

Resolution No 1023-2008 DMG

MINISTRY OF THE INTERIOR AND POLICE [*Ministerio de Gobernación y Policía*].
OFFICE OF THE SECRETARY.

San José, 8:00, July 23, 2008.

This office recognizes the motion of appeal filed by Ms. CHERE LYN TOMAYKO, adult, married, American citizen, passport number 132169430, against the administrative resolution 135- 99560-, at 14:43 on April 24, 2008, pronounced by the Director General of Immigration and Foreign Services [*Dirección General de Migración y Extranjería*], in which her request for asylum was denied.

RESULTING:

- 1- That February 22, 2008 Ms. Chere Lyn Tomayko filed before the Director General of Immigration and Foreign Services a request to obtain international protection of refugee status in Costa Rica.
- 2- That by means of administrative resolution number 135- 99560-, at 14:43 on April 24, 2008, said Director denied her request for asylum.
- 3- That in due time and form the applicant filed a motion for reversal subject to appeal.
- 4- That by means of administrative resolution number 135- 112946- at 14:15 on July 21, 2008 the Director General of Immigration and Foreign Services declared unfounded the lodged motion to reverse.
- 5- That considering the prior decision this motion of appeal is to be recognized.

CONSIDERING:

FIRST- That the Director General of Immigration and Foreign Services denied, by means of administrative resolution 135- 99560- on April 24, 2008, the appellant's request for asylum, through the principles which hereafter are summarized:

- a- That the applicant does not demonstrate adherence with the objective and subjective elements necessary for said declaration of asylum.
- b- That the living situation of the applicant is particular, and that the supposed fear testified to, in order to be consistent with the persecution or harassment in the terms defined in the Convention of 1951 and Protocol of 1967 on refugees, must be found in that interpretation.
- c- That the applicant tried to strengthen her need for protection based on fear that originates in her personal situation of apparent domestic violence to which she was subjected to by her husband and father of her daughters, for which the US authorities gave her the attention that was required.
- d- That her entrance into Costa Rica was in May of 1997, without having previously filed a request for asylum, which was done when she was detained by the national judicial authorities in light of a process of extradition negotiated by the US authorities.

- e- That it is clear that her situation is her own among situations of domestic violence whose protection and security should be sought in other specialized procedures.
- f- That it catches our attention that though she is married to a national and mother of Costa Rican minors she did not opt for Costa Rican residency.
- g- That the arguments eventually may be considered well-founded if it were possible to demonstrate in reasonable measure that the permanent residence or return to her country of origin could be intolerable, a situation that is not the case before us since it has been corroborated that an eventual exit from national territory with a destination of her country could be produced through an order of a Costa Rican jurisdictional body in light of a requirement of another competent jurisdictional body of her country of origin, due to a fact that is not found within the definition of a refugee.
- h- Due to all that previously stated this office has reasonable doubts in being able to consider that permanent residence in her country of origin would be intolerable for the indicated reasons in the definition of refugee, the absence of elements that validate her claim to international protection of refugee status undermines her integrity in the case of returning to her country, not framing her situation within the conceptual framework of the definition of a refugee, which as was already stated, was established in the Convention of 1952 [sic] and the Protocol of 1967 on refugees. The interpretation of her personal situation that affects the applicant does not mean that she should be accepted as valid in accessing what she has requested, for which the existence of a reasonable doubt is evident and manifest in the present case, the reason for which this office can no longer consider it. In the absence of validating and congruent elements of the definition of a refugee established in section 1-A of the Convention of 1951 on refugees, which proceeds to the denial of the application filed.

SECOND- That the written petitioner, Ms. Chere Lyn Tomayco, in summarized form declares:

- a- That the authorities have committed a lack of clear and deep analysis of her application, which would permit an accurate evaluation in determining whether or not her case contains the necessary elements of the definition a refugee.
- b- That as has been demonstrated she is a victim of domestic violence committed by her ex-partner in the United States, who also committed attempts against her life and that of her daughters, that threatened her with death and even followed her to Costa Rica. That he can track her entrance to and exit from the country. That the Director understands clearly the reasons which provoked her exit from her country of origin which is incongruent with the final results of the resolution. That the Director of Immigration seems to have repeatedly applied a resolution in similar cases of denial of asylum, in spite of in every instance the specificities of the situation.
- c- That an evaluation of the fear suffered by her and her daughters seems not to have been conducted (subjective elements of the definition of a refugee). This makes the resolution lack an analysis of the reasonability of the real risk or of the harm itself that they would suffer if they returned to their country of origin.

- d- In saying that they should turn to other easily accessible procedures not only is a seriously restrictive interpretation of the Law of Immigration [*Ley de Migración*], but a serious indefensibility is being placed upon her, with what her application for asylum is proposing is an inability to find assistance and protection of her life and that of her daughters in these “other procedures” to which the Director refers. That the 1951 Convention on the Status of Refugees does not exclude women victims of domestic violence from the possibility of being recognized as refugees when they flee their country, the Director does not recognize the structural violence against women established in said Convention. By the same token the resolution does not integrate, as sources of interpretation, the Convention on the Elimination of All Forms of Discrimination Against Women, ratified by Costa Rica according to Law N. 6968 on October 2 of 1984 and the Inter-American Convention for the Prevention, Punishment and Eradication of Violence Against Women, according to Law No. 7499 on April 18 of 1995. From this perspective on the rights of women, the concept of persecution itself in the figure of a refugee can be proposed as the violations of the right to life, to integrity and to personal freedom, that characterize the discrimination and violence against women. The concept of refugee from the perspective of gender permits the recognition of the exposure of women to risks that come from discriminatory practices such as structural violence that is committed against them, when the 1951 Convention on the Status of Refugees, establishes in the third section, that a refugee can be one who is persecuted for her membership to a determined social group. According to the general recommendation No 19 on the 11th session of the Committee on the Elimination of Discrimination Against Women of the UN, entitled “Violence Against Women,” it was determined that that the concept of discrimination against women established in the 1st article of the Convention includes violence based on sex and that affects women disproportionately. Including acts that inflict harm, physical, mental or sexual suffering, threats to commit these acts, coercion or other forms of deprivation of freedom. Including acts that inflict harm, suffering of a physical, mental, or sexual nature, threats to commit such acts, coercion or other forms of deprivation of liberty. There are acts of violence against women that can violate provisions of the Convention, without it speaking expressly of violence. In this last recommendation of CEDAW there was established a measure of refugee protection, accompaniment, rehabilitation and support services necessary for the effective protection of women victims of violence, or women who find themselves in danger of being victims.
- e- The statute on refugees has as its ultimate goal obtaining protection of rights such as to life, security and freedom of refugees through the effective obtaining of asylum. If she has requested asylum in Costa Rica it is because she is giving testimony that here she can find security for her life and that of her daughters.
- f- She appeals the lack of objectivity and depth of the Director General of Immigration and Foreign Services for arriving at the conclusion that merits attention that she waited until now to request asylum, which is arbitrary and does not consider even for a moment the psychological effects of terror and desperation that violence against women entails.

THIRD- The Ombudsman's Office of Residents of the Republic [*La Defensoría de los Habitantes de la República*], to the protection of article 13 of Law 7319, Law of the Ombudsmen of Residents [*Ley La Defensoría de los Habitantes*], presents auxiliary assistance to the motion for reversal subject to appeal filed in due time and form by Ms. Chere Lyn Tomayko, based on the following considerations relevant to the present case:

- a) The resolution being appealed denies the application for asylum on the grounds that domestic violence is not cause for recognition of refugee status. Nonetheless, it is indeed recognized that the situation lived by Ms. Tomayco is a case of domestic violence and, in spite of it, status is not granted to her.
- b) Not recognizing domestic violence as cause for recognition of refugee status implies then that the point of departure for analysis in the case, carried out by DGME, is erroneous, and that therefore the other considerations and conclusions are imprecise, inexact and mistaken.

The Ombudsman's Office reiterates that in accordance with paragraph 3 in the end of the guidelines on International Protection of the UNHCR: "Gender-motivated applications generally span acts of sexual violence, domestic violence and familial violence, forced family planning, female genital mutilation, punishment because of transgression of values, moral customs and discrimination."

In the case of Ms. Tomayco, in spite of the assured guarantee and the conditions that the United State's system might contemplate, the fear based on persecution committed by her partner and father of her daughter was of major impact and provoked a state of necessity, subjectively and objectively, which culminated in her flight to Costa Rica. From there the application for asylum reflects more an emphasis on the persecution on the part of the non-state actor than a question of whether or not there was an exhaustion of all existing measures in her country of origin.

FOURTH- Based on the previous factual statements and law, this ministerial office recognizes the motion of appeal in the following form:

- a) The 1951 Convention on the Status of Refugees decrees in Article A – "For the purposes of the present Convention, the term refugee will be applied to all people who for well-founded fears of being persecuted for reason of their race, religion, nationality, membership in a determined social group of political opinion, are found outside of their country of nationality and cannot or, because of said fears, do not wish to avail themselves of the protection of their country; or that, lacking nationality and being, as a consequence of such events, outside of the country where they previously had habitual residence, cannot or, because of said fears, does not wish to return to it.
- b) According to the Manual of Procedures and Criteria for the Determination of Refugee Status, in light of the 1951 Convention and the 1967 Protocol on the Status of Refugees, it is established that:

General Analysis:

37. The expression “well-founded fears of persecution” is the essential part of the definition. Given that the fear is subjective, the definition implies a subjective element in the person who is requesting recognition as a refugee. Consequently, the determination of refugee status fundamentally requires an evaluation of the declarations of the applicant rather than a judgment of prevailing situation in her country of origin.

38. To the element of fear –state of emotion and subjective condition- is added the qualification of that it be well-founded. It signifies that it is not only a state of emotion of the interested person that determines his/her refugee status, but that this frame of mind must be based in an objective situation. Consequently, the expression “well-founded fear” contains a subjective element and an objective element and, in determining if well-founded fear exists, both elements should be taken into consideration.

[sic]

40. The evaluation of the subjective element is inseparable from an appreciation of the personality of the applicant, since the psychological reactions of different individuals cannot be the same even in identical conditions...

41. It is important furthermore to proceed to the degree of credibility, it will be necessary to take into account the personal and familial antecedents of the applicant, his or her membership in a determined group, in other words: how much can serve to indicate that the predominant motivation of his or her application is fear.

42. For that which pertains to the objective element, it is necessary to evaluate the declarations of the applicant. It is not demanded that the competent authorities, in charge of determining refugee status, conduct a trial regarding the situation in the applicant’s country of origin. Knowledge of the situation in the applicant’s country of origin, though it may not be a paramount objective, is an important element in evaluating the level of credibility of the person. In general, fears of the applicant may be considered well-founded if it can be demonstrated, in reasonable measure, that the permanent residence in his or her country of origin has been made intolerable for the indicated reasons in the definition or that, for those same reasons, it would be intolerable in the case of his or her return.

c) The Manual of Procedures and Criteria for the Determination of Refugee Status, is clear when it refers to the concept of persecution and determines that:

51. “There does not exist a universally accepted definition of the concept of “persecution” and the various attempts to formulate one have had scant success. From the 1951 Convention it may be deduced that all threats against life and liberty motivated by race, religion, nationality, membership in a determined social group or

political opinions is always persecution. Also, serious violations of human rights for the same reasons will constitute persecution.” It is beneficial to keep in mind that a refugee is a victim or possible victim of injustice. In order to be considered a refugee a person should show well-founded fear of being persecuted for one of the said motives. It is unimportant whether the persecution is produced from whichever one of these motives or for a combination of two or more of them. It often occurs that the same petitioner does not know the motives for persecution that they fear being a victim of. It is not obligatory, however, to analyze his or her situation to the extent that it is possible to specify in detail these motives.

In the case that we see, we may determine a real and effective fear of persecution for reasons of membership in a determined social group. In general terms we are speaking of gender, the physical and psychological effects of intra-familial violence being recognized by the community, which satisfies in the present case a leading role as a subjective element. Through all the process of application of the recognition of a refugee, the appellant has demonstrated clear manifestations of having been a victim of aggression in the United States, committed by her ex-partner and father of her daughter and, faced with the impossibility of maintaining her own mental and physical safety and that of her daughter, decided to put distance between the aggressor and herself, with the aim of regaining her security. With this it is defined, in the opinion of this ministerial office in more than an evident manner the subjective element necessary in order to be able to determine refugee status. There can be no doubt that the domestic violence constitutes one of the acts that occasions major suffering and fear, provoking mental and physical harm and that it has been utilized as a mechanism of persecution, whether by state or private actors. In the case of domestic violence, it is generally supposed to be the latter, in as far as who commits the violence, that is to say the aggressor (partner, lover, significant other, relative, etc.) generally has this quality of persecutory, non-state agent.

Now, the objective element is a little more difficult to determine, in as much as we are presented with a situation of domestic violence coming from the United States of America, a country recognized for its having efficient mechanisms of protection for the victims of intra-familial violence; however, it should be taken into account that this phenomenon of aggression transcends all societies and nationalities, it is a globally recognized phenomenon which is independent of the country in which it occurs, the indices of deaths of women and in some occasions their children in this phenomenon of violence are scandalous and continue to rise from day to day; thus the fear of the appellant for her life and that of her daughter is more than probably within this objective element, that today forms part of the problem of global society, without distinction of nationality.

To not recognize domestic violence as cause for the recognition of refugee status implies the failure to recognize the basic international doctrine of the international right of refugees. This is shown by the Training Seminar for Judges of International Rights of Refugees in Chapter 2, page 3 –

“The right of refugees is intimately related to the law of human rights... It is necessary to remember that whosoever abandons their country to seek protection abroad does so precisely because in those countries their human rights are in danger. The decision that an individual have “well-founded fears of persecution” is, in effect, to conclude that he or she is having some of his or her human rights desecrated. Therefore, human rights are in the same center of determination for refugee status.”

It is evident, thus, that Domestic Violence is in fact recognized in the International Rights of Refugees as a basis for recognition.

This office wishes nonetheless, absolute clarity of the fact that not all victims of domestic violence are at once automatically to be accredited asylum; in this way we wish to avoid the erroneous implementation of the status of refugee as the only measure of guarantee and protection in all cases, opening gates that could denature the very nature of refugee itself.

That is why a detailed and exhaustive analysis of the evidence submitted in every particular case is necessary, and which should be indisputable and irrefutably convincing, in a way that credibly demonstrates not only the existence of a physical, economic, emotional or any other kind of disparity that results in the aggressor being found in a condition of evident abuse manifested against the victim, but also a state of indefensibility of such a magnitude as to have given rise to fundamental feelings of fear, within the premises that the Convention on Persecution has laid out.

FIFTH: Costa Rican legislation has recognized domestic violence as a public offense and has created a regulatory body for the protection of victims, as the Law Against Domestic Violence establishes:

Article 1 – Goals

This law will regulate the application of necessary measures of protection for the guarantee of life, integrity and dignity of the victims of domestic violence...

Article 2 – Definitions

In order to interpret this law the following definitions are to be established:

- A) Domestic Violence: Act or omission, direct or indirect, committed against a relative of blood, affinity or adoption, including relatives of the third degree, by legal link or in fact or for a guardian relationship, tutelage or curatorship and that produces, as a consequence, the infringement of physical, sexual or psychological integrity or the integrity of property. The link of affinity may substitute even when the original relationship has ended.

The Law for the Penalization of Violence Against Women goes further in indicating:

Article 4 – All crimes addressed in this law will be considered public offenses.

Article 5 – Obligations of public functionaries.

Whosoever exercises his/her official function, is obligated to recognize situations of domestic violence against women, in any of its forms, or in resolving them should act attentively and efficiently, respecting the proceedings as much as the human rights of the affected women; otherwise he/she may be implicated in a crime of breach of duties.

SIXTH: In as much as delay in applying for recognition as a refugee should signal that which is stipulated in the second part of the Manual of Procedures and Criteria for the Determination of Refugee Status, page 50:

“190. It is to be remembered that the person requesting to be recognized as a refugee usually is in an especially vulnerable position. He/she is found in an unfamiliar condition and may run into serious difficulties of technical and psychological order in explaining his/her case to the authorities of a foreign country, with in many cases a language that is not his/her own.”

While, in the present case a great deal of time has passed between the time of the appellant's entry into Costa Rica and her request for asylum, this is, for the purposes of this office, a product of the same fear of persecution which to some degree made it necessary for the appellant to maintain anonymity for the purposes of not being found by her aggressor. In any case the importance of protection of the human rights of the applicant, which are the rights to the protection of physical and mental integrity, are more important than the period of time elapsed, this in as much as the value of protection take supremacy over term of presentation of the application. Furthermore the arguments of *A Quo* are merely speculative in as far as the intention of the appellant. That which is certain is that there exists a request for asylum, with the aim of obtaining such a condition for the protection of her physical, mental and moral integrity, supreme and inherent rights of being human which are irrevocable and indispensable for our legal order.

Based on that demonstrated by the appellant in documents that are part of the record, on the considerations of fact and the rights previously indicated, on the disposition of the Convention of 1951 and the Protocol of 1967, article 11 of the Political Constitution, article 11 of the General Law of Public Administration and the Law Against Domestic Violence and the Law for the Penalization of Violence Against Women, this administrative body resolves that the appellant is correct and as such has brought together the necessary elements to be granted the international protection of asylum, in as much as it remains perfectly clear the existence of situations that conform to a situation of domestic violence that has created in her a justifiable fear for her physical, moral and mental integrity in the case of returning to her country of origin.

Thus:

THE SECRETARY OF THE INTERIOR AND POLICE
RESOLVES:

To accept the motion to appeal filed by Ms. CHERE LYN TOMAYKO against the raised administrative resolution No. 130- 99650- on April 24, 2008, pronounced by the Director General of Immigration and Foreign Services, and instead revoke all the points of said resolution; and grant the appellant the refugee status in conformance with the Convention of 1951 and the Protocol of 1967; As such she should present herself to the General Director of Immigration and Foreign Services for the purpose of obtaining the respective documentation. She is to be returned to the proceeding of the original office.

Notify: Fax 22830157

JANINA DEL VACCHIO UGALDE
SECRETARY OF THE INTERIOR, POLICE AND PUBLIC SECURITY
(*Ministra de Gobernación, policía y Seguridad Pública*)