IMM-3305-96

MONTRÉAL, QUEBEC, the 3rd day of October 1997

PRESENT: THE HONOURABLE MR. JUSTICE ALLAN LUTFY

BEFORE:

CARLOS HUMBERO GONZALES FARIAS,
YAZMINA FRANCIS ARANCIBIA LOYOLA,

Applicants

- and -

THE MINISTER OF CITIZENSHIP AND IMMIGRATION,

Respondent

ORDER

The application for judicial review is allowed. The decision of the Refugee Division is quashed and the matter is sent back to another panel for rehearing and redetermination.

Allan Lutfy
Judge

Certified true translation

C. Delon, LL.L.

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REASONS FOR ORDER

LUTFY J.

The applicants were members of a "neighbours' association", a group of political dissidents in the suburbs of Santiago, Chile, and eventually were among its leading organizers.

In April 1994, two of their colleagues were arrested by the police. One was found in a coma and hemorrhaging internally as a result of blows to his head and chest. He died a few hours later.

In July 1994, the male applicant was arrested during an altercation between some young people in the neighbourhood and the security forces. He was held, beaten and freed three days later. Surveillance of the neighbourhood by the security forces was stepped up. The police stopped other demonstrations. The applicants are convinced that the police station was protecting drug distributors and vendors in the area.

In June 1995, the applicants sought their fellow citizens' support in order to ask the senior authorities in Santiago to dismantle the neighbourhood police station. Again, the applicants were arrested, interrogated, beaten and harassed. They were freed the day following their arrest. Two days later the applicants went to a radio station to publicly denounce the conduct of the police officers. According to their Personal Information Form, the applicants made the following statements:

> [*Translation*] We were the first to denounce the sale of drugs in our neighbourhood. We especially denounced the complicity of the security forces in the area in this matter.... We denounced the local *carabineros* as being responsible for torture, arbitrary detention, assaults against the people, etc. We openly asked that the central government put an end to the institutional corruption and the failure to prosecute the armed groups that act within the country as if Chile was their personal property. We asked that the people be heard and that the police station in question be shut down. We held the authorities accountable for any violence to our persons and to the neighbours in the area.

In the hours following this denunciation, the police searched for the applicants and one of their colleagues. They found the latter, took him to the police station and beat him. The applicants think he has now disappeared. In late June 1995, they requested refugee status in Canada.

During the hearing, the members of the Refugee Division asked no questions about these events. After reproducing the applicants' Personal Information Forms over eight of the nine pages in its decision, and making no comment concerning their credibility, the Refugee Division concludes that the applicants are not Convention refugees. The reasons for this decision are expressed rather briefly:

> [*Translation*]
> We pointed out that in Chile the right of association is allowed, as are free elections. The abuses of the *carabineros* have been declared, some have even been dismissed and one can also request the protection of the authorities if one feels threatened.
>
> The gentleman tells us he requested protection for the neighbours' association whose interests he was defending, but when the time came to do so for him he did not do so. He took the necessary steps to enforce the rules and protect the needs of this association. He says he is a victim of reprehensible acts but he never acted accordingly. How can he criticize the authorities for not having protected him if he did not request this protection? Furthermore, we have reason to question his fear of persecution, given that no step was taken to get the Chilean authorities to protect him, while the documentation shows us that at a number of levels protection may be granted to individuals who need it.
>
> We think that the gentleman has not discharged the burden imposed on him by law to demonstrate to us that he has a reasonable fear of being persecuted were he to return to Chile, and the same applies to the female applicant, who bases her claim on that of her husband.[1]

In *Canada (Attorney General) v. Ward*, [1993] 2 S.C.R. 689, the Supreme Court of Canada established the guidelines for demonstrating a state's inability to protect its nationals and the reasonableness of the refusal by the refugee status claimant to actually solicit such protection. La Forest J. stated, at pages 724-26:

> . . . only in situations in which state protection "might reasonably have been forthcoming", will the claimant's failure to approach the state for protection defeat his claim. Put another way, the claimant will not meet the definition of "Convention refugee" where it is objectively unreasonable for the claimant not to have sought the protection of his home authorities; otherwise, the claimant need not literally approach the state.

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[1]The Refugee Division did not take any account of the answers to their own questions to the effect that the applicants are not husband and wife or common law spouses.

> . . . clear and convincing confirmation of a state's inability to protect must be provided. For example, a claimant might advance testimony of similarly situated individuals let down by the state protection arrangement or the claimant's testimony of past personal incidents in which state protection did not materialize.
>
> . . .
>
> A subjective fear of persecution combined with state inability to protect the claimant creates a presumption that the fear is well-founded. The danger that this presumption will operate too broadly is tempered by a requirement that clear and convincing proof of a state's inability to protect must be advanced.

The Refugee Division did not rule on the applicants' credibility. Accordingly, the events they related must be taken as proved for the purposes of judicial review. Judging by their version, the applicants established the death and disappearance of two of their fellow dissidents in the wake of police intervention. The applicants and their colleagues were victims of persecution by state agents. They made certain approaches to the police authorities and on the public airwaves without positive result. On the contrary, the threats and police intervention continued.

In my opinion, in accepting the applicants' credibility, the Division had to explain the additional concrete steps the applicants should, in its opinion, have taken in order to obtain state protection. In this case the agents of persecution are state agents, which was not the situation in *Ward*, *supra*. The Refugee Division criticizes the applicants for failing to make further approaches to the same state apparatus that was responsible for the agents of persecution without explaining, either at the hearing or in its decision what methods were objectively and reasonably available to them. The Refugee Division's omission in this regard requires the intervention of this Court.

In *Mehterian*, [1992] F.C.J. no. 545, the Court of Appeal concluded:

> Subsection 69.1(11) of the *Immigration Act* requires that the Refugee Division "give written reasons" for any decision against the claimant. If this obligation is to be met, the reasons must be sufficiently clear, precise and intelligible that the claimant may know why his claim has failed and decide whether to seek leave to appeal, where necessary.

In the case at bar, the reasons are somewhat more fleshed out, but not enough to meet the threshold laid down by the Court of Appeal. Furthermore, we would have more clearly understood these reasons if the further steps required by the Refugee Division had been discussed at the hearing.

For these reasons, this application for judicial review will be allowed. The decision of the Refugee Division is quashed and the matter is sent back to another panel for rehearing and redetermination.

The parties did not suggest that this matter raises a serious issue of general importance.

Allan Lutfy
Judge

Montréal, Quebec
October 3, 1997

Certified true translation

C. Delon, LL.L.

Federal Court of Canada

File No. IMM-3305-96

BETWEEN

CARLOS HUMBERO GONZALES FARIAS ET AL.,

Applicants

- and -

THE MINISTER OF CITIZENSHIP AND IMMIGRATION,

Respondent

REASONS FOR ORDER

FEDERAL COURT OF CANADA

NAMES OF COUNSEL AND SOLICITORS OF RECORD

FILE NO. IMM-3305-96

STYLE:CARLOS HUMBERO GONZALES FARIAS,
YAZMINA FRANCIS ARANCIBIA LOYOLA,

Applicants

AND:

THE MINISTER OF CITIZENSHIP AND IMMIGRATION,

Respondent

PLACE OF HEARING:Montréal, Quebec

DATE OF HEARING:September 29, 1997

REASONS FOR ORDER OF LUTFY J.

DATED:October 3, 1997

APPEARANCES:

Marie-Josée Houlefor the applicants

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SOLICITORS OF RECORD:

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