



RPD File No. / N° de dossier de SPR : VB1-02022

Private Proceeding / Huis clos

Reasons and Decision – Motifs et décision

Claimant(s)	XXXXXX XXXXX	Demandeur(e)(s) d'asile
Date(s) of Hearing	13 January 2012	Date(s) de l'audience
Place of Hearing	Vancouver, BC	Lieu de l'audience
Date of Decision	13 February 2012	Date de la décision
Panel	Colleen Zuk	Tribunal
Counsel for the Claimant(s)	N/A	Conseil(s) du / de la / des demandeur(e)(s) d'asile
Tribunal Officer	N/A	Agent(e) des tribunaux
Designated Representative(s)	N/A	Représentant(e)(s) Désigné(e)(s)
Counsel for the Minister	N/A	Conseil du ministre

REASONS FOR DECISION

[1] **XXXXXX XXXXXX**, (the “claimant”), is a citizen of Cuba and a permanent resident of Chile. He claims refugee protection pursuant to ss. 96 and 97(1) of the *Immigration and Refugee Protection Act* (the “Act”).¹

DETERMINATION

[2] I find that **XXXXXX XXXXXX** is excluded from the definition of Convention Refugee or a person in need of protection pursuant to Article 1E of the Convention.²

IDENTITY

[3] The claimant’s identity as a national of Cuba and permanent resident of Chile is established by his testimony and the supporting documentation filed: passport (Cuban); copy of his permanent resident ID card (Chile).³

ALLEGATIONS⁴

[4] On **XXXXXX**, 2009, the claimant was removed from his job because of his politics and what he thought about Cuban Government procedures. He worked in a **XXXXXX**. The Cuban government pays particular attention to the **XXXXXX** due to contact with foreigners.

¹ *Immigration and Refugee Protection Act*, S.C. 2001, c. 27.

² Sections E of Article 1 of The United Nations Convention Relating to the Status of Refugees
1.E. This Convention shall not apply to a person who is recognized by the competent authorities of the country in which he has taken residence as having the rights and obligations which are attached to the possession of the nationality of that country.

³ Exhibit 2, Chilean PR ID card page 38; Cuban Passport pages 44 to 63.

⁴ Exhibit 1, Personal Information Form completed by the claimant – summary of.

[5] Following his removal from his job, the claimant tried to leave Cuba via boat to the U.S. but was caught by the police and he was held for five days from XXXXXX to XXXXXX, 2009 due to his political beliefs. No charges were laid against him.

[6] He met Mr. XXXXXX, a Cuban with residence in Chile, who offered him a visa for Chile for XXXXXX USD. Though he knew it was wrong to use a document obtained in that fashion, the claimant left Cuba on XXXXXX, 2009 and arrived in Chile on XXXXXX, 2009.

[7] The claimant got a job and permanent residence status in Chile, but then the Chilean immigration authorities discovered that corrupted officers in the Chilean embassy in Cuba were selling illegal visas to Cuban citizens and they started searching for all Cubans that got into the country with illegal visas. Some escaped but most got caught and were treated poorly with respect to human rights. Their papers were removed (sic) and they could not apply for jobs, obtain official identification or medical assistance. The same would have happened to the claimant so he had to escape Chile as well.

[8] While in Chile he obtained a Canadian visitor's visa, valid for entry from XXXXXX to XXXXXX, 2011.

[9] He left Chile on XXXXXX, 2011 and returned to Cuba from XXXXXX to XXXXXX, 2011, after having obtained a re-entry permit valid XXXXXX, 2011 to XXXXXX, 2014. He returned to Cuba even though he knew he was at risk for having left on a fake visa, but he had not seen his mother in two years. During this time he was a citizen without rights in Cuba because for all Cubans who leave the country with a visa and are absent for more than 11 months, they are considered immigrants and lose all property and rights as Cuban citizens. To return they must ask for special permission that is only granted if they have no criminal record, and it is only granted for visiting, not for residing.

[10] The claimant left Cuba on XXXXXX, 2011, and flew to Canada, arriving in Canada the same day. He disposed of his Chilean permanent resident card in Havana, Cuba on XXXXXX,

2011. He claimed refugee protection on June 14, 2011, against both Cuba and Chile and indicates that he is now stateless. He fears he will suffer inhumane treatment if returned to Cuba due to his political beliefs, and equally he will suffer inhumane treatment if he is returned to Chile and is found to have obtained permanent residency status after entering Chile on a visa that he obtained by fraudulent means.

ANALYSIS

[11] The determinative issue is exclusion in the putative 1 E country.

Exclusion – 1 E

[12] There is *prima facie* evidence that the claimant has status similar to citizenship in Chile based on the claimant's admission that he obtained PR status in Chile and as corroborated by his application for a temporary resident visa to Canada where he indicated that he had PR status in Chile and provided a copy of his permanent residency card for Chile.⁵ Though the claimant no longer has his permanent resident card according to his Personal Information Form (PIF) because he disposed of it in Havana the day he flew to Canada, there is evidence, apart from his own admission, that it did exist at the time when he applied for his Temporary Resident Visa (TRV) to Canada.⁶ It was issued on XXXXXX, 2010 and expires on XXXXXX, 2015.

[13] The Minister was notified of a possible 1E exclusion issue⁷ and a representative signaled his intent to participate on exclusion issues Article 1E and 1F(b) of the *United Nations Convention Relating to the Status of Refugees*.⁸ One day before the hearing the Immigration and Refugee Board (the "Board") was advised that the Minister's representative no longer intended to intervene due to an urgent matter and no Minister's counsel was available.⁹

⁵ Exhibit 3, form IMM-5257, answer to question 7.

⁶ Exhibit 3.

⁷ Exhibit 8, sent XXXXXX, 2011 (previously sent but not on the file).

⁸ Exhibit 9, received January 10, 2012, *UN 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*, January 1992.

[14] The claimant seeks protection against the country of Chile because he obtained an entry visa to Chile by fraudulent means and believes he will suffer treatment amounting to persecution for having done so.

[15] At the hearing the claimant sought to submit further evidence, namely information regarding a Cuban individual in Chile who was being investigated due to having obtained an entry visa from Mr. **XXXXXX**. The claimant was not represented. I accepted the new evidence (Exhibits 11 and 12), and allowed him to provide post-hearing translations of these documents, which I have entered as Exhibit 13.

Does the claimant have status, substantially similar to that of its nationals in Chile?

[16] The Federal Court of Appeal's decision in *Zeng*¹⁰ guides me in assessing whether the claimant has status in Chile. When there is *prima facie* evidence of permanent residence status, the Courts have imposed an onus on the claimant to establish whether or not that status was lost.

[17] The claimant entered into an agreement to pay Mr. **XXXXXX** \$ **XXXXXX** USD to obtain a Chilean visa for him. This is the name provided in his PIF; however, during testimony he provided the name **XXXXXX XXXXXX**, which corresponds to the name given in a letter later submitted by the claimant as evidence that this person was being investigated.¹¹ He did not explain why the full name never appeared in his PIF and there is no way to corroborate that the Mr. **XXXXXX** he referred to in his PIF is the Mr. **XXXXXX XXXXXX** referred to in the news articles. Moreover, an article in Spanish dated May 4, 2010 (or April 5, 2010) submitted by the claimant along with his PIF identifies the individual obtaining fake visas as **XXXXXX XXXXXX** (50).

[18] I will accept without deciding the credibility of his allegation that the person he obtained his visa from is the person named in the news articles.

⁹ Exhibit 10, received January 12, 2012.

¹⁰ *M.C.I v. Zeng, Guanqiu*, May 2010 FCA 118.

¹¹ Exhibit 5, page 1.

[19] According to testimony, Mr. XXXXXX told him he could get the claimant a legal one year TRV and that he had a connection inside the consulate. After handing over his genuine passport, Mr. XXXXXX showed up at his house three days later with the claimant's passport, the Chilean visa

inside, and two letters that proved he was allowed to enter into Chile. To the claimant's understanding, this process would normally take six months if one was married to a Chilean or had family in Chile. Also, under normal visa application procedures, he would have to go to the Consulate, get a form to fill out and submit it. However, when he handed over his passport to Mr. XXXXXX, he did not give any personal details to Mr. XXXXXX or supply any forms.

[20] He received the passport and visa on XXXXXX, 2009. Mr. XXXXXX told the claimant to tell the Chilean immigration officials when entering Chile that he had contract work in Chile, but he was not supplied with any evidence or documents indicating that he had a job waiting for him in Chile. According to testimony, he believed the Chilean visa was legitimate, but after arriving in Chile he noticed that it was not. Conversely, in the letter he supplied to the Board, at the time he purchased the entry visa from XXXXXX, the person who facilitated getting his visa, he was told that what makes the visas fake is the supposed authorized signature and the official stamp shown are not real (sic). He was also told that in some cases the visas were not registered in official records at all.¹²

[21] The claimant married his long-time girlfriend on XXXXXX, 2009, and left Cuba for Chile via air on XXXXXX, 2009 with a valid Cuban exit visa allowing him to leave the country. His intention was to bring his wife over to Chile once he was settled in. Upon arrival in Chile, he had to give one letter to Customs and one to the International Police the next day. At the Civil Registry they took his letter, his picture and his fingerprints. He paid XXXXXX Chilean pesos. He does not recall if he had to give them any identity documents and possibly had to show them his passport. He was given a coupon and told to come back in 20 days to obtain his temporary residency card. He did return to the Civil Registry 20 days later and obtained the card.

¹² Exhibit 5, page 1.

[22] Approximately eight months after obtaining his temporary residency card he applied for permanent residency. To his understanding one had to apply three months before the temporary card's expiration and he thought he applied four months prior to its expiration. He downloaded the application from the internet, completed it with the personal details as required and submitted the required documentation. The claimant did not retain any copies of what documentation was provided in his permanent residence application. By the time of his application for PR status, he had been working at a **XXXXXX** in Chile and they sponsored his application, providing a letter for his application, along with a copy of the taxes that had been paid. The claimant also informed the Chilean authorities on his application of his marital status, though he did not supply proof of his marriage. A criminal check was done by the Civil Register.

[23] In order to obtain his Permanent Resident Card, he had to report to the Immigration Office and show his passport. They wrote something down and gave him a coupon. He then had to go to the International Police for a Travel Certificate, which he obtained, and then returned it to the Immigration Office. They gave him a document to take to the Civil Register, where he showed them his temporary card. At the Civil Register they took his picture and collected from him a fee of **XXXXXX** Chilean pesos. They gave him another coupon which allowed him to return in 20 days to obtain his Permanent Resident Card. He obtained the card by picking it up in person, four months after applying for it. With the card was supplied a letter informing him of his rights as a permanent resident: the right to work, access to medical care, etc. however, he threw these papers away and has not provided further evidence of his rights to the Board.

[24] Aside from what transpired regarding how the claimant obtained the entry visa to Chile, at no time did he provide fraudulent information to the Chilean government.

[25] The process the claimant described going through once he entered Chile and what he had to do to obtain a Temporary Resident Card mirrors that described in the documentary evidence. As well, the process he went through in order to obtain Permanent Resident status in Chile is also

mirrored in the independent documentary evidence, with the exception that an applicant is required to submit a copy of the marriage certificate and original birth certificate of the spouse.¹³

[26] The claimant is a divorced 35 year old male. The divorce was officially granted on **XXXXX**, 2011, for which Divorce for Just Cause was filed in 2010. The claimant had been served notice of the proceedings but did not respond within the designated time frame and did not appear for a scheduled public hearing.¹⁴ According to testimony, his wife initiated divorce in **XXXXX** 2010. As I do not know what exactly was put in his permanent resident application in terms of martial status (e.g. married, separated, etc.) and that application is not before me as evidence, I make no finding on the accuracy or legitimacy of the claimant's permanent residence status application due to the lack of provision of marriage certificate.

[27] The claimant's Chilean TRV was issued **XXXXX**, 2009. Assuming the claimant is correct in stating that he applied for permanent residence status four months prior to his Chilean TRV expiring, then he would have applied for permanent residence status in the month of **XXXXX** 2010. According to the letter provided to the Board by the claimant, the scandal pertaining to the fake immigration visas broke out prior to the claimant applying for and receiving his permanent residency card for Chile.¹⁵ He began to panic because the Chilean authorities were actively locating all the Cubans who had entered Chile with this type of visa. However, according to testimony he did not learn about the problems with the visas until **XXXXX** 2011 through the internet and television. Still, at least one of the news articles provided by the claimant reporting on the scandal is dated September 7, 2010.¹⁶

[28] The claimant's permanent residence card was issued effective **XXXXX**, 2010. Therefore, on a balance of probabilities and given the 2010 date of the news article in evidence, I find the Chilean authorities were aware of the ill-issued visas to Cubans prior to the claimant obtaining permanent residence status, and that investigations into such visas began prior to the claimant's

¹³ Exhibit 4, National Documentation Package (NDP), Chile, 29 April 2011, Item 3.2, CHL103411.FE. 2 March 2010. The procedure that a Chilean citizen's spouse with foreign citizenship must follow in order to obtain temporary or permanent residence in Chile.

¹⁴ Exhibit 5, pages 17 and 18.

¹⁵ Exhibit 5, page 1.

¹⁶ Exhibit 5, pages 4 – 8.

permanent residence status being completely processed. I also find, on a balance of probabilities that the claimant knew of the scandal prior to **XXXXXX** 2011 and prior to receiving his permanent residence status.

[29] To his knowledge, the Chilean authorities have never questioned the claimant's entry visa or his TRV at any time during any process. They also have not attempted to contact the claimant regarding his duly acquired permanent residence status, nor have they instigated removal proceedings against him, despite the several steps he went through to obtain this status. Based on the evidence before me, I find that the claimant underwent two distinct processes: entry into Chile and obtaining permanent resident status. On a balance of probabilities, I find that even if his entry visa was improperly obtained through a corrupt Chilean immigration official based in Cuba, he subsequently went through the correct processing for obtaining permanent resident status in Chile, and his permanent residence application was scrutinized by successive immigration and police authorities such that he met the Chilean requirements for obtaining permanent residence status. I therefore find on a balance of probabilities that the claimant obtained PR status in Chile.

[30] The Federal Court of Appeal in *Zeng* determined that when considering whether a claimant has PR status that will result in exclusion, the relevant factors of that status at the time of the hearing (my emphasis) must be analyzed.¹⁷ The claimant's PR card was issued on **XXXXXX**, 2010 and expires on **XXXXXX**, 2015. According to testimony, if he left Chile and was absent for more than one year, he would lose his permanent residency card. On a balance of probabilities, I find that at the time of applying for admission to Canada, at the time of the claimant's entry into Canada, and at the time of his refugee hearing, the claimant still had permanent residence status in Chile, the putative Article 1 E country. As the claimant left Chile on **XXXXXX**, 2011, at the time of writing this decision he had not surpassed the one year mark of being absent in Chile. He therefore has not lost his permanent residence status owing to an absence of more than one year from Chile.

¹⁷ *M.C.I v. Zeng, Guanqiu*, May 2010 FCA 118. at 28.

[31] In *Shamlou*, the Court accepted four criteria that the Board should undertake in an analysis of the “basic rights” enjoyed by a claimant:¹⁸

- a. the right to return to the country of evidence;
- b. the right to work freely without restrictions;
- c. the right to study; and
- d. full access to social services in the country of residence.

[32] The claimant testified that with permanent residence status he had the right to work and access to medical care and social assistance. Indeed, his reason for fleeing Chile was that he would lose these rights if it was discovered that he entered Chile with a falsely obtained visa.

[33] Aside from losing his permanent residency card if he is out of Chile for more than one year, which I have already addressed, the claimant has not advanced any evidence that would indicate he cannot return to Chile.

[34] Though the issue of the right to study was not canvassed, there is no evidence before me that the claimant cannot study in Chile if he would choose to do so. And, based on his testimony, I find that having PR status in Chile affords him the right to work freely without restrictions and provides him access to social services in Chile.

[35] The claimant asserts that he will be persecuted if he is returned to Chile and is found to have entered on a falsely obtained visa. Before deciding that he has all the rights and obligations that would lead to exclusion, I will assess his claim of persecution in Chile.

[36] There is no objective evidence before me that the claimant is being pursued by the Chilean authorities, or that he will be, for having obtained an entry visa to Chile by illegal means. I find that he is speculating.

¹⁸ *Shamlou, Pasha v. M.C.I* (F.C.T.D. no. IMM-4967-94) at 152.

[37] Nevertheless, I assessed the evidence he did supply in relation to others who entered Chile on fraudulent visas. He summarized a news article indicating nine persons are being investigated (with reference to their court case number) for connection to the visa fraudster, and that the Chilean authorities had announced their intentions of finding every single one of the Cubans involved, identifying that as of September 2010, 30 persons were under investigation. According to the claimant, those Cubans already identified are now living in inhumane conditions (no right to medical care, secure employment, social assistance) while awaiting deportation.¹⁹ He also highlights the plight of a former Cuban Marine, **XXXXXX XXXXXX**, who is under threat of deportation.²⁰ As well, he submitted documents referring to a court case of one of his friends, **XXXXXX**.²¹

[38] There is a distinction between this claimant's situation and those presented above: following their arrival in Chile, they were found to have problems in their documentation when applying for various migration certificates. None of them had cleared the TRV process and none of them had applied for and obtained permanent residence status in Chile.

[39] Chile is a multiparty democracy with a population of approximately 17 million with a functioning security apparatus and judiciary.²² Civilian authorities maintained effective control over the carabineros (former members of the national police), overseen by the Ministry of Defense, and the plainclothes Investigations Police (PDI), overseen by the Ministry of Interior. The government has effective mechanisms to investigate and punish abuse and corruption. There were no reports of impunity involving the security forces during the year.²³

[40] The law provides for an independent judiciary, and the government generally respected judicial independence in practice and defendants enjoy a presumption of innocence and have a right of appeal. Defendants have the right to a fair trial, and an independent judiciary generally

¹⁹ Exhibit 5, page 2-3, 5.

²⁰ Exhibit 5, page 2 and 4.

²¹ Exhibit 12, translation at Exhibit 13.

²² NDP, Item 2.1, United States (US). 8 April 2011. Department of State. "Chile." *Country Reports on Human Rights Practices for 2010*. page 1.

²³ NDP Chile, Item 2.1, United States (US). 8 April 2011. Department of State. "Chile." *Country Reports on Human Rights Practices for 2010*. page 5.

enforced this right. The law provides for the right to legal counsel and public defender's offices across the country provide professional legal counsel to anyone seeking such assistance.²⁴

[41] There is an independent and impartial judiciary in civil matters, which permits access for lawsuits regarding human rights violations. However, the civil justice system retains antiquated and inefficient procedures. The average civil trial lasted approximately five years and civil suits could continue for decades. There are administrative and judicial remedies available for alleged wrongs.²⁵

[42] The country's laws also provide for the granting of asylum or refugee status, and the government has established a system for providing protection to refugees. In practice the government provided protection against the expulsion or return of refugees to countries where their lives or freedom would be threatened on account of their race, religion, nationality, membership in a particular social group, or political opinion. During the year 75 residents were given recognized refugee status, for a total of 1,614 residents with that status at year's end.²⁶

[43] In the cases presented by the claimant, the persons being investigated are in the midst of court proceedings, demonstrating that even persons without permanent residence status have access to the judiciary and civil remedies.

[44] The claimant highlighted the situation of **XXXXXX XXXXXX**, about whom the panel received a short translated summary by the interpreter of a Spanish audio recording played at the hearing. His situation is also different from the claimant's in that he was stopped one week after his arrival in Chile for suspect documentation. He subsequently applied for asylum and has been awaiting his fate for 18 months.²⁷ He has **XXXXXX XXXXXX XXXXXX XXXXXX XXXXXX XXXXXX** and currently has many **XXXXXX XXXXXX XXXXXX XXXXXX XXXXXX XXXXXX XXXXXX XXXXXX**. The circumstances of his asylum claim are not known to the panel.

²⁴ NDP Chile Item 2.1, United States (US). 8 April 2011. Department of State. "Chile." *Country Reports on Human Rights Practices for 2010*.. page 6.

²⁵ NDP Chile Item 2.1, United States (US). 8 April 2011. Department of State. "Chile." *Country Reports on Human Rights Practices for 2010*.. page 7.

²⁶ NDP Chile Item 2.1, United States (US). 8 April 2011. Department of State. "Chile." *Country Reports on Human Rights Practices for 2010*. page 10.

²⁷ Exhibit 5, page 7-10.

According to the translated summary of a segment of the recording, **XXXXXX XXXXXX** does not know anyone else in his situation but does know that there are others trying to avoid deportation. He asked for assistance from UNHCR in Buenos Aires, who advised him to claim asylum in Chile. He did ask for political refugee asylum and was told he would not be allowed to have it, and he was given three days to appeal the decision. In **XXXXXX** [year unknown] he was told he would have to fill out other papers to get a visa, otherwise voluntarily return to Cuba.²⁸

[45] Regarding the claimant's friend **XXXXXX**, she has been assisted in her process by the Commission for the Protection of Human Rights and been provided legal assistance, also demonstrating that she has access to state protection mechanisms. She has requested that her and her daughter's status be regularized. On **XXXXXX**, 2011, she received notice from the Ministry of the Interior and Public Security that her entry visa was not validly issued and the aforementioned Ministry is recommending application of Articles 68 and 91 of Legislative Decree No **XXXXXX**.²⁹ The referenced articles were not made available to the panel. What is clear is that this process was initiated some time in 2010 and it continues to this day. This evidence demonstrates that **XXXXXX** is being afforded several state protection mechanisms to deal with her issue and she has not been deported to Cuba. Though the claimant states that **XXXXXX** applied for asylum and was denied, there is no corroborative evidence of that process before me, nor is there evidence as to the basis of her claim or reasons for the denial of asylum.

[46] On a balance of probabilities, based on the evidence before me, I find the claimant has access to state protection in Chile. Having found that he retains permanent residence status in Chile to this day, I find that his fear of persecution is not well founded and is speculative. There is no evidence that the authorities are interested in him and even if they were (or they become in the future), the evidence suggests that he will be afforded due process of law.

[47] Based on the claimant's evidence, and in the absence of evidence to the contrary, on a balance of probabilities, I find that the claimant retains basic rights and obligations similar to Chilean nationals as he currently has permanent resident status until **XXXXXX**, 2015, he has not

²⁸ Translated summary by Interpreter Audrey Escalante at the hearing, of a segment of the recording in evidence at Exhibit 7.

²⁹ Exhibit 13, Pages 4-5.

been out of Chile for more than one year, his permanent residence status provides him the basic rights and obligations of citizens of Cuba, and he has access to state protection mechanisms if required when returned to Chile. In light of these findings, he has all the rights and obligations of a national and is therefore excluded.

[48] I therefore find that exclusion based on Article 1 E applies as he is able to return to Chile.

[49] Having made these findings, I am not required to enter into any examination of the inclusion refugee claim per se, a position which is supported by the court decisions of *Cadovski*³⁰ and *Xie*.³¹

CONCLUSION

[50] I therefore find that **XXXXXX XXXXXX** is excluded from sections 96 and 97(1) pursuant to Article 1E of the *United Nations Convention Relating to the Status of Refugees*.³²

[51] I find that **XXXXXX XXXXXX** is a person referred to in section 98³³ of the *Act and I therefore reject the claim of XXXXXX XXXXXX*.

(signed)

“Colleen Zuk”

Colleen Zuk

13 February 2012

Date

³⁰ *M.C.I. v. Cadovski* 2006 FC 364.

³¹ *Xie v. Canada* 2004 FCA 250.

³² *UN 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*, January 1992.

³³ Exclusion -- Refugee Convention

98. A person referred to in section E or F of Article 1 of the Refugee Convention is not a Convention refugee or a person in need of protection.