 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 leaders in religious, political, or social causes, in a word, the ordinary person as well as the extraordinary one.”<sup>48</sup>

This aim puts a burden on implementers. The burden is “objectivity as possible”. Because of this burden all the instruments –firstly legal regulations- must prepare the suitable grounds for this aim.

As tried to be demonstrated in this paper, both “well-founded” and “fear” terms include subjectivity. When coping with this subjectiveness implementers must be aware of the fact that every case has its own facts. So at first, before trying to find common criteria or shaping a uniformity every applicant must be taken in to consideration with bringings of his or her own culture, own personality.

To do it it will be a useful start to acknowledge that the “fear” criteria shouldn’t be taken in the meaning of trepidation. But using the meaning of “forward-looking expectation of an actual risk” will be more objective. Of course when it is accepted as an including element of “well-founded” criteria. Because as mentioned previously, not only the feeling of fear but also demonstration of it is subjective, and potentially this subjectiveness has the capacity to affect the decisions of determining the status of refugee which can be crucial sometimes.

The criteria “well-founded” also includes subjectivity but less than “fear”. Thus it can be formulated by accepting the subjectivity in itself and constructing the equation by leaving to deal with this subjectivity to implementers after determining basic principles.

At this point it is a really useful suggestion that -as Goodwin-Gill stated- the degree of persecution and the degree of likelihood ought to be linked: the more serious the harm the individual fears, the less likely the risk of harm has to be in order to warrant refugee status.<sup>49</sup>

When the decision on determining the refugee status imagined as an equation according to this paper now there’s only one subjective element: the balance between the “degree of persecution” and the “degree of likelihood”. It is the essential need for a link to “Basic Human Rights Principles”. Within this approach -reliance on general human rights to establish the need for refugee protection- the burden on implementers will be reduced. Also it

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<sup>48</sup> Win v. Minister for Immigr. and Multicultural Aff., [2001] [F.C.A.] 132.

<sup>49</sup> G. Goodwin-Gill, *Ibid.* 56.

will provide reducing the burden on claimants which still needs proof for their fear of being persecution.<sup>50</sup>

#### BIBLIOGRAPHY:

##### Primary Sources:

U.N. Convention Relating to the Status of Refugees, July 28, 1951, 19 U.S.T. 6577, 189 U.N.T.S. 2545.

U.N. Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 8791.

New Zealand Refugee Status Appeals Authority (1999) [2000] NZLR 545 (Refugee Appeal No. 71427/99) para. 38.

Castillejos v. Can. (Minister of Citizenship and Immigr.) [1994] [Fed. Ct. Trial Div.]  
Del Valle v. INS, [1985] (9th Cir.)

Emnet v. Canada (M.E.I.) [1993] (F.C.T.D.)

INS v. Cardozo-Fonseca [1987] [U.S. Supr. Ct.]

Ponniah v. Canada (M.E.I.) [1991] (Fed. C.A.)

R. v. Sec'y of State for Home Dep't, Ex parte Ghaly, [1998] [E.W.H.C.]

Regina v. Home Secretary, ex parte Sivakumaran [1988] AC 958; [1987] UKHL 1; [1988] 1 All ER 193; [1988] Imm AR 147; [1988] 2 WLR 92; [2002] INLR 310

Suleiman v. Minister for Immigr. and Multicultural Aff., [2001] [F.C.A.]

Win v. Minister for Immigr. and Multicultural Aff., [2001] [F.C.A.]

U.N. High Commissioner for Refugees, 'The International Protection of Refugees: Interpreting Article I of the 1951 Convention relating to the Status of Refugees', [Oct. 2001] 20 REFUGEE SURV. Q.

##### Secondary Sources:

Adjin-Tettey, Elizabeth, 'Reconsidering the Criteria for Assessing Well-Founded Fear in Refugee Law' [1997-1998] 25 Man. L.J.

Carr, Bridgette Ann, 'We Don't Need to See Them Cry: Eliminating the Subjective Apprehension Element of the Well-Founded Fear Analysis for Child Refugee Applicants' [2005-2006] 33 Pepp. L. Rev.

Goodwin-Gill, Guy S., McAdam, Jane, 'The Refugee in International Law' (3rd edn, Oxford University Press, Oxford 2007)

Hathaway, James C., Hicks, William S., 'Is There a Subjective Element in the Refugee Convention's Requirement of "Well-Founded Fear?"', [2004-2005] 26 Mich. J. Int'l L.

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' (Here and after Handbook), U.N. Doc. Hcp/Ip/4/Eng/Rev.1 (1979, Reedited 1992)

Third Colloquium on Challenges in International Refugee Law: The Michigan Guidelines on Well-Founded Fear, [2004-2005], 26 Mich. J. Int'l L.

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<sup>50</sup> E. Adjin-Tettey, *Ibid.* 134.