



IMMIGRATION AND REFUGEE BOARD
(REFUGEE PROTECTION DIVISION)

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

IN PRIVATE
HUIS CLOS
TA4-07133

s.19(1)

CLAIMANT(S)

DEMANDEUR(S)

DATE(S) OF HEARING

20 August 2004

DATE(S) DE L'AUDIENCE

DATE OF DECISION

8 September 2004

DATE DE LA DÉCISION

CORAM

George A. Griffith

CORAM

FOR THE CLAIMANT(S)

n/a

POUR LE(S) DEMANDEUR(S)

REFUGEE PROTECTION OFFICER

n/a

AGENT DE PROTECTION DES RÉFUGIÉS

DESIGNATED REPRESENTATIVE

REPRÉSENTANT DÉSIGNÉ

MINISTER'S COUNSEL

CONSEIL DE LA MINISTRE

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the "claimant", is a citizen of Chile and he claims refugee protection in Canada pursuant to ss. 96, and 97 (1) of the Immigration and Refugee Protection Act.

ALLEGATIONS

The claimant alleges the following.

He is a gay man, and while he lived and worked in Chile, he tried to keep his sexual preference a discreet and private matter because of homophobia in that country.

While he studied and lived in [redacted] between 1993 and 1996, the claimant had same-sex partners, and they visited discos and other places reserved only for gays, such as the ' [redacted] ' club. When, in 1993 that club was razed by fire, under suspicious circumstances, and there were many deaths, he worried about his safety. In addition, in 1994, while leaving a pub in [redacted] he and his partner were assaulted by some individuals. When they reported the incident to the police, they were arbitrarily detained for two days and, during that time, they were mocked and insulted about their sexual orientation.

In the year 2002, the claimant moved to live and work in Santiago. He continued to hide his sexual preference for fear of being dismissed from his job. However, his secret was discovered by a fellow-worker, and that person proceeded to blackmail the claimant, forcing him to pay regular amounts of money, in order to keep the secret.

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The claimant eventually refused to continue to cooperate and make payments, and he alleges that, henceforth, through telephone calls, he was harassed and insulted about his sexual orientation, by persons believed to be neo-nazi thugs. He believes that that harassment was all instigated by his co-worker, the blackmailer. Moreover, in 2004, while leaving a pub in Santiago, he and his partner were attacked and beaten by four or five persons, believed to be neo-nazis. They were kidnapped, blindfolded and taken to a house in a mountain area, where they were again physically abused, then released.

The claimant's injuries were treated by his sister. They both agreed to conceal the truth of the incident. Thus, he told his employer that he was the victim of a mugging. He did not report the matter to the authorities in Santiago.

The claimant left Chile, after he allegedly received a telephone threat that he would not live beyond 2004, the day of a scheduled march by neo-nazis in Chile against minorities. He sought and obtained a Canadian visitor visa.

DETERMINATION

I find that the claimant is neither a Convention refugee, nor a person in need of protection. My reasons follow.

ANALYSIS

The claimant's identity as a citizen of Chile is established on the basis certified

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true copy of his Chilean Passport submitted by Immigration¹. He provided his testimony in a straightforward manner, and I accept his testimony under oath² wherein he states that he did not disclose his true reasons for leaving Chile to the visa officer, and that he used that ploy in order to facilitate his entry into Canada.

On the merits of the claim, however, in my opinion, there is no valid objective basis³ for the claimant's expressed subjective fear of persecution in Chile. He has not rebutted the presumption⁴ that state protection is available to him in Chile, and the Court⁵ holds that a claimant who seeks international protection has the onus of first rebutting the presumption that state protection is available to him or her in that person's country of nationality.

The Court⁶ holds that States are presumed to be capable of protecting their citizens, unless it can be shown that there is a complete breakdown of the state apparatus, and that the presumption will be rebutted by a claimant presenting "clear and convincing" proof or confirmation of the state's inability to protect.

I note that, according to the documentary evidence,⁷ there was a period when same-sex relations between consenting adults were considered a criminal act in the Penal

¹ Exhibit R/A-2

² Maldonado v. Canada (Minister of Employment and Immigration), [1980] 2 F.C. 302 (C.A.); 31 N.R. 34 (F.C.A.)

³ Rajudeen v. Canada (Minister of Employment and Immigration)(1984), 55 N.R. 129 (F.C.A.)

⁴ Canada (Attorney General) v. Ward, [1993] 2 S.C.R. 689 D.L.R. (4th) Imm.L.R. (2nd) 85

⁵ Supra, Ward

⁶ Ibid.

Code of Chile. However, the same document,⁸ a product of the International Lesbian and Gay Association (ILGA), says the following:

“...on December 23 1998, Chile’s Official Daily of the Republic published Law 1047 which modifies the Penal Code, the Code for Criminal Procedures and Law 18216 regarding punishment in Chile. The new legislation repealed the section that criminalized same-sex relations between consenting adults...the recent repeal of the sodomy law in Chile represents a great victory for the gay, lesbian, bisexual and transgender communities in Chile. Local activists have been organizing in their fight to repeal this unjust law for at least seven years. The change comes as part of the general reform of sexual crimes in Chile and was the result of a reform begun by the executive branch and agreed to unanimously by both legislative chambers...” (IGHRC Press release 14 Jan 1999).

The documentary evidence⁹ suggests that, in Chile, there is still some amount of homophobia. However, the documentary evidence¹⁰ indicates that Chile is a multiparty democracy, where the government generally respected its citizens’ human rights; that the Constitution provides for an independent judiciary, and that the Government generally respected this provision in practice. In its Section 5,¹¹ “Discrimination based on Race, Sex, Disability, Language or Social Status”, the DOS Report states that “...The Constitution provides for equality before the law, and the Government generally respected these provisions. The new Labour Code prohibits discrimination based on Race, Color, Sex, Age, Marriage Status....”

The above-mentioned excerpts suggest that the government of Chile is making

⁷ Exhibit R/A-2, The International Lesbian and Gay Association, World Legal Survey (<http://www.ilga/Information/Legal-survey/americas/chile.htm>), 28/6/2004

⁸ Ibid.

⁹ Exhibit R/A-2

¹⁰ Exhibit R/A 3- U.S. Department of State Country Reports on Human Rights Practices, 2003, February 25, 2004

¹¹ Ibid.

serious efforts to provide adequate," though not necessarily perfect protection to its citizens. The claimant, having left Chile after the incident of 2004, without making a report or seeking help of the authorities, is not in a position to say whether or not the police in Chile are prepared to take steps to provide him with protection. It is impossible, therefore, to establish any connection between his situation and his allegation of the Chilean police inability or unwillingness to protect him. In my opinion, the claimant has an obligation to make reasonable efforts at national protection, and I do not believe that it would be unreasonable to expect him to do so. He does not face a serious possibility¹³ of persecution in Chile, his country of nationality.

As I conclude that adequate protection is available to him in Chile, in my opinion, his removal to that country would not subject him to a risk to his life or a risk of unusual treatment or punishment, or a danger of torture.

For these reasons the claim is rejected.

"George A. Griffith"
George A. Griffith

DATED at Toronto this 8th day of September 2004

¹² 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.)

¹³ Adjei v. Canada (Minister of Employment and Immigration), [1989] 2 F.C. 680; (1989), 7 Imm. L.R. (2d) 169 (C.A.)

