

# **Gutierrez v. Canada (Minister of Citizenship and Immigration)**

Between

Blanca Gutierrez (aka Blanca Gutierrez); Ennio Jose Gutierrez Gonzalez and Jenny Isabel Gutierrez by their Litigation Guardian Blanca Gutierrez; Jenny Elizabeth Gonzalez; Ivan Rodriguez Pinilla; and Ivan Manuel Rodriguez and Irving Alberto Rodriguez by their Litigation Guardian Ivan Rodriguez Pinilla, applicants, and  
The Minister of Citizenship and Immigration, respondent

[2000] F.C.J. No. 636  
Court File No. IMM-1118-99

**Federal Court of Canada - Trial Division**  
**Toronto, Ontario**  
**Lemieux J.**

Heard: December 1, 1999.  
Judgment: May 12, 2000.  
(46 paras.)

*Aliens and immigration — Admission, refugees — Grounds, well-founded fear of persecution.*

Application by the Gutierrezes, the Rodriguezes and the Bermudezes for judicial review of the decision of the Board granting refugee status to only two of the adults. The applicants were three families from Nicaragua. They had children, some of whom were American citizens. Mrs. Gutierrez was forced to participate in the Sandinistas National Literary Crusade and received military training. She and her husband joined the Sandinistas in 1977. They fled in 1987 and 1988. Mrs. Rodriguez was forced to participate in a literacy campaign. She fled to the United States and married her husband in 1993. In 1995 she came to Canada. Mrs. Bermudez became aware of human rights abuses committed by the Sandinistas. She married a Sandinista guerilla. In 1988, upon finding that she was being charged with treason, she fled. Her husband was sent to the police department and assigned to deal with dissidents who were detained until sentenced and tortured. He fled in May 1989. The Board could not find any documentary evidence of the Aleman Government persecuting returnees with similar profiles as the applicants. It found that all the applicants except Mr. Gutierrez and Mr. Bermudez did not have a well-founded fear of persecution. The two had participated in the Sandinistas movement as guerrillas and armed and police forces.

**HELD:** Application allowed and matter remitted for rehearing. The Board had to consider each of the Convention grounds advanced by the applicants as the basis of their well-founded fear of persecution. It neglected to consider their claim of a well-founded fear of persecution on account of membership in a particular social group, i.e. family.

**Counsel:**

Judith Phipps, for the applicant.  
Andrea M. Horton, for the respondent.

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**LEMIEUX J.** (Reasons for Order):—

INTRODUCTION

1 The Convention Refugee Determination Division ("CRDD") joined the claims of the Gutierrez, Rodriguez and the Bermudez families whose common link are the sisters Ana Petrona Bermudez, Blanca Estelle Gutierrez and Jenny Elizabeth Gonzalez de Rodriguez.

2 The Gutierrez family consists of Blanca Gutierrez, her husband Hector Porfirio Gutierrez Saravia, both citizens of Nicaragua, and their two children Ennio Jose Gutierrez, a 13 year-old citizen of Nicaragua and Jenny Isabel Gutierrez who is a 9 year-old citizen of the United States.

3 The Rodriguez family consists of Jenny Gonzalez de Rodriguez and her spouse Ivan Rodriguez Penilla. Jenny de Rodriguez is a citizen of Nicaragua while her spouse is a citizen of Panama. Ivan Manuel Rodriguez who is 4 years old and Irving Alberto Rodriguez who is 3 years old are their children. They are both citizens of the United States.

4 The Bermudez family consists of Ana Bermudez and her husband Ivan Antonio Bermudez, both citizens of Nicaragua. They have three children, Ivan Bermudez who is 15 years old and Grethell Bermudez who is 12 years old, both citizens of Nicaragua. Their son Bryan Bermudez is 6 years old and a citizen of the United States.

5 All of the refugee claims arose out of events in Nicaragua during the 1980s when that country was controlled by the Sandinista Government. Their fears relate to persecution by the Sandinistas if they return to Nicaragua. Their flight from Nicaragua was in different years and the United States was the country where they initially fled to and where some of the children were born. The assessment by the CRDD was made against the backdrop of a change in power in Nicaragua in the early 1990s; the government there is now democratically elected and the civil war is over.

6 In its February 12, 1999 decision the CRDD decided:

- (a) in respect of the Gutierrez family to grant the husband Hector refugee status because of a well-founded fear of persecution from the Sandinistas; to find that both his wife Blanca and their son Ennio did not have a well-founded fear of persecution because neither the documentary evidence nor her testimony indicated there is more than a mere possibility of persecution by the Sandinistas if they were to return to Nicaragua. The daughter, Jenny, was held not to be a Convention refugee because she was a U.S. citizen and that country could protect her.
- (b) in respect of the Rodriguez family not to grant status to any of its members. The father, Ivan and the two children were held not to be Convention refugees because he was a citizen of Panama and the children were citizens of the U.S. and they had no fear of persecution from these countries.
- (c) in respect of the Bermudez family to recognize the father Ivan had a well-founded fear of persecution but to exclude him on the grounds he had committed crimes against humanity. However, Ana and her two Nicaraguan born children were denied recognition on the basis there was a mere possibility of persecution. The remaining child, a U.S. citizen, was found not to be a Convention refugee having no fear of persecution there.

7 The only applicants remaining in these proceedings are Blanca Gutierrez, her son Ennio and Jenny Gonzalez. Counsel for the applicants advised the other applicants were not proceeding with their judicial reviews. It is also noted the members of the Bermudez family were not before the Court in this application.

#### THE CRDD'S DECISION

- (a) The applicants' circumstances - findings of fact
  - (i) The Gutierrez Family

8 In 1980, at the age of 16, Blanca Gutierrez was forced to participate in the Sandinista National Literary Crusade; she was sent to a war zone near the Honduras border to dispense communist political materials. With the assistance of her family she deserted after two months. In 1983, she was forced to render volunteer social services at a government institution; she was sent to the Ministry of the Interior to work. In September 1983, she received military training and met her future husband who then was a military trainer whom she married in 1984. In 1986, she held a position as a secretary to the Ministry on the East Coast. She was separated from her spouse and child. She deserted after three months and returned to her family. While on the East Coast, her spouse was incarcerated by the Sandinistas but he escaped to the United States in 1987 and helped his wife to escape there in 1988.

9 Her husband had joined the Sandinistas in 1977 serving in the Army and Air Force. By 1983, as a sub-lieutenant, he was posted as a trainer in military strategy and arms use. In 1986, he became disenchanted with the Sandinista leadership and revolution and was incarcerated for one year for insubordination. He sought and was denied release from his position; he deserted in December 1987 by fleeing to the United States. After his asylum request was denied there, he returned to Nicaragua but fled again in December 1991.

(ii) The Rodriguez Family

10 Jenny Elizabeth Gonzalez de Rodriguez's circumstances are somewhat analogous to that of her older sister Blanca. In 1981, she was forced to participate in the literacy campaign. She refused to participate in Sandinista activities causing Sandinista youths to insult her. After her sister Ana Bermudez fled the country in 1988, she and her mother took care of Ana's children. She was under surveillance by state security officers who, on one occasion, attempted to arrest her and Ana's children. After being denied a passport and exit visa by the Chamorro Government after the election in Nicaragua she fled to the United States where she married her husband in 1993. She was a member of the Baptist Church in Nicaragua and singled out as a religious fanatic and reactionary. In 1995, she received a deportation order from the U.S. Immigration Service and came to Canada.

(iii) The Bermudez Family

11 While the Bermudez family are not applicants in these proceedings, because their claims were joined with the other families, a description of their circumstances is necessary. In 1981, Ana Petrona Bermudez was recruited by the Ministry of the Interior to work at the Sandinista's Police General Direction Department as part of a mandatory "volunteer" service. She was to be secretary in the Department of Public Security and the Police Sub-Command Office. She said she was tricked into working another six years after her "volunteer service". Her work consisted of passing on information to her superiors and, as a result, she became aware of the human rights abuses committed by the Sandinistas. She was detained on many occasions because her father, a Church Pastor, was accused of being a CIA member.

12 In 1983, she married Ivan Antonio Bermudez, a Sandinista guerilla and an officer of the Ministry of the Interior. In 1985, she worked in the State Security Intelligence section. In 1988, she learned that she was being charged for treason as a counter-revolutionary and that is when she left the country.

13 Her spouse, Ivan Bermudez, had joined the Sandinistas when he was sixteen and, in 1981, he first worked as a police officer in a unit which monitored the movements of diplomats in Nicaragua. In 1983, after eight months of training in a Sandinista school, he was sent to work in the Police Department. In addition to the regular activities of a police station, the station where he was assigned to dealt with political dissidents who were detained until sentenced by police judges. During their incarceration, they were tortured.

14 Ivan Bermudez says he complained about the treatment to political dissidents and was penalized with a 24-hour confinement; he complained again and received a 15-day confinement as punishment. Co-workers began calling him a counter-revolutionary and reactionary. He asked repeatedly for his release from the police force but never received an answer.

15 In 1985, he deserted but was captured and detained until January 14, 1986, when he was ordered to return to work. In 1988, after his spouse fled, he was interrogated and threatened. He asked to be released from the police force again in 1989 but was refused. He was offered a bribe to buy his loyalty but declined to cooperate with the police and began making arrangements to flee the country, leaving it in May 1989.

(b) The CRDD's findings -- well-founded fear of persecution

16 In this aspect of its analysis, relying on the Federal Court of Appeal's decision in *Adjei v. Canada (M.E.I.)*, [1989] 2 F.C. 680 (F.C.A.), the CRDD said a claimant must establish, on a balance of probabilities, there are "good grounds" for fearing persecution and this may be called a "reasonable" or even a "serious possibility" as opposed to a mere possibility. The CRDD noted a claimant may have a subjective fear he or she will be persecuted if returned to his or her country, but the fear must be assessed objectively in light of the situation in the country to determine whether it is well-founded, citing the Federal Court of Appeal's decision in *Rajudeen v. M.E.I.* (1984), 55 N.R. 129.

17 The CRDD indicated each claimant's fear of persecution was considered in light of their profiles, the evidence of what happened to them, the evidence as to the treatment of similarly situated persons and the documentary evidence pertaining to human rights abuses.

18 Turning to the documentary evidence, the CRDD acknowledged the Nicaraguan Government's human rights record has improved measurably, "but serious problems remain" referring to the Country Report for Nicaragua in 1996 by the U.S. State Department. Citing other documentary evidence, the CRDD noted several sources which referred to the influence of the Sandinistas in both the Armed Forces and the police, and that they retained considerable power and maintained important positions in the military, police, bureaucracy, judiciary and unions. The reports also said they had followers throughout the population and were in a position to punish and harm their perceived enemies if they had sufficient motive to do so because of their positions within the public safety/security organizations, their influence upon government and the government's repeated grants of amnesty for past deeds.

19 The CRDD made reference to documentary evidence on persons with profiles similar to the claimants. It noted the "out-of-power Sandinistas do not have a policy of systematic repression of returnees" and that "in general, the Sandinistas seem to confine serious mistreatment to individuals who challenge the current privileges of the party (or powerful individuals within it) or who challenge Sandinista unwillingness to allow human rights violators to be punished".

20 The CRDD also cited a more recent report which indicated that in Nicaragua some former Sandinista soldiers are at risk and the new government is unable to provide protection.

21 The CRDD said it had reviewed the documentary evidence and while the documentary evidence indicated some authorities are committing human rights abuses, it could not find any documentary evidence of the Aleman Government persecuting returnees with profiles similar to the claimants'. The CRDD said this at pages 9-10 of its decision:

With respect to the well-foundedness of the claimants' fears, I gave greater weight to the documentary evidence because it provided more recent information on the situation in Nicaragua than the claimants' testimony. The claimants left Nicaragua many years ago. As well, I find that the documentary evidence comes from a variety of reliable sources which have no interest in the outcome of this claim.

[emphasis mine]

(i) The Gutierrez family

22 The CRDD found that neither Blanca Estela Gutierrez nor the minor child, Ennio Jose Gutierrez, had a well-founded fear of persecution because: [page 11]

Like her sister, Ana, Blanca was never a Sandinista. She was forced to participate in a number of Sandinista activities and on two occasions she deserted and returned to her family. No harm came to her as a result of her desertion. She was not a human rights activist nor witnessed any human rights abuses. Neither the documentary evidence nor the testimony of the claimants indicates that there is more than a mere possibility that Blanca would be harmed or persecuted by the Sandinistas if she were to return to Nicaragua.

[emphasis mine]

23 In terms of her spouse, as noted, the CRDD found a well-founded fear of persecution based on the documentary evidence and his testimony. It said it was not clear he would be perceived by the Sandinistas as a risk like his brother-in-law Ivan Bermudez, but his testimony concerning his experiences at the military school and when he returned in 1991, persuaded the panel there was more than a mere possibility that he would be at risk if he were to return to Nicaragua.

(ii) The Rodriguez family

24 The CRDD found Jenny Gonzalez de Rodriguez did not have a well-founded fear of persecution if she were to return to Nicaragua because: [pages 11-12]

Jenny, like her sisters, was never a Sandinista. She was forced to participate in a "literacy campaign" but unlike her sisters she was not obliged to work for the Sandinistas. She cared for the claimants' children when they fled Nicaragua. Although there was some evidence of threats, Jenny was not harmed. She remained in Nicaragua until after the Sandinistas lost the election to Chamorro. It was her responsibility to reunite the children with their parents in the United States. Nothing happened to her during that period.

Given Jenny's profile, the lack of harm she experienced and the lack of documentary evidence to indicate any risk of harm to someone in her position, on the balance of probabilities, there is no more than a mere possibility that Jenny would be harmed or persecuted by the Sandinistas if she were to return to Nicaragua.

## ANALYSIS

25 The CRDD invoked *Adjei, supra*, for the proposition a claimant must establish, on the balance of probabilities, the claimant has good grounds for fearing persecution and this may be called a reasonable or even serious possibility, as opposed to a mere possibility. This test was approved by the Supreme Court of Canada in *Chan v. Canada (M.E.I.)*, [1995] 3 S.C.R. 593 at page 659.

26 Furthermore, the CRDD relied upon *Rajudeem, supra*, for the proposition a claimant's fear must not only be assessed subjectively but must also be looked at in the light of the situation in the country to determine whether objectively it is well-founded. The *Rajudeem* test was endorsed by the Supreme Court of Canada in *Canada (Attorney General) v. Ward*, [1993] 2 S.C.R. 689 at 723.

27 The CRDD considered the claimant's fear of persecution in terms of their profiles, evidence of what happened to them, evidence as to the treatment of similarly situated persons and the documentary evidence pertaining to human rights abuses. The consideration of this type of evidence was endorsed both in *Ward* and in *Chan, supra*.

28 On this basis, there is no doubt the CRDD's approach and consideration of the evidence were framed on proper legal principles but counsel for the applicants' challenge was of a different nature.

29 Applicants' counsel said they had based their claims both on account of membership in a particular social group (their family) and on account of their political opinions. The error made by the CRDD was that it did not examine the applicants' claim of having a well-founded fear of persecution on account of their membership in the family which includes the extended family of the three sisters.

30 He points to the evidence in the transcript showing the applicants were persecuted because they were part of the family: one remaining brother in Nicaragua had his home

bombed; Jenny Gonzalez took care of the children of Ivan and Ana Bermudez and was persecuted on this account; twelve of the fourteen family members have fled from Nicaragua. In short, he says the CRDD ignored all of this evidence and the ground for their having a well-founded fear of persecution.

31 He adds two family members were found to have a well-founded fear of persecution and this fact required an assessment of the impact of that finding on the family class claim, i.e. if they were being persecuted on account of being members of a family, the persecution finding in relation to two members of the family could only serve to confirm the applicants' fears of being persecuted on that account.

32 Counsel for the respondent argued the applicants failed to establish a nexus or link between their fear of persecution and that expressed by Hector Gutierrez and Ivan Bermudez which was on account of the fact they had participated in the Sandinista movement as guerrillas and later as members of the Sandinista Government's armed and police forces, albeit recanting at a later stage.

(i) Failure to consider a Convention ground

33 It was the CRDD's obligation to consider each of the Convention grounds advanced by the applicants as the basis of their well-founded fear of persecution. This proposition was made clear in Ward, supra, at 745.

34 The Supreme Court of Canada went further and considered "political opinion" as a ground for fear of persecution even though that ground was not raised by the claimant before the Board or the Court of Appeal. La Forest J. said at page 745-46:

While political opinion was raised at a very late stage of the proceedings, the Court has decided to deal with it because this case is one involving human rights and the issue is critical to the case.

35 The CRDD acknowledged in its written reasons that Jenny Gonzalez claimed Convention refugee status "based on her perceived political opinion and her membership in a particular social group, namely, the family (applicants' record, page 13). In Blanca Gutierrez's case, the CRDD said she based her claim on her perceived political opinion, retribution by the Sandinistas.

36 In several places in her testimony, Jenny Gonzalez addressed the issue of why she feared persecution because of her membership in the family. The following examples suffice:

- (1) At page 1021 of the certified record, she indicates that "we are identified as the Gonzalez family, as the children of Ennio and we are identified as a reactionary family, or a family of reactionaries".



- (2) Even today, her brother and sister who remain in Nicaragua are persecuted and at pages 1007, 1021 and 1022 she mentions her brother's home had been bombed and that her sister had not been able to secure employment;
- (3) At page 1010 of the certified record, she said "it's not just that I am afraid for myself, I am afraid for my whole family, there's 14 of us and for them [the Sandinistas] we represent 14 negative points";
- (4) At pages 1005 and 1006, she recites her attempted arrest by the police when she was taking care of Ana's children in Nicaragua and mentions "the whole family has always been stalked" and "they all had problems and so, one by one, they left the country" and the problems arose because "we did not participate in anything to do with the revolutionary process".

37 A review of the transcript indicates Blanca Gutierrez was not as explicit as her sister Jenny in providing evidence linking her fear to persecution of the family members as a whole. However, at page 1058 of the certified record, she indicates her fear is not one solely related to her and her background but "my own, my family, my in-laws, my family, my whole family, it's based on all that".

38 After reviewing the transcript of proceedings, I am satisfied the CRDD neglected to consider the applicants' claim of a well-founded fear of persecution on account of membership in a particular social group, the Gonzalez family, i.e. because they were members of that family.

39 Counsel for the respondent is accurate in saying each of the sisters had lived different experiences in Nicaragua and these individualized experiences had been advanced before the CRDD in testimony. Respondent's counsel is also correct in saying the reason Hector Gutierrez and Ivan Bermudez established a well-founded fear of persecution was because they were former Sandinista guerilla fighters and later part of the Sandinista army or police force who later deserted and the applicants cannot automatically hook on to their claims.

40 Those arguments, in my view, are relevant to the claims advanced by the applicants on grounds of political opinion, actual or perceived but, however, fail to address the independent grounds of fear of persecution because of membership in the Gonzalez family.

41 The Federal Court of Appeal has long recognized the family as a particular social group. In its January 1992 decision of *Al-Busaidy v. Canada (M.E.I.)*, 16 Imm.L.R. (2d) 119, Heald J.A., on behalf of the Court, held the Board (CRDD) had committed a reviewable error in not giving due effect to the applicant's uncontradicted evidence with respect to membership in a particular social group -- his immediate family. He held the

evidence clearly established the applicant was targeted by the Ugandan military because of his father.

42 Counsel for the respondent attempted to draw me into a difficult area of refugee law represented by decisions of this Court in *Casetellanos v. Canada* (Solicitor General), [1995] 2 F.C. 190, a decision of my colleague Nadon J. and *Kaprolova v. Canada* (M.C.I.), 41 Imm.L.R. (2d) 56, a 1997 decision of my colleague Teitelbaum J. These cases illustrate the problems which arise when one member of a family is found to have a well-founded fear of persecution but other family members are denied such recognition. Both judgments appreciated that Parliament, in the Immigration Act, somewhat alleviated the problem through the provisions of section 46.04(1) where it is provided that any person who is determined by the Refugee Division to be a Convention refugee may, within the prescribed period, apply to an immigration officer for landing of that person and any dependent of that person under certain conditions.

43 In *Casetellanos*, supra, Nadon J. examined, in detail, the concepts of family unit, indirect persecution and the family as a social group. In the aspect which is of interest here, he held at page 204 "there can be absolutely no doubt that the family unit forms a social group which is protected against persecution by the Act" relying upon *Gonzalez v. Canada* (M.E.I.) (1991), 14 Imm.L.R. (2d) 51 (F.C.A.) and *Taheri v. Canada* (M.E.I.), [1993] F.C.J. No. 389 adding, however, that it is clear the scope of the family as a social group is not limitless and that each case must be decided on its own merits on the basis of evidence presented. He said at page 204:

One will not, for example, be deemed to be a Convention refugee just because one has a relative who is being persecuted. There has to be a clear nexus between the persecution that is being levelled against one of the family members and that which is taking place against the others: *Al-Busaidy v. Canada* (M.E.I.) (1992), 16 Imm.L.R. (2d) 119 (F.C.A.). The family can only be considered to be a social group in cases where there is evidence that the persecution is taking place against the family members as a social group. For example, it is possible that a claimant may be persecuted for his own political views, and not because of those of his parents, who may also be dissidents.

In the case before him, the CRDD had found only the father qualified as a Convention refugee on the grounds of political opinion. Justice Nadon upheld the CRDD on its finding that the evidence of fear of persecution felt by the remaining family members was insufficient to draw the required nexus in that there was no evidence whatsoever any persecutory activities had been levelled against the mother or her daughters, let alone any based upon their being members of Mr. *Casetellanos*' family.

44 In *Kaprolova*, supra, the Refugee Division recognized the husband had a well-founded fear of persecution but his wife and son did not even though they had based their claim on his. Teitelbaum J. allowed the judicial review holding the Refugee Division was wrong in invoking the notion of indirect persecution to resolve the case. He held it

was obvious the applicants feared the same persecution as the husband and father who was granted refugee status.

45 As I see it, the nexus issue in this case does not present itself as starkly as counsel for the respondent would have it because it fails to take into account the evidence before the CRDD. Counsel for the applicants points out the applicants advanced the basis for a well-founded fear of persecution because of membership in the Gonzalez family, led some evidence in respect of that fear and the CRDD failed to consider that ground explicitly. I agree with that submission. In the circumstances, it would be unwise and unprudent to go further in the matter and make an assessment on the evidence or deal with issues which may arise before the applicants' refugee claims are reconsidered.

46 For all of these reasons, this judicial review application is allowed, and the applicants' claims are remitted for rehearing before a differently constituted panel. No certified question has been raised and none is formulated.

LEMIEUX J.