IMMIGRATION AND REFUGEE BOARD
(REFUGEE DIVISION)

LA COMMISSION DE L'IMMIGRATION
ET DU STATUT DE RÉFUGIÉ
(SECTION DU STATUT DE RÉFUGIÉ)

IN CAMERA
HUIS CLOS
TA0-05472

CLAIMANT(S) / DEMANDEUR(S)

XXXXX XXXXX

DATE(S) OF HEARING / DATE(S) DE L'AUDIENCE

February 7, 2001
April 9, 2001

DATE OF DECISION / DATE DE LA DÉCISION

May 30, 2001

CORAM / CORAM

Harriet Wolman
Yasmeen Siddiqui

FOR THE CLAIMANT(S) / POUR LE(S) DEMANDEUR(S)

Frank Gardner
Barrister and Solicitor

REFUGEE CLAIM OFFICER / AGENT CHARGÉ DE LA REVENDICATION

Bonnie (M.A.) Stoddart

DESIGNATED REPRESENTATIVE / REPRÉSENTANT DÉSIGNÉ

XXXXXXX XXXXXX

MINISTER'S COUNSEL / CONSEIL DE LA MINISTRE

These are the reasons for the decision of the Convention Refugee Determination Division (CRDD) with respect to the Convention refugee[1] claim, made by XXXXX XXXXX (the "claimant"), an unaccompanied 14-year-old minor citizen of Poland. The hearing into the claim was held pursuant to section 69.1 of the Immigration Act,[2] on February 7 and April 9, 2001, at Toronto.

The claimant was represented by Frank Gardner, Barrister and Solicitor. The CRDD was assisted by Mary-Ann Stoddart, Refugee Claim Officer (RCO). The claimant came to Canada alone and unaccompanied in XXXXXX 1999 to visit a former school friend of his father's. He subsequently made a refugee claim. The panel was guided by the Guidelines on Child Refugee Claimants: Procedural and Evidentiary Issues[3] when considering this claim.

A pre-hearing conference was held at the beginning of the hearing and considerable time was spent in assessing the "best interests of the child" before a Designated Representative was appointed. A document was presented to the panel[4] purporting to be Minutes of Settlement, Ontario Court of Justice. This indicated that the Applicants, XXXXXXX XXXXXX and XXXXXXXX XXXXXXXXX, had been granted temporary custody of the claimant on consent of his parents, the Respondents, XXXXXXXX and XXXXXXX XXXXX. This document was signed by the claimant's parents, and there was a notarial seal attesting to the signatures of the XXXXX's. However, during testimony, Ms. XXXXXX indicated that this document had not actually been issued by an Ontario Court, and had no legal validity in Ontario. The claimant also testified regarding the circumstances of his coming to stay with XXXXXX and XXXXXXXXX and it was clear to the panel that there was a close relationship between

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1 As defined in subsection 2(1) of the Immigration Act, as enacted by R.S.C. 1985 (4th Supp.), c. 28, s. 1.

2 As enacted by S.C. 1992, c. 49, s. 60.

3 Guidelines Issued by the Chairperson Pursuant to Section 65(3) of the Immigration Act, Child Refugee Claimants: Procedural and Evidentiary Issues, IRB, Ottawa, Canada, August 26, 1996.

4 Exhibit C-6.

the claimant and his unofficial “guardians” and that he was happy living with them. Although the panel could not give weight to the document, it found the testimony regarding the sincere and affectionate commitment of the “guardians” to be in the best interest of the claimant. The testimony of the claimant was also persuasive. Therefore, the Refugee Division appointed XXXXXXX XXXXXX as the designated representative of the claimant.

The claimant is nearly completely XXXX and did not speak clearly enough to testify aloud. Interpreters proficient in the English and Polish languages and American Sign Language were present throughout the hearing.

The claimant bases his claim to a well-founded fear of persecution in Poland on the ground of membership in a particular social group, defined as a disabled minor. He is XXXX and does not speak; he also has XXXXXXXXXX XXXXXXXX.

Summary of the Alleged Facts

The claimant's narrative was in the form of a letter outlining the reasons for the refugee claim of the claimant. The letter was signed by XXXXXXX XXXXXX, the claimant's designated representative, and XXXXXXXX XXXXXXXXX, his father’s old friend. The letter stated the claimant came for a visit in XXXXXX 1999, and shortly after his arrival began to reveal the circumstances under which he had been living in Poland. He said he had been physically abused by his parents, his father in particular, as far back as he could remember. The abuse took the form of slapping the claimant on the head, pinching and twisting his nose and ears, striking him with slippers and a belt, and locking him in his room for long periods of time. He was also verbally abused by his parents.

The claimant told his hosts that the claimant was deathly afraid to return to Poland. Mr. XXXXXXXXX wrote a letter to the claimant's parents, in August 1999,

asking for some clarification of these allegations. They replied directly to the claimant, but made no reference to the situation of the claimant before he left Poland. They stated in their letter to the claimant that he was stupid and too young to decide not to return to Poland. At that point the claimant became terrified to return home, and the hosts decided to support him in Canada and to assist him to stay.

They notified the claimant's uncle that the claimant would not be returning on schedule and wrote to his parents asking for a temporary custody petition,[5] which they voluntarily signed. A refugee claim was then made by the claimant.

Analysis

The determinative issues in this claim are whether there is a nexus to the Convention refugee definition, and if this is found to be so, whether the evidence of persecution in this claim is credible and trustworthy, and whether, if the claimant were to return to Poland, there would be state protection available and he would be able to access it.

Nexus and Membership in a Particular Social Group

It was held in Rizkallah[6] and affirmed by the Supreme Court of Canada[7] that, in order for a claimant to be determined a Convention refugee,[8] the harm feared by the claimant must be by reason of one or more of the grounds set out in the statutory definition. In Rizkallah, it was stated that:

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5 Exhibit C-6.

6 Rizkallah v. Canada (Minister of Employment and Immigration) (1992), 156 N.R. 1 (F.C.A.), applied in Hersi, Ubdi (Ubdi) Hashi v. M.E.I. (F.C.T.D., no. 92-A-6574), Joyal, May 5, 1993.

7 Canada (Attorney General) v. Ward, [1993] 2 S.C.R. 689; Chan v. Canada (Minister of Employment and Immigration), [1993] 3 F.C. 675; (1993), 20 Imm. L.R. (2d) 181 (F.C.A.).

8 as defined in part, in subsection 2(1) of the Immigration Act, as enacted by R.S.C. 1985 (4th Supp.), c. 28, s. 1.

To succeed, refugee claimants must establish a link between themselves and persecution for a Convention reason. In other words, they must be targeted for persecution in some way, either personally or collectively.[9]

[9] Rizkallah v. Canada (Minister of Employment and Immigration) (1992), 156 N.R. 1 (F.C.A.).

This principle has also been stated as follows:

> Under the Convention, then, if the peril a claimant faces - however wrongful it may be - cannot somehow be linked to her socio-political situation and resultant marginalization, the claim to refugee status must fail.[10]

The statutory definition of "Convention refugee" does not delineate what is meant by "membership in a particular social group".

The Supreme Court of Canada, in the leading case of Ward[11] reviewed a variety of sources concerning this ground, including Canadian and American jurisprudence, the UNHCR Handbook,[12] academic writings, and the history of its development.

The Supreme Court went on to identify the following three categories of particular social group:

> (1) groups defined by an innate or unchangeable characteristic;
>
> (2) groups whose members voluntarily associate for reasons so fundamental to their human dignity that they should not be forced to forsake the association; and
>
> (3) groups associated by a former voluntary status, unalterable due to its historical permanence.[13]
>
> The first category would embrace individuals fearing persecution on such bases as gender, linguistic background and sexual orientation, while the second would encompass, for example, human rights activists. The third branch is included more because of historical intentions, although it is also relevant to the anti-discrimination influences, in that one's past is an immutable part of the person.[14]

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10 James C. Hathaway, The Law of Refugee Status, (Toronto: Butterworths, 1991), at 136.

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

12 Office of the United Nations High Commissioner for Refugees, Handbook on Procedures and Criteria for Determining Refugee Status, Geneva, January 1992.

13 Canada (Attorney General) v. Ward, [1993] 2 S.C.R. 689 at 739 and 744.

14 Canada (Attorney General) v. Ward, [1993] 2 S.C.R. 689 at 739, 744 and 745.

The first category would also embrace those individuals, such as the claimant who are physically disabled. The claimant was born XXXX (and cannot communicate effectively except through sign language) and for all intents and purposes his condition is permanent and unchangeable. He also cannot change the fact that he is inflicted with XXXXXXXXXX XXXXXXXX, which is publicly obvious since he is unable to control the XXXX, which afflict him.

Turning to the claim at hand, the panel finds that the harm feared by the claimant is by reason of the ground of membership in a particular social group, and, in particular, he would fall into the first category as defined by Ward. The situation experienced by the claimant in Poland is similar to that of a woman who is abused because of her gender, since the agents of persecution are the claimant's parents and his problems are because of a family situation.

Accordingly, it has been demonstrated that the ground of membership in a particular social group is relevant to the claim and there is a nexus to the definition.

Credibility and Plausibility

In accordance with subsection 68(3) of the Immigration Act,[15] the panel has considered the credibility or trustworthiness of the evidence adduced in this proceeding. Testimony that is given under oath is presumed to be true, unless there is valid reason to doubt its truthfulness.[16] The real test of the truth of the story of a witness..."must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions."[17]

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15 as enacted by R.S.C. 1985 (4th Supp.), c. 28, s. 18.

16 Maldonado v. Canada (Minister of Employment and Immigration) (1994), 23 Imm. L.R. (2d) 220 (F.C.T.D.).

17 Faryna v. Chorny, [1952] 2 D.L.R. 354 (B.C.C.A.) at 357;
Relating directly to the assessment of the evidence with respect to its plausibility in the context of CRDD claims:
Giron v. Canada (Minister of Employment and Immigration) (1992), 143 N.R. 238 (F.C.A.) 152;
Ye v. Canada (Minister of Employment and Immigration) (1992), 17 Imm. L.R. (2d) 77 (F.C.A.);
Aguebor v. Canada (Minister of Employment and Immigration) (1993), 160 N.R. 315 (F.C.A.).

The claimant was the principal witness at the hearing. Although he is only fourteen years of age, he tried his best to convey to the panel what he had gone through until he came to Canada. He described a family that is fraught with stress because of the disabilities they all have.

The claimant said his parents are profoundly deaf as are his two younger brothers. He himself has enough hearing to disqualify him from being able to attend the XXXXXXXXXXX school in XXXXXX where his brothers are being educated. His personal situation is compounded by his development of XXXXXXXXXX XXXXXXXX, which causes him to XXX visibly and sometimes make XXX XXXXXX. He said his parents did not seem to understand this complication and found his behaviour unacceptable even though he has no control over the XXXXXXXXXX XXXXXXXX. He said he attended a regular school in XXXXXXXXX and during the week lived with his parents but stayed with his paternal (hearing) grandmother (who died in 1998) on weekends. He said he had a poor relationship with his father, who was a drinker who took out his frustrations on his oldest child, the claimant.

The claimant described the ongoing physical assaults of his father from the time he was barely more than a toddler. He said he was often bruised from beatings with a belt or kicks, and the ongoing (nearly constant) harassment made him depressed and caused him to have severe stomach upsets. A medical report[18] was submitted which confirmed the claimant's emotional and physical condition, including the presence of XXXXXXXXXX. The psychiatrist who submitted the report had extensive sessions with the claimant before writing his report, and the panel gives it significant weight.

The claimant submitted a diary,[19] written in Polish and translated into English, which described well over 100 incidents of abuse that the claimant allegedly recalled since he was the tender age of four. In its deliberations, the panel considered whether it

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[18] Exhibit C-2.

[19] Exhibit C-5.

is plausible that the claimant could remember all these incidents in such detail. However, the panel also took into account that the claimant is an adolescent and it is not reasonable that he would have participated in as involved a ruse as would be necessary to create such a diary under false pretences. Even if the diary is somewhat embellished, the panel finds that the claimant's recollection of ongoing abuse over many years is credible, and the panel finds that the claimant has suffered physical and emotional abuse at the hands of his parents, especially his father.

Having considered the totality of the evidence and the applicable jurisprudence, the panel finds that there arose no implausibilities in the claimant's evidence that would give valid reason to doubt and reject the truthfulness of allegations made in support of the claim insofar as the abuse of the claimant is concerned.

State Protection

The Supreme Court of Canada in Ward,[20] articulated the "rationale underlying the international refugee protection regime"[21] as follows:

> International refugee law was formulated to serve as a back-up to the protection one expects from the state of which an individual is a national. It was meant to come into play only in situations when that protection is unavailable, and then only in certain situations. The international community intended that persecuted individuals be required to approach their home state for protection before the responsibility of other states becomes engaged. For this reason, James Hathaway refers to the refugee scheme as "surrogate or substitute protection", activated only upon failure of national protection,[22]

…

> The international community was meant to be a forum of second resort for the persecuted, a 'surrogate', approachable upon failure of local protection….[23]

In this spirit, the Supreme Court underscored that the issue of whether the state is unable to provide protection from persecution is "...a crucial element in determining

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

21 Ibid., at 709.

22 Canada (Attorney General) v. Ward, [1993] 2 S.C.R. 689, at 709.

whether the claimant's fear is well-founded, and [in] thereby [determining] the objective reasonableness of his or her unwillingness to seek the protection of his or her state of nationality."[24]

Accordingly, the panel has considered the application of the issue of state protection to the claim at hand, keeping in mind the two presumptions formulated by the Supreme Court.

The first presumption is as follows:

> Having established that the claimant has a fear, the Board is, in my view entitled to presume that persecution will be likely, and the fear well-founded, if there is an absence of state protection. The presumption goes to the heart of the inquiry, which is whether there is a likelihood of persecution….Of course, the persecution must be real -- the presumption cannot be built on fictional events -- but the well-foundedness of the fear can be established through the use of such a presumption.[25]

In this regard, the Federal Court of Appeal has reaffirmed that the claimant must nevertheless establish an objective basis for fearing persecution and that the judgement of the Supreme Court "...does not in any way cast doubt on the need for an objective fear as the basis for a refugee status claim".[26]

As for the second presumption, the Supreme Court stated that:

> Absent a situation of complete breakdown of state apparatus, such as that recognized in Lebanon in Zalzali, it should be assumed that the state is capable of protecting a claimant.[27]

The Supreme Court held that this presumption may be rebutted where the claimant "provides" or "advances" "clear and convincing proof" or "clear and convincing confirmation" of the state's inability to protect.[28] The Supreme Court noted that, absent an

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23 Canada (Attorney General) v. Ward, [1993] 2 S.C.R. 689 at 716.

24 Ibid., at 722.

25 Canada (Attorney General) v. Ward, [1993] 2 S.C.R. 689 at 722.

26 Jimenez, Fernando Madrid v. M.E.I. (F.C.A., no. A-354-91), Hugessen, Desjardins, Létourneau, February 3, 1994; also see Sandy, Theresa Charmaine v. M.C.I. (F.C.T.D., no. IMM-22-95), Reed, June 30, 1995, p. 2.

27 Canada (Attorney General) v. Ward, [1993] 2 S.C.R. 689, p. 725.

28 Canada (Attorney General) v. Ward, [1993] 2 S.C.R. 689, p. 724.

admission from the state of its inability to protect a claimant, such proof may consist of evidence relating to "...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".[29] Whether a claimant need also have literally approached her or his state for protection to rebut the presumption, the Supreme Court commented that:

> ...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 a "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. [emphasis added][30]

The Supreme Court made it clear that it is the claimant who bears the onus of rebutting the presumption that a state is capable of providing protection,[31] though the panel is also mindful that it has an obligation to assess all credible and trustworthy evidence, regardless of its origin. The claimant's onus has been described by the Federal Court of Appeal as one that is "...difficult, though not insurmountable".[32] Whether clear and convincing evidence has been adduced to rebut the presumption will depend upon whether the claimant could reasonably have been expected to take more steps than were pursued in seeking protection. [emphasis added].[33]

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29 Ibid.

30 Ibid.

31 Canada (Attorney General) v. Ward, [1993] 2 S.C.R. 689, p. 726;
see also:
Omoghan, Osaretin Esohe v. M.E.I. (F.C.A., no. A-253-93), Isaac, Linden, McDonald, October 6, 1995, p. 1;
Smirnov v. Canada (Secretary of State), [1995] 1 F.C. 780 (T.D.), p. 7;
Mendivil v. Canada (Secretary of State) (1994), 23 Imm. L.R. (2d) 225 (F.C.A.);
Canada (Minister of Employment and Immigration) v. Villafranca (1992), 18 Imm. L.R. (2d) 130 (F.C.A.).

32 Mendivil v. Canada (Secretary of State) (1994), 23 Imm. L.R. (2d) 225 (F.C.A.);
Barkai, Alex v. M.E.I. (F.C.T.D., no. IMM-6249-93), Gibson, September 27, 1994, p. 8; and as inferred in Smirnov v. Canada (Secretary of State), [1995] 1 F.C. 780 (T.D.), p. 10.

33 Lazo, Eunice Nicargua Valenzuela v. M.E.I. (F.C.T.D., no. A-1488-92), Rothstein, November 25, 1993.

As for the quality of the protection to be afforded by the state, while the Supreme Court has made reference to the protection being "effective",[34] it is also clear that "no government that makes any claim to democratic values or protection of human rights can guarantee the protection of all of its citizens at all times."[35] What is paramount to formulating any test for "effective" protection[36] is that regard be had to all of the evidence adduced and to all of the circumstances of the claim, including those circumstances, which are personal to the claimant, as well as those relating to persons to whom the claimant may be similarly situated.

The claimant found himself in an untenable situation. His home life was one of intimidation and stress for him. His parents had warned him for many years that what occurred in the family was a private matter, and he should not talk about it outside the home. He said his grandmother knew what he was going through, but she died in 1998 when the claimant was barely twelve. His two brothers were even younger than he, and could not have been expected to provide him with any protection. He said his other relatives did not live close to the family. As for physical evidence that he was being assaulted at home, he said that there were bruises and welts that would have been apparent at school when he was in shorts for physical education. However, he said that his teachers did not say anything to him about this, nor ask him any questions. Given that he is XXXX, cannot communicate verbally, and also has XXXXXXXXXX XXXXXXXX, is it reasonable to expect him to tell any authorities about the abuse from his parents especially since they warned him to reveal nothing?

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34 Canada (Attorney General) v. Ward, [1993] 2 S.C.R. 689, at 724; also see:
Barrios, Jose Samuel et al. v. M.E.I., (F.C.T.D., no. 92-A-7139), Wetston, September 9, 1993;
Zalzali v. Canada (Minister of Employment and Immigration), [1991] 3 F.C. 605 (F.C.A.).

35 Canada (Minister of Employment and Immigration) v. Villafranca (1992), 18 Imm. L.R. (2d) 130 (F.C.A.);
Sandy, Theresa Charmaine v. M.C.I. (F.C.T.D., no. IMM-22-95), Reed, June 30, 1995, at p. 2.

36 In this regard, there are conflicting decisions of the Federal Court Trial Division:
Smirnov v. Canada (Secretary of State), [1995] 1 F.C. 780 (T.D.);
Bobrik, Iouri v. M.C.I. (F.C.T.D., no. IMM-5519-93), Tremblay-Lamer, September 16, 1994;
Kraitman v. Canada (Secretary of State) (1994), 27 Imm. L.R. (2d) 283 (F.C.T.D.).

The documentary evidence[37] indicates that Poland has attempted to take steps to provide some protection for children in Poland. The panel notes as follows:

> The Code of Civil Procedure contains a very important provision concerning protection [of] the child against harm, i.e. Article 572 par. 1, which places every adult under an obligation to inform the guardianship court if he suspects that a child does not have the necessary care, is neglected, or is a victim of violence……The provision reads as follows: *Anyone aware of an event which justifies ex officio action shall be obliged to report such an event to the guardianship court.*

However, success has been quite limited. This same document goes on to say, "There is no mandatory child abuse reporting law in Poland". Since no one reported the claimant's problems, and he could not or would not report himself, he was in an untenable situation.

The British Home Office Report[38] reports "principles of equality for children is strictly observed whenever the law is applied". It further states that:

> 6.6 The ratification by Poland of the Convention on the Rights of the Child has had a substantial impact on the creation and observance of law aimed at the protection of the rights of every child…..
>
> 6.9 The Constitution extends some state protection to the family and children and provides for the appointment of an Ombudsman for children's rights. However, an ombudsman had not been appointed since Parliament passed legislation, which was awaiting the President's signature at the end of 1999.

Clearly what is on paper in Poland is not what occurs in actual practice. The 1991 Department of State Report[39] indicates that although violence against children is illegal, and there are provisions in the Criminal Code for action to be taken against perpetrators of violence against children, "abuse is rarely reported and convictions for child abuse are even more rare".

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37 Exhibit R-3, Response to Information Request POL34210, 14 June 2000.

38 Exhibit R-2, CRDD Information Package: Poland, item 2.4, British Home Office Country Assessment, October 2000, p. 2 of 12.

39 Exhibit R-2, CRDD Information Package: Poland, item 2.2, US Department of State Annual Report on International Religious Freedom for 1999: Poland, 9 September 1999, p. 9 of 15.

Turning to the subject claim, it should also be noted that the age of majority for males in Poland is 18.[40] If the claimant were to return to Poland, he would be returned to his parents who are the agents of persecution. Would it be reasonable in his particular circumstances to seek protection for himself against the ongoing abuse he fears? The panel finds it would not. Although the government has begun to take steps to protect the rights of children in Poland, the documentary evidence indicates that the protective measures are not effectively in place. The claimant lacks his own resources to report to the authorities, and has no one there who could act on his behalf. The panel finds that the claimant has advanced clear and convincing proof of the state's inability to protect him because of his special circumstances due to his disability.

Accordingly, the presumption that "...persecution will be likely, and the fear well-founded, if there is an absence of state protection"[41] is satisfied in this claim.

The Decision

Having considered the evidence the panel finds that the claimant has a well-founded fear of persecution if he were to return to Poland.

For these reasons, the Convention Refugee Determination Division determines that the claimant, XXXXX XXXXX, is a Convention refugee as defined in subsection 2(1) of the Immigration Act.

"Harriet Wolman"
Harriet Wolman

Concurred in by:

"Yasmeen Siddiqui"

40 Ibid.

41 Canada (Attorney General) v. Ward, [1993] 2 S.C.R. 689, at 722.

REFUGEE DIVISION - PARTICULAR SOCIAL GROUP – UNACCOMPANIED MINORS – CHILDREN - DISABILITY - CHILD ABUSE - STATE PROTECTION - MALE - POSITIVE - POLAND

Yasmeen Siddiqui

DATED at Toronto this 30th day of May, 2001.