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Yong-Gueico v. Canada (Minister of Citizenship & Immigration)
In The Matter of the Immigration Act, R.S.C. 1985, c. I-2 as amended;
In The Matter of a decision of the Convention Refugee Determination Division of the Immigration and Refugee Board regarding the claims to Convention Refugee Status of Juan Carlos **Yong-Gueico** (a.k.a. Juan Carlos **Yong Gueico),** Ana Maria Carrion Munoz, Stephanie Nicol Yong Carrion (a.k.a. Stephanie Yong Carrion), and Grace Ana Yong Carrion;
Juan Carlos **Yong-Gueico** (A.K.A. Juan Carlos **Yong Gueico**) Ana Maria Carrion Munoz Stephanie Nicol Yong Carrion (A.K.A. Stephanie Yong Carrion), Grace Ana Yong Carrion, Applicants and The Minister of Citizenship and Immigration, Respondent
Federal Court of Canada -- Trial Division
Cullen J.
Heard: June 26, 1997
Judgment: July 14, 1997
Docket: IMM-3413-96

Counsel: Mr. Lawrence Band, for the Applicant.

Mr. David Tyndale, for the Respondent.

Subject: Immigration

Aliens, Immigration and Citizenship --- Convention refugees -- Elements of Convention refugee status -- Protection of country of nationality -- Changes in country conditions

Applicants were refused Convention refugee status on grounds of changed country conditions and brought application for judicial review -- Application granted upon finding that tribunal had erred in failing to consider effect of s. 2(3) on applicants' case -- Tribunal has obligation to consider s. 2(3) even if applicants do not make submissions with regard to section -- Immigration Act, R.S.C. 1985, c. I-2, s. 2(3).

The applicants came from Chile. The principal male applicant's father had disappeared or been killed in 1973. His sister was raped, threatened with death, detained, beaten and tortured, and his aunt disappeared or was killed. Other siblings had had similar problems and had claimed and received Convention refugee status in Canada. The applicant had been arrested several times, detained, beaten, threatened with death, tortured, and accused of being a "Communist" and a terrorist.

The Convention Refugee Determination Division ("tribunal") found that applicant's testimony to be credible but determined that the applicants were not refugees because changes in the conditions in Chile were such that the applicants could not have a well-founded fear of persecution if they returned there.

The applicants applied for judicial review of the decision.

Held: The application was granted and the matter was referred to a differently constituted tribunal; a question

was certified.

Under s. 2(3) of the Immigration Act, a refugee claimant, who, because of a change in country conditions may no longer have a well-founded fear of persecution, may still be a Convention refugee and refuse to avail himself or herself of the protection of that country if there is a compelling reason for that person to do so. The section is applied only in exceptional circumstances. In this case, the tribunal did not consider s. 2(3) and the applicants' counsel made no submissions on the section.

Section 2(1) requires a tribunal to consider the cessation clauses in s. 2(2). Section 2(2)(e) refers to changed country conditions. Therefore, in order for a tribunal to give the full consideration of s. 2(2) that is required by the Act, it must also consider another provision that bears directly on s. 2(2) and limits its scope. When s. 2(2)(e) is engaged to determine a claimant's case, then s. 2(3) is also engaged. The tribunal must, in such a case, consider s. 2(3). Therefore, the tribunal in this case erred in failing to consider s. 2(3) and, in so doing, failed to exercise its jurisdiction. The failure of the applicants' counsel to point out the relevant evidence did not excuse the tribunal for overlooking it.

As question was certified regarding whether the Refugee Division has an obligation in law to consider the application of s. 2(3) if the issue is not raised at the hearing by the parties or by the Refugee Division and, if such an obligation exists, what is the nature and extent of that obligation.

Cases considered by Cullen J.:

> Ammery v. Canada (Secretary of State) (1994), 78 F.T.R. 73 (Fed. T.D.) -- referred to
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> Canada (Minister of Employment & Immigration) v. Obstoj, 93 D.L.R. (4th) 144, 142 N.R. 81, [1992] 2 F.C. 739 (Fed. C.A.) -- considered
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> Emnet v. Canada (Minister of Employment & Immigration) (August 27, 1993), Doc. 93-A-182 (Fed. T.D.) -- referred to
>
> Navarro v. Canada (Minister of Citizenship & Immigration) (December 20, 1994), Doc. A-1699-92 (Fed. T.D.) -- referred to
>
> Singh v. Canada (Secretary of State) (1994), 80 F.T.R. 132 (Fed. T.D.) -- referred to
>
> Yusuf v. Canada (Minister of Employment & Immigration) (1995), 179 N.R. 11 (Fed. C.A.) -- referred to

Statutes considered:

Immigration Act, R.S.C. 1985, c. I-2

> s. 2(1) "Convention Refugee" -- considered
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> s. 2(2) -- considered
>
> s. 2(2)(e) -- considered
>
> s. 2(3) -- considered

APPLICATION for judicial review of decision finding applicants not to be Convention refugees.

***Cullen J.*:**

1 This is an application for judicial review of a decision of the Convention Refugee Determination Division of the Immigration and Refugee Board [hereinafter, the "Tribunal"], dated August 26, 1996, wherein the applic-

ants were determined not to be Convention refugees.

2 The applicants request an Order that their case be reconsidered before a differently constituted panel of the Convention Refugee Determination Division.

The Facts

3 The facts in this case are not in dispute, and save for the relevant portions of the Tribunal's decision, need not be repeated here.

4 The principal male applicant [hereinafter, the "applicant"] had submitted evidence to the Tribunal which can be summarized briefly as follows. The applicant's father had disappeared or was killed in 1973. The applicant's sister was raped, an aunt through marriage also disappeared or was killed, his sister was threatened with death, detained, beaten and tortured. Other siblings had problems as well which resulted in them leaving Chile and claiming and receiving Convention refugee status in Canada. The applicant, himself, was on several occasions arrested, detained, beaten, threatened with death, tortured, cut with a knife, punched, kicked, abducted, accused of being a "Communist" and terrorist, forced into hiding, separated from his wife and child, and frequently harassed in his employment by the authorities. In 1994, the applicant's home was broken into and thoroughly searched, but nothing was taken.

5 The Tribunal accepted the principal applicant's testimony with respect to his experiences in Chile as credible (the female applicant and two minor applicants based their claim on that of the principal male applicant).

6 However, the Tribunal determined the applicants not to be refugees because: 1) the applicants did not show a subjective fear of persecution because they delayed making their claims until three weeks after they arrived in Canada; 2) the country conditions have changed in Chile to such an extent that the applicants could not have a well-founded fear of persecution there.

The Issue

7 In my view, only one issue is determinative of this case, and it consists of the finding of changed country conditions and its interplay with subsection 2(3) of the *Act*. Did the Tribunal err in not considering this provision in the applicants' case?

Discussion

Changed country conditions and subsection 2(3)

8 *The Tribunal's decision*: The thrust of the Tribunal's decision concerns a change of circumstances in Chile. The Tribunal determined that the changes in country conditions that have taken place in Chile have been sufficient to affect the well-foundedness of the applicants' fear of persecution should they be returned there.

9 The applicant's then-counsel had made no submissions regarding subsection 2(3) of the *Act* at the hearing before the Tribunal. The Tribunal's decision makes no reference to subsection 2(3) of the *Act*. However, the applicant's current counsel has made substantial submissions to this Court regarding this provision.

10 *The applicants' submissions*: Counsel to the applicant submits that on the basis of the record in this case, the applicants have established a cogent factual foundation which irresistibly supports a finding that they have "compelling reasons" within the meaning of subsection 2(3) of the *Act*, with the result that the Board should have found them to be Convention refugees. Its failure to do so constitutes an error of law.

11 *The case law*: The Federal Court of Appeal has spoken to changes in country conditions in *Yusuf v. Canada (Minister of Employment & Immigration)* (January 9, 1995), Doc. A-130-92 (Fed. C.A.) [now reported at (1995), 179 N.R. 11 (Fed. C.A.)] thus:

> ...A change in the political situation in a claimant's country of origin is only relevant if it may help in determining whether or not there is, at the date of the hearing, a reasonable and objectively foreseeable possibility that the claimant will be persecuted in the event of return there. That is an issue of factual determination and there is no separate legal "test" by which any alleged change in circumstances must be measured. The use of words such as "meaningful" "effective" or "durable" is only helpful if one keeps clearly in mind that the only question, and therefor the only test, is that derived from the definition of Convention refugee in section 2 of the *Act*: does the claimant now have a well-founded fear of persecution?

12 The Courts have consistently held that the changes in country conditions must be assessed according to their impact on the claimant's situation.

13 *The legislation*: A finding by the Tribunal that there have been changes in country conditions does not finally determine a claim to Convention refugee status. This is explained in subsection 2(3) of the *Act*, which reads:

> (3) A person does not cease to be a Convention refugee by virtue of paragraph 2(e) if the person establishes that there are compelling reasons arising out of any previous persecution for refusing to avail himself of the protection of the country that the person left, or outside of which the person remained, by reason of fear of persecution.

This subsection is substantially similar to paragraph 136 of the United Nations *Handbook on Procedure and Criteria for Determining Refugee Status* (1979) Geneva: Office of the United Nations High Commissioner for Refugees:

> [The clause] deals with the special situation where a person may have been subjected to very serious persecution in the past and will not therefore cease to be a refugee, even if fundamental changes have occurred in his country of origin... It is frequently recognized that a person who, or whose family, has suffered under atrocious forms of persecution should not be expected to repatriate. Even though there may have been a change of regime in his country, this may not always produce a complete change in the attitude of the population, nor, in view of his past experience, in the mind of the refugee.

14 If a refugee claimant, who, because of a change in country conditions, may no longer have a well-founded fear of persecution for a Convention reason, that claimant may nonetheless be a Convention refugee and refuse to avail her-or himself of the protection of the claimant's country if there are *compelling reasons* for that person not to do so. This is the effect of subsection 2(3) of the Convention refugee definition in the *Immigration Act*. If there are such compelling reasons, then, pursuant to subsection 2(3), the cessation clause of the definition, paragraph (2)(e), will not be operative and the change of country conditions will not thereby defeat the person's claim for Convention refugee status.

15 The sparse case law on subsection 2(3) indicates that it is to be applied only in exceptional circumstances. The key decision on point is that of Hugessen, J. in *Canada (Minister of Employment & Immigration) v. Obstoj* (May 11, 1992), Doc. A-1109091 (Fed. C.A.) [now reported at (1992), 93 D.L.R. (4th) 144 (Fed. C.A.)]. Hugessen, J. stated that subsection 2(3) applies:

> as requiring Canadian authorities to give recognition of refugee status on humanitarian grounds to this special and limited category of persons, i.e., those who have suffered such appalling persecution that their experience alone is a compelling reason not to return them, even though they may no longer have any reason to fear further persecution.

However, Hugessen, J. further commented that, "The exceptional circumstances envisaged by subsection 2(3) must surely apply to only a tiny minority of present day claimants."

16 *Analysis*: Was the Tribunal duty bound to consider and conclude whether or not there were "compelling reasons" within the meaning of subsection 2(3) in the applicants' case?

17 The answer to this question lies in the Convention refugee definition as found in the *Act*. Subsection 2(1) defines the term Convention refugee. The definition has two parts, and reads as follows:

> "Convention refugee" means any person who
>
> (a) by reason of a well-founded fear of persecution for reasons of race, religion, nationality, membership in a particular social group or political opinion,
>
> (i) is outside the country of the person's nationality and is unable or, by reason of that fear, is unwilling to avail himself of the protection of that country, or
>
> (ii) not having a country of nationality, is outside the country of the person's former habitual residence and is unable or, by reason of that fear, is unwilling to return to that country, *and*
>
> (b) *has not ceased to be a Convention refugee by virtue of subsection* (*2*),
>
> [my emphasis]

Paragraph (a) of the definition contains the criteria that have to be established in order to fall within the definition. Paragraph (b) sets out one additional criteria that must be taken into consideration, which criteria is subsection 2(2).

18 Subsection 2(2) of the *Act* sets out the circumstances under which one *ceases* to be a Convention refugee. The portion of the provision relevant to this case is paragraph (e), which reads as follows:

> (e) the reasons for the person's fear of persecution in the country that the person left, or outside of which the person remained, cease to exist.

It is thus pursuant to the authority granted under paragraph 2(2)(e) that a Tribunal may determine that, due to changed country conditions, a person can no longer be a Convention refugee. Although the Tribunal did not specifically refer to this provision in its reasons, paragraph 2(2)(e) is the authority underpinning those reasons.

19 However, subsection 2(3), referred to earlier, can come into play to cancel the effect of paragraph 2(2)(e). Subsection 2(3) requires the refugee claimant to establish compelling reasons arising out of past persecution, that effectively negate the positive impact of changed country conditions in that particular claimant's circumstances. Must the Tribunal consider subsection 2(3) absent submissions from the claimant specifically on that provision? This is not an obvious point, even though the provision clearly places the onus on the claimant to make her or his case.

20 As a matter of statutory interpretation, subsection 2(3) should be looked at in the context of the whole Convention refugee definition as set out in the *Act*. The definition in subsection 2(1) requires the Tribunal to consider the cessation clauses in subsection 2(2). Paragraph 2(2)(e) refers to changed country conditions. It follows that, in order for the Tribunal to give the full consideration of subsection 2(2) that is required by statute, the Tribunal must also consider another provision of the *Act* that bears directly on subsection 2(2), and limits its scope. Therefore, when paragraph 2(2)(e) is engaged to determine a refugee claimant's case, then so too is subsection 2(3). The Tribunal must, in such a case, consider the effect of subsection 2(3) on the case before it. Otherwise, the Tribunal has declined to exercise its jurisdiction, and the result is an error in law.

21 The difficulty in this conclusion, however, is the positive onus placed on the refugee claimant to establish "compelling reasons" in subsection 2(3). If a claimant does not speak specifically to this point, how is this reconciled with the duty of the Tribunal to consider subsection 2(3)?

22 Counsel to the applicants submits that the Tribunal is duty bound to make the relevant determinations regardless of whether the issue is raised by the applicant or not. A ground not argued must be considered by the Board, if raised by the facts.[FN1] This issue was raised by the facts, and the Tribunal ought to have considered it. Counsel submits that the failure of the then-counsel to point out the relevant evidence does not excuse the Tribunal for overlooking it.

23 I agree.

24 The Tribunal failed to consider the "compelling reasons" aspect which forms an integral part of the Convention refugee definition. Therefore, the Tribunal failed to exercise its jurisdiction. This is a reviewable error in law, sufficient to quash the decision of the Tribunal in this case.

25 Given my conclusions regarding the application of subsection 2(3), it is unnecessary to make a determination on the Tribunal's finding regarding the applicants' 24-day delay in filing a refugee claim in Canada. The most important thing to be determined -- or re-determined -- is whether the applicant's evidence indicates past persecution, and if it does, whether there are compelling reasons arising out of that past persecution, by reason of fear of persecution, as to why the applicants should not be repatriated. The delay in filing a refugee claim is but one of the factors to be taken into consideration in such a re-determination.

26 There is a further point that ought to be addressed here. There is nothing in the Tribunal's decision that refers to the documentary evidence supporting the position of the applicants. There is no explanation at all as to why the applicants' documentary evidence is not accepted. Of course, there is no requirement for the Tribunal to refer to every piece of documentary evidence before it. But, to make no reference at all to documentary evidence supportive of the applicants' position looks rather suspicious. It is well known that justice must not only be done, but must also be *seen* to be done.

Conclusion

27 This case initially had no documents from the respondent. A Memorandum of Argument was filed at the hearing of this matter. This is not the preferable way of going about a judicial review.

28 That said, the applicants have made out their case on the merits. There was no problem with the credibility of the applicant's evidence at the hearing before the Tribunal. The applicant's evidence laid a foundation that strongly pointed to past persecution. The Tribunal determined that the applicants could go home because country conditions had changed. However, in coming to its conclusion concerning the applicants' fear of persecution in light of those changed country conditions, the Tribunal neglected to consider the impact of subsection 2(3) on the applicants' case. The Tribunal made no finding as to past persecution, and whether compelling reasons arose out of it so as to negate the impact of the changed country conditions. But, the very definition of Convention refugee contained in the *Act* required the Tribunal to do just that. The Tribunal, therefore, refused to exercise its jurisdiction, and the resultant decision contains a serious error of law. To my mind, this is a "text-book case" to refer back to the CRDD for re-determination.

29 Accordingly, I would grant an Order referring this case back to a differently constituted Tribunal for re-determination on the impact of subsection 2(3), taking into account the reasons as set out in this decision.

30 This application is allowed.

31 At the conclusion of the hearing, both counsel wished to submit a question for certification, but had not yet worked out the final wording. I gave them the opportunity to submit the question in writing at a later date. Each counsel submitted a different question on the same subject matter. After careful consideration of both questions, I conclude that they are substantially the same in content. However, the wording of the respondent's question is more concise and has a more general application than that of the applicant. Therefore, I have chosen the respondent's question as the one that should be certified in this case.

32 I hereby certify the following question as a serious question of general importance:

> Does the Refugee Division have an obligation in law to consider the application of Section 2(3) of the *Immigration Act* if the issue is not raised at the hearing by the parties to the hearing or by the Refugee Division? If so, what is the nature and extent of the obligation?

Application granted.

FN1. *Emnet v. Canada (Minister of Employment and Immigration)* (August 27, 1993), Doc. 93-A-182 (Fed. T.D.); *Singh v. Canada (Secretary of State)* (June 14, 1994), Doc. IMM-3591-93 (Fed. T.D.) [now reported at (1994), 80 F.T.R. 132 (Fed. T.D.)]; *Navarro v. Canada (Minister of Citizenship & Immigration)* (December 20, 1994), Doc. A-1699-92 (Fed. T.D.); *Ammery v. Canada (Secretary of State)* (May 11, 1994), Doc. IMM-5405-93 (Fed. T.D.) [now reported at (1994), 78 F.T.R. 73 (Fed. T.D.)].

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