



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
TA5-15711

s.19(1)

CLAIMANT(S)

DEMANDEUR(S)

DATE(S) OF HEARING

August 21, 2006

DATE(S) DE L'AUDIENCE

DATE OF DECISION

August 30, 2006

DATE DE LA DÉCISION

CORAM

M. Freilich

CORAM

FOR THE CLAIMANT(S)

Dr. .

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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These are the reasons for the negative decision of the Refugee Protection Division (RPD) with respect to the claim of (the claimant), a 41-year-old citizen of Jamaica.¹ The hearing for this claim was held pursuant to sections 96 and 97 of the Immigration and Refugee Protection Act (IRPA).² s.19(1)

The claimant alleged that he has a well-founded fear of persecution if he were to return to Jamaica by reason of his sexual orientation as a homosexual. In addition, he claims to be a person in need of protection by reason of either a danger of torture within the meaning of Article 1 of the Convention Against Torture or a risk to his life or a risk of cruel and unusual treatment or punishment.

ISSUES AND DETERMINATION

The determinative issue in this claim is credibility and whether the claimant has a well-founded fear of persecution in Jamaica by reason of a Convention ground.

Having considered the totality of the evidence, the panel finds that the claimant is not credible and is not a Convention refugee or a person in need of protection.

¹ Exhibit R/A/2 – certified true copy of the claimant's Jamaica passport
² Immigration and Refugee Protection Act, S.C. 2001, c.27

ALLEGATIONS**CLAIMANT**

The claimant's testimony of past events going to the basis of his fear is contained in his narrative to his Personal Information Form³ and was given orally by the claimant during the hearing. For the purposes of these reasons, the panel will not repeat all of the allegations in these reasons. However, the panel has considered all of the evidence as well as the documents before it and counsel's submissions.

ANALYSIS**RE-AVAILMENT and SUBJECTIVE FEAR**

The male claimant came to Canada on two occasions, both times as a farm worker with an eight month visitors visa and work permit allowing him to work in Canada as a farm worker. The claimant re-availed to Jamaica in 2004, even though he s.19(1) alleged that he has been a homosexual since he was seventeen years old, which would have been in 1982, some twenty-two years ago. When asked to explain why he returned to Jamaica, the claimant alleged that he had not had any problems at that point, and that his problems started in 2005, after he was in Canada the second time and he called home and realized that he could not return to Jamaica. The panel does not find the claimant's explanation for not making his claim for refugee protection the first time he was in

³ Exhibit C-1

Canada and re-availing to Jamaica satisfactory. The panel believes that if the claimant were actually a homosexual for over twenty-two years and residing in Jamaica, a country that is not extremely tolerant of homosexuals, he would have returned to Jamaica when he had the opportunity to leave his country and come to Canada.

The panel notes that the Court has determined that, where there are sojourns in and out of the country of alleged persecution (the claimant has an opportunity to seek asylum elsewhere and re-avails himself of the state protection of his nation of citizenship), a panel may draw as an adverse inference that the claimant's actions are not consistent with the actions of a person with a subjective fear of persecution.

The panel draws as an adverse inference that the male claimant's actions are not consistent with the actions of a person with a subjective fear of persecution.

CREDIBILITY

The panel finds that the main issue in this claim is that of credibility. The panel considered the claimant's testimony in its entirety and found material aspects of it not to be credible. In reaching this conclusion, the panel is guided by a number of cases with respect to determining credibility of the evidence presented by the claimant in support of his claim for Convention refugee status and for his claim to a person in need of protection, the panel is guided by the principles established in the Federal Court of Appeal in Maldonado⁴ wherein the court states, in part, "When an applicant swears to the

⁴ Maldonado v. Canada (Minister of Employment and Immigration), [1980] 2 F.C. 302 (C.A.).

truth of certain allegations, this creates a presumption that those allegations are true unless there be reason to doubt their truthfulness.”

The panel is also guided by the Federal Court decision in Dan-Ash,⁵ wherein the court held that the existence of contradictions in the evidence could be a valid basis for a finding of a lack of credibility. However, even when the evidence is un-contradicted, it may be that the evidence does not accord with the known country conditions. This principle is well elucidated by the British Columbia Court of Appeal in Faryna v. Chorny,⁶ wherein O’Halloran, J.A., states, in part as follows: “In short, the real test of the truth of the story of a witness in such a case must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions.”

The panel is also guided by the Federal Court decision in Shahamati,⁷ wherein Pratte, J.A., writing for the court, states in part, that: “Contrary to what has sometimes been said, the Board is entitled, in assessing credibility, to rely on criteria such as rationality and common sense.”

In Sheikh,⁸ MacGuigan, J.A., writing for the court, states, in part, that: “In other words, a general finding of a lack of credibility on the part of the applicant may

⁵ Dan-Ash v. Canada (Minister of Employment and Immigration) (1988), 93 N.R. 33 (F.C.A.)

⁶ Faryna v. Chorny, [1952] 2 D.L.R. 354 (B.C.C.A.), at 357

⁷ Shahamati, Hasan v. M.E.I. (R.F.C.A., no. A-388-92), Pratte, Hugessen, McDonald, March 4, 1994

⁸ Sheikh v. Canada (Minister of Employment and Immigration), [1990] 3 F.C. 238 (C.A.), at 244

conceivably extend to all relevant information emanating from his testimony.” The panel also notes the Federal Court decision in Castroman,⁹ which held that a primary way of testing credibility is by comparing what is contained in the claimant’s PIF narrative and his testimony at his hearing.” The panel is further guided by the Federal Court decision in Orelien¹⁰ stating that “one cannot be satisfied that the evidence is credible or trustworthy, unless satisfied that it is probably so, not just possibly so.”

The panel finds that there are a number of inconsistencies and implausibilities that were more than sufficient to rebut the presumption that the claimant is telling the truth.

The claimant alleged that he cannot return to Jamaica due to his sexual orientation. The claimant stated that the most serious incident that occurred to him was in 2005, after he had been in Canada for eight months and his work permit as a farmer expired, and twenty-three years after he alleged that he was in his first homosexual relationship. The claimant stated that no one knew that he was a homosexual but that he acted funny and he did not have girl friends. s.19(1)

The claimant alleged that a man he was involved with for a couple of months in 2003, was beaten and tortured by individuals in the community and while he was being beaten and tortured he told the community that the claimant had been his homosexual lover and therefore the claimant cannot return to Jamaica or he will be persecuted.

⁹ Castroman v. Canada (Secretary of State) (1994), 27 Imm. L.R. (2nd) 129 (F.C.T.D.)

¹⁰ Orelien v. Canada (Minister of Employment and Immigration), [1992] 1 F.C. 592 (C.A.), at 605

When asked if he had been persecuted in the past in Jamaica due to his sexual orientation, the claimant stated that he had not as his sexual orientation was a secret. The claimant alleged that he was in a homosexual relationship with [redacted] from 1982 until he died in 1983. The claimant stated that he had not been in another homosexual relationship until he met [redacted] who he had a three month relationship with in 2003. When asked why he did not have another homosexual relationship from 1983 until 2003, almost twenty years later, the claimant alleged that it was because he had too many strong feelings for [redacted].

The panel notes however, that the claimant also has three children, all from the same woman, who are now 14, 16, and 18 years old, all born during this twenty year period when the claimant alleged that he was a homosexual but that he keep it a secret. Further, the panel notes that on the claimant's application for temporary entry into Canada, he indicates that he is living in a common-law relationship with a [redacted] and that they have three children.

The claimant was asked why he indicated that he was in a common-law relationship on his form and stated that he only did that for tax purposes because if you show you have a family your taxes are lower. The claimant stated that he never lived with the mother of his children but that she would come and visit him at his father's [redacted] where he resided and he only slept with her because she came on to him.

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The panel finds that the claimant does not have a well-founded fear of persecution if he were to return to Jamaica. The panel does not believe that the claimant is a homosexual or that he was ever persecuted due to his sexual orientation in Jamaica. The panel believes that the information on his form is correct, that he has a common-law wife and three children in Jamaica. The panel finds that the claimant was never persecuted in the twenty years that he alleged that he was a homosexual. The claimant re-availed to Jamaica, again many years after he was allegedly a homosexual. The panel does not find credible that only eight months after the claimant came to Canada that someone would tell the community that he is gay and therefore the claimant cannot return to Jamaica because he will be persecuted.

After careful consideration of all the evidence and because of the reasons set out above, the panel finds that the claimant is not credible and does not have a well-founded fear of persecution by reason of any of the enumerated grounds. Given that the panel finds that the claimant is not credible, the panel therefore finds that the claimant is not a Convention refugee.

Having found that the claimant is not a Convention refugee, the panel also considered the applicability of sections 97(1)(a) and 97(1)(b) of the Act, and finds that no evidence was adduced that would support a finding that the claimant faces a danger of torture. With respect to a risk to his life or a risk of cruel and unusual treatment or punishment, the panel's finding with respect to the claimant's credibility applies to this

ground as well. Having found that the claimant is not credible, the claim fails under section 97 of the Act.

CONCLUSION

For these reasons, the Refugee Protection Division determines that the claimant is not a Convention refugee nor is he a person in need of protection and therefore, rejects his claim for refugee protection.

"M. Freilich"
M. Freilich

DATED at Toronto this 30th day of August, 2006.