Vergara v. Canada (Minister of Citizenship and Immigration)

Between
Marcos Vinicio Marchant Vergara, plaintiff, and
The Minister of Citizenship and Immigration, respondent

[2001] F.C.J. No. 759
2001 FCT 474
Court No. IMM-1818-00

Federal Court of Canada - Trial Division
Montréal, Quebec
Pinard J.

Heard: March 20, 2001.
Judgment: May 15, 2001.
(10 paras.)

Aliens and immigration — Admission, refugees — Grounds, well-founded fear of persecution — Exclusion and expulsion — Immigration, exclusion, particular persons — Persons suspected of committing crimes.

Application for judicial review brought by Vergara from a decision of the Refugee Division that he was not a Convention refugee. Vergara, a citizen of Chile and a member of the Communist Party, had claimed a well-founded fear of persecution based on his political opinions. The Division rejected his claim that he had been kidnapped and interrogated, finding it improbable. Vergara had also committed acts of sabotage and armed robbery and claimed that these were political acts.

HELD: Application dismissed. The Division's decision was not unreasonable. Vergara had not established a well-founded fear of persecution. As he had not served sentences for his crimes, he could not take advantage of the exception to the exclusion under article 1F(b) of the Convention.

Counsel:

William Sloan, for the plaintiff.
Marie Nicole Moreau, for the defendant.

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1 **PINARD J.** (Reasons for Order):— The application for judicial review is from a decision by the Refugee Division ("the RD") on March 8, 2000 that the plaintiff is not a

Convention refugee and, further, is excluded from the scope of the Convention pursuant to article 1F(b).

2 Thus, quite apart from its conclusion that the plaintiff was excluded under article 1 F(b) of the Convention, the RD held that the plaintiff could not establish a well-founded fear of persecution within the meaning of the said Convention, as appears from the following passage from its decision:

> [TRANSLATION]
>
> BASIS OF PLAINTIFF'S FEAR
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> Further, it appeared to us that the plaintiff had not presented evidence of a well-founded fear of persecution for his political opinions or on any other ground contained in the definition of a Convention refugee if he were to return to Chile.
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> The documentary evidence was that the Communist Party has been a legally recognized political party in Chile since 1990 [reference omitted]. Similarly, the documentary evidence indicated that no complaint of persecution or mistreatment had been filed by a member of the Communist Party in recent years, apart from noting the case of its president Gladys Marin, who was briefly arrested in 1986 for defamation of the former dictator Pinochet.

3 The RD further refused to accept the plaintiff's claim that on January 15, 1996 he was kidnapped by unknown persons and subjected to two days' interrogation about the names and addresses of union leaders. In this regard, the tribunal found it unlikely that the plaintiff would have been targeted simply because he was a former political prisoner, since unions are legally recognized in Chile, conduct their activities openly, their leaders are well known to the public and the plaintiff had never filed any complaint with the authorities. The RD concluded that this was an invention by the plaintiff used as a pretext for his decision to leave his country.

4 It is clear from reading the foregoing passage from the decision in question that the tribunal's conclusion about whether the plaintiff had a reasonable fear of persecution was based on several general observations, not merely on the incident of January 15, 1996. Accordingly, whether the tribunal erred in not believing the latter incident is not conclusive. I am not persuaded that the error, if there was one, had any effect on the final result of the decision (see, e.g. Schaaf v. Minister of Employment and Immigration, [1984] 2 F.C. 334 and Canadian Cable Television Association v. American College Sports Collective (1991), 129 N.R. 296 (F.C. Appeal)).

5 However, as there were five years between the 1991 incident (in which the plaintiff was arrested, beaten and interrogated about the FASIC reintegration project) and the alleged incident of January 15, 1996, I consider, against the background of events

occurring in Chile since 1990, that the RD could well conclude that this 1996 incident was improbable.

6 The plaintiff did not persuade me that the inferences drawn by the RD, a specialized administrative tribunal, were unreasonable (see Aguebor v. Minister of Employment and Immigration (1993), 160 N.R. 315 (F.C. Appeal)). On the contrary, the tribunal's conclusions about the absence of a reasonable fear of persecution appear to be generally well supported by the evidence in the record. There is accordingly no basis for substituting my own assessment of the facts for that given by the RD.

7 Additionally, I am also not persuaded, with regard to the exception pursuant to article 1F(b) of the Convention, that the RD made any error that requires intervention by this Court. In deciding that the political exception could not be applied in the circumstances to prevent implementation of clause 1F(b), the tribunal seems to have correctly applied the rules laid down by the courts, in particular Gil v. Canada (M.E.I.), [1995] 1 F.C. 508 (F.C. Appeal). The tribunal might well, relying on that precedent, not regard acts of sabotage and armed robbery committed by the plaintiff as political crimes in the absence of any logical connection between, on the one hand, these serious crimes affecting civilian populations and involving the risks of death or injury for them, and on the other the political objective.

8 Finally, Chan v. Canada (M.C.I.), [2000] 4 F.C. 390 (F.C. Appeal), which confirmed that there could be an exception to the exclusion under article 1F(b) where the claimant had already been convicted and served his sentence for the serious crime under the ordinary law with which he was charged, cannot assist the plaintiff in the case at bar. From his own evidence, it appeared that the plaintiff has never been convicted and served a sentence for dynamiting electric pylons which deprived several cities of electricity and for the armed robbery committed in a supermarket frequented by unarmed civilians. As these crimes served as the basis for his exclusion, the plaintiff therefore cannot benefit from the exception in Chan, supra.

9 For all these reasons, the application for judicial review is dismissed.

10 Since none of the questions suggested by the parties for certification dealt with the RD's conclusion that the plaintiff could not establish a well-founded fear of persecution; moreover, in view of the rules set out in Gil, supra; and in view of the foregoing reasons for dismissing the application for judicial review, the questions suggested do not meet the particular criteria laid down by the Federal Court of Appeal in Liyanagamage v. M.C.I. (1994), 176 N.R. 4, and so do not merit certification.

Certified true translation: Suzanne M. Gauthier, LL.L. Trad. a.

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ORDER

The application for judicial review of the decision by the Refugee Division on March 8, 2000 that the plaintiff is not a Convention refugee and, further, is excluded from the scope of the Convention pursuant to article 1F(b) is dismissed.

Certified true translation: Suzanne M. Gauthier, LL.L. Trad. a.