

CHANGE IN CIRCUMSTANCES IN A REFUGEE CLAIMANT'S COUNTRY OF ORIGIN

SUGGESTED FRAMEWORK OF ANALYSIS

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THE ISSUE

Any claim to Convention refugee status is determined by applying the Convention refugee definition to the facts of the claim, having regard to the **current conditions** in the claimant's country of origin. Where the particular circumstances that gave rise to the claimant's fear of persecution have changed since the claimant's departure from that country, the determination of the claimant's Convention refugee status is made in light of those changes. The central question is: Are the changes such as to make the reasons for the claimant's fear of persecution cease to exist?

IMMIGRATION ACT

While spelling out in subsection 2(1) the basic criteria that a person must satisfy in order to be defined as a "Convention refugee", the *Immigration Act* further enumerates in subsection 2(2) certain conditions under which the "**person ceases to be a Convention refugee**". One such situation is when:

.... (e) the reasons for the person's fear of persecution in the country that the person left, or outside of which the person remained, cease to exist.

Subsection 2(3) entitles certain persons in exceptional circumstances to invoke "**compelling reasons**" that may justify their exemption from the above cessation provision:

A person does not cease to be a Convention refugee by virtue of paragraph (2)(e) if the person establishes that there are compelling reasons arising out of any previous persecution for refusing to avail himself of the protection of the country that the person left, or outside of which the person remained, by reason of fear of persecution.

INTERPRETATION

A reasonable interpretation of the "cessation" provisions, as incorporated in the *Immigration Act*, leads to the conclusion that they are applicable in two circumstances: 1) the **denial** of Convention refugee status in the case of persons who otherwise meet the basic definition of a Convention refugee set out in paragraph (a) of subsection 2(1), i.e. in the case of refugee claimants at determination hearings; and 2) the **withdrawal** of Convention refugee status, under the terms of subsection 69.2(1), in the case of persons who have already been determined to be Convention refugees.

This interpretation is not consistent with what is suggested by the UNHCR *Handbook on Procedures and Criteria for Determining Refugee Status*. Under the 1951 Convention, according to paragraphs 111 to 117 of the *Handbook*, the “cessation” provisions are not applicable to the procedure for determining a person’s claim to refugee status but they are rather used only for the purposes of withdrawal of status that has already been recognized. Indeed, unlike paragraph 2(2)(e) of the Act which simply speaks of cessation of “the reasons for the person’s fear of persecution”, Article 1C(5) of the Convention explicitly refers to cessation of “the circumstances in connexion with which he has been recognized as a refugee.”

While careful attention should be given to the differences between the application of the cessation provisions under the Act and under the Convention, it is the definition in the Act which must be followed by the Convention Refugee Determination Division (CRDD) of the Immigration and Refugee Board (IRB). The recognition, therefore, of a person’s Convention refugee status under the Act is dependent upon the requirement that the person does not fall under any one of the cessation provisions. It thus follows that a claimant whose **reasons for fear of persecution in the country of origin have ceased to exist** as a result of a change in circumstances may not be determined to be a Convention refugee unless the claimant can make his or her case of “compelling reasons” for being unwilling to return to that country.

JURISPRUDENCE

In all claims to Convention refugee status, regardless of changes in circumstances in the claimant’s country of origin, the applicable standard of proof is the one developed in *Adjei v. M.E.I.*, [1989] 2 F.C. 680 (C.A.), p. 683:

...[O]ne accurate way of describing the requisite test is in terms of “reasonable chance”: is there a reasonable chance that persecution would take place were the applicant returned to his country of origin?

In addition, the following judgments of the Federal Court of Appeal are relevant to the issue of change in circumstances:

M.E.I. v. Obstoj, Agnieszka, No. A-1109-91, dated 11 May 1992, (F.C.A.), per Hugessen J.A., pp. 8-9:

...Parliament intended a consideration of the matters raised in subsection 2(2) [of the *Immigration Act*] (and necessarily of subsection 2(3) as well) to be included in the consideration of whether or not a person meets the requirements of paragraph (a) of the [Convention refugee] definition....To put the matter another way, subsections 2(2) and 2(3), while at first blush they appear to deal only with the loss of a refugee status which has already been acquired, have in fact been extended by Parliament and incorporated into the definition by means of paragraph (b), so that their consideration forms part of the determination process itself.

M.E.I. v. Paszkowska, Malgorzata, No. A-724-90, dated 16 April 1991, (F.C.A.), pp. 1-2:

...[B]oth the first stage Tribunal set up under section 46 and the Refugee Division are obliged to evaluate the evidence of the conditions in the claimant’s country of origin

at the time of their respective hearings... The conditions at the time that a claimant flees his country are of course relevant, but only to the extent that other credible and trustworthy evidence does not demonstrate that because of changes which have taken place in that country it is no longer reasonable for the claimant to fear persecution there...

Mileva v. M.E.I. (1991), 81 D.L.R. (4th) 244, per Pratte J.A., p. 248:

...The fact that the political situation existing in a claimant's country of origin has developed in such a way as to remove the reasons causing him to fear persecution is obviously a fact relevant to the question of whether that person can validly maintain that he is a Convention refugee. The question raised by a claim to refugee status is not whether the claimant had reason to fear persecution in the past, but rather whether he now, at the time his claim is being decided, has good grounds to fear persecution in the future. Any doubt that there may be in this regard disappears when one reads the definition given to the expression "Convention refugee" in s. 2(1) [of the *Immigration Act*]. According to that definition, a person is a "Convention refugee" if he meets the requirements stated in para. (a) and, further [in para. (b)], "has not ceased to be a convention refugee by virtue of subsection (2)...

ASSESSMENT OF CHANGE IN CIRCUMSTANCES

Paragraph 135 of the UNHCR *Handbook* offers a useful point of departure in assessing what kinds of changes in circumstances may serve as grounds for rejecting a refugee claim:

...fundamental changes in the country, which can be assumed to remove the basis of the [claimant's] fear of persecution. A mere - possibly transitory - change in the facts surrounding the individual refugee's fear, which does not entail such major changes of circumstances, is not sufficient...

Thus, the assessment of a Convention refugee claim involving a change in circumstances in the claimant's country of origin rests largely, although not exclusively, on:

A) the nature and degree of change in the country conditions, and

B) how that change affects the individual claimant in his/her particular situation:

- (a) the reasons for his/her fear of persecution and whether this fear still exists;
 - (b) the feared agent(s) of persecution and whether they are still present in the country of origin and are still inclined to harm the claimant;
 - (c) whether the claimant has good grounds to fear persecution if returned to that country because of negative side effects emanating from what might otherwise be viewed as a positive change.
- € for example, a liberalizing change in a country's political system may lead to the emergence of long-standing ethnic or religious tensions which could bring certain groups in society into open conflict with other groups and with the state authorities.

I. The Changes

For a change in circumstances in a claimant's country of origin to be judged fundamental and of such apparent permanence as to lead the decision-maker to find that "the reasons for the claimant's fear of persecution in that country have ceased to exist," the following indicators, not in themselves exhaustive, are relevant but only insofar as they are directly related to the claimant's particular reasons for fearing persecution; that is, only those pertinent changes that are capable of removing the basis of the particular claimant's fear of persecution will need to be considered.

(1) Nature of the changes

- the replacement of an oppressive regime by a democratic government;
- modifications of formerly oppressive laws, decrees or policies (e.g. amendments to the Penal Code);
- the dismantling of the former security services;
- legislative changes affecting civil, political and human rights (e.g. legalization of political parties, ratification of international human rights instruments);
- the enactment of general amnesties and the existence of repatriation programmes.

(2) Effectiveness of the changes

- improvements in the overall human rights situation, specifically with regard to persons similarly situated to the claimant;
- the observance of due process of law;
- the compliance by the police and military establishments with the dictates of democracy and respect for human rights;
- the willingness and ability on the part of the new regime to control the activities of non-state agents of persecution (i.e. guerrilla groups, death squads, etc);
- the favourable treatment of minorities, religious communities or political opposition groups by the new regime;
- the positive attitude of the population towards the ethnic, racial, religious, social or political group to which the claimant belongs.

(3) Durability of the changes

- given the passage of time since the changes have occurred and in light of the substantial progress that has been made, there is reason to believe that the changes are likely to last in the foreseeable future.

II. The Exception

Although the reasons for the claimant's fear of persecution in his or her country of origin have ceased to exist as a result of the fundamental changes that have taken place in that country, there may be "**compelling reasons**" that would justify recognition of the claimant's Convention refugee status if:

- (1) there is evidence of previous persecution to which the claimant had been subjected in that country for one of the reasons set out in the definition;
- (2) the nature or gravity of the persecution suffered in the past is such that it deprives the claimant of the emotional wherewithal necessary to return to and live in that country, or otherwise normalize his or her relationship with that country; and
- (3) the claimant is found to satisfy all the criteria of the Convention refugee definition set out in subsection 2(1) but for the change in circumstances in that country.

Applicability of the exception

The object of the subsection 2(3) "compelling reasons" exception to cessation of the reasons for fearing persecution is to provide a humanitarian relief to those persons who still suffer the effects of their past persecution. As Justice Hugessen stated in *Obstoj*, subsection 2(3) should be read:

...as requiring Canadian authorities to give recognition of refugee status on humanitarian grounds to this special and limited category of persons, i.e. those who have suffered such appalling persecution that their experience alone is a compelling reason not to return them, even though they may no longer have any reason to fear further persecution. (p. 9)

By expressly linking "compelling reasons" to previous persecution, the *Immigration Act*, like the 1951 Convention, seems to limit the scope of this exception to exclude such grounds as those of personal convenience. "Compelling reasons" which justify a refusal to avail oneself of the protection of the country of origin vary from case to case depending on the particular facts, and taking into account both a subjective and objective test. International authorities such as Atle Grahl-Madsen suggest that persons who may come within the ambit of this humanitarian principle include:

- ◇ persons who, because of the atrocities which they and their kin had experienced, might have developed a certain distrust of the country of origin and a disinclination to be associated with its nationals;
- ◇ persons who may fear serious discrimination at the hands of certain elements of the population whose attitude remains unchanged despite the change in the political structure;
- ◇ persons who were persecuted by the former government, but whose views and opinions are nonetheless strongly opposed under the new regime;
- ◇ persons who, having fled the country of origin to escape persecution, are without abode, vocation, and anything else which binds them to that country;

- ◇ persons who, because of enforced flight and subsequent length of time spent abroad, are psychologically conditioned to distance themselves from the government and/or the community of their country of origin.

III. Procedural Issues

- (1) Until such time as it has made its determination of a claim, the CRDD retains jurisdiction to reconvene a completed hearing into that claim in order to hear new evidence of any change in circumstances in the claimant's country of origin. [*M.E.I. v. Salinas, Marisol Escobar*, No A-1323-91, dated 25 June 1992, (F.C.A.)]
- (2) At any time until the CRDD has made its determination of a claim that it has heard, the claimant may submit new evidence pertaining to such matters as the effectiveness or durability of the change in circumstances taking place in his/her country of origin, and the CRDD has the obligation to consider that evidence. [*Nadarajah, Senthilvel v. M.E.I.*, No. A-947-90, dated 19 March 1992, (F.C.A.)]

BURDEN OF PROOF

When the Minister makes an application for determination of cessation of refugee status under subsection 69.2(1), clearly the Minister has the burden of proof. At a section 69.1 hearing into a person's claim to be a Convention refugee, on the other hand, the claimant must meet the requirements of the definition and must not have ceased to be a Convention refugee by virtue of the cessation provisions. If there has been a change in circumstances in the claimant's country of origin since the claimant left that country, the claimant would have to assume the burden of establishing that, notwithstanding this change, the reasons for his or her fear of persecution have not ceased to exist.

For the claimant to establish that his or her reasons for fearing persecution have not been removed by the change, there does not have to be evidence of previous persecution. If, on the other hand, the claimant's reasons have ceased to exist because of the change in circumstances in the country of origin but the claimant wishes to rely on the "compelling reasons" exception, there has to be evidence of previous persecution in that country. As a reasonable threshold standard, the persecution suffered should be, on the authority of *Obstoj*, one of an "appalling" nature, or what the UNHCR *Handbook* describes as an "atrocious form of persecution."

SUMMARY

Where a claim to Convention refugee status involves a change in circumstances in the claimant's country of origin, the evidence must establish that:

1. The claimant left, or remained outside of, the country of origin by reason of a well-founded fear of persecution for one of the reasons set out in the definition.
2. The claimant has not ceased to be a Convention refugee by reason of the change in circumstances that has taken place in that country, because:

- (a) the changes are not so fundamental as to remove the particular reasons for the claimant's fear of persecution and he/she is unable, or by reason of that fear, is unwilling to return to that country; **or**
- (b) the claimant, although no longer in fear of persecution, nevertheless refuses to return to that country on grounds of "compelling reasons" arising out of previous persecution such that:
- (i) the claimant found the persecution suffered so appalling or atrocious as to deprive him or her of the emotional wherewithal necessary to return to and live in that country, or otherwise normalize his or her relationship with that country; and
- (ii) a reasonable person would find the persecution appalling or atrocious.

AUTHORITIES

In addition to the relevant statutory provisions and case law, the following academic authorities were relied on in developing this framework of analysis:

- ◇ Atle Grahl-Madsen, *The Status of Refugees in International Law*, vol. 1 (Leyden: A.W. Sijthoff, 1966), pp. 399-411;
- ◇ James C. Hathaway, *The Law of Refugee Status*, (Toronto: Butterworths, 1991), pp. 199-204;
- ◇ Guy S. Goodwin-Gill, *The Refugee in International Law* (Oxford: Clarendon Press, 1983), pp. 51-52.