



RPD File No. / N° de dossier de la SPR : MA8-04150

Private Proceeding

Huis clos

Claimant(s)

Demandeur(e)s d'asile

XXXXX XXXXX XXXXX

Date(s) of Hearing

Date(s) de l'audience

May 12, 2011

Place of Hearing

Lieu de l'audience

Montréal, Quebec

Date of Decision

Date de la décision

June 23, 2011

Panel

Tribunal

M^c Mélanie Raymond

Claimant's Counsel

**Conseil du demandeur
d'asile**

M^c Annick Legault

Tribunal Officer

Agent du tribunal

Sylvie Lagace
(Filing of documents)

Designated Representative

Représentant désigné

N/A

Minister's Counsel

Conseil du ministre

Diane Fournier

[1] The claimant, XXXXX XXXXX XXXXXX, is a Mexican citizen. She is invoking section 96 and subsection 97(1) of the *Immigration and Refugee Protection Act* (IRPA).

ALLEGATIONS

[2] The claimant is a transgender person. She crossed the Canadian border on XXXXX, 2008, and claimed refugee protection that day.

[3] She fears being a victim of persecution by reason of her sexual identity if she had to return to Mexico.

DETERMINATION

[4] Having considered all the documents on file, the panel is of the opinion that the claimant should not be excluded under Article 1F(b) of the Convention from the protection granted under section 96 and subsection 97(1) of the IRPA. The panel is also of the opinion that there is a serious possibility that the claimant would be persecuted because of her sexual identity if she had to return to live in Mexico.

ANALYSIS

Identity

[5] Given the documents on file, the panel is satisfied as to the claimant's identity. The panel believes that she was born XXXXX XXXXX XXXXX, while she now prefers to be called XXXXX, and that she is a Mexican citizen.

[6] **Non-application of exclusion under 1F(b)**

[7] The panel first considered the application of Article 1F(b) of the Convention in this matter. The panel is of the opinion that, given the very particular circumstances of this case, the claimant should not be excluded from the application of section 96 and subsection 97(1) of the IRPA on these grounds.

[8] The claimant testified at the hearing. She showed great openness in response to the questions asked by the Minister's representative and by the panel and did not try to hide certain facts or to embellish her story. She admitted, from the start of the hearing, the facts stated by the

Minister, and the panel notes that she declared her troubles with the law in the United States as soon as she arrived in Canada, at her interview with an immigration officer to determine the eligibility of her refugee protection claim.¹

[9] The claimant stated at the hearing that XX years ago, in XXXX, when she was living in the United States, her boyfriend at the time—an individual named XXXXX —asked her to hold onto a toiletry bag for him that he wanted to pick up the next day. Because the claimant was an XXXXX student at that time, they agreed that he would come to pick up his property at the school where the claimant was studying.

[10] The next day, the claimant brought the toiletry bag to school with her in order to return it to XXXXX. Because she was in a hurry to get to the classroom for an exam, she forgot the toiletry bag on the school's reception counter. She was later asked to step out of the classroom. Some police officers were waiting for her. The school director had opened the bag that was on the counter and had found XXXXX in it. When asked about the quantity of XXXXX in the bag, the claimant responded XXXXX XXXXX XXXXX, a quantity that she estimated XXXXX. She stated that she had never known that the bag had drugs in it. When the panel asked her whether she had not found it questionable that her boyfriend was giving her a bag that he wanted to pick up the next day, she responded that, in retrospect, she had maybe been a little naive, but that, at the time, she trusted him. In her submissions, her counsel suggested that the fact that the claimant had gone to her school with the bag in question and that she had not been careful with it, to the point of forgetting it on the counter, should show to what point she did not suspect that it contained illegal substances.

[11] The claimant continued her testimony with suppressed emotion and great dignity. She stated that when she left the classroom, the police officers had told her that she was being arrested. The police officer in charge apparently showed sensitivity toward her by telling her that he would not handcuff her, in order not to embarrass her in front of her classmates. He allegedly also asked her if she had children. The claimant allegedly then told the police officer that she was a transsexual person.

¹ A-2, Immigration documents, interview with an immigration officer, April 9, 2008.

[12] The police officers' attitude apparently changed completely. They allegedly handcuffed her and pushed her toward the police car. The claimant stated that during the trip from her school to the police station, the driver drove very fast and that, on turns, she would hit her head against the car, unable to protect herself with her hands, as she was still handcuffed.

[13] The claimant was allegedly put in isolation for two hours in a padded cell. Then the officers allegedly asked her to follow them into her apartment, which they searched. They allegedly did not find drugs there. The police officers allegedly surveyed the surroundings, hoping to find XXXXX, but he had vanished.

[14] The claimant was then allegedly incarcerated. In the hall that led from the police station to her cell, someone allegedly said, because XXXXX XXXXX XXXXX XXXXX, that the XXXXX had arrived for a XXXXX. A police officer allegedly responded contemptuously, [translation] "it's not a XXXXX, it's a man dressed like a woman." When she arrived at her cell, the police officers allegedly asked her to get undressed. Several officers allegedly watched her take her clothing off. She allegedly tried to hide her genitals with a piece of paper, which was ripped out of her hands. Some officers apparently then exclaimed with [translation] "oohs and aahs."

[15] The claimant allegedly did not have an opportunity to contact a close relation during this part of her detention.

[16] While she was imprisoned, the claimant allegedly received a visit from a government-paid lawyer. She allegedly talked with him for about ten minutes, and he strongly suggested that it would be much easier for her to plead guilty. The claimant was allegedly released XX days later, after her employer at the time posted bail. She allegedly met with a probation officer, who told her that she had to pay a fine of \$800 and report to him every month. She does not remember meeting a judge at that point.

[17] Two years later, in XXXX, the Court summoned the claimant to appear. She stated at the hearing that her understanding of the facts at the time was that she was going to be freed of her probation conditions, and that she [translation] "had made herself beautiful for the occasion." It seems instead that she had been summoned to appear in order to receive her sentence; the claimant stated at the hearing that she had been told that there had been a long delay because they had lost

her file and that the judge had told her [translation] “that she was guilty and that she had to serve time.”

[18] The claimant allegedly received a sentence of XXXX in prison. She allegedly served only XXXX; the probation officers informed her that she could get out earlier than expected because it was her first offence and because she had been a [translation] “mule.”

[19] The claimant allegedly continued her monthly meetings with a probation officer. She stated that no additional obligation was imposed on her. She allegedly completed her XX years of probation in XXXX.

[20] These statements were not questioned by the Minister’s representative, and the panel, finding the claimant’s testimony credible, takes them to be true.

[21] Section 98 of the IRPA states that a person described in Article 1E or F of the Refugee Convention is not a refugee or a person in need of protection.

[22] Article 1F(b) of the Convention reads as follows:

F. The provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that:

(b) he has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee

[23] It appears from the documents submitted by the Minister’s representative that the claimant pleaded guilty, in XXXX, to the following offence: “XXXXX XXXXX XXXXX XXXXX XXXXX XXXXX XXXXX XXXXX XXXXX XXXXX XXXXX XXXXX XXXXX XXXXX XXXXX XXXXX XXXXX of the *Health and Safety Code* of California. The maximum sentence for this offence is XX years’ imprisonment.²

² See wording of article 11351 at page 29 of the documents filed by the Minister, as well as point 10 of the document submitted, on p. 25.

[24] According to Canadian jurisprudence (*Chan*),³ a serious non-political crime is to be equated with one in which a maximum sentence of ten years or more could have been imposed had the crime been committed in Canada.

³ *Chan, San Tong v. M.C.I.* (F.C.A., No. A-294-99), July 24, 2000. Indexed as *Chan v. Canada* (M.C.I.), [2000] 4 F.C. 390 (F.C.A.).

[25] The offence to which the claimant pleaded guilty would, in Canada, equate to a conviction for possession for the purpose of trafficking in a substance included in Schedule I,⁴ an offence punishable by imprisonment for life. This equivalence was not questioned by the claimant's counsel.

[26] However, the panel notes that this criterion of ten years, established by the case law, is one of the factors to be considered by the panel in determining whether the matter before it constitutes a serious non-political crime. Although this is an indicator of the seriousness of the crime, it is not decisive in itself. In fact, Justice Letourneau states in *Jayasekara*⁵ that, to determine the seriousness of the crime, the panel must conduct the following evaluation:

[44] I believe there is a consensus among the courts that the interpretation of the exclusion clause in Article 1F(b) of the Convention, as regards the seriousness of a crime, requires an evaluation of the elements of the crime, the mode of prosecution, the penalty prescribed, the facts and the mitigating and aggravating circumstances underlying the conviction.... In other words, whatever presumption of seriousness may attach to a crime internationally or under the legislation of the receiving state, that presumption may be rebutted by reference to the above factors. There is no balancing, however, with factors extraneous to the facts and circumstances underlying the conviction such as, for example, the risk of persecution in the state of origin....

[45] For instance, a constraint short of the criminal law defence of duress may be a relevant mitigating factor in assessing the seriousness of the crime committed. The harm caused to the victim or society, the use of a weapon, the fact that the crime is committed by an organized criminal group, etc. would also be relevant factors to be considered.

[27] Looking at the particular circumstances of this case, the panel cannot conclude that there are serious reasons for considering that the claimant committed a serious non-political crime.

[28] The claimant did admit to having had in her possession a XXXXX XXXXX XXXXX XXXXX. She even pleaded guilty to an offence of XXXXX XXXXX XXXXX XXXXX, which earned her a XXXXX XXXXX XXXXX XXXXX XXXXX XXXXX XXXXX XXXXX sentence.

⁴ Subsection 5(2) of the *Controlled Drugs and Substances Act*, p. 51 of the documents submitted by the Minister.

⁵ *Jayasekara, Ruwan Chandima v. M.C.I.* (F.C.A. No. A-140-08), December 17, 2008, 2008 FCA 404.

[29] However, the particularly humiliating circumstances of her arrest, which go to the heart of the discrimination she claims she has faced since her childhood, suggest that she would not at that time have been able to make use of all of the means available to defend herself. It is understandable that, having undergone such an experience, she would believe that she had no chance of getting out of it and that she would want it to be over as quickly as possible and so have complied with the advice of her lawyer, who suggested that she plead guilty, especially since the maximum sentence in the United States is considerably less than the sentence for the same offence in Canada.

[30] The claimant made it clear at the hearing that the XXXXX did not belong to her, that she had not intended to XXXXX in it and that her boyfriend at the time had used her as a [translation] “mule,” which the prison authorities recognized when they released her from prison after she had served half of her sentence.

[31] In *Zrig*,⁶ Justice Decary notes the objectives of Article 1F of the Convention:

[118] My reading of precedent, academic commentary and of course, though it has often been neglected, the actual wording of Article 1F of the Convention, leads me to conclude that the purpose of this section is to reconcile various objectives which I would summarize as follows: ensuring that the perpetrators of international crimes or acts contrary to certain international standards will be unable to claim the right of asylum; ensuring that the perpetrators of ordinary crimes committed for fundamentally political purposes can find refuge in a foreign country; ensuring that the right of asylum is not used by the perpetrators of serious ordinary crimes in order to escape the ordinary course of local justice; and **ensuring that the country of refuge can protect its own people by closing its borders to criminals whom it regards as undesirable because of the seriousness of the ordinary crimes which it suspects such criminals of having committed**. It is this fourth purpose which is really at issue in this case. ...

[119] These purposes are complementary. The first indicates that the international community did not wish persons responsible for persecution to profit from a convention designed to protect the victims of their crimes. The second indicates that the signatories of the Convention accepted the fundamental rule of international law that the perpetrator of a political crime, even one of extreme seriousness, is entitled to elude the authorities of the State in which he committed his crime, the premise being that such a person would not be tried fairly in that State and would be persecuted.

⁶ *Zrig v. Canada*, [2003] FCA 178.

The third indicates that the signatories did not wish the right of asylum to be transformed into a guarantee of impunity for ordinary criminals whose real fear was not being persecuted, but being tried, by the countries they were seeking to escape. **The fourth indicates that while the signatories were prepared to sacrifice their sovereignty, even their security, in the case of the perpetrators of political crimes, they wished on the contrary to preserve them for reasons of security and social peace in the case of the perpetrators of serious ordinary crimes. This fourth purpose also indicates that the signatories wanted to ensure that the Convention would be accepted by the people of the country of refuge, who might be in danger of having to live with especially dangerous individuals under the cover of a right of asylum.**⁷ (Emphasis added)

[32] The panel does not believe that excluding the claimant in this case because a crime to which she pleaded guilty XX years ago under difficult and humiliating circumstances, whose outcome could have been different if she had been able to make full answer and defence and for which she served the entire sentence imposed on her, satisfies this fourth purpose. It would instead constitute an injustice.

Analysis of the claim under section 96 of the IRPA

[33] At the hearing, the claimant described various incidents during which she was a victim of discrimination while she was living in Mexico. She believes that she was a victim of insults, denigration and violence from an early age because she had [translation] “abnormal” behaviour. She stated that she was stopped by police officers at the age of about 13 or 14 because she was wearing a [translation] “Tarzan-like swimsuit, but with a fringe” on the beach. A few years later, she was allegedly refused a job in a hotel because they were hiring [translation] “only decent people.”

[34] The claimant left Mexico for the first time in XXXX or XXXX, to go to the United States. She apparently returned to Mexico a few months later to care for her mother, who was dying, and then returned more permanently to the United States in XXXX. She thinks that she lived there for about XX years, illegally. However, the claimant frequently travelled between Mexico and the United States at a time when it was much easier to cross the borders than it is today. She was living in XXXXX XXXXX, California, and she often went to XXXXX, in particular to obtain female hormones. It was in Mexico, in XXXX, that she underwent gender reassignment surgery. In XXXX, she

⁷ *Zrig v. Canada*, [2003] FCA 178.

allegedly tried voluntarily to return to Mexico and live with her sister, but this plan apparently failed and she returned to the United States two or three months later. In XXXX, she married an American citizen who wanted to sponsor her. Her application was allegedly rejected in XXXX, mainly because of the offence to which she had pleaded guilty in XXXX.

[35] In XXXX, when living conditions for illegals were becoming increasingly difficult in the United States, the claimant decided to return to Mexico. She noticed that the negative stereotypes toward transgender people had not evolved much. In XXXXX, she was allegedly prohibited from XXXXX XXXXX in exchange for a voluntary contribution because she [translation] “did not represent a good contribution for the people.” In XXXXX XXXXX, she was also prohibited from appearing in an XXXXX XXXXX XXXXX XXXXX. She allegedly tried to XXXXX XXXXX and an XXXXX XXXXX XXXXX XXXXX, but the police came and bothered her and some young people in the neighbourhood threw rocks, put garbage bags in front of her home and stole the tires from her car. During that time, some of her transgender friends were victims of violence.

[36] In XXXX, the claimant allegedly tried to obtain a Mexican passport. She stated that the officers in the passport office had made fun of her. They told her to remove her earrings and make-up because she was not a woman, but a man.

[37] In XXXX, the claimant responded to an advertisement from a telemarketing company in XXXXX that was recruiting new employees. The only requirement was to speak English. The claimant revealed her transgender identity at the first interview. She was made to undergo psychometric tests and was told that she had a very good profile for the job and that she would be contacted. The weeks went by and the claimant was not contacted. After several follow-up calls with no response, the claimant was told that the recruiter whom she had met the first time no longer worked for the company.

[38] The claimant stated that the difficulties that she had making a living in Mexico had pushed her, like many other transgender people, into prostitution. This is apparently tolerated on a street in XXXXX. Aside from the danger that she exposed herself to daily, the claimant stated that she was often a victim of extortion and harassment by police officers.

[39] The documentary evidence reports that, although Mexican society is becoming increasingly open toward homosexual individuals, the situation of transgender people in Mexico remains very problematic.

[40] It is argued that the “machismo” culture, in which the roles between men and women are well defined, makes those who seem to break those rules very vulnerable.⁸ It is also reported that transgender people are victims of police harassment.⁹ Transgender people are victims of discrimination in employment and in the school system.¹⁰ They find limited jobs in the workforce and are often pushed into prostitution to survive.¹¹

[41] Based on this information in the evidence and in light of the claimant’s testimony, the panel is of the opinion that the cumulative effect of the various acts of discrimination to which the claimant was subjected because of her transgender identity and to which there is a serious possibility that she could be subjected again, if she had to return to Mexico, amounts to persecution.

[42] In addition, the panel is of the opinion that the claimant discharged her burden of demonstrating that she could not avail herself of state protection.

[43] Mexico is a democratic state that must be presumed capable of protecting its citizens. Since 2003, discrimination based on sexual orientation has been prohibited in Mexico.¹² Marriage between same-sex couples has been legal in Mexico City since March 2010.¹³ More specifically with respect to the situation of transgender persons, Mexico City has adopted legislation that facilitates name changes for transsexuals who live in that jurisdiction.¹⁴ Some mechanisms,

⁸ A-1, National Documentation Package on Mexico, tab 6.1, Reding, Andrew. December 2003. World Policy Institute. “[Mexico](#)”. *Sexual Orientation and Human Rights in the Americas*, pp. 1–17, 55–62, 94–96, 103–104.

⁹ A-1, National Documentation Package on Mexico, tab 6.3, at p. 12, Global Rights / International Gay and Lesbian Human Rights Commission (IGLHRC) / International Human Rights Clinic (IHRC) (Harvard Law School) / Colectivo Binni Laanu A.C. March 2010. Virginia Corrigan. [The Violations of the Rights of Lesbian, Gay, Bisexual and Transgender Persons in Mexico: A Shadow Report](#).

¹⁰ *Idem*, at pages 6 and 8.

¹¹ A-1, National Documentation Package on Mexico, tab 6.1, at p. 13.

¹² A-1, National Documentation Package on Mexico, tab 6.3.

¹³ *Idem*.

¹⁴ A-1, National Documentation Package on Mexico, tab 6.7, [MEX103304.E](#). October 19, 2009. Whether transgender persons can get their identity documents re-issued to reflect their gender change.

including the National Council to Prevent Discrimination, are in charge of investigating discrimination complaints concerning the public and private sectors.

Mexico has also created a National Council to Prevent Discrimination (CONAPRED). CONAPRED is responsible for receiving and resolving complaints of discrimination in both public and private sector. In addition, CONAPRED is charged with creating proactive antidiscrimination programs, and has been active in the field of LGBT rights, publishing numerous reports on the issue.¹⁵

[44] But when we delve deeper into the matter, we note that despite these efforts, Mexico is unable to provide adequate protection to transgender persons.

[45] First, the panel notes that the claimant identifies herself as a transgender person, not as a woman. Although she could perhaps feminize her name if she settled in Mexico City, she would not obtain protection as a transgender person. It is also because society perceives her as having a man's body that became a woman's that she was subjected to and risks being subjected to persecution. A legal identity change could not remedy this situation.

In recent months, Mexico City has adopted legislation which would facilitate the change of name for transsexuals living in that jurisdiction. While such initiative is a positive step, it does not necessarily eliminate the threat of persecution. Scientific studies in this area reveal that Mexican society is deeply aggressive towards male-to-female transsexuals, and that such aggression manifests itself through verbal, physical and social violence – from insults yelled on the streets to assault, robbery and refusal of employment based on one's physical appearance.

...

In my empirical research on violence against transsexuals, I have found that it is the visibility of one's transsexual status which puts someone at risk of violence: the fact that other people can identify an individual in question to be transsexual explains why they are so often victims of assault.¹⁶

[46] In addition, the documentary evidence reports on the closing of CONAPRED's special Sexual Diversity program and on the step backward that this represents for the human rights of LGBT communities in Mexico:

The recent closing of the Sexual Diversity program of National Council to Prevent Discrimination (CONAPRED) is especially troubling. CONAPRED is the organ of

¹⁵ A-1, National Documentation Package on Mexico, tab 6.3.

¹⁶ Exhibit P-13, page 3.

the Mexican government responsible for investigating discrimination across the country. The closing of its Sexual Diversity program is a step backward in the fight against discrimination, especially in the light of the numerous reports of discrimination, as described below.¹⁷

[47] The panel notes that the claimant contacted XXXXX XXXXX after she thought that she had been a victim of employment discrimination by a telemarketing company in XXXXX in XXXX. She filed a copy of her communications with XXXXX XXXXX and the steps taken to process her complaint.¹⁸ When asked about this during the hearing, the claimant responded that she had been told that a meeting to raise awareness would be offered in the company at fault. Although this is a commendable idea, the panel notes that it did not give the claimant a job, nor did it heal the wounds of the discrimination that she believes she was a victim of.

[48] With respect to the police protection that she could benefit from if she were a victim of violence, the panel concludes that it is almost non-existent. The claimant stated that she was kicked by a police officer when she was in XXXXX. She stated that she tried to file a report but that she was not given any attention.

[49] In this respect, the documentary evidence indicates that police officers are themselves agents of persecution of transgender persons in Mexico, regularly harassing and extorting them.

Transgender persons are also threatened by the existence of public morals laws throughout the country. These laws, found in several areas across the country, are often very vague, criminalizing such acts as “obscene exhibitions”, “causing a scandal in a public way”, “acting in such a way as to offend one or more persons”, “acting in ways which fail to respect human dignity, public morality and good customs”. Because these laws are so vague, they are frequently used by police officials to harass, detain and extort transgender persons and travesty. For example, the International Gay and Lesbian Human Rights Commission has documented that the mere presence of a travesty person in public may be interpreted as an ‘obscene exhibition’ by police in some states. Some travestis and transgender persons pay fines to police officials almost daily to avoid being detained under these laws, a clear act of extortion and a violation of the right to be free from arbitrary detention.¹⁹

¹⁷ A-1, National Documentation Package on Mexico, tab 6.3, at p. 6.

¹⁸ Exhibits P-12, in a bundle.

¹⁹ A-1, National Documentation Package on Mexico, tab 6.3, at p.12.

[50] In light of all of the above, the panel is of the opinion that, by means of clear and convincing evidence, the claimant rebutted the presumption of state protection in this case.

[51] Although some areas in Mexico such as Mexico City, Guadalajara and Puerto Vallarta are more open to homosexual communities, the panel is of the opinion that the claimant would not have had an internal flight alternative. The particular situation of transgender persons, who according to traditional Mexican values are out of place in society, is such that the claimant is at risk everywhere in the country.

CONCLUSION

[52] The panel determines that the exclusion clause described in Article 1F(b) of the United Nations Refugee Convention does not apply to the claimant, because it is of the opinion that there are no serious reasons for considering that she committed a serious non-political crime.

[53] The panel is further of the opinion that there is a serious possibility that the claimant would be a victim of persecution by reason of her membership in a particular social group, that of transgender persons, if she had to return to Mexico.

[54] The panel determines that the claimant is a refugee under section 96 of the IRPA and allows the claim filed by XXXXX XXXXX XXXXX XXXXX.

Mélanie Raymond

M^e Mélanie Raymond

June 23, 2011

Date

IRB translation

Original language: French

KEYWORDS – REFUGEE PROTECTION DIVISION – SEXUAL IDENTITY – TRANSGENDER – EXCLUSION CLAUSE – ART. 1F(b) – DOCUMENTARY EVIDENCE – DISCRIMINATION – PERSECUTION – FAVOURABLE – MEXICO

