

Immigration and Refugee Board
Refugee Protection Division



Commission de l'immigration et du statut
de réfugié
Section de la protection des réfugiés

RPD File # / No. dossier SPR VA1-02828
VA1-02826
VA1-02827
VA1-02829

Private Proceeding
Huis clos

Claimant(s)

Demandeur(s) d'asile

XXXXXXXXXX
XXXXXXX
XXXXXXXXXX
XXXXXXXXXX

Date(s) of Hearing

Date(s) d'audience

October 8, 2002

Place of Hearing

Lieu de l'audience

Vancouver, BC

Date of Decision

Date de la décision

February 27, 2003

Panel

Tribunal

Thomas H. Kemsley

Claimant's Counsel

Conseil du demandeur d'asile

Iven Tse
Barrister & Solicitor

Refugee Protection Officer

Agent de la protection des réfugiés

Nil

Designated Representative

Représentant désigné

XXXXXXXXXXXXXX
For
XXXXXXXXXX and XXXXXXXXXXXXX

Minister's Counsel

Conseil du ministre

Gordon Starr

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XXXXXXXXXX and XXXXXXXX, who are husband and wife, are both citizens of China and long-term residents of Peru. Their children, XXXXXXXX, age 14, and XXXXX XXXXX, age 11, were born in Peru and are citizens of Peru. All four claimants say they have a well-founded fear of persecution and/or are persons in need of protection.

There are potentially two countries of reference for the two adult claimants-- China, where they were born and have citizenship, and Peru, where they resided as permanent residents before coming to Canada.

The claimants fear racially motivated harassment, violence, threats to their lives, and interference with the children's education in Peru. The adult claimants also fear persecution on the basis of religion in China.

The principal claimant was designated as the representative for the two children for this proceeding.

ALLEGATIONS

The male adult claimant moved to Peru in 1985 and the female adult claimant moved there in 1988. They were married in China in 1984. They had two children in Peru, a son in 1989 and a daughter in 1991. The four claimants left Peru in 2001, and came to Canada where they made refugee claims.

The adult claimants owned and ran a restaurant in Lima, Peru. They say they were robbed many times by local Peruvian gangsters. These people had knives or guns, and took their money and told them to return to China. In XXXXX 2000 a Peruvian gang came into their restaurant and demanded money. The claimant and his wife were there. A kitchen helper, who was a relative, came out from the kitchen and one of the Peruvians shot him. He died later in hospital.

The adult claimants say they face harassment as well. People scold them in the streets and tell them to go home. Sometimes people refuse to sell goods to them as "Chinos". Their children were not liked at school and were bullied and badly treated, even though the parents spoke to the school authorities. All the children at the school were taken to the hospital

for routine eye examinations, but these two children were not included because of their race. There was a national celebration day in Peru and all students were given special uniforms and hats for the parade – except these two children were not included because of their race. The children gave some evidence and said other students swear at them and bully them. They also said their teachers tell other students not to go to China because if they believe in Jesus Christ they will be killed in China. The two children have no friends at their school. The parents looked for other schools for the children but found conditions were the same in other schools.

The adult claimants say the police never assisted them with any of the robberies at the restaurant. They say some of the police are also thieves. After the shooting incident and death, the claimants decided they could no longer remain in Peru. They sold their restaurant and came to Canada.

Their counsel argued that the claimants were subject to crime because they are Asians. Counsel said the motivation for the crime is not money but race. The Minister's Representative said the claimants were the victims of discrimination but said the objective documentation shows there is no nexus. However, the Minister's Representative said he was most concerned about the children and the treatment they had received at school.

The adult claimants also make allegations regarding China, however I find it is not necessary to set out those allegations here.

Regarding their status in Peru, the adult claimants say they were permanent residents in Peru and last paid their annual resident fee in 2001. The claimants are not sure if they can return to Peru because they failed to pay their resident fee for 2002. They think people are entitled to pay their fee late, but they are unsure of the consequences of paying late. They think the late fee might be an additional \$20. They said they do not think there would be any barrier if they wanted to return to Peru. Their counsel said their right to return is conditional, as it is discretionary and they have to pay for it. Counsel says this involves an economic test.

DETERMINATION

I find the two adult claimants are excluded by Section 98 of the *Act* and Article 1E of the Convention,¹ as they had permanent resident status in Peru, that status gave them the rights and obligations of a national of Peru, they have not lost those rights or have not shown they have lost the rights, and they do not have a well-founded fear of persecution based on race or nationality in Peru. Further I find they do not meet the definition of "persons in need of protection" in regard to Peru. As a result of these determinations, it is not necessary for me to make any determination regarding their claims against China.

I find the two minor claimants do have a well-founded fear of persecution in Peru based on their race. This persecution is in relation to their education. These two claimants are not citizens of China and have never lived there, so there is no claim to be considered against China for the two minor claimants. Therefore, I find the two minor claimants are Convention refugees.

ANALYSIS – TWO ADULT CLAIMANTS

Article 1E²

I find the two adult claimants are recognized by the authorities in Peru, where they resided as permanent residents for over ten years, as having the rights and obligations which are attached to the possession of nationality in Peru.

Permanent Resident Status

While the adult male claimant was in Peru from 1985 to 2001, and the adult female claimant from 1988 to 2001, they had Immigrant Identity Cards and the status of permanent residents. An immigrant who moves to Peru can apply for an Immigrant Identity Card, which gives the person the status of permanent resident. With this status the person can continue to live in Peru indefinitely, provided they pay an annual fee and abide by certain laws.³

¹ *Immigration and Refugee Protection Act*, S.C. 2001, c. 27, and Annex II of the 1951 Convention Relating to the Status of Refugees, United Nations Treaty Series, vol. 189 p. 137.

² *Ibid.*

³ Exhibit 10: *PER38829.E; PER38830.E; PER38831.E.*

Immigrants who are the age of majority can apply for Peruvian citizenship after two years of residency, if they meet certain language and other criteria. The claimants say they never applied for Peruvian citizenship.

According to the claimants' evidence and country information on file, a person with permanent resident status can exit and re-enter Peru, live there, own property, work, own a business, and has the same access to educational services and health care as Peruvians. They also must pay taxes in the same way as Peruvians. However, the person is not allowed to vote in elections. The status is retained as long as the person complies with the requirements set out by legislative decree. This includes paying a modest annual fee. The status can be lost if the resident commits actions contrary to state security or public order, or does not have the economic means to support his or her residency, or has been sentenced by a Peruvian court for a crime. If a foreigner with permanent residence status fails to pay the annual fee or violates the terms of the decree, they can be subject to fines, forced exit, the cancellation of status as a resident, and/or expulsion. However, the cancellation of residence status and expulsion requires a ministerial resolution following a recommendation of the Commission on the Status of Foreigners based on a police report issued by the Foreigner's Division of the National Police.⁴

Based on the evidence and information on file, I find the Peruvian government recognizes that people who have been given an Immigrant Identity Card and permanent resident status in Peru have the rights and obligations which are attached to the possession of nationality of Peru.⁵ It is not necessary for a person to have a right to vote to meet this requirement. As well, the potential for loss of status and expulsion is minimal and there are significant procedural protections in this regard. As noted above, the claimants had Immigrant Identity Cards and the status of permanent residents.

⁴ *Ibid.*

⁵ *Kroon v. Canada (Minister of Employment and Immigration)* (1995), 28 Imm. L.R. (2d) 164 (F.C.T.D.)
Shamlou v. Canada (Minister of Citizenship and Immigration) (1995), 32 Imm. L.R. (2d) 135 (F.C.T.D.).

No Loss of Status

The claimants left Peru in 2001 and say they are unsure if they have the right to return there now. Their Immigrant Identity Cards show their annual fees were last paid for the year 2001. The claimants agreed with this information.

At this time, the claimants have been out of Peru for less than two years. Their annual fees were paid for the year 2001 and have not been paid for 2002 and 2003. From the documents on file referred to above, it is clear that the status of permanent resident in Peru is not easily lost. Immigrants who fail to pay the annual tax can be required to pay a fine to reinstate the currency of their Immigrant Identity Card. The state must take several significant steps to cancel the person's status. Based on all of this information and no evidence to the contrary, I am satisfied on a balance of probabilities that the claimants have not lost their status of permanent residents in Peru and, at most, they would be required to pay a modest fine and the 2002 and 2003 annual fees to maintain their status.

In the alternative, having established that they had permanent resident status, the adult claimants have failed to produce evidence to prove, on a balance of probabilities, that they are not entitled to return to Peru and retain their status. Several Federal Court cases have said that once *prima facie* evidence has been presented to show a claimant had resident status and the right to return, the onus shifts to the claimant to show he or she cannot now return.⁶

Well-Founded Fear of Persecution in Peru

While Section 98 and Article 1E make no reference to assessing whether the person in question has a well-founded fear of persecution or is a person in need of protection in the Article 1E country, I conclude these requirements are implicit in Article 1E⁷. That Article says a person must be recognized as having the "rights and obligations" of a national of the country. I am satisfied the rights of a national of a country include the right to be free from

⁶ *Juzbasevs, Rafaels v. M.C.I.* (F.C.T.D., no. IMM-3415-00), McKeown, March 30, 2001.
Shahpari v. Canada (Minister of Citizenship and Immigration) (1998), 44 Imm. L.R. (2d) 139 (F.C.T.D.).
Nepete, Firmino Domingos v. M.C.I. (F.C.T.D., no. IMM-4471-99), Heneghan, October 11, 2000.

⁷ *Supra*, footnote 5, Kroon at 167-168.

persecution on the basis of race, religion, nationality, political opinion, and membership in a particular social group, and the rights protected by section 97 of the *Immigration and Refugee Protection Act*. Thus, this would apply to people, like the claimants, who have the status of permanent residents in Peru.

The adult claimants say they were victims of economic crime -- robbers wanted their money. They say they were not the victims of other crimes. They also say they faced discrimination and harassment. Some Peruvian shops refused to sell goods to them. The claimants say Peruvians do not like the Chinese as Peruvians feel the Chinese earn money in Peru and send it back to China. Their counsel argued the crime was motivated by race, but the facts provided by the claimants indicate the crime was perpetrated by robbers who wanted their money. I note the claimants gave evidence of three significant robberies in 13 years. Although the last incident was very traumatic, the total number of robberies they actually described is not very high for a crime-ridden city like Lima. I also note they were able to sell their restaurant to another Chinese person – so obviously other Chinese people were willing to operate a restaurant on the same premises.

The country documentation on file confirms that the crime rate in cities in Peru is high and gangs commit many crimes. Further, the police are often implicated, either by actually participating in the crimes or offering little protection from criminal acts and gangs. However, the country documentation does not support the claim that crimes are committed against the Chinese in Peru because of their race or nationality. Except for the unrest around the time of the 2000 election, the country documentation indicates that crime in Peru is primarily economically motivated.⁸ This is consistent with the claimants' evidence. The crime faced by the Chinese in Peru, including the lack of police protection, is faced generally by Peruvians. Therefore, based on the objective country documentation, I find there is no nexus or connection between the potential crime and lack of police protection faced by the claimants and their race or nationality. Further, I find this crime and the lack of police protection are problems faced generally by people in Peru; it is not personal to the claimants.

⁸ Exhibit 6: PER34377E; PER38044E; US Department of State *Country Reports on Human Rights Practices for 2001*; PER33879.E.

I find the discrimination and harassment the claimants experienced on the street was likely racially motivated, but does not amount to persecution. The claimants say sometimes Peruvians would not sell goods to them, or would tell them to return to China. This family was part of a visible minority in Peru. Unfortunately, visible minorities in many countries often experience some harassment and discrimination. I find the incidents described by the claimants and in the country documentation in this regard are unpleasant but, neither individually nor cumulatively, do they amount to a systemic or persistent denial of basic human rights or human dignity.⁹

In conclusion, I find the adult claimants do not have a well-founded fear of persecution in Peru based on their race or ethnicity or any other ground in the Convention refugee definition. That is, there is less than a serious possibility they will suffer persecution in Peru due to their race or ethnicity or any other Convention ground. Based on the country documentation, I find there is a lack of nexus or connection between the more serious crime and the claimants' race or nationality. Further, I find the harassment and discrimination they face, while racially motivated, is not a systemic denial of human rights or human dignity. Thus, even considering the cumulative effect of all these racially motivated incidents, I find they do not amount to persecution.

Person in Need of Protection

I also find the adult claimants do not meet the definition of "persons in need of protection" in Peru. They do face a significant risk of crime. However, the country documentation shows that people in many cities in Peru face the same level of crime, potential threats to their lives, and lack of police protection. Thus, while the claimants fear significant harm, this is a risk faced generally by other individuals in that country. It is not personal to the claimants in any way. It is a risk faced generally by citizens and residents in cities in Peru.

Therefore, I find the adult claimants do not meet the definition of "persons in need of protection" because the risk they face is a risk faced generally by other individuals in Peru.

⁹ Exhibit 5. US Department of *State Country Reports on Human Rights Practices for 2001*.

ANALYSIS – TWO MINOR CLAIMANTS

As the children were born in Peru, have Peruvian citizenship, have always lived in Peru and do not have Chinese citizenship, Peru is the only country of reference for their claims.

I find the two minor claimants have been persecuted based on the treatment they received at school, and the requirements of the *Act* and the provisions of the *Convention on the Rights of the Child*.¹⁰

The evidence about the treatment of the children at school indicates they were singled-out and ostracized by the other students and by the teachers and other authorities at the school. They were harassed and bullied. They were excluded from routine eye examinations and from the national celebration – even though they were born and raised in Peru and speak Spanish. The teachers spoke very negatively about Chinese people and their values. The parents spoke to the teachers and other school authorities, but no action was taken. The children continued to be excluded and did not want to attend school. The parents looked for other schooling but did not find any place their children would receive better treatment.

Persecution is not defined in the *Act* but is interpreted to mean “serious harm”. This requires an analysis of the interest harmed and the extent to which the exercise of that interest has been compromised. In *Ward*,¹¹ the Supreme Court said persecution will arise when actions deny human dignity in any key way. Persecution can be a single act, or the cumulative effect of a number of acts.

Section 3(3) of the *Immigration and Refugee Protection Act* says the *Act* is to be construed and applied in a manner that complies with international human rights instruments to which Canada is a signatory. In *Baker*,¹² the Supreme Court of Canada commented on the use of international instruments in the interpretation of Canadian law and noted that Canada has ratified the *Convention on the Rights of the Child* although it has not been implemented.

¹⁰ *Convention on the Rights of the Child*, Adopted and opened for signature, ratification and accession by General Assembly resolution 44/25 of 20 November 1989.

¹¹ *Canada (Attorney General) v. Ward*, [1993] 2 S.C.R. 689.

¹² *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817; (1999), 1 Imm. L.R. (3d) 1 (S.C.C.).

Article 28 of the *Convention on the Rights of the Child* states that “States Parties recognize the right of the child to education, with a view to achieving this progressively and on the basis of equal opportunity...”. Article 29 provides:

States Parties agree the education of the child shall be directed to: ...
The development of respect for the child’s parents, his or her own cultural identity, language and values, for the national values of the country in which the child is living, the country from which he or she may originate, and for civilizations different from his or her own;

Article 30 states that:

In those States in which ethnic ... minorities exist, a child belonging to such minority ... shall not be denied the right with other members of his or her group, to enjoy his or her own culture

I find the sustained and repeated acts faced by these children at their school were inconsistent with the principles set out in the *Convention on the Rights of the Child* and resulted in serious and sustained harm to these children. These children did not receive equal opportunity to education in Peru, their cultural identity and values were not respected, nor were they allowed to enjoy their culture. They were repeatedly harassed, sworn at, and belittled by classmates, but the teachers took no corrective action.

I find the cumulative effect of these repeated acts amounted to persecution of these children on the basis of their race and ethnic origin. This was serious harm and involved a denial of human dignity in a key way. These acts fundamentally affected their education, which is essential to the development and well-being of a child. The state was complicit in this persecution as the school authorities were aware of the problem and did nothing to correct it. I am satisfied the parents were unable to find other schools where the children would receive better treatment. I find there is more than a mere possibility the two children would face the same kind of persecution if they returned to Peru.

CONCLUSION

I find the two adult claimants are excluded by Section 98 of the *Act*, as they have permanent resident status in Peru, which gives them the rights of a national of Peru, they have not lost those rights during their absence nor have they shown they cannot return to Peru, there is

less than a serious possibility they will be persecuted in Peru based on their race or nationality or any other Convention ground, and they do not meet the definition of “persons in need of protection” in Peru. Thus, by virtue of Section 98 of the *Act* and Article 1E of the Convention, I find the two claimants are not Convention refugees and are not persons in need of protection.

Based on these findings, it is not necessary to determine the adult claimants' claims against China.

I find the two minor claimants do have a well-founded fear of persecution in Peru based on their race or ethnic origin, and no state protection is available and there is no Internal Flight Alternative.

Therefore, based on all the evidence and submissions and the above reasons, the Convention Refugee Division determines:

1. XXXXXXXXX and XXXXXXXXXXXXXXX are not Convention refugees and are not persons in need of protection, and
2. XXXXXXXXXXXXX and XXXXXXXXXXXXX are Convention refugees.

“Thomas H. Kemsley”

Thomas H. Kemsley

February 27, 2003

Date

**REFUGEE PROTECTION DIVISION – EXCLUSION CLAUSES - ART. 1E -
 PROTECTION ELSEWHERE – RIGHTS AND OBLIGATIONS OF A NATIONAL –
 GENERALIZED RISK - MINORS – INTERNATIONAL LAW - INTERNATIONAL
 INSTRUMENTS - DISCRIMINATION - PERSECUTION - EDUCATIONAL
 DISCRIMINATION – MALE - FEMALE – NEGATIVE - POSITIVE – CHINA - PERU**