



IMMIGRATION AND REFUGEE BOARD
(REFUGEE PROTECTION DIVISION)

LA COMMISSION DE L'IMMIGRATION
ET DU STATUT DE RÉFUGIÉ
(SECTION DE LA PROTECTION DES RÉFUGIÉS)

IN PRIVATE
HUIS CLOS
TA5-09415

s.19(1)

CLAIMANT(S)

DEMANDEUR(S)

DATE(S) OF HEARING

January 11, 2006

DATE(S) DE L'AUDIENCE

DATE OF DECISION

February 10, 2006

DATE DE LA DÉCISION

CORAM

S. Alidina

CORAM

FOR THE CLAIMANT(S)

POUR LE(S) DEMANDEUR(S)

REFUGEE PROTECTION OFFICER

AGENT DE PROTECTION DES RÉFUGIÉS

DESIGNATED REPRESENTATIVE

REPRÉSENTANT DÉSIGNÉ

MINISTER'S COUNSEL

CONSEIL DE LA MINISTRE

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is a citizen of Mexico. The claimant claims refugee s.19(1) protection pursuant to sections 96, 97(1)(a) and 97(1)(b) of the *Immigration and Refugee Protection Act (IRPA)*.

ALLEGATIONS

The claimant alleges that he is a bisexual and because of his sexuality he was physically and verbally abused by his family, including his uncle, as well as he was discriminated against and harassed by the homophobic males in Mexico.

ANALYSIS

The determinative issue in this claim is whether the claimant has adequate state protection in Mexico. In making this assessment, the panel considered the claimant's oral testimony and all of other documentary evidence provided. The panel particularly considered the documentary evidence pertaining to discrimination, harassment and criminality that gays face, as well as evidence about the police, the availability of mechanisms for lodging complaints and, in general, the level of democracy in Mexico.

Based on the evidence adduced, and for the following reasons, the panel finds that there is adequate state protection for the claimant if returned to Mexico. The panel finds that the claimant has not met the burden of establishing "clear and convincing" proof of lack of state protection for individuals in similar situation like him in Mexico.

The law states that there is a presumption that a state is capable of protecting its citizens. The claimant may rebut this presumption by providing "clear and convincing proof of lack of state protection" in the country of origin. The claimant must approach his or her state for protection, providing state protection might be reasonably forthcoming.¹

Evidence that protection being offered is "adequate though not necessarily perfect"² is not clear and convincing proof of the state's inability to protect its citizens, as no government can guarantee the protection of all its citizens at all times. However, where a state is in effective control of its territory, has military, police and civil authority in place and makes serious efforts to protect its citizens, the mere fact it is not always successful at doing so will not be enough to justify a claim that the victims are unable to avail themselves of protection.³

When the state in question is a democratic state, the claimant must do more than simply show that he or she went to see some member of the police force and that his or her efforts were unsuccessful. The burden of proof that rests on the claimant is, in a way, directly proportional to the level of the democracy of the state in question: the more

¹ Canada (Attorney General) v. Ward, [1993] 2 S.C.R. 689, 10 Imm. L.R. (2d) 189 (C.A.).

² Zalzali v. Canada (Minister of Employment and Immigration), [1991] 3 F.C. 605 (F.C.A.); (1991), 14 Imm. L.R. (2d) 81; 126 N.R. 126 (F.C.A.).

³ Canada (Minister of Employment and Immigration) v. Villafranca (1992), 18 Imm. L.R. (2d) 130 (F.C.A.).

democratic the state's institution, the more the claimant must have done to exhaust all courses of action open to him or her.⁴

With respect to the case at bar, the claimant testified that he fears his family including his uncle and the homophobic males in Mexico. Because of his sexual orientation, his family, including his uncle physically and verbally abused him, as well as, the homophobic males insulted him and at times threw objects at him.

In this case, the claimant did not attempt to avail himself of state protection in Mexico at all. He did not attempt to seek any redress regarding the mistreatment he received at the hands of his family and the homophobic males by way of lodging a formal complaint with the police, or accessing other complaint mechanisms in Mexico. He said that he did not file a complaint against his family because "it was his family" and therefore he did not want more problems with them. And, based on his testimony, the harm he was subjected to from the homophobic males in Mexico does not cumulatively amount to persecution.

The claimant admitted that he had knowledge about other levels of the police such as the Preventive Police and the Judicial Police but he elected not to seek help from them, instead he elected to move out of the family home and as a result the abuse from his family stopped. He testified that even if he had been to the police to complain about his

⁴ Canada (Minister of Citizenship and Immigration) v. Kadenko (1996), 143 D.L.R. (4th) 532 (F.C.A.).

family, the police would not have done anything for him since police do not help gays, in that a friend of his received no help from the police when his father beat him badly.

The claimant indicated that he had knowledge about the Human Rights Commissions in Mexico but elected not to seek assistance from them because some friends of his had tried to seek help from them but abuses from the family had continued. The claimant admitted that he had no knowledge about the existence of anti-discrimination law and the federal agency the National Council to Prevent Discrimination established for that purpose. Although he had knowledge about the Attorney General's Office (PGR) and the Mexican Judiciary he did not make any attempt to seek help from either of these state entities.

The documentary evidence⁵ indicates that Mexico is a federal republic with a bicameral legislature. It has functioning police forces, which include the federal and state judicial police, the Federal Preventive Police (PFP), municipal police and various police auxiliary forces having primary responsibility for law enforcement and maintenance of order within the country. It has other state agencies that address discrimination, criminality and corruption in an effort to assist citizens in obtaining state protection. The claimant, living in a democratic country, is obliged to attempt to seek protection from the state agencies of the country of his nationality first, prior to seeking international protection. The claimant had the ability to, but elected not to avail himself of state

⁵ Exhibit R/A-1, US Dept. of State Report 2004.

protection in Mexico. Therefore, in this case, the panel finds that the claimant, living in a democracy, simply did not reasonably exhaust any course of action open to him in attempting to avail himself of state protection in Mexico. Therefore, he has not discharged the onus of showing clear and convincing proof of the state's inability or unwillingness to protect him.

In regards to Mexico, the documentary evidence entered as an exhibit⁶ contrasts markedly with the claimant's allegations of lack of state protection for bisexuals. In this case, the panel prefers to give more weight to the documentary evidence, prepared by reputable sources having no interest in the outcome of this case, describing country conditions and availability of state protection for individuals similarly situated as the claimant, than to the claimant's written evidence and his oral testimony. Based on the documentary evidence, the panel does not have any persuasive evidence to believe that the claimant would not receive protection from the state agencies in Mexico.

For example: Sources have reported that all 31 states in Mexico maintain a preventive and judicial police force. There are about 90,000 state-level preventive police and 26,185 judicial police across the country. The judicial police were the law enforcement branch of the state-level Public Ministry and Justice Attorney General's Office (PGJ) and are responsible for investigating and prosecuting local criminal

⁶ Exhibit R/A-1, RPD Index for Mexico, Country Reports on Human Rights Practices 2004, Section 2.1.

offences.⁷ Until recently, gay rights activists said that police often wrote off murders of homosexuals as crimes of passion. Now they have set up a unit specialising in dealing with homophobic crimes and they are to get sensitivity training on this subject.⁸

Based on the evidence adduced, the panel is not persuaded to believe that police would not have helped the claimant, since gay rights activists indicate that the police are making serious efforts to provide protection to individuals in similar situation as the claimant, as well as, are providing sensitivity training to their officers.

In regards to treatment of homosexuals and availability of state protection, documentary evidence⁹ indicates that in 2003 Mexico became the second country in Latin America to enact a national anti-discrimination law that includes protection for "sexual preference". Along with its other functions, the Federal Law to Prevent and Eliminate Discrimination established the National Council to Prevent Discrimination, a federal agency that will investigate acts of discrimination perpetrated by public officials. Another legal initiative that aims to recognise gay rights is the proposed Law of Society and coexistence, a law that seeks to legalise same-sex unions in the Federal District.

In August 2003 President Vincente Fox announced that the government would subsidise medication costs for all its citizens with AIDS. In June 2003, the 25th annual

⁷ Exhibit R/A-1, Section 10.1.8.

⁸ Exhibit R/A-1, Response to Information Request MEX38203.E.

⁹ Exhibit R/A-1, Response to Information Requests MEX42621.E.

Lesbian, Gay, Bisexual and Transgender Pride March was held in Mexico City attended by 30,000 to 80,000 people with 30 floats. In the lead-up to the Pride March, the National Institute of Anthropology and History hosted the second annual Sexual Diversity Week in Mexico City to indicate the need to dignify the lives of the sexual minorities.

In June 2003 the transvestite and political candidate Amaranta Gomez campaigned to win a place in the local government seat and in the National Congress. Also political party Mexico Possible had 32 gay candidates running for the July 2003 midterm and congressional and local elections.

Documentary evidence¹⁰ indicates that the National Council to Prevent Discrimination will provide legal advice to victims of discrimination (Article 45) and complaints could be submitted in person, by phone or by email.

Documentary evidence¹¹ indicates that gays in Mexico have made huge strides towards acceptance in the past decade. Two gay-rights campaigners took up seats on the Mexico City Council in September 2000. Dozens of homosexual support groups have popped up in the past five years and gay bars have opened on main avenues. In June 2000, a gay-parade drew more than 30,000 members, by the organiser's count. Just five years ago, such parades drew fewer than 1000 people.

¹⁰ Exhibit R/A-1, p. 6.9.1.

¹¹ Exhibit R/A-1, Response to Information Request MEX38203.E.

In his presidential race, Vicente Fox's socially conservative National Action Party published a newspaper ad defending itself to the gay community, the first time a major party had done so.

Latest documentary evidence¹² indicates that in Mexico City or the entire country there are about 180 organisations involved in lesbian, gay, bisexual and transgender (LGBT) movement. According to the (LGBT) Pride Committee of Mexico City, the LGBT movement represents a "historic effort" to gain understanding and equitable treatment for gay men and lesbians in Mexico. ANODIS, a Mexico City- based news service for sexual diversity, reported that the June 2003 pride march in Mexico City marked 25th anniversary of the LGBT movement in Mexico. The same document lists a number of NGO's open to (LGBT) individuals with telephone numbers to provide support, including legal assistance to gays.

The documentary evidence¹³ indicates that gay and lesbian organising is rapidly spreading outward from its established bases in Mexico City, Guadalajara and Tijuana and is becoming more accessible through the telephone and internet. There appears to be more rights now for gay people in Guadalajara and other cities in Jalisco than there were when PAN took over the government four years ago. There are, for example, more gay bars and discos than before, completely nude male dancers are allowed to perform in

¹² Exhibit R/A-1, p. 6.7.1.

¹³ Exhibit R/A-1, pp. 6.2.30 and 6.2.31.

bars, and gay magazines with nude photos are legally sold by vendors. Moreover, every Friday, a leading Guadalajara newspaper presents a list of what is happening in gay places.

Based on the documentary evidence, the panel finds that Mexicans are becoming aware of, and are beginning to accept sexual minorities, and a number of LGBT activist groups are emerging and are operating freely in Mexico.

Documentary evidence¹⁴ also indicates that the Mexican Government continues to push forward with federal police reform by focusing on rigorous new recruiting, training and vetting measures. The Federal Preventive Police (PFP) has internal regulations with disciplinary measures that classify transgressors and apply sanctions, including removal, suspension or dismissal. To enforce police internal rules, a collegiate organ, headed by Internal Affairs General Co-ordinator decides whether there is responsibility or not. The Attorney General's Office (PGR) provides three offices to test the institution's public official's adherence to legality, professionalism and impartiality.

Based on the documentary evidence, the panel finds that police receive training prior to joining the police force and after joining the force. They are subjected to disciplinary measures for their misconduct.

¹⁴ Exhibit R/A-1, p. 10.1.13.

Documentary evidence¹⁵ indicates that in November 1996, Mexico passed a federal law against organised crime in order to deal with the problem of “organised delinquency”. If the integrity of persons that testify against any member of the “organised delinquency” appears to be jeopardised, their identity can be kept secret by decision of the Public Ministry until the prosecution takes place. The Public Prosecutor’s Department will support and protect judges, experts, victims and other persons when necessary. Since its inception, the law has protected 112 witnesses however 8 persons renounced witness protection and were subsequently assassinated. The office of the Deputy Attorney General of Special Investigations into Organised Crime (SIEDO) was created. One of the potential roles of the SIEDO is to grant witness protection to any person who is useful to an investigation in crimes such as money laundering, arms trafficking and human smuggling. SIEDO investigates and prosecutes members of organised crime.¹⁶

Based on the aforementioned documentary evidence, the panel is not persuaded to believe that there is lack of state protection for individuals who are victims of crimes as a result of their sexual orientation. The panel does not find that the claimant would not have received assistance from SIEDO had been to seek help from them.

¹⁵ Exhibit R/A-1, Response to Information Request MEX39623.E, p. 7.4.1.

¹⁶ Exhibit R/A-1, Response to Information Request MEX42716.E, p. 10.2.1.

In his testimony the claimant also implied that there was corruption within the police and the authorities in Mexico.

In regards to corruption within the authorities, documentary evidence¹⁷ indicates that the Fox Administration placed high priority on combating police and judicial corruption during 2004. Mexican leaders made significant efforts to investigate and punish instances of corruption among federal law enforcement officials and military personnel. President Fox, Attorney General Macedo, and other Cabinet members repeatedly warned that they would punish public servants engaged in corruption. The Organisational Law for the Attorney General's Office, which became effective in August 2003, outlines requirements for employment within the organisation, standards of conduct, and procedures for dismissal from service, of corrupt officials. Provisions of better pay and benefits and dismissal and prosecution of corrupt officials have served as deterrents to corrupt behaviour.

The Secretariat of Public Service and the PGR led day to day efforts coordinating anticorruption initiatives and implementing policy for the entire government. The PGR conducted more than 1,300 investigations into possible malfeasance of 2,200 PGR officers from the outset of the Fox Administration through May 2004 resulting in 418 legal cases against 711 officers including 267 prosecutors and 335 AFI agents for offences ranging from abuse of authority to criminal collusion to kidnapping.

¹⁷ Exhibit R/A-1, section 7.1.5.

Documentary evidence¹⁸ indicates that the government has enacted strict laws attacking corruption and bribery, with average penalties of 5 to 10 years in prison. Although enforcement of corruption was a challenge, officials have been sentenced and punished with imprisonment and fines. The Fox administration has issued over 13,000 sanctions against public servants, resulting in 1,297 dismissals, 278 indictments and 53 convictions. The Mexican chapter of Transparency International reported that the country's national corruption index had decreased. At the federal level, in addition to the National Human Rights Commission the Secretariat of Public Administration offers various services to citizens wishing to report acts of corruption. In Mexico, the National Human Rights Commission (CNDH) and State Human Rights Commission (CEDH) are government-funded organisations that provide recourse to those citizens who wish to file a human rights violation or complaint against a civil servant. Specifically, the CNDH receives complaints related to acts or omissions by federal public servants that have allegedly resulted in a violation of an individual's rights. The CEDH receives complaints related to acts or omissions by state or municipal servants within their respective states that have allegedly resulted in a violation of an individual's rights. Both these bodies, after investigating a complaint, issue recommendations to the authorities under whose jurisdiction the public servant in question works.

¹⁸ Exhibit R/A-1, p. 9.2.1.

Based on the evidence adduced the panel is not persuaded to believe that there is lack of action against corrupt government officials in Mexico, given that the claimant never sought help from any of the aforementioned state institutions if he felt that the authorities were corrupt. There is no persuasive evidence to suggest that the Human Rights Commission would not have ensured that adequate state protection was available to the claimant. The panel finds that, although corruption is a problem in Mexico, the state authorities are making serious efforts to contain it.

The panel does not disagree that criminality, corruption and hatred towards sexual minorities continues in Mexico, however, based on the evidence adduced, the panel finds that Mexico is making serious efforts to protect the rights of sexual minorities by enacting laws to protect them and by creating awareness for their dignity and acceptance in the Mexican society.

Therefore, based on the totality of the evidence adduced, the panel finds that adequate state protection is available to the claimant if returned to Mexico; he simply did not exhaust any course of action open to him in availing himself of state protection.

Since adequate state protection is available to the claimant, the panel finds that there is not a serious possibility that the claimant would face persecution, a risk to his life, a danger of torture, or a risk of cruel and unusual treatment or punishment in Mexico.

Accordingly, the panel determines that . is neither a s.19(1)
Convention refugee nor a person in need of protection. The Refugee Protection Division,
therefore, rejects his claim for refugee protection.

"S. Alidina"
S. Alidina

DATED at Toronto, Ontario this 10th day of February 2006.