Immigration and Refugee Board

Refugee Protection Division

Commission de l'immigration et du statut de réfugié

Section de la protection des réfugiés

RPD File # / No. dossier SPR **VA2-01374**
VA2-01722
VA2-01723
VA2-01724

Public Proceeding
Audience publique

Claimant(s) — **Demandeur(e)s d'asile**

Steven Wynn KUBBY
Michele Renee KUBBY
Brooke Kona KUBBY
Crystal Bay KUBBY

Date(s) of Hearing — **Date(s) de l'audience**

March 5, 2003
March 6, 2003
March 7, 2003
March 10, 2003
April 8, 2003
April 10, 2003
April 11, 2003
April 15, 2003
April 16, 2003

Place (s) of Hearing — **Lieu de l'audience**

Vancouver, B.C.

Date of Decision — **Date de la décision**

November 17, 2003

Panel — **Tribunal**

Paulah Dauns

Claimant's Counsel — **Conseil du demandeur d'asile**

Nil

Refugee Protection Officer — **Agent de la protection des réfugiés**

Marilyn Babcock

Designated Representative — **Représentant désigné**

Michele Renee KUBBY
for
Brooke Kona KUBBY & Crystal Bay KUBBY

Minister's Counsel — **Conseil du ministre**

G. Starr and S. Buckoll

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[1] Steven Wynn KUBBY, aged 56 years, Michele Renee KUBBY, aged 37 years, and their two minor children, Brooke Kona KUBBY, aged 7 years, and Crystal Bay KUBBY, aged 3 years, are all citizens of the United States (US). US Passports were produced for all of the claimants;[1] accordingly, identity is not an issue in their claims. I am satisfied that the four claimants are all citizens of the US and of no other country.

[2] The claimants were not represented by counsel at the hearing, although they had the benefit of counsel's assistance in the preparation of their Personal Information Forms (PIFs).[2] Ms. Kubby was designated the representative for the two minor children.

THE GROUNDS

[3] All four claimants are seeking refugee protection on several grounds.

I MR. KUBBY'S CLAIM

(a) Convention Refugee (*IRPA* Section 96)

[4] Mr. Kubby is claiming to be a Convention refugee[3] on the basis of his political opinion and his membership in a particular social group: patients who use cannabis medically (also referred to herein as "medical marihuana patients").

> 96. A Convention refugee is a person who, by reason of a well founded fear of persecution for reasons of race, religion, nationality, membership in a particular social group or political opinion,
>
> > (*a*) is outside each of their countries of nationality and is unable or, by reason of that fear, unwilling to avail themself of the protection of each of those countries; or

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1 Exhibit 3.1.

2 Exhibits 1.1, 1.2, 1.3, and 1.4.

3 Section 96 of *Immigration and Refugee Protection Act*, S.C. 2001, c. 27.

> (*b*) not having a country of nationality, is outside the country of their former habitual residence and is unable or, by reason of that fear, unwilling to return to that country.

(b) Person in Need of Protection (*IRPA* Section 97)

[5] Mr. Kubby also claims to be a "person in need of protection" because he alleges that he would be jailed and denied the use of marihuana, which would put his life at risk, if he returned to the United States.

[6] Section 97 provides:[4]

> 97. (1) A person in need of protection is a person in Canada whose removal to their country or countries of nationality or, if they do not have a country of nationality, their country of former habitual residence, would subject them personally
>
> (*a*) to a danger, believed on substantial grounds to exist, of torture within the meaning of Article 1 of the Convention Against Torture; or
>
> (*b*) to a risk to their life or to a risk of cruel and unusual treatment or punishment if
>
> (i) the person is unable or, because of that risk, unwilling to avail themself of the protection of that country,
>
> (ii) the risk would be faced by the person in every part of that country and is not faced generally by other individuals in or from that country,
>
> (iii) the risk is not inherent or incidental to lawful sanctions, unless imposed in disregard of accepted international standards, and
>
> (iv) the risk is not caused by the inability of that country to provide adequate health or medical care.

[7] Finally, he asserts that he fears a risk of torture pursuant to section 97(1)(a).

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[4] Section 97 of *Immigration and Refugee Protection Act*, S.C. 2001, c. 27.

II Ms. Kubby and the Minors' Claims

[8] Ms. Kubby claims she is a Convention refugee on the basis that she is a member of a particular social group: Mr. Kubby's family. She claims, on behalf of the minor children, that they too are Convention refugees on the basis they are members of Mr. Kubby's family. She asserts that she and their two minor children are at risk of harm as set out in section 97.

THE ISSUES

[9] The determinative issues of the claim are first, whether the claimants have a subjective fear of persecution, specifically in the light of their delay in making their claims. Second, whether, if a subjective fear is present, that fear is objectively well founded. Under this heading I will be canvassing the issues of state protection and prosecution versus persecution. If I am satisfied that the claimants have a well founded fear of persecution or are at risk of harm as set out in section 97 of *IRPA*, in Placer County in the State of California, I will canvass whether there is an Internal Flight Alternative (IFA) to another part of the United States.

THE WITNESSES

[10] The Board heard from a number of witnesses including journalist Patrick McCartney; California Superior Court Judge James P. Gray; marihuana activist Angel McCleary Raich; author Edward Rosenthal; British Columbia cancer specialist Dr. Joseph Michael Connors; California deputy district attorney Christopher Cattran; journalist Peter Edmund Brady; California defence attorney William Gary Panzer; Oregon Medical Marijuana Program manager, Mary S. Leverette and Washington prosecuting attorney (Chief of Staff) Daniel T. Satterberg. We also heard evidence from Mr. and Ms. Kubby. The claim was heard over the course of nine hearing days, between March 5, 2003 and April 16, 2003. Two conferences pursuant to Rule 20[5] were held, at which procedural and administrative issues were discussed.

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[5] Section 20 RPD Rules SOR/2002-228 11 June 2002.

20. (1) The Division may require a party to participate at a conference to discuss issues, relevant facts and any other matter in order to make the proceedings more fair and efficient.

[11] Both the Minister's counsel and the claimants in their submissions used a similar Table of Contents to comment on the evidence. For reasons of consistency, I have followed generally the same format in these reasons for my decision. The analysis which follows, is regarding Mr. Kubby's claim. I will analyse the claims of his family immediately thereafter.

SUMMARY OF THE EVIDENCE ADDUCED

[12] According to the evidence,[6] Mr. Kubby was able to smoke marihuana in California without incident for more than sixteen years (between the early 1980's when he began to use marihuana and when he was arrested in 1999), long before the passage of the *Compassionate Use Act (CUA)*[7] in 1996.

[13] Following a tip (an anonymous letter) on July 2, 1998,[8] an investigation was launched into what the California state authorities believed was a marihuana grow operation in Placer County, at the Kubby residence. The letter alleged Mr. Kubby was growing approximately fifteen hundred plants and selling large crops of marihuana. Since cultivation remained a state offence following the enactment of the *CUA*, and following receipt of this letter, law enforcement in Placer County began an investigation of Mr. Kubby.[9]

[14] Mr. Kubby allegedly retained the services of Robert Raich, Attorney-at-law who arranged for Mr. Kubby to be deputised as an agent of the City of Oakland, as a medical marihuana agent entitled to handle or possess medical marihuana for medical patients.[10] We do not have documentary evidence showing that Mr. Kubby was in fact deputised, however I accept

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6 Evidence of Steven Wynn Kubby, Transcript, March 7, 2003, page 23, line 22 - 27; page 24, lines 23 - 39; page 25, lines23 - 31; and page 44, lines 14 - 22.

7 *Compassionate Use Act, 1996*, Health and Safety Code paragraphs 11357 - 11362.9; Exhibit 11.2, page 1.

8 Exhibit 17, page 1 – 3 and Exhibit 21, page 174 – 176, Anonymous Letter and Covering Memorandum

9 Exhibit 21, page 212 – 280, Investigative Reports, Placer County, July 2, 1998, and related documents.

10 Evidence of Steven Wynn Kubby, Transcript, March 7, 2003, page 47, lines 31 – 37.

that he was. Mr. Kubby's standard of living appeared to police and prosecutors to exceed the Kubby family's apparent sources of income.[11]

[15] A search warrant was approved by a judge and executed at the Kubby residence. The claimants allege the information provided to the judge who ordered the warrant, was incorrect and a fabrication. The trial judge made a pre-trial ruling with respect to the validity of the search warrant and Mr. Kubby's motion to suppress the search warrant. The motion to suppress was dismissed.[12] The evidence obtained by the search warrant was considered as part of the claimant's criminal trial, in Placer County, California. Mr. Kubby appealed the trial judge's dismissal of his motion to suppress to the California Court of Appeal.[13]

[16] In January 1999, state police and federal DEA executed a search warrant[14] at Mr. Kubby's residence and found a two hundred and sixty-five plant indoor marihuana grow operation. Mr. Kubby was subsequently arrested, released on his own recognisance[15] and together with his wife, charged with thirteen felony offences[16] including cultivating marihuana, possession of marihuana for sale, conspiracy to cultivate marihuana, possession of concentrated cannabis, possession of mescaline, possession of *psilocyn*, possession of injection/ingestion device, and unauthorised possession of hypodermic needle or syringe.

[17] According to California deputy district attorney Christopher Cattran, the Federal Drug Enforcement Administration (DEA) assisted with the search warrants due to "manpower issues." A videotape of the execution of the warrant and seizure of evidence was filed in these

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[11] Evidence of prosecutor Christopher Cattran, Transcript, April 11, 2003, page 36, line 8.

[12] Evidence of prosecutor Christopher Cattran, Transcript, April 11, 2003, page 45, lines 19 - 28.

[13] *Infra,* Footnote 41.

[14] Exhibit 21, pages 169 – 173 and pages 177 – 211, Search Warrant and Affidavit; see also Exhibit 24, video of search of the Kubby residence and seizure of evidence.

[15] Exhibit 21, pages 281 – 287, Arrest and Bail Documents.

[16] Exhibit 21, pages 288 – 291, Original Felony Complaint. (Mr. Kubby – Counts 1 – 7 and Ms. Kubby – Counts 1 – 6).

proceedings.[17] Mr. Cattran testified that he was told that the DEA was not interested in pursuing the Kubby case federally, and that they would defer to the state prosecution.[18]

[18] Two hundred and sixty-five marihuana plants was far in excess of medical use based upon a police officer's expertise, and California State Prosecutor Christopher Cattran approved prosecution in the case.[19]

> Contained within the search warrant was the fact that Mr. Kubby had some medical condition. That was taken into consideration as well; however it was determined that the amount was far in excess of a medical use.[20]
>
> Very few medical users can grow a sustainable supply without growing 20, 30 or 40 plants minimum. That is a typical garden. Twenty, 30, 40 plants. Sophisticated growers grow 100 or 200 if they're experimenting with varieties and so forth …[21]

[19] While in Canada pending the outcome of his refugee claim, Health Canada has given Mr. Kubby permission to grow one hundred and seventeen plants for medical purposes.[22] Mr. Cattran testified that the standard required in Placer Country to prosecute a defendant in a state criminal Court, would be:

> whether or not…the amount possessed, either in plants or off of plants, is reasonably related…to the person's then existing current medical condition.[23]

[20] Mr. and Ms. Kubby were subsequently tried before a jury in the fall of 2000. Because this was a state, and not a federal prosecution, Mr. Kubby successfully avoided

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17 Exhibit 24.

18 Evidence of prosecutor Christopher Cattran, Transcript, April 11, 2003, page 33, lines 25 - 26.

19 Evidence of prosecutor Christopher Cattran, Transcript, April 11, 2003, page 35, line 35.

20 Evidence of prosecutor Christopher Cattran, Transcript, April 11, 2003, page 35, lines 13 - 15.

21 Evidence of Patrick McCartney, Transcript, March 5, 2003, page 57, lines 18 - 21. [Public]

22 Exhibit 44, [Filed post hearing] Health Canada "Personal Use Production Licence valid to 11/09/04 permitting a maximum of 117 plants indoor, and 0 plants outdoor."

23 Evidence of prosecutor Christopher Cattran, Transcript, April 11, 2003, page 50, lines 26 - 30.

conviction on the marihuana related charges, by raising the defence of "medical necessity"[24] provided for in the *Mower*[25] decision and the *Compassionate Use Act*. Eleven of the jurors accepted Mr. Kubby's medical marihuana defence and voted in favour of acquittal. However, the judge was required to declare a mistrial because one juror held out for conviction.[26] The prosecutors subsequently informed the Court that they would not be seeking to retry Mr. Kubby on the marihuana related charges.[27] The effect of the prosecution's position resulted, in practical terms, in the end of the State's prosecution, at least on the marihuana charges.

[21] However, with respect to the non-marihuana related charges, the jury convicted Mr. Kubby of possession of mescaline and *psilocyn* (counts 5 and 6). This despite Mr. Kubby's assertion that his possession of mescaline was for research for his book: "*The Politics of Consciousness,*" and was therefore "protected". He said he was told by someone that he could possess an "unusable amount" of mescaline, pursuant to the *Religious Restoration Act* of 1995.[28] He alleged that the *psilocyn* was found in a guest room and he knew nothing about it or where it came from. The jury did not accept these explanations, and convicted him of the two non-marihuana drug offences.

[22] Ms. Kubby was acquitted of all charges.[29]

[23] Following his conviction on December 21, 2000, Mr. Kubby's matter was adjourned until March 2001 for sentencing.[30] A pre-sentence report was prepared and a

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[24] Evidence of Steven Wynn Kubby, Transcript, April 8, 2003, page 99, lines 12 - 39.

[25] *People* v. *Mower*, (2002) DJDAR 8025 (unanimous decision of all seven Justices of the California Supreme Court), found at Exhibit 7, page 148 (full text of the decision).

[26] Exhibit 11.1, Tab 4, pages 7 – 8, Minute Order.

[27] Evidence of Christopher Cattran, Transcript, April 11, 2003, page 42, lines 1 - 3.

[28] Evidence of Steven Wynn Kubby, Transcript, March 7, 2003, page 54, lines 20 - 24.

[29] Exhibit 11.1, Tab 4, page 7, Minute Order.

[30] *Ibid,* pages 9 - 11 and Exhibit 21, pages 44 – 45.

protracted sentencing hearing was conducted before Judge Cosgrove, who sentenced Mr. Kubby to 120 days of house arrest, a fine, and three years probation.[31]

[24] The judge said, according to Ms. Kubby, that "jail is not a place for [my husband]."[32] Possession of mescaline is a felony (the Canadian equivalent of an indictable offence) whereas possession of *psilocyn* is a "wobbler" (the Canadian equivalent of a hybrid offence). The judge chose to convict on the basis of a misdemeanour on the *psilocyn* as he was entitled to do, but erroneously reduced the conviction for possession of mescaline to a misdemeanour as well.

[25] The Court directed that Mr. Kubby, who alleges that he has a medical need for marihuana, could use marihuana during his period of house arrest and probation, in accordance with the *Compassionate Use Act (CUA).*[33] I think it useful to set out the full text of the *Act*.

> The Compassionate Use Act of 1996
>
> [Proposition 215]
>
> Section 1. Section 11362.5 is added to the Health and Safety Code, to read:
>
> 11362.5.(a) This section shall be known and may be cited as the Compassionate Use Act of 1996.
>
> (b) (1) The people of the State of California hereby find and declare that the purposes of the Compassionate Use Act of 1996 are as follows:
>
> (A) To ensure that seriously ill Californians have the right to obtain and use marijuana for medical purposes where that medical use is deemed appropriate and has been recommended by a physician who has determined that the person's health would benefit from the use of marijuana in

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[31] Exhibit 21, pages 77 – 89. Motion to Declare Offenses to be Misdemeanors and to Limit Terms of Probation.

[32] Evidence of Michele Renee Kubby, Transcript, March 6, 2003, page 88, line 33 [Public]; see also Claimant's Submissions – July 30, 2003, at page 8 referring to the trial transcript April 6, 2001, marked as Exhibit 39(B).

[33] *Supra*, footnote 7.

> the treatment of cancer, anorexia, AIDS, chronic pain, spasticity, glaucoma, arthritis, migraine, or any other illness for which marijuana provides relief.
>
> (B) To ensure that patients and their primary caregivers who obtain and use marijuana for medical purposes upon the recommendation of a physician are not subject to criminal prosecution or sanction.
>
> (C) To encourage the federal and state governments to implement a plan to provide for the safe and affordable distribution of marijuana to all patients in medical need of marijuana.
>
> (2) Nothing in this section shall be construed to supersede legislation prohibiting persons from engaging in conduct that endangers others, nor to condone the diversion of marijuana for nonmedical purposes.
>
> (c) Notwithstanding any other provision of law, no physician in this state shall be punished, or denied any right or privilege, for having recommended marijuana to a patient for medical purposes.
>
> (d) Section 11357, relating to the possession of marijuana, and Section 11358, relating to the cultivation of marijuana, shall not apply to a patient, or to a patient's primary caregiver, who possesses or cultivates marijuana for the personal medical purposes of the patient upon the written or oral recommendation or approval of a physician.
>
> (e) For the purposes of this section, ‘‘primary caregiver" means the individual designated by the person exempted under this section who has consistently assumed responsibility for the housing, health, or safety of that person.
>
> Section 2. If any provision of this measure or the application thereof to any person or circumstance is held invalid, that invalidity shall not affect other provisions or applications of the measure that can be given effect without the invalid provision or application, and to this end the provisions of this measure are severable.

[26] Following sentencing, the prosecutor moved for dismissal of the marihuana charges and appealed the judge's reduction of the outstanding charges to misdemeanours from

felonies. The prosecutor's appeal was successful and the charge regarding possession of mescaline reverted to a felony.[34]

[27] In the meantime, Mr. Kubby tried to make arrangements[35] to serve his period of house arrest or electronically monitored home detention in San Francisco[36] rather than in Placer County because "there is a more tolerant attitude and there are people that support [him] there."[37] Both Placer County and San Francisco County approved Mr. Kubby for electronic monitoring in San Francisco County and set out the terms of the "house arrest".[38] His period of house arrest was to begin on April 10, 2001.[39]

[28] Mr. Kubby filed a cross appeal to the prosecution's appeal, on the grounds the search of his home was "wrongful." The California Appeals Court held that the cross appeal could not be heard so long as Mr. Kubby was a "fugitive."[40] The Appeals Court determined Mr. Kubby became a fugitive when he knowingly fled the jurisdiction before he completed his sentence.

> One who with knowledge that he is being sought pursuant to court process in a criminal action, absents himself or flees is a fugitive from justice. Accordingly, the defendant is, without question, a fugitive from

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[34] Exhibit 41, [Filed post-hearing] *P.* v. *Kubby* CA 3, 6/23/03, where the Court of Appeal reversed the trial judge's decision to reduce possession of mescaline to a misdemeanour. The trial judge ruled that because possession of peyote was a "wobbler" (the US equivalent of a "hybrid offence") and the more serious of the two crimes – possession of mescaline should be reduced to a misdemeanour as well as the peyote charge. The Court of Appeal held that the Rules of statutory interpretation do not permit a Court to rewrite section 11350 and ignore its plain language, which unambiguously makes possession of mescaline a felony. The judgment was modified to reflect that the conviction is a felony. Except as modified, the judgment was affirmed.

[35] Exhibit 21, page 68. Letter from Placer County Probation Department.

[36] Exhibit 21, pages 53 – 67. San Francisco Electronically Monitored Home Detention Program Information.

[37] Exhibit 39(a), [Filed post-hearing] Transcript of Court Proceedings – April 27, 2001, page 3, line 28 and page 4, line 1.

[38] Exhibit 21, pages 69 – 71. San Francisco Home Detention Applicant Instructions.

[39] Exhibit 11.1, tab 4, pages 10 - 11.

[40] Evidence of Christopher Cattran, Transcript, April 11, 2003, page 45, lines 22 - 40.

> justice. As such, and based on the rationale of the foregoing cases, he has forfeited his right to appeal his jail term while he flaunts it.[41]

[29] In April 2001, Mr. Kubby filed additional materials seeking to amend his sentence to provide for treatment (pursuant to Proposition 36)[42] rather than punishment. Although he had agreed to the terms of probation, he was no longer prepared to comply with the Probation Order.[43] Mr. Kubby's motion was originally set to be heard on April 6, 2001, but it was later adjourned to April 27, 2001. Mr. Kubby's "surrender date," the date on which he was to surrender himself to the Placer County Jail to begin serving his period in custody, either under house arrest or in jail, was extended to May 11, 2001.

[30] A hearing was held to deal with Mr. Kubby's request that he be permitted to serve the time in jail rather than house arrest and probation. He felt that if he could have access to cannabis while in jail, this would be a better outcome than serving his time at home and being on probation for three years. He felt it would be too difficult to find a home to rent to serve his sentence. His family had by now moved to Canada to pursue business opportunities under NAFTA.[44] He claimed to no longer have a residence in the US, even though he was only admitted to Canada temporarily. He objected to the three-year probation order because it

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41 Exhibit 25, page 662, *People* v. *Steven Wynn Kubby*, California Court of Appeal, C038631, (Kolkey, Blease, Hull), J. Kolkey speaking for the Court. (Case referred to *Estate of Scott*, 150 Cal. App. 2d at page 592).

42 Evidence of prosecutor Christopher Cattran, Transcript, April 11, 2003, page 44; see also Exhibit 17, pages 11 – 22. **Proposition 36** – *Substance Abuse and Crime Prevention Act of 2000* was passed by the electorate on November 7, 2000, and regulates how the California criminal justice system will deal with substance abusers who violate the criminal laws of California. The statutes enacted by Proposition 36 mandate probation and drug treatment for defendants convicted of a "non-violent drug possession offence." Incarceration is prohibited as a condition of probation when the defendant is first sentenced. Mr. Kubby had hoped the bar against incarceration would apply in his case. It did not apply to Mr. Kubby because it only applied to those who committed an offence after July 1, 2001. Since Mr. Kubby was charged in 1999, he was not entitled to sentencing under Proposition 36 provisions. Any new convictions would be subject to these provisions.

43 Evidence of Michele Renee Kubby, Transcript, March 6, 2003, page 90, lines 7 – 20. [Public]

44 North American Free Trade Agreement Between the Government of Canada, the Government of the United Mexican States and the Government of the United States of America, December 17, 1992, [1994] Can. T.S. No. 2, Arts. 1015(4)(d), 1017, Annex 1001.1b-1, Art. 5(h), Annex 1001.1b-2, Art. J019, Annex 1001.2b.

permitted searches of his person, home and vehicle. He thought this would be subject to abuse by probation and law enforcement officials. His application for Proposition 36 relief was denied.[45]

[31] On April 27, 2001,[46] after considering the parties' submissions, Judge Cosgrove decided not to commute Mr. Kubby's sentence or terminate his probation.[47] However, Judge Cosgrove extended Mr. Kubby's "surrender date" to July 20, 2001, at the request of jail staff who were awaiting some guidance from the United States Supreme Court as to what medical care could be provided to Mr. Kubby in jail if he chose to serve his period of custody in jail rather than under house arrest.

[32] At the April hearing, a correctional official from the Placer County jail submitted to the Court that they not be asked to take Mr. Kubby to jail as they were unsure whether they could provide marihuana in the jail while Mr. Kubby served his sentence.[48] They were awaiting the US Supreme Court's decision in the *Oakland Cannabis Buyers' Cooperative*[49] case, which they hoped might give them some guidance on the issue.

[33] Mr. Kubby's "turn in" date of July 20, 2001 was to be the day that the Electronic Monitoring Program (EMP) was to be set up. If that failed, he was ordered to turn himself in to Placer County jail officials.[50] Mr. Kubby alleges he was given the Court's permission to go to Canada in April 2001, and he was not required to return to California until July 20, 2001. Ms.

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45 Evidence of Steven Wynn Kubby, Transcript, April 8, 2003, page 32, line 34; see also Exhibit 21, page 46.

46 Exhibit 39(a), [Filed post-hearing] Transcript of Court Proceedings – April 27, 2001.

47 Exhibit 21, pages 72 – 75. Points and Arguments in support of Drug Treatment in lieu of Punishment.

48 Evidence of Michele Renee Kubby, Transcript, March 6, 2003, page 94, line 29 [Public]; see also evidence of Steven Wynn Kubby, April 8, 2003 page 61, line 39, and see Exhibit 39(a), [Filed post-hearing] Transcript of Court Proceedings – April 27, 2001.

49 *United States v. Oakland Cannabis Buyers' Cooperative, et al.,* (2000) Certiorari to the USCA for the 9th Circuit, USSC, found at Exhibit 7, page125 (full text of the decision).

50 Evidence of prosecutor Christopher Cattran, Transcript, April 11, 2003, page 44, lines 9 - 11.

Kubby stated that he also received the permission of his probation officer to leave until July 20, 2001.[51] This allegation is inconsistent with the court and probation documents filed.[52]

[34] Mr. Kubby left the United States at the end of April 2001, and came to Canada before serving his period of house arrest and probation, while the details of how he would serve his sentence, were being resolved.

[35] On July 20, 2001, Mr. Kubby failed to surrender himself to the Placer County jail as ordered. The Placer County Probation Department subsequently filed a petition for revocation of probation based on Mr. Kubby's failure to report to the county jail and on his change of residence without permission. On July 30, 2001, the judge issued a bench warrant for Mr. Kubby's arrest as a result of his violation of probation.[53]

[36] To date, Mr. Kubby has neither paid his fines, nor complied with the terms of his probation. He has not served his jail sentence.[54] Ms. Kubby testified that they were aware of the date, but made a conscious decision not to return for Mr. Kubby to serve his sentence.[55] Mr. Kubby therefore has outstanding convictions in the United States for one misdemeanour and one felony.

[37] In general terms, Mr. Kubby claims that he is a Convention refugee because he was prosecuted by the local authorities for his political opinion, namely his pro-marihuana beliefs. He alleges that because he was an outspoken activist, a former gubernatorial candidate,

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51 Evidence of Michele Renee Kubby, Transcript, March 6, 2003, page 96, line 24 [Public], see also Exhibit 21, page 29: Travel Permit, dated 4-6-01 which says "*subject is directed to report to probation upon return; to return by 4-27-01*." And see: Exhibit 25, page 659 "*The People vs. Kubby* CA 3, at page 664, where Judge Kolkey held that "he was only granted permission to go to Canada and to return on April 27, 2001. In no way did that give defendant permission to ignore his subsequent surrender date of July 20, 2001 and remain in Canada."

52 Exhibit 17, pages 658 – 695.

53 Exhibit 17, pages 663 – 671 and Exhibit 2.1, Bench Warrant.

54 Evidence of prosecutor Christopher Cattran, Transcript, April 11, 2003, page 45, lines 2 - 3.

55 Evidence of Michele Renee Kubby, Transcript, March 6, 2003, page 116, line14. [Public]

and well-known medical marihuana user, he was targeted by law enforcement officials and others.

[38] In addition to his allegations about the state prosecution, Mr. Kubby also alleges that he is at risk of federal prosecution if he returns to the United States and that this prosecution would amount to persecution on the basis of his anti-government political opinion. He submits that any jail term imposed after a federal prosecution would constitute a risk to his life in that he would be denied the use of cannabis while serving his federal sentence, which would result in his death, thereby constituting cruel and unusual treatment or punishment.

MR. KUBBY'S MEDICAL HISTORY

[39] Mr. Kubby was diagnosed with adrenal (*pheochromocytoma*) cancer in 1968. When he was diagnosed with the disease, he was given only a few years to live, at most. In fact, he has lived for thirty-five years since his diagnosis. He believed, based on a medical diagnosis that he was going to die. After going through surgery to remove an aggressive tumour, chemotherapy and radiation, Mr. Kubby turned to non-traditional means to deal with his illness. He testified that he was "preparing to die"[56] when a friend suggested he try marihuana to see if it helped with his symptoms. Since he has been in Canada, he has undergone radiation therapy in addition to the medical use of cannabis.

[40] Dr. Connors, an expert in the area of adrenal cancers, and whose *curriculum vitae*[57] suggests is highly knowledgeable in this area of medicine, testified at the hearing about Mr. Kubby's medical condition. According to Dr. Connors, Mr. Kubby's tumour releases, in excess quantities, hormones normally found in the adrenal gland that are called *catecholamines*. Excessive levels of *catecholamines* in Mr. Kubby's blood cause a range of separate symptomatic problems including *paroxysmal* headaches, sudden flushing or pallor of the skin, palpitations (rapid and irregular beating of the heart), hypertension (sudden dangerous rise in blood pressure), excessive sweating, sudden abdominal cramps and diarrhea, chest pain, shortness of breath,

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[56] Evidence of Steven Wynn Kubby, Transcript March 7, 2003, page 23, lines 22 & 23.

[57] Exhibit 35.

nausea, sudden severe weakness and anorexia (loss of appetite). If not controlled, Mr. Kubby's symptoms could evolve further to the point where a myocardial infarction (heart attack) or cerebral vascular accident (stroke) could occur.[58]

[41] As previously mentioned, Mr. Kubby's cancer and related symptoms were treated for more than ten years by conventional means, including surgery, chemotherapy, radiation and medications. The life expectancy of a person with *pheochromocytoma* is usually three to five years.[59]

[42]. In the early 1980s, Mr. Kubby began smoking marihuana and he stopped conventional treatments for his cancer and related symptoms. Mr. Kubby has not tried any conventional treatments for the symptoms of his cancer and related symptoms since he began using marihuana, except for radiation therapy while in Canada. Dr. Connors testified that it may take months to years to fully accomplish the radiation therapy, but there was no evidence that Mr. Kubby's tumour has responded to this therapy.[60]

MR. KUBBY'S MEDICAL NEED FOR MARIHUANA

[43] There is evidence before the Board, that marihuana controls the symptoms of Mr. Kubby's cancer, including hypertension.[61] In Dr. Connors' opinion, marihuana continues to be the best treatment available to Mr. Kubby.[62]

[44] The evidence is inconclusive as to whether Mr. Kubby's life would be at risk if he could not smoke marihuana to treat his symptoms, and was forced instead, towards conventional treatments. The Minister's counsel submits that the length of Mr. Kubby's survival is unusual but not unique. These are the words of Dr. Connors:

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58 Exhibit 11.1, tab 5, pages 28 – 29, Letter from Dr. Connors dated August 8, 2002.

59 Evidence of Dr. Connors, Transcript, April 11, 2003, page 27, line 40 and page 28, lines 1 & 2.

60 Evidence of Dr. Connors, Transcript, April 11, 2003, page 12, lines 10 – 20.

61 Exhibit 11.1, tab 2, pages 3 – 4, Letter from Dr. DeQuattro dated February 4, 1999; Exhibit 11.1, page 41, Letter from Dr. Connors dated August 16, 2002.

62 Evidence of Dr. Connors, Transcript, April 11, 2003, pages 14, lines 39 – 40 and page 15, line 1.

> He has had a much longer than expected survival with this kind of medical problem than is usually seen, but it's not unique. There are recordings of other cases of equally long survivals and equally slowly progressive disease, as he manifests. [63]

[45] Bearing Dr. Connors' opinion in mind, it cannot therefore be stated with any degree of certainty, that marihuana is the reason for Mr. Kubby's survival even though it remains the best treatment option at this time. Mr. Kubby on the other hand contends that the length of his survival is unique in medical history and asserts that it was described by California cancer specialist Dr. DeQuattro as "miraculous."[64]

[46] These are the words of Dr. DeQuattro:

> Faith healers would term Steve's existence these past 10 – 15 years as nothing short of a miracle. In my view, the miracle, in part, is related to the therapy with marijuana.[65]

[47] The Minister raises the point that Mr. Kubby's cancer and symptoms were treated by conventional means for approximately fifteen years, which is well past the average three to five years' life expectancy of a person with his type of cancer, suggesting that conventional means, at least while they were being employed, may have been successful in keeping him alive.

[48] The only direct evidence from a doctor as to whether Mr. Kubby's life would be at risk if he could not use marihuana, is from Dr. Connors. His evidence was that cannabis has proven more effective than other medications in blocking the symptoms caused by Mr. Kubby's cancer. Because of this, Dr. Connors recommended that Mr. Kubby continue to use cannabis as his treatment to suppress symptoms.[66] He also stated the opinion that cannabis is the best

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63 Evidence of Dr. Connors, Transcript, April 11, 2003, page 17, lines 25 - 29.

64 Exhibit 17, page 4 and 5, (Letter from Dr. DeQuattro, February 4, 1999) and Exhibit 11.1, page 41 (Letter from Dr. Connors, August 16, 2002), Exhibit 9, videotape.

65 Exhibit 11.1, tab 2, page 3 (Letter from Dr. DeQuattro, February 4, 1999); Exhibit 24, videotaped interview of Dr. DeQuattro.

66 Evidence of Dr. Connors, Transcript, April 11, 2003, page 9, lines 1 & 2.

treatment available to Mr. Kubby.[67] He did however concede that other medications, such as alpha and beta-blockers, might be able to control Mr. Kubby's symptoms but that marihuana appeared to be the best treatment.[68]

[49] In 1999, Dr. DeQuattro evaluated Mr. Kubby's responses to marihuana therapy and evaluated his future need for treatment. He referred Mr. Kubby to Dr. Weiss, who assessed Mr. Kubby both before and after ingesting marihuana. Dr. Weiss concluded that Mr. Kubby's neuropsychological profile is "indicative of intact to excellent cognitive functioning." She concluded that the "most significant improvement demonstrated after his consumption of marihuana was reflected in both verbal and visual recall memory functioning."[69] Dr. Weiss was not called as a witness in these proceedings to confirm whether Mr. Kubby's use of marihuana assists in his treatment of the cancer. Nor is it clear she would be capable of rendering such an opinion.

[50] Unfortunately, Dr. DeQuattro died in an accident while on vacation in Hawaii[70] and could not testify as to the results of his evaluation or provide a medical opinion about the risk to Mr. Kubby's life if he did not have access to marihuana. Witness McCartney testified that the email exchange[71] between he and Dr. DeQuattro on July 7, 2001, was the "last word" from Dr. DeQuattro on the subject. In this exchange of emails between Dr. DeQuattro and Mr. McCartney, Dr. DeQuattro was persuaded that the use of marihuana helped Mr. Kubby with his symptoms. There is therefore, some evidence before the panel that marihuana has been effective in managing Mr. Kubby's symptoms and most likely, extending his life.

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67 Evidence of Dr. Connors, Transcript, April 11, 2003, page 15, line 1; Exhibit 24, videotaped interview of Dr. Connors.

68 Evidence of Dr. Connors, Transcript, April 11, 2003, page 18, lines 27 - 40 and page 19, lines 1 - 16; Exhibit 24, videotape of interview of Dr. Connors.

69 Exhibit 3.6, Neuropsychological Evaluation of Steve Kubby on April 15, 1999 by Dr. Dorothy Weiss, Clinical Neuropsychologist, at page 5.

70 Evidence of Patrick McCartney, Transcript, March 5, 2003, page 14, lines 35—38. [Public]

71 Exhibit 17, pages 6—10.

[51] Mr. Kubby filed a journal article[72] post-hearing on the anticancer effects of cannabinoids. The document was admitted on November 13, 2003. While I find the article is relevant to his claim, it does not raise new issues. The issue to be decided is not whether marihuana cures adrenal cancer, or any cancer, but whether it is a useful treatment in Mr. Kubby's case. I have found Dr. Connors' evidence compelling on this point, as stated previously. The journal article suggests that cannabis "inhibits the growth of tumour cells in culture and animal models by modulating key cell-signalling pathways".

[52] The article cautions:

> Regarding effectiveness, cannabinoids exert notable anti-tumour activity in animal models of cancer, but their possible anti-tumour effects in humans has not been established.

It concludes that further research is required.

[53] Given my assessment of his evidence and in the interest of finality, the Minister was not invited to make submissions on whether this document should be admitted.

MARIHUANA LEGISLATION IN THE UNITED STATES

[54] By way of history, it is helpful to understand the issues surrounding drug legislation and policy in the US, in order to appreciate what was happening at the time of Mr. Kubby's investigation and prosecution, and at present.

[55] At that time and currently, there is a public debate in the United States over whether marihuana has any medical value and whether persons should be allowed to use marihuana for medical reasons. In California, Proposition 215, which passed in 1996 by way of a ballot initiative, was approved by a majority of California voters. The *Compassionate Use Act*[73] (formerly Proposition 215) provides that the sections of the state *Health and Safety Code*

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[72] Exhibit 45, [Filed post hearing] "*Cannabinoids: Potential Anticancer agents",* Nature, October 2003, page 745, by Manuel Gugman.

[73] *Supra*, footnote 7.

prohibiting the possession and cultivation of marihuana "shall not apply to a patient, or to a patient's primary caregiver, who possesses or cultivates marihuana for the personal medical purposes of the patient, upon the written or oral recommendation or approval of a physician."[74]

[56] The intent of the legislation is clear: to exempt medical marihuana patients and their caregivers from criminal laws. No amounts were proscribed by statute nor can amounts be prescribed by a doctor, and there is no central registry of approved patients in California, as may be found in other states.[75] The fact that limits have not been proscribed has caused problems for both law enforcement officials and medical marihuana patients. Interpretation of the statute has been left to a county-by-county guideline system, which is inconsistent amongst counties. Accordingly, enforcement and interpretation of who can possess and cultivate marihuana legally, has created friction.

[57] Many guidelines have been recommended to ensure patients and caregivers are growing only what is necessary. For example, Dr. Mikuriya offered the following method for calculating a usable amount of marihuana:[76]

> Total number of plants (T)
> Minus (-) Number of Immature plants (I)
> Minus (-) Number of Unsuitable Plants (u)
> Equals (=) Useable Number
> Times (x) Height in Centimeters (H)
> Times (x) Width (W)
> Divided by (/) Density (D)
> Minus (-) Water (w)
> Minus (-) Lower Leaves and Stems (L)
> Minus (-) Seeds (S)
> Equals (=) Net Usable Amount
> Divided by (/) Number of Strains (s)
> Equals (=) Actual Usable Amount (A) in grams

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74 Exhibit 11.2, pages 1 - 9, *California Health and Safety Code*, sections 11357 – 11362.9.

75 See however Bill 420 which set out guidelines to assist patients, their caregivers and physicians, at Exhibit 4, *infra*, footnote 77.

76 Exhibit 21, page 140.

Thus: A={[T - (I + U)] x (H x W) / D - (w + L + S)} is (/s)

[58] The conclusion of Dr. Mikuriya was that a reasonable number of plants was fourteen. As it is readily seen by this formula, law enforcement would have had a very difficult task to establish what was reasonable in the circumstances. Not all marihuana patients agreed with this formula, and several others are found in the materials filed. Formulae, such as these did not advance the debate over what constituted a reasonable number of plants.

[59] A new Bill was enacted by Governor Davis (California, Democrat) on October 13, 2003. Bill 420 comes into effect on January 1, 2004.[77] It deals with many of the issues raised in this claim regarding cultivation, possession and transport of medical marihuana. Section 11362.71 permits a medical marihuana patient to possess a valid identification card and be immune from arrest and prosecution unless the card was obtained fraudulently.[78]

[60] In addition, Section 11362.77 provides that a medical marihuana patient may possess eight ounces of dried marihuana and up to twelve marihuana plants. If the patient's doctor recommends that this does not meet the qualified patient's medical needs, the patient may possess an amount of marihuana consistent with their needs.[79]

[61] The guidelines are intended to provide guidance for when police can make arrests.[80]

[62] Sonoma County has enacted guidelines which allow three pounds and ninety-nine plants.[81]

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[77] Exhibit 43, [Filed post hearing] Bill 420, Senate Bill introduced by Senator Vasconcellos February 20, 2003 and is an *Act* to add Article 2.4 (commencing with Section 11362.7) to Chapter 6 of Division 10 of the *Health and Safety Code*, relating to controlled substances. This Bill passed the Assembly 42 to 32 and the State Senate 24 to 14.

[78] Exhibit 43, page 5.

[79] Exhibit 43, page 8.

[80] Exhibit 43, page 12.

[81] Exhibit 43, page 12.

[63] The US federal government and the American Medical Association have determined that marihuana has no currently accepted medical use. Accordingly, the federal *Controlled Substances Act (CSA)*[82] still prohibits, among other things, the manufacture, distribution and possession of marihuana. The *CSA* also provides that marihuana is a Schedule I drug. Since a Schedule I drug has "no recognised medical value," there is no defence of "medical necessity" against federal charges of possession or cultivation of marihuana,[83] even where the marihuana is allegedly being grown pursuant to a state Act such as the *Compassionate Use Act.*

[64] The *CUA* not only permits a person to raise their status as a qualified patient or caregiver at trial, but also **permits a person to make a motion to set aside the charges against them before trial**. This is significant because there is provision for the avoidance of a trial if the defendant can demonstrate medical necessity.

[65] A person is only required to raise a reasonable doubt that they were in possession of, or cultivating marihuana for their personal medical purposes. It is not necessary that they prove this by a preponderance of the evidence. In other words, the defendant need only establish that the possession of marihuana is for medical reasons, and is using the substance pursuant to a doctor's recommendation.[84]

[66] The *CUA* directly conflicts with federal law treating marihuana as a substance with no medical value and high potential for abuse. Drug busts of legitimate medical marihuana patients and Compassionate Use Clubs by DEA officials, followed the enactment of the *CUA*. Witness Patrick McCartney contended that the "first strategy of law enforcement was to eliminate a public supply."[85]

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82 *Controlled Substances Act*, 84 Stat. 1242, 21 U.S.C. 801.

83 Evidence of Judge James P. Gray, Transcript, April 10, 2003, page 52, lines 31—37.

84 *Supra*, footnote 25, *People* v. *Mower*.

85 Evidence of Patrick McCartney, Transcript, March 6, 2003, page 69, lines 2 – 3. [Public]

[67] The Oakland Cannabis Buyers' Co-operative was formed by the city of Oakland to grow and/or distribute marihuana to approved medical users. The Federal government charged those who were distributing under the city's auspices, with federal offences, including distribution and trafficking in marihuana.

[68] People like Edward Rosenthal, a witness in this claim, who were "deputised" by the city of Oakland to grow for third party patients, were not limiting themselves to possession and/or cultivation for their own personal medical needs, as Mr. Kubby claimed he was. Several of the witnesses and US Court proceedings mentioned throughout this hearing are intertwined in ways large and small with the federal prosecution of the Oakland Cannabis Buyers' Cooperative. Mr. Kubby "raised funds for them" in their appeal before the US Supreme Court;[86] Angel McCleary Raich was a buyer from this club, and her husband Robert Raich (whom Mr. Kubby retained in order that Mr. Kubby could likewise be deputised by the City of Oakland), was one of the Cooperative's attorneys.

[69] All of the federal prosecutions mentioned were connected with third party distribution at one point or another. The US government sued to enjoin the Oakland Cannabis Buyers' Cooperative arguing it violated the *CSA*'s prohibitions on distributing and manufacturing or possessing with intent to distribute a controlled substance. The Ninth Circuit Court ultimately recognised the "medical necessity" defence for the Oakland Cannabis Buyers' Cooperative but this decision was appealed to the US Supreme Court where it was overturned in May 2001.[87]

[70] In evidence is the brief from the Department of Justice to the US Supreme Court arguing that the Ninth Circuit's decision was "outrageous" and of "enormous legal importance"

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[86] Evidence of Steven Wynn Kubby, Transcript, March 7, 2003, page 59, lines 17 – 20.

[87] *Supra,* footnote 49.

since marihuana was a Schedule I substance with a high potential for abuse for which Congress had imposed an outright ban.[88]

[71] In its decision, the US Supreme Court held that there was no medical necessity exception to the *CSA's* prohibitions on manufacturing and distributing of marihuana. The Court's decision does not overturn state law but prevents clubs and cooperatives from dispensing to third parties. Justice Clarence Thomas, for the majority, held that:

> the *Controlled Substances Act* cannot bear a medical necessity defense to ***distributions*** of marijuana, we do not find guidance in this avoidance principle.[89] [*Emphasis added*]

[72] The Court held further:

> this case does not call upon the Court to deprive *all* such patients [with medical marijuana recommendations] of the benefit of the necessity defense to federal prosecution, when the case itself does not involve *any* such patients.[90] [*Emphasis in the original]*

[73] Finally, the Court's reversal was on the basis that a "distributor of marijuana does not have a medical necessity defense under the Controlled Substances Act."[91]

[74] It is significant to note that the judgment does not deal with simple possession. Although the United States Supreme Court has spoken on the issue of clubs' distribution of marihuana for medical purposes, the debate regarding simple possession has not yet been litigated before it, nor has the issue of growing for personal medical use been decided by the Supreme Court.

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88 Exhibit 6, *United States* vs. *Oakland Cannabis Buyers' Cooperative*, Department of Justice Reply Brief, pages 40 — 45.

89 *Ibid,* page 137.

90 *Ibid,* page 146.

91 *Ibid,* page 147; see also: Exhibit 7, page 122, GayLesbian News "*Reefer Madness: The DEA Raids WeHo Cannabis Club"* Karen Ocamb, stating the USSC "ruled 8 to 0 that the club itself could not claim the 'medical necessity' exception defense traditionally afforded individual defendants" which suggests the Court saw distributors acting out of choice to assist suffering and not from medical necessity as patients do.

[75] In 2001, it was estimated that the number of persons using marihuana for medical purposes in California under the *Compassionate Use Act* ranged from twenty-five thousand to one hundred thousand. It has also been estimated that there are more than thirty organisations that distribute or dispense marihuana to persons for medical purposes currently operating in California.[92]

[76] There are other examples of regulations enacted to deal with medical marihuana patients in the US. For example, Washington State permits a qualifying patient or designated primary caregiver to possess a sixty-day supply of marihuana.[93] At least nine states have medical marihuana laws in place, where there has been a removal of criminal penalties.[94] Many of the laws enacted in thirty-five states since 1978 are ineffectual due to the federal government's overarching prohibition.[95] The debate has many supporters at all levels of government. A recent survey[96] indicated that eighty percent of Americans think adults should be able to use marihuana legally for medical purposes and forty-seven percent say they have tried marihuana at least once. As the debate heated up, so did the confusion for lawmakers and enforcers. If federal law "trumps" state law, as we have heard repeatedly in the present case, how do state law enforcement agencies decide how much marihuana is too much for a grow operation, even if they are satisfied they are dealing with a *bona fide* patient with a doctor's recommendation?

[77] Each state and county has developed its own guidelines, and some are more generous than others. What the *Mower* decision succeeded in doing was to ensure that those who were legitimately growing marihuana for their own medical purposes, could raise the

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92 Exhibit 27, tab 2, page 40, *State-By-State Medical Marijuana Laws*; Marijuana Policy Project, February 2001, Richard Schmitz and Chuck Thomas; see also Exhibit 39 (a), [Filed post hearing], "*Pot Grower Spared prison time - medical marijuana advocates claim victory in pivotal Rosenthal sentencing".* San Francisco Chronicle, June 4, 2003.

93 Exhibit 11.2, tab 3, page 20 – 24, Washington State Medical Marijuana Legislation.

94 Exhibit 27, tab 2, page 8: the state are: AK, AZ, CA, CO, HI, ME, NV, OR, WA. Thirty-five others have enacted legislation recognising marihuana's medicinal value. See also: Exhibit 26, Times article titled: "*Is America Going to Pot?*", November 4, 2002, pages 35 – 46.

95 *Ibid*.

96 Exhibit 26, Times article titled: "*Is America Going to Pot?*", November 4, 2002, pages 35 – 46.

medical necessity defence in a *state* prosecution. What it could not do, was reach into *federal* prosecutions and ensure the same protection and necessity defence could be raised in Federal Court. The confusion amongst the medical marihuana community became problematic for prosecutors and triers of fact.

[78] The debate between federal and state jurisdiction grew and some claimed that medical marihuana patients were caught in the middle.[97] There were images in the media of those purporting to be legitimate medical marihuana patients being arrested in a series of drug busts of Compassionate Use Clubs, in 2002 in California. According to at least one news article filed,[98] the DEA was seen:

> dragging paraplegics and cancer patients who were legally growing pot, according to California statutes, to jail in a federal building in San Jose, for breaking federal law. "I opened my eyes to see five federal agents pointing assault rifles at my head. 'Get your hands over your head. Get up. Get up.' I took the respirator off my face and I explained to them that I'm paralysed, " said Susanne Pheil, 44 a paraplegic disabled by childhood polio.[99]

[79] These images did not enhance the DEA's image with some of the American public. Mr. Kubby as a self-proclaimed "med-pot activist," made it a point to communicate his disgust with federal and state officials when he ran for governor, and whenever he was in front of a microphone. He testified that he believed he was under surveillance for a long time, that authorities were aware he was growing marihuana, and he was targeted because he is an activist.

[80] However, it is important to be mindful of the fact that despite the federal *CSA* not permitting persons to cultivate or possess marihuana for medical purposes, state laws allowing the medical use of marihuana still have real value because ninety-nine percent of marihuana arrests are made by state or local officials who enforce state or local laws, not federal laws.[100]

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97 Exhibit 17, pages 313 – 395.

98 Exhibit 26, Times article titled: "*Is America going to Pot?*", November 4, 2002, pages 35 – 46.

99 *Ibid*, at page 38.

100 Exhibit 27, tab 2, pages 12 – 13, Washington State Medical Marijuana Legislation.

California and Washington have very generous and sympathetic state laws regarding the medical use of marihuana. In short, favourable state laws can effectively protect ninety-nine out of one hundred medical marihuana users who otherwise would have been prosecuted.[101]

[81] It is clear that the medical marihuana debate is on-going in the US. Since the hearing into Mr. Kubby's claim, several important things have taken place which I feel are significant. Governor Davis signed Bill 420 which recognises that even prisoners may require guidelines to ensure medical marihuana is available for their use.

[82] This Bill grew out of consultation with patient rights groups, medical cannabis growers, law enforcement officials, prosecutors and defence attorneys. Not all of these groups are satisfied with the Bill, however in the main, it has been lauded as a step forward for medical cannabis users.

[83] It is clear that in the seven years since the *CUA* came into force the vexing question that has remained unresolved is: How much marihuana should a patient be allowed to possess and cultivate? It is not altogether clear whether Bill 420 will answer this question to the satisfaction of prosecutors or patients. Some medical marihuana advocates have thrown their weight behind the Bill, while more radical advocates have objected to any limits being placed on the amount a patient may possess or cultivate. Mr. Kubby submits there is no guarantee that Bill 420 will have any impact on his situation. What is clear is that the debate is far from over.[102]

[84] In addition, the United States Supreme Court let stand a ruling by the 9th Circuit Court of Appeal in *Conant* v *Walter*, No 00-17222 (formerly *Conant* v *McCaffrey*, Ninth Circuit Court of Appeal), that doctors have a right to recommend or approve marihuana as treatment for their seriously ill patients. This ruling has been described as a major victory for medical

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[101] *Ibid*, at page 12.

[102] Exhibit 43, [Filed post hearing] page 16.

marihuana patients. The ruling applies to nine states, including seven that have decriminalised the use of marihuana for medical purposes. California is one of the nine states affected.[103]

[85] Doctors see this ruling as a favourable outcome which will permit them to have 'real conversations' with [their] patients about medial marihuana as part of their treatment option.[104]

[86] In the *Conant* decision, the Court held:

> The evidence supporting the medical use of marijuana does not prove that it is, in fact, beneficial. There is also much evidence to the contrary, and the federal defendants may well be right that marijuana provides no additional benefit over approved prescription drugs, while carrying a wide variety of serious risks. What matters, however, is that there is a genuine difference of expert opinion in the subject, with significant scientific and anecdotal evidence supporting both points of view.[105]

[87] Mr. Kubby is not confident that Bill 420 will "guarantee" he will be permitted medical cannabis while in jail. As will be seen below, a "guarantee" is not required.[106]

CONVENTION REFUGEE CLAIM PURSUANT TO *IRPA* Section 96

(a) Definition and Burden of Proof

[88] As set out above, section 96 of the *Immigration and Refugee Protection Act* requires Mr. Kubby to establish a well founded fear of persecution.[107]

[89] He must establish the facts of his case on a balance of probabilities. Once the facts are established on a balance of probabilities, he must show that there is a serious possibility of persecution for a Convention reason and that there is no state protection available. He must also establish that he does not have an Internal Flight Alternative (IFA). He is only required to show

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[103] Exhibit 43 [Filed post hearing] page 36.

[104] *Ibid*, page 37.

[105] Exhibit 43, page 65.

[106] [Filed post hearing] Steven Wynn Kubby's submissions filed October 27, 2003, at page 3.

[107] *Supra*, footnote 3.

that there is "more than a mere possibility"[108] he will be persecuted should he return to the United States.

(b) Nature Of Mr. Kubby's Convention Refugee Claim

[90] Mr. Kubby, is claiming that he is a Convention refugee because he was prosecuted by state authorities for his political opinion and further that his prosecution was persecutory. He alleges that he was targeted for harassment because he is an outspoken advocate for medical marihuana patients.

[91] Mr. Kubby claims that his investigation and prosecution by Placer Country law enforcement officials under the state *Health and Safety Code* amounted to persecution. He compares his treatment by law enforcement in California, to the Nazi treatment of the Jews. He alleges that the court process is being used as cover for persecution.

> And, you know, during the Nazi regime every Jew got adjudicated, every trial was heard. You could have listed all these -- all these same kind of things could have been marshalled for any Jewish person that was sent to a death camp, because it is the appearance of justice without any real justice ever intended.[109]

[92] He alleges the police harass medical marihuana patients because the police identify them as "undesirable". It appears to be Mr. Kubby's opinion that law enforcement officials are hiding behind the courts to harass and persecute those who advocate for medical marihuana patients.

[93] In addition to his allegations about the state prosecution, Mr. Kubby also alleges that he is at risk of federal prosecution if he returns to the United States and that this prosecution would amount to persecution for his political opinion.

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[108] *Adjei v. Canada (Minister of Employment and Immigration),* [1989] 2 F.C. 680; (1989), 7 Imm. L.R. (2d) 169 (C.A.).

[109] Evidence of Steven Wynn Kubby, Transcript, April 8, 2003, page 72, lines 25 – 28.

(c) Subjective Fear

[94] I am satisfied that Mr. Kubby has a subjective fear of being jailed in the US. I note that there was a significant delay between Mr. Kubby's arrival in Canada (May 4, 2001) and when he advised Canadian Immigrant Officials of his intention to seek Canada's protection as a Convention refugee (May 17, 2002). I do not find that this delay demonstrates a lack of subjective fear in Mr. Kubby's case. He had legal status when he arrived in Canada, and on the advice of counsel, believed that he lacked the circumstances required to make a successful refugee claim. I find this is a plausible explanation for the delay in making his refugee claim. In addition, I do not find delay determinative nor do I find it indicative of a lack of fear of persecution.

[95] Therefore, Mr. Kubby has established a subjective fear of persecution in the US.

CREDIBILITY

[96] Mr. Kubby is passionate about his beliefs, including his belief that marihuana has saved his life. Dr. Connors testified that marihuana seems to be controlling his deadly adrenal cancer. It would have been helpful to have had one witness testify with greater certainty that what Mr. Kubby alleges is true - marihuana keeps him alive. Dr Connors came the closest to this without ever actually saying this was the case. In fact, it was Dr. Connors' evidence that any treatments that are available to Mr. Kubby medically in Canada would be available to him in the United States.

[97] I do not think Mr. Kubby lied when he testified, and found him to be an intelligent, knowledgeable though at times, excitable witness. However, in my opinion, he was prone to exaggeration, and speculation. He made decisions he thought were reasonable in the circumstances such as leaving the US with outstanding, unresolved criminal convictions. However, the basis for his decisions, the underlying premises, have not been borne out by the facts.

[98] An example of an exaggeration is the fact that the Kubbys appeared to take credit for Proposition 215 coming into force as the *Compassionate Use Act.* Witness Patrick

McCartney on the other hand, testified that Mr. Kubby had a "small but important" role in it's passing. Ms. Kubby reiterated several times: "I passed a law"[110] that would allow Mr. Kubby to smoke marihuana for medical purposes. Many people worked long and hard to enact the *Compassionate Use Act*, yet the Kubbys appeared at times to take most of the credit for its enactment.

[99] Another example of exaggeration or mis-statement of facts is regarding Mr. Kubby's legal representation at his California criminal trial. Mr. Kubby alleges that he was let down by his court appointed public defender Ms. Mumma who allegedly refused to answer his or Mr. McCartney's calls. Mr.Kubby said that he had been left to his own devices while he was in Canada. He alleges he was effectively "unrepresented" in his California proceedings going on while he was here. A fair reading of the court transcripts[111] demonstrates that Ms. Mumma was extremely persistent and diligent in raising defences and making submissions to the court regarding Proposition 36 relief – the limited purpose for which she was retained. Ms. Mumma may not have felt it appropriate, due to solicitor-client privilege to speak to Mr. McCartney. The transcripts filed demonstrate that Ms. Mumma was present and made submissions on Mr. Kubby's behalf on April 27, 2001 and on July 20, 2001, at a time Mr. Kubby testified he was no longer represented by her.[112]

[100] An example of speculation is Mr. Kubby's belief that Mr. Lungren was involved in some way with the anonymous letter that began his prosecution. There is no evidence that this is true.

[101] Another example of speculation (and there are others described below), is the fact that Mr. Kubby remains convinced federal DEA charges were looming on the horizon when he left the United States in 2001, yet none have materialised to date, some two years later (and four

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[110] Evidence of Michele Renee Kubby, Transcript, March 6, 2003, page 107, line 40 and page 108, lines 1 – 3 and line 17. [Public]

[111] Exhibit 39 (b).

[112] Exhibit 39, pages 35 – 43.

years after the original investigation). He believed he would be extradited from another state and indeed perhaps from Canada. In fact, no such proceedings have been commenced.

[102] In addition, it was witness Satterberg's post hearing evidence that even with the change on the mescaline charge from a misdemeanour to a felony, it was his opinion that financial constraints would mean it was highly unlikely Mr. Kubby would be extradited from any other state to California.[113] In addition, witness Cattran said there was no federal warrant outstanding for Mr. Kubby.[114]

[103] The evidence suggests that Mr. Kubby's move to Canada was premature. Mr. Kubby is highly suspicious of US drug enforcement officials (particularly the DEA), yet rather than discuss with state authorities how much marihuana he required for medical purposes (including providing medical evidence of need), he chose to communicate his need for cannabis to the police while he was under surveillance, by leaving notes in his garbage which he believed would be intercepted by the police.

[104] *A Guide for Patients and Physicians in Washington State*, demonstrates how a medical marihuana patient might deal with authorities if investigated by law enforcement. It is suggested:

> [t]hough the *Act* does not specifically prevent arrests, police officers are now being trained in ways to determine legitimate medical versus illegal, social use, when they discover a person with marijuana. You can make a police officer's job easier, and protect yourself, by carrying written documentation of your medical need for marijuana, including a copy of your doctor's authorising medical records.[115]

[105] There was nothing stopping Mr. Kubby from attending the police station, the DEA or the District Attorney's (DA) offices, accompanied by his attorney, to tell them why he was growing so many plants and to elicit cooperation and develop a working relationship with

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[113] Exhibit 42, page 3.

[114] Exhibit 42, page 4.

[115] Exhibit 11.2, page 151.

law enforcement, as Angel McCleary Raich has done. He has powerful evidence with Dr. DeQuattro's and Dr. Connors' letters that could be given over to law enforcement officials to establish his need for medical marihuana. The fact is, Mr. Kubby did not do this. The investigation and prosecution that resulted, at least in Mr. Kubby's mind, was a conspiracy against him because he was an outspoken medical marihuana activist who ran alongside the State Attorney General for California, in the gubernatorial campaign. In my opinion, it was nothing more than the state authorities' attempt to satisfy their obligation to protect the public good from drug dealers.

[106] I am in no way suggesting Mr. Kubby is a drug dealer. Quite the contrary. However, were we to step into the shoes of the police, it would be difficult to infer malicious intent.

[107] I accept Mr. Kubby is ill with adrenal cancer, and that he has determined using marihuana is the treatment that works best with his particular symptoms. He has received a Health Canada exemption,[116] which suggests he is a *bona fide* ill person in need of medical marihuana. It is noteworthy that Mr. Kubby was investigated and charged with marihuana related criminal offences in Canada. Those Canadian charges were later stayed by the Crown, and his marihuana grow equipment was returned to him by the RCMP after the charges were stayed. This suggests the Government of Canada believes he has a medical necessity for marihuana.[117]

[108] His tendency to speculate and his exaggerated "conspiracy theory" notions aside, I find his testimony on the whole, to be generally credible. In summary, while I have concerns about Mr. Kubby's tendency towards exaggeration and speculation, there are no major credibility concerns.

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[116] Exhibit 44 [Filed post hearing] *Personal Use Production Licence*.

[117] Exhibit 24, television news report re: Kubby criminal charges in Sechelt, Canada.

PROSECUTION vs. PERSECUTION

(a) Introduction

[109] Mr. Kubby argued that the criminal charges against him were politically motivated. He alleges that he had a role in the enactment of the *Compassionate Use Act*. When qualified patients continued to face arrest and prosecution after passage of the *CUA*, Mr. Kubby ran for the office of governor of the state of California. One of his opponents was Attorney General Daniel Lungren, the man Mr. Kubby believed had undermined the implementation of the *CUA*.

[110] It is Mr. Kubby's belief that Mr. Lungren or others acting for him, had a role in the anonymous letter that began the prosecution. Mr. Kubby's local opposition to the actions of the DEA and state authorities allegedly did not make him popular in some law enforcement circles. The authorities' interest in him was likely prompted by his outspoken and vocal opposition on an issue that was controversial. Mr. Kubby was provocative, as he is entitled to be. He was exercising his constitutional right of free speech.

[111] However, this does not lead me to find that the entire system of criminal justice in the US has been impeached in the manner envisioned by *Satiacum*.[118] The issue I must determine is whether the prosecution against Mr. Kubby was politically motivated.

(b) Fair and Independent Judicial System

[112] It is clear that the United States is a democratic country with a system of checks and balances amongst its three branches of government: the executive branch, the legislative branch and the judicial branch. Mr. Kubby alleges the US system of government is not fair or independent, in part because it allegedly leads the world in incarceration of its citizens, although he filed no documentary evidence to support this assertion. In addition he relies upon the opinion

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[118] *Canada (Minister of Employment and Immigration) v. Satiacum (1989), 99 N.R. 171 (F.C.A.).* See the anlysis of the issue of state protection below.

of Judge Gray, a former US prosecutor and sitting superior court judge, as evidence to support this view. I will have more to say about the testimony of Judge Gray below.

[113] According to the Canadian Federal Court of Appeal, a claimant must establish "exceptional circumstances" exist in his case such that one would be left to assume a fair and independent judicial process did not occur in his US criminal trial. Furthermore, the events leading up to Mr. Kubby's prosecution and his criminal trial must likewise be taken to be merged into the judicial system and are not open to review by a Canadian tribunal.

[114] In order to rebut the presumption that the American judicial system is fair and independent, Mr. Kubby must provide evidence that tends to impeach the total system of prosecution, jury selection, and judicial oversight. He cannot pick and choose discrete indiscretions or illegalities by individual participants to demonstrate a failure of the entire system of government.[119] Even if Mr. Kubby could prove that individual police officers or prosecutors abused their power, in my opinion, these isolated incidents would be subject to "self-correcting mechanisms"[120] contained within the process itself. He has not demonstrated a failure of the entire system, nor has he established any persecutory intent on the part of law enforcement officials, prosecutors or judges in the state of California or elsewhere in the US.

(c) Laws of General Application

[115] I must presume that a law of general application, such as the *California Health and Safety Code*, is valid and neutral. The onus is on the refugee claimant to show that the law is inherently or for some other reason persecutory.[121] No evidence was filed which would suggest that the state is in some way singling out Mr. Kubby for a Convention reason, in its application of the *California Health and Safety Code*. Mr. Kubby's anti-government political opinion is the reason alleged for abuse of his prosecution for alleged *California Health and Safety Code* violations. In fact, Mr. Panzer testified that in his opinion, as a criminal defence lawyer, the

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[119] *Ibid*.

[120] *Ibid*.

[121] *Zolfagharkhani* v. *Minister of Employment and Immigration* [1993] 3 F.C. 540 (Fed. C.A).

charges in the Kubby case were justified in the circumstances.[122] Mr. Kubby alleges that Mr. Panzer's testimony would have been different had they been able to show him that the DEA report on Pete Brady was a lie.[123] In my opinion, this would not have changed Mr. Panzer's evidence because he based his opinion on the number of plants found at the Kubby residence.

[116] Mr. Kubby alleges that he is not contesting the *California Health and Safety Code,* but rather the failure, by the court system, to provide the necessary protection a *bona fide* medical marihuana patient such as Mr. Kubby requires to be safe from prosecution and conviction as a drug criminal. He argues that any system of law including California's is clearly unjust and persecutory, if seriously ill patients are being denied protection from police raids and are being blocked from accessing their medically approved therapy. While I do not take issue with this proposition, what the claimant fails to address is how he was denied access to approved therapy, after he was acquitted of marihuana charges. He has also failed to establish he would not be permitted the benefit of the exemption in the *CUA* with a doctor's recommendation, in future.

[117] In my view, it is reasonable for the state of California to put restrictions on the use of medical marihuana. It is not reasonable for Mr. Kubby to assume the state should let him decide what amount is appropriate to cultivate and process. For example, in Canada, it is Health Canada that determines the number of plants he can grow. Likewise, in California he needed to persuade law enforcement that the amount he possessed was reasonable, given his medical need. Without clear guidelines, it was for Mr. Kubby to persuade prosecutors his grow operation was legitimate. He failed to do this, so a trial was the proper forum to litigate the issue.

[118] There is no doubt in my mind that if the *Compassionate Use Act* had created a neutral body to determine the number of plants a patient is allowed to grow, medical marihuana patients would have fewer problems in the US. This was not done however, and I cannot re-write the *CUA* to deal with its perceived frailties.

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[122] Evidence of William Gary Panzer, Transcript April 15, 2003, page 54, lines 13 – 18.

[123] Claimant's submissions July 30, 2003, page 26.

(d) Jury Trial

[119] In addition to my comments above, the Minister's counsel submits that because Mr. Kubby was tried by a jury of his peers (meaning that the outcome of his trial was in the hands of his peers, not the police, the prosecutors or the judge), I should conclude that he received a fair trial. Mr. Kubby on the other hand, submits that the jury was not comprised of his peers from Placer County, since the prosecution succeeded in obtaining a change of venue. I find that the facts of the trial were decided nonetheless by a jury of his peers of US citizens. Mr. Kubby points to the trial of Edward Rosenthal as evidence of the unfairness of the system. Jurors in that case felt betrayed by the judge for not being told that Mr Rosenthal was growing marihuana for sick patients and was not a drug dealer. He ignores the fact that the lower courts are bound by the US Supreme Court's decision in the *Oakland Cannabis Buyers' Cooperative* and as such, the judge was precluded from permitting Mr. Rosenthal to advance the "medical necessity" defence because he was growing for others. In the end, Mr. Rosenthal received a one-day jail sentence.

[120] Mr. Kubby alleges further that the prosecutors tried to improperly exclude persons from the jury, as further proof of bias and an unfair trial. However, there is no evidence to support his allegation and certainly no evidence that would tend to impeach the total system of jury selection or otherwise rebut the presumption of a fair and independent judicial system in the United States. To the contrary, the very fact that eleven of the jurors were in favour of acquitting him on his marihuana related charges demonstrates that the jury was not biased against him.

(e) Right to Counsel

[121] A careful reading of the court documents filed demonstrates that Mr. Kubby was asked at each appropriate juncture whether he wanted a court-appointed public defender. Sometimes he declined[124] and other times, he accepted. He was represented much of the time by

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[124] For example, Exhibit 39, page 15, lines 20 - 21.

able counsel, and when he was not, it was his choice not to be. I find that he was extended the right to counsel as required by the *US Constitution*, for the entirety of his court process.

(f) Independence and Impartiality of the Presiding Judge

[122] With respect to the evidence adduced regarding the impartiality of the Judge who presided over Mr. Kubby's trial, from reading the documents filed, I am satisfied that Judge Cosgrove was independent and impartial and that Mr. Kubby's trial was fair. Mr. Kubby has previously acknowledged that he believed that Judge Cosgrove was independent and that he had acted fairly throughout his trial. During court proceedings on April 6, 2001, Mr. Kubby stated to Judge Cosgrove:

> I do believe that the judiciary is independent, and I believe that you have in your hand the key to ending this nightmare for my wife and my family and myself. [125]
>
> I think that you are the kind of Judge, I think that you have shown throughout this whole trial, allowing us to look at whatever both sides wanted to come up, and there were times where we were unhappy, and I am sure there were times when the prosecution was unhappy, but you certainly have shown a willingness to look at the total picture.[126]

[123] In addition to Mr. Kubby's admission, there is an abundance of other evidence indicating that Mr. Kubby was treated fairly by Judge Cosgrove and the other judges who have presided over his proceedings at various points. The Minister's counsel sets these out in his submissions:

a) Mr. Kubby was permitted to raise a full answer and defence to the charges against him, including raising the medical marihuana defence provided by the *Compassionate Use Act*, a defence which ultimately proved successful;

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[125] Exhibit 39(a) [Filed Post-Hearing], Transcript of evidence of court proceeding, April 6, 2003, page 11, lines 26 – 28, and page 12, line 1.

[126] *Ibid,* at page 12, lines 23 – 28.

b) Mr. Kubby was granted numerous adjournments of his trial to allow him to prepare his defence;

c) Judge Cosgrove accommodated Mr. Kubby's medical condition by shortening the court day and allowing him to smoke marihuana on courthouse property during the trial;

d) After Mr. Kubby had been convicted by the jury, Judge Cosgrove, over opposition from the prosecutors, reduced Mr. Kubby's charges from felonies to misdemeanors and directed that Mr. Kubby could continue to possess and use marihuana in accordance with the *CUA* while he was on probation; and

e) Judge Cosgove sentenced Mr. Kubby to serve his jail time at home.

[124] In the US, judges are elected officials and may only serve at the pleasure of the electorate. Judge Gray, one of the witnesses called by Mr. Kubby, is an elected judge in California, and is a good example of the independence of the American judiciary. He has maintained his position as a judge even though he has been a public critic of American drug policies for years. He apparently is not fettered by his position from expressing his opinion on US drug policy.

[125] In addition, I find it noteworthy that the federal judge who presided over Mr. Rosenthal's marihuana trial, sentenced Mr. Rosenthal to a jail term of one day and ordered that it be time served. This, even though the federal prosecutors had been seeking a six-year jail sentence for Mr. Rosenthal, demonstrates that on balance, the system is independent. It would appear that the judge, by imposing this sentence, did what he was precluded in law from doing in the trial.

[126] It seems Mr. Kubby believes the only just recourse would have been for the judge presiding over his drug trial to order state and local law enforcements to keep their hands off of the Kubby medical marihuana garden and permit Mr. Kubby to grow as much marihuana as he feels he needs to stay alive. Anything short of this seems to be labelled "unfair". Mr. Kubby compares his medical need for cannabis to a diabetic who needs insulin. "No judge would deny

a diabetic their insulin" he submits. The distinction is clear: insulin has been approved by the medical community as a treatment for diabetics, whereas marihuana has not. The research on the benefits of marihuana is woefully inadequate and inconclusive, making a comparison of these two treatments illogical.

[127] In his submissions he argues:

> The judge should have handed Mr. Kubby a court order spelling out exactly how many plants he could grow safely, without having to worry about another raid. Instead, he placed Mr. Kubby and his family in the direct line of fire of law enforcement by putting him on three years of probation. Law enforcement had carte blanche to come into Mr. Kubby's life and judge whether he and his family were living up to police standards or not.[127]

[128] Mr. Kubby lacks an understanding of judicial limitations. The trial judge was deciding a criminal case, not setting guidelines for how much marihuana he could grow. The number of plants found at the Kubby residence warranted the laying of charges, as his own defence lawyer, Mr. Panzer, conceded. I am not persuaded by Mr. Kubby's argument with respect to a lack of due process regarding his criminal prosecution in California. It is clear to me from the evidence adduced in this case, that Mr. Kubby was given a fair trial in the US.

(g) Alleged Risk of Federal Prosecution

[129] Mr. Kubby is alleging that he is at risk of a federal prosecution either for his past or future actions. Several witnesses gave their opinion that Mr. Kubby would be prosecuted by the federal authorities if he returned to the United States. Mr. Kubby argues that if he were prosecuted on federal drug charges, he would be denied the right to advance the "medical necessity" defence he is afforded under the *CUA* for state prosecutions. His fear is that his continued need for marihuana will cause him to eventually run afoul of federal laws by growing and cultivating marihuana. He fears he will expose himself inadvertently to a federal prosecution thereby inviting a lengthy sentence at the end of a successful prosecution.

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[127] Claimant's submissions, July 30, 2003, page 17.

[130] Clearly it is against federal law in the United States to cultivate and use marihuana for any reason. Accordingly, Mr. Kubby would be committing a federal offence if he were to grow and/or cultivate marihuana outside of the protection afforded in the *CUA*.

[131] However, the evidence on the whole indicates that the DEA's focus is on large scale drug trafficking. As we have heard repeatedly in this hearing, the DEA does not generally get involved in minor drug investigations and prosecutions, largely because of limited resources. Mr. Satterberg testified:

> I spoke this morning with [DEA] chief criminal deputy there, and there are no specific guidelines. They are pretty flexible about what cases that they look at... they typically will not handle a case unless it's at least 500 plants or/and at least 50 pounds of processed marihuana. Those are kind of general guidelines that they follow … they are interested in getting drug traffickers.[128]

[132] On the one hand several witnesses expressed their opinion that Mr. Kubby would likely be prosecuted by the federal authorities because he was a high profile marihuana advocate. Based on this evidence, Mr. Kubby alleges that he is at significant risk of being prosecuted by the federal authorities if he returns to the United States.

[133] On the other hand, there was also evidence that some prominent marihuana advocates have not been charged by the DEA. Angel McCleary Raich, who described herself as a medical cannabis activist,[129] was a most compelling and articulate witness. She has several caregivers who are responsible for growing 500 marihuana plants for her use. She testified that she and her caregivers have not been investigated or prosecuted by the federal authorities, although she lives in fear the day will come when the federal DEA will come for her. In part to deal with this fear, she has established a good rapport with local law enforcement. She did however add that the identity of her caregivers is kept secret to protect them from prosecution. It is not clear from the evidence what Ms. McCleary Raich fears, given she has never been targeted

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[128] Evidence of Daniel T. Satterberg, Transcript, April 16, 2003, page 23, lines 14 – 40 and page 24, lines 8 - 13.

[129] Evidence of Angel McCleary Raich, Transcript, April 10, 2003, page 6, line 7.

by law enforcement and maintains a good relationship with them. It is a non-specific, generalised fear that she describes, because she is ill and therefore vulnerable.[130]

[134] The testimony of Mr. Satterberg directly contradicted the opinion expressed by some witnesses that Mr. Kubby would be prosecuted by the federal authorities because of his political opinions. It was his evidence that the federal government authorities do not have a policy on medicinal marihuana patients and it is not their practice or intent to try to prosecute a medicinal marihuana case simply to make some sort of political point.[131] Of course, he was describing his relationship with federal prosecutors in Washington state and was not expressing an opinion on what the DEA's position might be in California.

[135] However, it is noteworthy that the DEA is a federal institution and one would assume that theirs is a national policy. What Mr. Satterberg was saying about Washington state would likely be their drug policy throughout the US.

[136] By way of example, the city of Seattle Vice and Narcotics Section Commander wrote to the US Department of Justice, seeking clarification of consequences to police officers who returned medicinal marihuana seized pursuant to drug investigation, if a recommendation by a doctor was verified. The police were concerned that by returning a Schedule I controlled substance (marihuana) they would be in violation of federal law.[132]

[137] The US Attorney responded that while Washington State's medical marihuana initiative was clearly in conflict with federal laws prohibiting cultivation, possession, distribution of marihuana, and drug control policies of their Administration (that legalised medical use of controlled substances should be based on medical research) they understand that the conflict

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130 Evidence of Angel McCleary Raich, Transcript, April 10, 2003, page 19, and Exhibit 25, Declaration of Angel McCleary Raich.

131 Evidence of Daniel T. Satterberg, Transcript, April 16, 2003, page 23 – 25.

132 Exhibit 11.2, tab 4, page 25.

between state and federal laws puts the Seattle Police Department in an "uncomfortable position."[133]

[138] Speaking for the US Department of Justice, the Attorney stated:

> Given our limited funding and overwhelming responsibilities to enforce an ever larger number of federal offenses, we simply cannot afford to devote prosecutive resources to a case of this magnitude.

[139] In short, she would decline to prosecute, and confirmed they have no interest in the police investigating and forwarding cases involving medical marihuana patients

[140] The federal authorities did not handle Mr. Kubby's prosecution at the time he was arrested. One would think that if they were interested in doing so, the time to have done this would have been when he was arrested in 1999. At that time he was a prominent medical marihuana advocate. He had recently finished his campaign to become the Libertarian governor of California and during that campaign, he had publicly criticised drug polices in the United States and supported the legalisation of marihuana. Despite Mr. Kubby's public profile as a marihuana advocate and the DEA involvement in the execution of the warrant at his residence, he was not charged federally. Nor has he been charged federally since his acquittal on state charges in the US.

[141] Moreover, there is no evidence that the federal authorities have taken any steps to lay federal charges against Mr. Kubby following his acquittal on state marihuana charges. Several witnesses alleged that they had heard that a federal prosecutor wanted to arrest Mr. Kubby, but there is no evidence to support these allegations. Even Mr. Kubby appeared to acknowledge that he had no evidence that the federal authorities intend to revive the charges against him. [134]

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[133] Exhibit 11.2, tab 4, page 26.

[134] Evidence of Steven Wynn Kubby, Transcript, April 8, 2003, page 101, lines 21 – 28.

[142] It has been four years since Mr. Kubby was arrested in California. I do not have any evidence the Federal Drug Enforcement Administration is interested in him today. Gerald Uelmen, a Professor of Law at Santa Clara University Law School who was involved in both the *Mower* case before the Supreme Court of California and the *Oakland Cannabis Buyers' Cooperative* case before the United States Supreme Court, has stated that the federal government has never prosecuted a cancer or AIDS patient for simple possession of marijuana for personal use and expressed his opinion that it never will, because government officials realise no jury would ever convict in such a case.[135]

(h) Fugitive From Justice

[143] Mr. Kubby urges me to find that he is not a fugitive from justice, but rather a victim of arbitrary arrest and prosecution, the result of which was a jail term, which he alleges will cause his death, if he is forced to serve it in a prison. In his submissions, Mr. Kubby alleges that the allegation that he is a fugitive has never been adjudicated in the US and that in Canada, where it has, the Immigration Adjudicator ruled that Mr. Kubby entered Canada legally and is not a fugitive.[136] On July 30, 2001, a bench warrant was issued in California for Mr. Kubby's arrest, as a result of his violation of probation. Accordingly, I agree with the characterisation of Mr. Kubby as a fugitive from US justice, notwithstanding the fact that he entered the country legally. In addition, Judge Kolkey of the California Court of Appeal made the finding that Mr. Kubby is a fugitive.[137]

[144] Mr. Kubby also urges me to accept that he is a victim of a justice system whose priorities, for reasons of his political opinion, have gone astray. That in its aim of eradicating drug use and thereby prevailing in the "War on Drugs," it has ignored its own *US Constitution* and trampled on individual civil liberties. He expects that the commission of an offence, in this

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[135] Exhibit 27, *Compassion and Common Sense*, G. Uelmen, San Jose Mercury News, July 23, 1999, tab 13, pages 134 – 135.

[136] Claimant's submissions, July 30, 2003, page 29.

[137] *Supra*, footnote 41.

case the failure to appear in Court to serve his sentence, coupled with fleeing the jurisdiction contrary to the terms of his probation order, should not automatically lead to the conclusion that his fear is of prosecution and punishment, rather than of persecution on one of the grounds specified in the definition.

[145] Having made the finding that Mr, Kubby is a fugitive from justice, it is important to draw a distinction between a "fugitive" and a "refugee" facing persecution. The United Nations High Commissioner for Refugees (UNHCR) has considered this distinction in its handbook.

> … a fugitive from justice [may] not use the Convention as a shield, and therefore abuse the Convention refugee process. 'Persecution must be distinguished from punishment for a common-law offence. Persons fleeing from prosecution or punishment for such an offence are not normally refugees. It should be recalled that a refugee is a victim, or potential victim, of injustice, not a fugitive from justice.'[138]

(i) Summary

[146] Despite his impassioned evidence, Mr. Kubby has failed to demonstrate that he did not receive a fair trial in California. In my view, he was afforded numerous procedural and substantive legal rights in the United States. Mr. Kubby submits that his witnesses, some of whom are similarly situated to him, have demonstrated the shortcomings of the US judicial process. What is clear to me from reading the cases that have come out of the US Courts of Appeal, and the US Supreme Court, and carefully listening to the witnesses who have testified in this case, is that matters are being considered and judgments are being made on the issue of medical use of marihuana in the United States. The debate is still very much alive.[139]

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[138] *UNHCR Handbook on Procedures and Criteria for Determining Refugee Status* under the 1951 Convention and the 1967 Protocol relating to the status of Refugees, reedited Geneva, January 1992, page 15, paragraph 56, as cited in CRDD V99-02159, Dauns, Vanderkooy, October 6, 1999 (reasons signed October 20, 1999).

[139] *People* v. *Mower*, (2002) DJDAR 8025; *United States v. Oakland Cannabis Buyers' Cooperative et al.* (2000) Certiorari to the USCA for the 9th Circuit, USSC; *People* v. *Steven Wynn Kubby*, California Court of Appeal, C038631; *US* v. *Edward Rosenthal*, CR02-0053CRB, US District Court for the Northern District of California, Exhibit 40, herein and Exhibit 43.

[147] The fact that the outcome does not always please the litigants is not evidence of bias, unfairness, breach of Constitutionally protected rights, or persecution. It is evidence of an on-going debate in a politically charged area of the law: that is, the issue of the use and abuse of marihuana for medical reasons. The sad reality is that this in an area of law subject to abuse by drug users, traffickers, and those who would benefit from taking advantage of the medical marihuana laws, to the detriment of legitimately ill and dying patients.

[148] The marihuana debate is underway in many countries today, including Canada, and it will not be easily or quickly resolved. Based upon the documents filed, Mr. Kubby was given a fair and impartial trial in the US and was afforded multiple avenues of appeal. He has therefore failed to establish that the trial process was not fair. He has likewise failed to establish the process was persecutory.

[149] I reject his evidence that he was the victim of a "witch hunt" by prosecutors, law enforcement officials and judges. I prefer the evidence of a lack of persecution presented by the witnesses of the Minister's counsel because their evidence, coupled with the documentary evidence filed, demonstrates that the United States government is bound by its *Constitution* and affords legal protections where individual rights are concerned.[140]

[150] Although the Preamble of the *US Constitution* is not a source of power for any department of the Federal Government, the US Supreme Court has often referred to it as evidence of the origin, scope, and purpose of *The Constitution*. The Fifth Amendment guarantees a person the right against self-incrimination and double jeopardy in a criminal proceeding. The Sixth Amendment affords an accused person a "speedy and public trial, by an

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[140] *The United States Constitution* states in it's Preamble: "We the People of the United States, in order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.

impartial jury of the State and district wherein crimes shall have been committed … and to be informed of the nature of the [crime] and to have the assistance of counsel for his defence." [141]

[151] I find that the *US Constitution* and its entire system of justice, are devised to afford individual civil liberties, and extensive fundamental rights.

[152] As noted above, with the exception of one brief period following his arrest in January 1999, Mr. Kubby has been able to use marihuana in the United States for more than fifteen years without incident. Even following his arrest, Mr. Kubby was able to continue smoking marihuana without any interference by law enforcement even though he alleges he was forced to purchase marihuana illegally. Furthermore, during his trial, the Court facilitated Mr. Kubby's use of marihuana.

[153] While I accept Mr. Kubby fears returning to the US to serve out his sentence, I do not accept that his fear is objectively well founded. It is clear to me that Mr. Kubby and some of his supporters, have lost faith in the judicial process in the US. There has been much written about the federal versus state mandates in the "War on Drugs", that has been unflattering to the Federal "drug Czar"[142] and the DEA. There is no doubt that the US must reconcile two opposing legal doctrines: the states that have passed *Compassionate Use Acts* (or their equivalent) as against federal laws which declare that possession of a Schedule I drug should net the convicted felon substantial jail time. In the words of the United States Attorney, this is a "complex and contradictory area of drug enforcement."[143]

AVAILABILITY OF STATE PROTECTION

[154] There is a requirement in the definition of Convention refugee that the claimant be unable, or by reason of his fear of persecution, unwilling to avail himself of the protection of

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[141] *Jacobson* v. *Massachusetts,* 197 U.S. 11. 22 (1905).

[142] John P. Walters, Director, White House Office of National Drug control Policy, often referred to as the "Drug Czar".

[143] Exhibit 11.2, tab 4, page 27.

the country of nationality (citizenship), in this case, the United States. The Supreme Court of Canada in *Ward* extensively canvassed the issue of state protection.

> *Having established that the claimant has a fear, the Board is, in my view, entitled to presume that persecution will be likely*, and the fear well-founded, if there is an absence of state protection. The presumption goes to the heart of the inquiry, which is whether there is a likelihood of persecution. ... Having established the existence of a fear and a state's inability to assuage those fears, it is not assuming too much to say that the fear is well founded. Of course, the persecution must be real – the *presumption* cannot be built on fictional events – but the well-foundedness of the fear can be established through the use of such a presumption.[144] [*Emphasis added*]
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> Although this presumption increases the burden on the claimant, it does not render illusory Canada's provision of a safe haven for refugees. The presumption serves to reinforce the underlying rationale of international protection as a surrogate coming into play where no alternative remains to the claimant. Refugee claims were never meant to allow a claimant to seek out better protection than that from which he or she benefits already.[145]

[155] The state's ability to protect the claimant is a crucial element in determining whether the fear of persecution is well founded, and as such, is not an independent element of the definition. The issue of state protection goes to whether the fear of persecution is objectively well founded.

[156] The claimant has come to Canada seeking refugee protection. The responsibility to provide international protection only becomes engaged when national or state protection is unavailable to the claimant. This is referred to in *Ward* as "international" or "surrogate" protection. If the state in question is able to protect the claimant, then his fear is not, objectively speaking, well founded.

[157] Moreover, except in situations where the foreign country is in a state of complete breakdown, states must be presumed capable of protecting their citizens. This presumption can

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144 *Canada (Attorney General)* v. *Ward*, [1993] 2 S.C.R. 689, 103 D.L.R. (4th) 1, 20 Imm. L.R. (2d) 85 (SCC), page 722.

145 *Ibid*, page 725.

be rebutted by "clear and convincing" evidence of the state's inability to protect. The danger that the first presumption (set out above), will operate too broadly, is tempered by a requirement that clear and convincing confirmation of a state's inability to protect must be advanced.

> *Absent some evidence, the claim should fail, as nations should be presumed capable of protecting their citizens.* Security of nationals is, after all, the essence of sovereignty. *Absent a situation of complete breakdown* of state apparatus, such as that recognized in Lebanon in *Zalzali*[146] it should be assumed that the state is capable of protecting a claimant. [*Emphasis added*]
>
> The quantum of clear and convincing evidence required to rebut the presumption of a state's ability to protect will depend on its democratic processes.[147]

[158] Mr. Kubby adduced evidence of similarly situated individuals whom he alleges have been let down by the state protection arrangements. He alleges that the state is singling out medical marihuana users for abuse and endangering their lives thereby. He argues the state cannot or will not protect him from the ambiguity of the laws in the US.

[159] In *Satiacum,* the Federal Court of Appeal held:

> In the absence of *exceptional circumstances* established by the claimant, it seems to me that in a Convention refugee hearing, as in an extradition hearing, Canadian tribunals have to assume a fair and independent judicial process in the foreign country. In the case of a non-democratic State, contrary evidence might be readily forthcoming, but in relation to a democracy like the United States contrary evidence might have to go to the extent of substantially impeaching, for example, the jury selection process in the relevant part of the country, or the independence or fair-mindedness of the judiciary itself. [*Emphasis added*]

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146 *Ibid*, page 726.

147 *Canada (Minister of Citizenship and Immigration)* v. *Smith (T.D.)* [1999] 1 F.C. 310, paragraph 23.

[160] In *Kadenko*,[148] the Federal Court of Appeal noted that the burden of proof to establish the absence of state protection is:

> directly proportional to the level of democracy in the state in question. The more democratic the state's institutions, the more the claimant must have done to exhaust all the courses of action open to [him].

[161] The claimant bears the burden at all times of rebutting the presumption that the state is capable of protecting its citizens. Decisions following *Ward* have established that state protection need not be perfect.[149]

[162] A review of *Satiacum*[150] is helpful to the analysis of whether the claimant's subjective fear of persecution is objectively well founded because the facts of that case have similar elements to the present case. In that case, a Hereditary Chief from Tacoma Washington, Robert Satiacum, made the claim that he was a Convention refugee and could not obtain the protection of the US government.

[163] In May 1982, Mr. Satiacum was indicted and, after a trial with a jury, Mr. Satiacum and two other co-accused were found guilty. He was never sentenced because he fled to Canada while out on bail awaiting sentencing, therefore, he was not present when his co-accused were sentenced.

[164] Mr. Satiacum was arrested in Canada in 1983 and claimed refugee status. In a 77-page decision, the Immigration Appeal Board (IAB, as it then was) rendered a split - decision. Two of the three Members determined Mr. Satiacum was a Convention refugee. Pursuant to the law at the relevant time, this resulted in a positive determination of Mr. Satiacum's claim. The third panel Member dissented, and held that Mr. Satiacum did not have a well founded fear of

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148 *M.C.I.* v. *Kadenko, Ninal* (F.C.A., no.A-388-95), Hugessen, Décary, Chevalier, October 15, 1996. Reported*: Canada (Minister of Citizenship and Immigration)* v. *Kadenko* (1996), 143 D.L.R. (4th) 532 (F.C.A.).

149 *M.E.I.* v. *Villafranca, Ignacio* (F.C.A., no.A-69-90), Hugessen, Marceau, Décary, December 18, 1992.Reported:*Canada (Minister of Employment and Immigration)* v. *Villafranca* (1992), 18 Imm. L.R. (2d) 130 (F.C.A.).

150 *Supra*, footnote 118.

persecution, in part based on the fact the US was a democracy and therefore the claimant's fear was not objectively well founded.

[165] Mr. Satiacum feared being murdered while in jail serving his sentence on criminal charges. The IAB held this fear was reasonably justified, both for the past and in the present.

[166] They arrived at this conclusion based on the evidence adduced at the hearing. It was not suggested that the US government took an active role in the persecution, but it was alleged the government could not protect him.

[167] The Board relied upon *Rajudeen*[151] and *Surujpal*[152] and held:

> It is not necessary to the success of the applicant's claim that active harassment by federal authorities be shown, as long as they were shown to be unable or unwilling to effectively protect the applicant.

[168] A majority of the IAB held there was an objective basis to Mr. Satiacum's fear of persecution because the federal government did not protect him against strong and vocal state interests, which he challenged. It is significant that the panel did not know the reason for the inactivity by federal officials, since there was no evidence tendered, either way. The IAB found that Mr. Satiacum feared for his life if incarcerated in a federal prison.

[169] The Federal Court of Appeal held that the degree of risk, or likelihood of persecution was that established in *Adjei*.[153]

> What is evidently indicated by phrases such as "good grounds" or "reasonable chance" is, on the one hand, that there need not be more than a 50% chance (i.e., a probability), and on the other hand that there must be more than a minimal possibility. We believe this can also be expressed as a "reasonable" or even a "serious possibility", as opposed to a mere possibility.

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151 *Rajudeen* v. *Canada* (Minister of Employment and Immigration)(1984), 55 N.R. 129 (F.C.A.).

152 *Surujpal* v. *Canada* (Minister of Employment and Immigration) (1985), 60 N.R. 73 (F.C.A.).

153 *Adjei* v. *Canada (Minister of Employment and Immigration),* [1989] 2 F.C. 680; (1989), 7 Imm. L.R. (2d) 169 (C.A.), paragraph 8.

[170] For this reason, Mr. Justice MacGuigan, speaking for the majority in *Satiacum*, held that *Rajudeen* was inappropriately applied to the facts of Mr. Satiacum's case. In *Rajudeen* there was illegal and violent harassment by intolerant majorities with police acquiescence or indifference, which amounted to state complicity in the persecution. In both *Rajudeen* (Sri Lanka) and *Surujpal* (Guyana) there was no federal state (as in the US) and there was no judicial system in play.

> Both cases clearly deal with the kind of law enforcement, which may amount to persecution. Neither relates in any way to the judicial process, let alone to a fair and independent judicial process. The Board majority therefore erred in law in applying *Rajudeen* to the facts in the case at bar.[154]

[171] The Federal Court was clear in its guidance:

> Again, in the absence of proof by the refugee claimant, Canadian tribunals must assume a fair trial. The notion of a fair trial in a fair and independent judicial system must make allowances for the *self-correcting mechanisms* within the system, e.g., the trial judge's control over the excesses of the participants, and the control of the appellate Courts over any errors of the trial judge.
>
> In all but the most *extraordinary circumstances* all the events leading up to a prosecution and all of the events of a trial in a free and independent foreign judicial system must be taken to be merged into the judicial process and not open to review by a Canadian tribunal. *Extraordinary circumstances* would be those, for example, which tended to impeach the total system of prosecution, jury selection or judging, not discrete indiscretions or illegalities by individual participants which, even if proved, are subject to correction by the process itself.[155] [*Emphasis added*]

[172] In *Ward*, the Supreme Court of Canada, commented on *Satiacum*:

> The Federal Court of Appeal's disposition in *Satiacum* may best be explained as exemplifying such a case of presumption of a state's ability

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[154] *Supra*, footnote 118.

[155] *Supra*, footnote 118, at page 5.

> to protect and of objective unreasonability in the claimant's failure to avail himself of this protection.

[173] Whether one applies the reasoning of *Satiacum* (decided before *Ward*) or the presumption set out in *Ward*, it amounts in effect in the same result.

[174] Canadian tribunals must assume a fair and independent judicial process in a foreign democracy such as the United States. Mr. Kubby, through his evidence, has attempted to demonstrate that the US Federal Government, through its Drug Enforcement Administration (DEA), post September 11, 2001 and under the Bush administration, has become non-democratic. I do not find this amounts to the "exceptional circumstances" envisioned in *Satiacum*.

[175] Although Mr. Kubby and his witnesses were passionate when they testified that the United States is no longer a democracy, and is denying the most fundamental of rights to patients who use cannabis medicinally,[156] insufficient evidence has been advanced to support this assertion, in Mr. Kubby's specific case.

[176] In the present case, the claimant has failed to establish there exists "exceptional circumstances" that would warrant international protection. "Exceptional circumstances" do not exist in relation to the search of Mr. Kubby's home, nor in the charges which followed that search. The state of California charged Mr. Kubby with cultivation and conspiracy – very serious charges – as well as other drug-related offences arising from his marihuana grow-operation. Law enforcement believed he was growing too many plants to be a *bona fide* medical marihuana user. Witness Patrick McCartney testified there were no limitations on plants grown

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[156] Evidence of Judge James P. Gray, Transcript, April 10, 2003, page 35, lines 12 – 17; page 41, lines 16 – 26; page 43, lines 36 – 40; page 44, lines 3 – 5; page 47, lines 22 – 30.

Evidence of Angel McCleary Raich, Transcript, April 10, 2003, page 23, lines 28 – 40, page 24, lines 1 – 11, page 25, lines 39 - 40; page 26, lines 1 - 2.

Evidence of Patrick McCarthy, Transcript, March 5, 2003, page 20, lines 29 - 40; page 21, lines 1 – 16. [Public]

Evidence of William Gary Panzer, Transcript April 15, 2003, page 54, lines 18 – 22.

and possessed, in the *Compassionate Use Act*, by "design," and they were "vague".[157] Mr. Kubby alleges he stuck to the "Oakland Guidelines"[158] on the number of plants he could grow. These Guidelines have been amended since Mr. Kubby's arrest,[159] and Bill 420 which comes into force in January 2004 would radically change the guidelines for medical marihuana patients.[160] Because the instructions to law enforcement in 1999 were vague, the proper procedure when in doubt, was to have a deputy district attorney make the call, which happened in Mr. Kubby's case. Prosecutor Christopher Cattran attended the Kubby residence when the warrant was executed[161] and made the decision that charges were reasonable in the circumstances. He was aware that Mr. Kubby intended to raise the defence of medical necessity. The recourse Mr. Kubby had was to the courts. Both Mr. and Ms. Kubby were provided the full benefit of due process, the result of which is that they no longer face any marihuana-related charges. In effect, the process worked, as it was designed to. I do not wish to minimise the trauma and expense to the Kubbys of such a process, however, I am guided by law, and do not have the mandate to apply humanitarian and compassionate considerations.

[177] The United States has a court system which is very similar to Canada's. There are safeguards built into the justice system – the right to counsel, the right to remain silent, the right against self-incrimination, are some examples. *Satiacum* stands for the proposition that the Refugee Protection Division must be extremely careful when dealing with cases from a democracy such as the United States, before affording international protection. Even where, as here, there are allegations of an abuse of power or authority within the democracy, it is necessary to be mindful of "self-correcting mechanisms". In this case, Mr. Kubby had able counsel representing him and he had full appeal rights, some of which he exercised. Prosecutors and law

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157 Evidence of Patrick McCarthy, Transcript, March 5, 2003, page 55, line 37, page 56, line 30, page 57, lines 9 – 11. [Public]

158 Exhibit 21, pages 138 – 139.

159 Exhibit 31.

160 Exhibit 43, [Filed post hearing] Minister's Counsel's evidence, filed October 15, 2003, page 1.

161 Evidence of Christopher Cattran, Transcript, April 11, 2003, page 53, line 24.

enforcement officials are subject to complaints procedures that Mr. Kubby could have used if he felt there was an abuse of power or process.[162]

[178] The state law enforcement officials are responsible for criminal charges in drug cases where the seizure is for a smaller number of plants than the Federal DEA would be interested in prosecuting. Several minimum numbers of plants were discussed, and it is not entirely clear in which cases the DEA would determine their intervention was necessary. However, the prosecutor in the case, Mr. Cattran testified that somewhere around one thousand plants might be needed to involve the limited resources of the DEA. Mr. Satterberg said less than five hundred plants or fifty pounds of dried marihuana would likely not result in federal prosecution. Mr. Kubby seems to concede this in his submissions.

> It is well known in criminal justice circles that federal prosecutors are only interested in pursuing cases involving more than 500 plants or 1000 plants in some jurisdictions.[163]

[179] Around two hundred and sixty-five plants were seized from the Kubby residence, well below the number of plants that would be of concern to the DEA. While it was the DEA who executed the warrant at the Kubby residence, it was clear from a review of the videotape[164] of that search, that the DEA was interested in the preservation of evidence, not in persecuting Mr. Kubby. After the seizure, the investigation was handed over to the state authority. There is no evidence of an on-going interest by federal authorities, in Mr. Kubby's case, as he alleges. The significance of this is that Mr. Kubby testified that he would be precluded from raising the defence of "medical necessity" in a federal prosecution and as I have already noted, he has failed to establish he is likely to face federal prosecution.

[180] The problems between the enforcement of state medical marihuana laws and the Federal DEA's interest in abolishing drug trafficking and possession are not mutually exclusive.

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[162] Evidence of Christopher Cattran, Transcript, April 11, 2003, page 71, lines 11 – 30, "arbitrary and capricious searches may be taken before the courts," line 13.

[163] Claimant's submissions, July 30, 2003, page 20.

[164] Exhibit 24.

They can co-exist with cooperation between the two departments. Mr. Satterberg testified this is the case in King County.

[181] The United States government has grappled with this dichotomy, between federal and state powers, and many legal minds have turned their attention to the issues involved.[165]

[182] Mr. Kubby chose to leave the US after all of the criminal charges against him and his wife had been prosecuted, and a sentence rendered. He took extraordinary steps to ensure he received approval for electronic monitoring and could therefore serve his sentence in the comfort of his home, in order that he might medicate with marihuana, as he needs to. His objection to the sentence was in part due to the imposition of a three-year term of probation, one of the terms of which would permit his probation officer to search his home if illicit drug use was suspected. This Probation Order provided an exemption for the growth and consumption of marihuana.[166] Mr. Kubby decided it would be too difficult to find someone who could rent him a home under these circumstances, yet advanced little evidence other than his testimony, that this was so. He decided it would be an unnecessary violation of his civil rights to have a probation officer possessed with such power, for three years, yet advanced no concrete evidence of a problem. Prosecutor Christopher Cattran noted there is recourse for a defendant who alleges a probation officer is improperly using the search clause.[167]

[183] In summary, Mr. Kubby has not rebutted the onus upon him to establish that his state is not able to protect him from rogue probation officers or law enforcement acting beyond the scope of their power. In addition, he has not established the state as a whole, is in a situation of complete breakdown. I am satisfied the US government is able to protect Mr. Kubby from persecution, if he were to actually face persecutory acts in the US.

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[165] *People* v. *Mower*, (2002) DJDAR 8025 (unanimous decision of all seven Justices of the California Supreme Court), found at Exhibit 7, page 148 (full text of the decision).

[166] *Supra*, footnote 29 (Court Minute Order) and footnote 31 (Probation Order).

[167] *Supra,* footnote 162.

CLAIM PURSUANT TO *IRPA* Section 97

(a) Definition and Burden of Proof

[184] As stated above, section 97 of the *IRPA*[168] requires a person claiming refugee protection to establish that they face a risk to their life, or a risk of cruel and unusual treatment or punishment, in their country of origin. This risk is to be assessed using the standard of "serious possibility."[169] Section 97 also provides protection to individuals who establish there are good grounds to believe they will be tortured within the meaning of Article 1 of the *Convention Against Torture*.[170]

(b) Nature of Mr. Kubby's Risk to Life Claim

[185] Mr. Kubby alleges he will be incarcerated in a prison if he returns to the US. Mr. Kubby alleges further that he will be denied his drug of choice, cannabis, if incarcerated, and that he will die as a result of the denial of cannabis. I find that this is speculation on his part.

[186] Governor Davis' Bill 420 previously mentioned, contains section 11362.785(c) that provides as follows:

> Nothing in this article shall prohibit a jail, correctional facility, or other penal institution in which prisoners reside or persons under arrest are detained, from permitting a prisoner … to use marijuana for medical purposes under circumstances that will not endanger the health and safety of other prisoners or the security of the facility.[171]

[187] There is insufficient evidence that Mr. Kubby would not be afforded appropriate medical attention, should he need it, while serving his sentence in a state prison. The evidence he proffered of what transpired while he was briefly detained when he was initially charged with

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168 *Supra*, footnote 4.

169 *Supra*, footnote 153.

170 Article 1 of the *Convention against Torture and other Cruel, Inhuman or Degrading Treatment of Punishment (*the "*CAT*"), Can. T.S. 1987 No. 36; G.A. res. 39/46 [annex, 39 U.N. GAOR Supp. (No. 51) at 197, U.N. Doc. A/39/51 (1984).

171 Exhibit 43, page 9.

drug offences, is inconclusive. Mr. Kubby alleges he will go into adrenal failure, his blood pressure would become elevated, and he could have a stroke or heart attack, if left unattended. Dr. Connors agrees with Mr. Kubby's description of what is likely to happen, should he be cut off from marihuana.[172]

[188] There is insufficient evidence that Mr. Kubby would not be removed from his jail cell and taken immediately to a hospital for treatment if a medical crisis occurred. We have no evidence that Mr. Kubby would not be permitted to treat himself in a US hospital, with marihuana for medicinal purposes, through the use of a vaporiser, for example.

[189] In fact, we have evidence to the contrary, from Angel McCleary Raich. Ms. Raich testified[173] she was permitted to use a vaporiser while in hospital, in order to medicate with marihuana. Mr. Kubby has not established his hospital placement if required, would result in different treatment. Dr. Connors was asked whether he had ever treated a patient with adrenal cancer who was incarcerated. He replied:

> you need to understand that his is a very rare problem, and the chance that an incarcerated prisoner would happen to have this condition has to be astronomically small.[174]

[190] Therefore, it is reasonable to assume that if the state correctional authorities are presented with a medical history, treatment for Mr. Kubby's illness would factor in the rarity of his condition and authorities may conclude that permitting Mr. Kubby to ingest cannabis or marinol[175] while in jail, would not set a dangerous precedent for future patients in similar situations, because his illness is so rare. That fact alone suggests a unique handling of Mr. Kubby's case is likely. Mr. Kubby was asked if he had ever used marinol and he said he had not

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172 Evidence of Dr. Connors, Transcript, April 11, 2003, page 8, lines 1 – 20.

173 Evidence of Angel McCleary Raich, Transcript, April 10, 2003, page 14, lines 23 – 24.

174 Evidence of Dr. Connors, Transcript, April 11, 2003, page 13, lines 6 – 8.

175 An online medical dictionary published by the Department of Medical Oncology at the University of Newcastle upon Tyne defines marinol as "an appetite stimulant composed of THC, the active ingredient in marijuana." (*http://cancerweb.ncl.ac.uk/cgi-bin/omd?marinol*)

and would not, because he feared side-effects. Marinol is a substance used in place of cannabis where smoking is not permitted, as it can be ingested orally.[176]

[191] The evidence tendered by Mr. Kubby to establish a failure of the justice and medical systems in the US that would amount to risk of harm to him and his family, has been described by Mr. Kubby. He has described undergoing surveillance, the execution of a search warrant, threats of federal charges that have never materialised, uncertainty that he would be permitted to ingest marihuana in a federal or state prison, the refusal to extend the one hour he was permitted to be outside his home while serving his house arrest sentence, the refusal to revoke the "searchable probation" clause, the threat to involve state child welfare authorities should he smoke marihuana in front of his children, and the refusal to drop all criminal charges against him. In my opinion, all of the allegations Mr. Kubby presents are subject to the "self-correcting mechanisms" described by Mr. Justice MacGuigan in *Satiacum*. They do not, even cumulatively, lead me to conclude Mr. Kubby is a risk of cruel and unusual treatment or punishment, or a risk to his life.

[192] Mr. Kubby alleges that he cannot serve his 120-day prison sentence because he will die once cut off from marihuana. The medical evidence does not establish that he would (a) die if cut off from marihuana, or (b) be denied appropriate medical care while in a US correctional facility if he suffered an acute medical crisis as a result of not ingesting cannabis.

[193] He asked Judge Cosgrove in the proceedings on April 6, 2001 if the court would "pay particular attention to my arguments regarding my life and death medical necessity for marijuana if I am jailed" to which the Judge replied: "I am sure if you are jailed, that situation can be taken care of one way or another."[177] He also went on to consider the 8th Amendment and whether it would amount to cruel and unusual punishment and held: "I have considered it. It's

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[176] See also Bill 420 which may affect what a jail is willing to do for medical marihuana patients.

[177] Exhibit 39(a), [Filed post-hearing] Transcript of Court Proceedings – April 27, 2001page 15, lines 24 - 28.

certainly not unusual treatment if you are treated like any other person similarly situated. That's not cruel and unusual."[178]

[194] Many high-profile prisoners are protected during the whole of their terms of imprisonment. Protection includes ensuring the personal safety of the prisoner and that person's physical and mental well-being. I am not persuaded that the US correctional system will be unable or unwilling to ensure Mr. Kubby survives his penal incarceration, if indeed he is incarcerated in a prison, a fact that has not been established. I think it is fair to say that either the Department of Corrections (for state prisoners) or the Bureau of Prisons (for federal prisoners) are capable of taking care of Mr. Kubby's special needs, if he is in danger while in prison. They are charged with the duty to protect Mr. Kubby while he is in one of their institutions. Mr. Kubby has not established that they would fail to do so in his case.

[195] A document filed by Mr. Kubby discusses this issue.[179] This paper, written by John Gordiner, a senior assistant Attorney General for the state of California states:

> ... County and state operated correctional facilities are generally deemed to be responsible for insuring that persons committed to custody receive proper and necessary medical care. This duty carries with it the right to independently evaluate the medical condition of an inmate to determine the appropriate treatment.
>
> Thus, it would appear that a physician working for the facility may independently determine whether any inmate has the right to use marijuana as medicine. [footnote: Mere disagreements between treating physicians, or between an inmate and his treating physician, about the kind of medical care that is adequate or necessary in his case fails to state a constitutional violation and thus, a cause of action under paragraph 1983 of the Federal Civil Rights Act. (see *Sanchez* v. *Vild*, 897 F. 2d 240, 242 (9th Circ. 1989); *Franklin* v. *Oregon*, 662 F.2d 1337, 1344 (9th Circ. 1981)].

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178 *Ibid*, page 16, lines 8 – 10.

179 Exhibit 17, page 193.

[196] The decision about inmates use of cannabis is left to the attending physician at the prison.

> While there are concerns about inmates in the state's jails and prisons claiming illness and the need for marijuana, the physician working at the facility must independently determine whether an inmate should be provided marijuana, consistent with facility security policies.[180]

[197] I infer from this that the provision of cannabis to a prisoner might be available in certain circumstances, such as those presented by Mr. Kubby.

[198] Notwithstanding Mr. Kubby's assertions he will not be provided cannabis in jail, we have further evidence to the contrary, in the testimony of Judge Gray:

> I can tell you there is a constitutional right to medical treatment if you are in custody of the Marshall's office…that is why it gets too expensive to keep older people in prison.[181]

[199] Judge Gray goes on to say that the Preamble to the US *Constitution* confirms the government's obligation to promote the general welfare.[182]

[200] In addition, there was the evidence of William Panzer who testified that Mr. Kubby would be permitted to serve his time in a prison hospital if it was necessary for his health, and that there is a fundamental right to receive medical treatment without unreasonable interference from the government. He described this as "substantive due process."[183] He described what happens in situations involving prisoners with AIDS, those on heart-lung machines, or in need of dialysis. In his opinion, there is a fundamental right under the

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[180] *Ibid*.

[181] Evidence of Judge James P. Gray, Transcript, April 10, 2003, p. 51, lines 14 - 17.

[182] *Ibid,* at page 51, line 24, also see footnote 140.

[183] Evidence of William Gary Panzer, Transcript, April 15, 2003, page 57, lines 5 - 8.

Constitution to get access to medical care, but questioned whether it would be appropriate or adequate care.[184]

[201] Both Judge Gray and Mr. Panzer, by virture of their roles in the US justice system, have knowledge of its correctional system. This evidence, given objectively, as officers of the court, suggests a very different scenario than that described by Mr. Kubby.

[202] Finally, Mr. Satterberg testified there are national corrections standards for prisoners who are in need of medical care and are wards of the state. It was his evidence that there would be liability to the county for its failure to provide proper medical care.[185]

[203] In addition, Mr. Cattran's testimony indicates that once Mr. Kubby serves his time on the pending convictions, there are no other charges he will face, and the state of California has no intention of reviving the charges upon which Mr. Kubby has been tried.[186]

[204] The Common Law recognises the difference between "reasonable inference" on the facts in evidence, and "pure conjecture." It would be pure conjecture on my part to accept that correctional officials would ignore an acute medical crisis while Mr. Kubby is under their care, for political or other reasons, as he serves his sentence. The words of Lord Macmillan are instructive:

> The dividing line between conjecture and inference is often a very difficult one to draw. A conjecture may be plausible but it is of no legal value, for its essence is that it is a mere guess. An inference in the legal sense, on the other hand, is a deduction from the evidence, and if it is a reasonable deduction it may have the validity of legal proof. The attribution of an occurrence to a cause is, I take it, always a matter of inference.[187]

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184 *Ibid,* page 60, lines 3 - 7.

185 Evidence of Daniel T. Satterberg, Transcript, April 16, page 37, lines 1 – 40.

186 Evidence of Christopher Cattran, Transcript, April 11, 2003, page 42, line 3.

187 *Jones* v. *Great Western Railway Co*. (1930), 47 T.L.R. 39 at 45, 144 L.T. 194 at 202 (H.L.).

[205] Mr. Kubby's case is unique, in that no other person has advanced a similar claim before the Immigration and Refugee Board and in that Dr. Connors has testified his situation is extremely rare. In fact, William Panzer testified that he has no knowledge of any case where an accused had a "life and death necessity" for marihuana as Mr. Kubby alleges to have. Mr. Kubby alleges that by virtue of his unique medical condition, any period of incarceration would endanger his life. However, on both occasions that Mr. Kubby was incarcerated, he was afforded medical attention immediately upon complaining of a medical crisis. No witness was able to say that Mr. Kubby would not obtain the medical treatment he required if incarcerated.

[206] There are facts to the contrary: (1) a penitentiary system that has the ability to protects its inmates, (2) a Probation Order permitting him to serve his sentence in his home; (3) Dr. Connors ability to speak authoritatively on Mr. Kubby's behalf before this Board, and presumably if he needed a medical opinion in the US; (4) the notoriety of Mr. Kubby's public assertion that he will die without marihuana. These facts could permit an inference that the claimant's life would not be in danger if imprisoned. There are no facts on the record that would found the opposing inference – that Mr. Kubby would die if incarcerated in a US prison. On that side there is only conjecture.

(c) Lawful Sanctions

[207] In analysing Mr. Kubby's risk to life and risk of cruel and unusual treatment or punishment, above, I have found he has not established such a risk. I have found that what Mr. Kubby alleges he risks is criminal prosecution pursuant to lawful sanctions. Mr. Kubby must establish that the risk to his life is inherent and incidental to lawful sanctions that have been imposed in disregard of international standards.

[208] Mr. Kubby cannot be sent to jail other than through the imposition of lawful sanctions. The United States is a signatory to international treaties, some of which are intended to control international and domestic trafficking in controlled substances. The *CUA* is in place in part to fulfill the US obligation under these treaties. Canada's apparently more flexible laws on

marihuana for medical use are the first in the world.[188] Possession (at least for the moment) and distribution of marihuana remains illegal in Canada. The Health Canada medical exemption afforded to Mr. Kubby provides amounts permissible to possess and grow depending on individual need.[189]

[209] The Canadian Medical Association (like its US counterpart), opposes the medical exemption because there is insufficient empirical scientific research available to permit doctors to properly prescribe dosage. While there is currently a source of the drug legally available through Health Canada, many medical doctors are reluctant to have marihuana in their offices due to the high potential for abuse.[190] There is no evidence before the panel that US marihuana laws and sanctions arising from them are imposed in disregard of international standards.

[210] I find there is insufficient evidence to conclude Mr. Kubby's medical condition would be ignored if he were sentenced to a penal institution. He has therefore not established that he is a person in need in protection.

[211] The analysis with respect to state protection applies to the analysis of his claim under section 97 as well.

INTERNAL FLIGHT ALTERNATIVE

[212] We heard from witnesses from other jurisdictions, notably from Washington State (Mr. Satterberg) and from Oregon (Ms. Leverette) about their medical marihuana drug policies. Mr. Kubby has not established he has a well founded fear of persecution or a risk under *IRPA* section 97, in California, in that his subjective fear and risk to his life, have not been objectively established, as discussed above. Accordingly, it is not necessary to analyse whether he has an Internal Flight Alternative to another part of the United States.

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188 Exhibit 7, page 14.

189 Exhibit 6, pages 4, 6, 7 and 8.

190 Exhibit 7, page 15.

CLAIMS OF MICHELE KUBBY AND THE MINOR CLAIMANTS

[213] Ms. Kubby has made her claim on the basis of her husband's. She claims to be at risk to her life independently of her husband. She testified that she suffers from irritable bowel syndrome and ingests marihuana as her drug of choice. While she is in possession of a medical recommendation to use marihuana in the US, she did not provide this to the Board. I accept that she was granted this recommendation in California. She concedes that hers is not a medical necessity need for marihuana and that other drugs might help her with her medical problem, though not as well as marihuana does. She also conceded that many doctors do not believe her illness warrants a recommendation that she use marihuana for medical purposes.[191]

[214] Ms. Kubby testified that she could use medical marihuana in the US but she does not possess a doctor's recommendation or a Health Canada exemption, in Canada. In my opinion, Ms. Kubby is in a worse position *vis à vis* her use of medical marihuana in Canada, where she is not permitted to use it, than she is in the US, where she is permitted to use cannabis.

[215] While she alleges that the quality of her life is affected when she does not use cannabis, she conceded that there is not a risk to her personally if she is denied its use.

[216] Her risk is based upon the fact, in part, that she was arrested along with her husband because the marihuana was grown at their residence. She fears she will be charged with other crimes related to assisting her husband because she tends their marihuana garden. She fears charges of cultivation, and perhaps conspiracy. She alleges that she will be prosecuted by federal authorities for her work on Pot TV and her reporting on US drug policies. She also fears what would happen to her and their children if Mr Kubby had to return to the US.[192] I note that Ms. Kubby was acquitted of all charges she was accused of along with Mr. Kubby and there are

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[191] Evidence of Michele Renee Kubby, Transcript, March 6, 2003, page 86, lines 9 – 16. [Public]

[192] Evidence of Michele Renee Kubby, Transcript, March 6, 2003, page 82, lines 5 – 11. [Public]

no outstanding charges against Ms. Kubby at present. Ms. Kubby alleges that she fears "prosecution."[193]

[217] The Minister on the other hand submits that Ms. Kubby has not shown that there is a serious possibility she would be persecuted if she were to return to the US with or without her husband. Ms. Kubby did not file any evidence to suggest that she is of interest to law enforcement officials in the US, either federally or in the state of California, or any other state.

[218] In addition, Ms. Kubby concedes that her use of marihuana for irritable bowel syndrome is a choice for her and not a medical necessity. She has not advanced any evidence of a risk to her life, or a risk of cruel and unusual treatment or punishment if she returns to the US. She has alleged that she fears her children will be taken from her if she returns to the US, however, she has not persuaded me that this is a real possibility in the circumstances.

SUMMARY

[219] What Mr. Kubby alleges does not amount to persecution. He was prosecuted for a breach of a law of general application. His prosecution ultimately resulted in all marihuana charges being dealt with, none by conviction.

[220] Mr. Kubby likens his situation to that of a diabetic. He asserts that the state would never deprive a diabetic of their insulin and he should not be denied life-saving marihuana. As I have said, there is a clear distinction between insulin, which has been approved by the American Medical Association, and cannabis, which has not. Not only has cannabis use not been approved, it has been denounced in some quarters and described as "snake oil" by others. I do not agree. It is clear from the evidence advanced in this case, that marihuana is helping control Mr. Kubby's cancer symptoms. However, more research is needed to draw a medical connection between Mr. Kubby's longevity with a terminal illness, and his ingestion of marihuana as the cause of this longevity.[194]

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[193] Evidence of Michele Renee Kubby, Transcript, March 6, 2003, page 82, lines 10 - 11. [Public]

[194] Exhibit 45 demonstrates scientific research regarding the use of cannabis for cancer patients is on-going.

[221] As the sentencing judge said:

> This case started off as a marijuana case. It's not a marijuana case today. It went through a trial and the jury essentially decided that the issue of marijuana…[is] out of the picture. This is a case regarding possession of two illegal substances, mushrooms and peyote buttons. Much of this argument has revolved around marihuana. That's not the issue. [195]

[222] Mr. Kubby is still trying to make this a case about the denial of his right to cultivate and possess marihuana. That is not what this refugee case is about. He argues that a medical marihuana patient should be protected from prosecution. What he has demonstrated is that in fact, they are.

[223] Despite Mr. Kubby's evidence that he has a well founded fear of persecution in the United States, it is important to note that as a medical marihuana patient with a recommendation to use marihuana in California, Mr. Kubby has limited immunity from prosecution.

[224] The state of California in Proposition 215 and later under the *CUA*, has chosen not to decriminalise the use and possession of medical marihuana for patients. Instead, the decision was made to permit sick and dying Californians to possess and cultivate marihuana so long as its conditions are satisfied—and have made it no more criminal than possession and acquisition of any prescription drug with a physician's prescription.[196]

[225] The burden (at least for the present) is on the patient to satisfy law enforcement of a medical need and a supply of the medicine to address that need. Anything beyond this, would be litigated in a court for a judge to decide. This is what Californians decided would be a fair process in order to provide marihuana for patients and also to deal with the high potential for abuse. It is not for the Immigration and Refugee Board to look behind this process decided by the public and the courts in California.

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[195] Exhibit 39(a), Transcript of proceedings, April 6, 2001, Superior Court of the State of California, page 13.

[196] Exhibit 11.2, page 154, San Jose Mercury News, July 19, 2002, "*Medicinal Marijuana is Legal, Court Says*" by Lori Aratani.

[226] Chief Justice Ronald M. George wrote for the Court:

> In light of its language and purpose, [Proposition 215] reasonably must be interpreted to grant a defendant limited immunity from prosecution, which not only allows a defendant to raise his or her status as a qualified patient or primary caregiver as a defense at trial, but also permits a defendant to raise such status by moving to set aside an indictment or information prior to trial on the ground of the absence of reasonable or probable cause to believe that he or she is guilty.[197]

[227] Mr. Kubby has the option open to him when he returns to the US to raise the defence at the time of any future investigation, that he is a qualified patient, growing an amount as required by him. If charged he may yet again raise the medical necessity defence in a pre-trial motion, or at trial. At each step, he is entitled to full answer and defence. His preferred process would be for someone to advise him how much he can safely grow and then he would grow that amount, thereby being guaranteed not to be prosecuted. Perhaps this would be the best approach. Certainly it is the approach that Canada has adopted. But it is not the only approach and governments are entitled to choose from amongst a variety of approaches in order to deal with this difficult issue. There are fifty-two states in the US – some, like Washington and California, have very liberal and clear medical marihuana laws. Mr. Kubby is free to choose to live in whichever state he feels best meets his medical needs.

[228] Mr. Kubby does not fear persecution in the US. Moreover, he has not rebutted the presumption that the state is capable of protecting him, for the reasons given above.

[229] In addition, I find that Mr. Kubby is not at risk of cruel and unusual treatment or punishment, or a risk to his life. He asserts he is at risk of being jailed and will die if imprisoned because he will be cut off from cannabis. He has failed to demonstrate this is even remotely likely. The scope of section 97(1)(b) is very narrow. The provisions will benefit mainly those who face a risk which is not generalised.

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[197] Exhibit 11.2, page 195, "*Medical Pot Patients Afforded Same Legal Protections as Other Prescription Drug Users, California's Top Court Rules*", NORML News, July 24, 2002.

[230] Moreover, Mr. Kubby's risk is incidental to lawful sanctions and a claimant is not a person in need of protection if the risk faced is inherent or incidental to lawful sanctions. Lawful sanctions however, cannot be imposed in disregard of accepted international standards. I have carefully analysed his claim and find that the laws in the United States that are relevant to Mr. Kubby's claim do not offend international norms and as such, he has not established there is a risk to his life or a risk of cruel and unusual treatment or punishment.

[231] Finally, I have adjudicated this claim on the basis of domestic law, that is, the *Immigration and Refugee Protection Act*, but I have done so with the understanding that there is a common law presumption that Canada's laws have been enacted with the intention of giving force to Canada's international obligations. Accordingly, I have considered domestic law such as Canada's Charter of Rights and Freedoms, which states that everyone has the right to life, liberty and the security of the person.[198] I have also considered the *Canadian Bill of Rights*, which contains similar provisions dealing with the fundamental human right of protection of the person,[199] and which state that no law of Canada shall be construed or applied so as to impose or authorise the imposition of cruel and unusual treatment or punishment. I have also considered international instruments such as the *Universal Declaration of Human Rights* which provides that no one shall be subjected to cruel, inhuman or degrading treatment or punishment;[200] and the *International Covenant on Civil and Political Rights (ICCPR)* which discusses cruel and unusual treatment or punishment.[201]

[232] I do not take these internationally protected rights lightly. However, I am not satisfied that what Mr. Kubby describes amounts to cruel and unusual treatment or punishment, or that if it does, his state is unwilling or unable to protect him from such a risk. Accordingly, I

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198 Charter of Rights and Freedoms, Section 7.

199 *Canadian Bill of Rights* 1960, c.44, Sections 1 and 2.

200 *Universal Declaration of Human Rights,* G.A. res. 217A (III), U.N. Doc A/810 (1948), Article 5.

201 *International Covenant on Civil and Political Rights,* G.A. res 2200A (XXI), 21, U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, entered into force March 23, 1976. Ratified by Canada in 1976.

am satisfied that what Mr. Kubby describes is not a risk of harm that is envisioned by the *IRPA* or the international instruments.

[233] Finally, I have considered whether there is a danger that Mr. Kubby will be tortured if he returns to the US. In section 97(1)(a) "Torture" has been described as:

> … any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.[202]

[234] What Mr. Kubby alleges does not fit this definition. He is arguing he will be denied medication, not that he would be tortured while incarcerated to extract information by a state agent or with the acquiescence of the state. This is simply not what was envisioned when the *Convention Against Torture* was enacted. I find further, that the lawful sanctions exception applies here as well.

[235] In summary, Mr. Kubby has not established he has either a well founded fear of persecution under section 96 (*IRPA*), or a risk to his life under section 97 (*IRPA*).

DETERMINATION

[236] I find that Steven Wynn KUBBY is not a Convention refugee as he does not have a well founded fear of persecution for a Convention ground in the United States. I also find that the claimant is not a person in need of protection in that his removal to the United States would not subject him personally to a risk to his life or to a risk of cruel and unusual treatment or

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[202] *Supra*, footnote 170.

punishment, and in that there are no substantial grounds to believe that his removal to the United States will subject him personally to a danger of torture. Accordingly, for the foregoing reasons, the claim for refugee protection of Steven Wynn KUBBY is hereby rejected.

[237] There is no reasonable basis upon which to conclude Ms. Kubby faces a reasonable chance of persecution for a Convention reason should she return to the US. Likewise, she has not advanced any evidence of a risk to her life or a risk of cruel and unusual treatment or punishment, or a danger of torture.

[238] Because her husband's claim for refugee protection has been dismissed, to the extent her claim is dependent upon his, her claim too must fail. She has not established a well founded fear of persecution on the basis of her membership in Mr Kubby's family. Nor has she established any evidence she would suffer harm for any other reason, independent of his claim.

[239] Ms. Kubby alleges her children might be taken away from her because of her husband's use of marihuana.[203] Brooke was not taken into protective custody by state child welfare authorities at the time the Kubbys were arrested in 1999, even though there was an allegation of child abuse contained in the anonymous letter that started the investigation.[204] There is no independent evidence of persecution of the children, nor any evidence of a risk of harm, and Ms. Kubby confirmed that they have not been threatened. The claims of the children must fail for the same reason.

[240] I find that Ms. Kubby and her daughters are not Convention refugees as they do not have a well founded fear of persecution for a Convention ground in the United States. I also find that these three claimants are not persons in need of protection in that their removal to the United States would not subject any of them personally to a risk to their lives or to a risk of cruel and unusual treatment or punishment, and in that there are no substantial grounds to believe that

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[203] Evidence of Michele Renee Kubby, Transcript, March 6, 2003, page 83, lines 32-39 and page 84, line 1. [Public]

[204] Exhibit 17, page 3.

their removal to the United States will subject them personally to a danger of torture. Accordingly, for the foregoing reasons, I conclude that Ms. Kubby and her two daughters are not Convention refugees and they are not persons in need of protection. I therefore reject their claims.

[241] Accordingly, the claims for refugee protection of Michele Renee KUBBY, Brooke Kona KUBBY, and Crystal Bay KUBBY are hereby rejected.

"Paulah Dauns"

Paulah Dauns

November 17, 2003

Date