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The Constitutional Court of Chile's case law on migration

REPORT BY

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Immigration created and built what Chile is now. Before entering into the case law of the Supreme Court and the Constitutional Court, let us begin with a short historical introduction.

Chile was a Spanish colony until 1810 and then a stream of Europeans arrived between 1850 and 1950, starting with Germans in South Chile; followed by Britons and Italians in Valparaiso and surroundings and Croatians in Punta Arenas and Antofagasta. They were all welcomed and their arrival was even promoted by State policies, which gave land to immigrants in unsettled territory. No major problems were reported.

It was a little bit different for the diaspora of Palestinians, Syrians and Lebanese that came to Chile. Most of them arrived during the 1st World War and later, during the 1948 Palestine War. Most of them were Christian - largely Orthodox Christian and some Roman Catholics - who were escaping from the mandatory military service ordered by the Ottoman Empire. That is the reason why they were commonly known as the "Turks" in Chile, which was the nationality they had on their passports when they arrived.

The arrival of Palestinian immigrants in Chile in the early 20th century coincided with the Chilean state's decision to end sponsoring immigration to Chile and the country suffered a severe social and economic crisis coupled with a wave of nationalism with xenophobic and racist undertones. Many of the immigrants were very poor and illiterate and had to take loans to pay their travel costs. Once in Chile, Palestinians largely settled in the marginal areas of cities and worked as small merchants, an economic activity that is despised by the Chilean aristocracy. Hard work permitted them, within a few years, to become part of a large middle class. In the 1950s, many Palestinian-Chileans had acquired substantial economic as well as political power in Chile, some of whom were working as deputies, ministers or ambassadors. Besides these migrants of previous decades, Chile has also welcomed Palestinian refugees later on, as for instance in April 2008 when it received 117 from the Al-Waleed refugee camp on the Syria–Iraq border near the Al-Tanf crossing. All of those refugees were Sunni Muslims. Today, the largest Palestinian colony outside the Arab world resides in Chile: between 450 000 and 500 000 Chileans have Palestinian roots.

Years of economic prosperity and political stability brought Argentinians and Spaniards to Chile, looking for better work opportunities, given the economic crisis their countries suffered over the last years; Colombians, fleeing from the guerrillas and drug dealers; Haitians, and also Peruvians, who sought better wages and work conditions, before the economic boom in their country began.

Proof of that is the electoral registration of foreigners. After five years of permanent residency in the country, they can be registered and then vote in all elections and affiliate to political parties. Their influence is growing every year. For example, communal elections are scheduled for this year and almost 9% of the registered voters of Santiago Downtown are foreigners. In a close race, as it has always been in Santiago Downtown, they could be decisive and their turn out is much higher than that of national voters.

Now for the jurisprudence: Ordinary Courts (Courts of Appeals and the Supreme Court) are increasingly reviewing legal actions against deportation orders decreed by the Ministry of Interior. The first option is a preventive *habeas corpus*, which would be revised by the Court of Appeals of Santiago and by the Supreme Court at second instance. The second option is to go

directly to the Supreme Court through a special action against the administrative act that ordered the expulsion. The jurisprudence of the Courts has been consistent in following aspects:

Firstly, deportation cannot take place when it affects the family, understood as being a fundamental nucleus of society, and it being a State duty to protect and strengthen people and the family. Both aspects are included in Article 1 of the Chilean Constitution.

Secondly, when it is proved that the deported has children under his/her care, and they have a strong attachment to the country (by schooling, for instance) or depend entirely on the deported, besides having children most of whom have the Chilean nationality (*jus soli* rule). In such cases, the Supreme Court justifies its decisions on the principle of the best interests of the child.

The justification of the case-law mentioned above lies on the infringement of the fundamental right of "family as a fundamental nucleus of society" and not directly on the personal freedom or individual safety, as prescribed by the action of *habeas corpus*, contained in Article 21 of the Constitution.

Thirdly, deportation cannot be implemented when the administrative act, which orders the expulsion of a foreigner, is not founded or the measure is disproportionate. In the first case, the administrative act becomes arbitrary when it does not consider the entire information contained in the administrative file; the disproportionality of the deportation occurs when the foreigner has been convicted for a minor offence in Chile (the law prescribes that foreigners may be expelled from the country, if they commit acts including drug dealing, smuggling, human trafficking or any act against moral or decency) or prior to his or her arrival in Chile, in his or her country of origin.

Fourthly, Court conviction for drug dealing constitutes a sufficient basis to reject any reclamation against expulsion, moreover when his or her partner was also legally expelled from the country. In that case, there is no possible allegation about an infringement of family protection.

In conclusion, the expulsion of foreigners is an *ultima ratio* measure. The Ministry of Interior has to collect and consider all the information obtained by the police and other public services and delivered by the deported him-or herself, before signing the expulsion order. He or she has no legal obligation to take such measure, because the attribution is formulated as a discretional one. There is also a high probability that an expulsion will be stopped by an order in the Courts, if the requisites established by the jurisprudence were not taken into account.

Now, what has the Constitutional Tribunal that I represent said?

The Tribunal reviewed the first action of inapplicability against the legal precept that gives the Ministry of Interior the discretional attribution to grant visas, its prorogations and permanent residency, considering the convenience or utility to the country and the international reciprocity, always prior to a hearing at the Immigration Police.

The Tribunal declares that norm inapplicable as it contravenes the right of residency, the equal treatment before the law and the equality principle. More interesting than the result of the inapplicability itself, is the doctrine that emanated from the decision.

Firstly, foreigners are entitled to be protected by our Constitution. The epigraph of Article 19 declares "The Constitution assures to all", and then enumerates fundamental rights. One of them expresses the right of every person to reside and stay in any part of the territory, to move from one place to another and to enter and leave the country at any time; just respecting the law and avoiding harming others. The Constitution does not exclude foreigners.

Secondly, the exercise of the right of circulation and residence must be regulated by law. The right itself cannot be restricted. However, the autonomy of the legislative branch is severely limited by the principles of equality – especially the non-discrimination clause – and proportionality, and also by International Human Rights Treaties, ratified and approved by Chile.

Thirdly, the administrative attribution to grant or deny the admission of foreigners cannot be seen merely as a security measure. In some cases, they have to be admitted, such as asylum seekers or foreigners who entered the country legally. In the latter case, the principle of equal rights and non-discrimination among nationals and aliens must also be followed and respected. The decision strengthens the change of intensity of the fundamental rights of foreigners – when they entered legally – because they are entitled to reside and stay in the country; to regularise it, and generally an equal treatment to nationals.

Fourthly, the legislative branch can make distinctions between foreigners and nationals, but needs a compelling reason, which justifies the necessity and the fulfilment of a legitimate goal, recognised constitutionally.

Finally, the convenience and utility as concepts defined by the administration itself, from case to case, to grant or reject visa or residency, is a questionable starting point. It must be understood that such provisions have an impact and have repercussions, which often generate a multitude of situations of discrimination based on their legally vulnerable position.