



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
TA2-10659

CLAIMANT(S)

DEMANDEUR(S)

DATE(S) OF HEARING

October 29, 2004

DATE(S) DE L'AUDIENCE

DATE OF DECISION

December 17, 2004

DATE DE LA DÉCISION

CORAM

Hope Sealy

CORAM

FOR THE CLAIMANT(S)

**Marc J. Herman
Barrister and Solicitor**

POUR LE(S) DEMANDEUR(S)

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CONSEIL DE LA MINISTRE

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

The hearing of this claim was first scheduled for August 5, 2004. The claimant failed to show. On August 24, 2004 the claimant appeared and showed cause why his claim should not be declared abandoned. As a result his claim was heard on October 29, 2004.

Allegations²

The claimant is forty years old. He fears persecution in Chile because of his homosexuality. In 1999 while in the army he was found in a sexual act with another man as a result of which he was beaten and put in jail. He resigned from the army. He received threatening telephone calls and was assaulted in [redacted] and 1999. He left Chile on [redacted] 2000 arriving in Canada on [redacted] 2000. He claimed refugee protection on April 25, 2002.

Determination

The panel finds that the claimant is not a Convention refugee as he does not have a well-founded fear of persecution. The panel finds that if removed to Chile the claimant

¹ Exhibit R-2. Copy of pages of the claimant's passport provided by Canada Immigration (CIC). There is no notation on the copy indicating that CIC regard the passport as fraudulent.

² Exhibits C-1 and C-4. Personal Information Form and Amendment thereto completed by the claimant – summary of.

would not face a risk to his life or a risk of cruel and unusual treatment or punishment beyond the risk faced generally by other individuals in Chile. No evidence was adduced that could lead the panel to find that substantial grounds exist to believe that he will be subjected personally to a danger of torture.

Analysis

The claimant was told that the panel would need to find that the evidence in support of his claim was credible.³ He was told that significant to his claim was the issue of state protection. The changed circumstances in Chile since 1999 as well as an Internal Flight Alternative in Chile's capital city, Santiago were also described as significant issues in his claim.

The claimant was a [redacted] in the Chilean army in 1999 when, according to his testimony, he was found in a sexual act with a partner - [redacted], in one of the bedrooms at his army base. He testified that he was beaten up by two colleagues, detained and then on release forced to resign from the army. The panel had before it his military record.⁴ It carries no reference to the claimant having been detained or forced to resign. It does confirm that he resigned from the army on [redacted] 1999. The claimant stated that military records would not indicate that he was asked to resign. Based on its

³ Orelicn v Canada (Minister of Employment and Immigration), [1992] 1 F.C. 592 (C.A.) at 605: "one cannot be satisfied that the evidence is credible or trustworthy, unless satisfied that it is probably so, not just possibly so."

⁴ Exhibit C-3.

reading of the documents⁵ and on a balance of probabilities, the panel accepts that the claimant was asked to resign from the army in 1999 for the reason he gives. The claimant has expressed no desire to re-join the army. In Canada he has been working in construction having been trained in mechanics in Chile.⁶

It was the claimant's testimony that in 1999 and then in 1999 persons whom he recognized as former army colleagues assaulted him. He identified his assailants in [redacted] as [redacted] and [redacted] and in [redacted] as [redacted] and [redacted]. The first assault took place in a parking lot in Los Lagos, the other in a field near to the farm of the claimant's parents, midway between Valdivia and Temuco. These towns are located in a triangle in the same area of Chile. The claimant described Los Lagos as a small town of 10,000 people.

He testified to also receiving telephone calls between [redacted] and his departure for Canada in [redacted] 2000 in which the callers castigated him for having sullied the reputation of the army and threatened to avenge his behaviour. He said he recognized the voice of one of the callers as that of [redacted].

It was also his testimony that his mother receives telephone calls from persons stating that they are friends of the claimant, asking to speak with him and seeking [redacted].

⁵ Exhibit R-2. Response to Information Request CHL37939.E, 31 January 2002.

⁶ Exhibit C-1. Personal Information Form completed by the claimant – answer to Question 17.

information as to his whereabouts. The claimant speculates that these calls are from persons hostile to him in the military. Given the contents of the alleged telephone calls to his mother the panel does not find that it has evidence on which to find that these calls to the claimant's mother are indeed from _____ or other persons in the military who wish harm to the claimant.

The claimant stated that those who he fears in Chile are his former army colleagues, and that he fears them because of the dishonour they believe him to have brought on the army. The panel lacks evidence on which to find that the former army colleagues who beat up the claimant twice in 1999, and the one who telephoned him threatening him, have any continuing interest in the claimant. It is now five years since the assaults and four years since the claimant left Chile. He testified that through a friend he learned that those who had assaulted him in 1999 are still in the military though he does not know in which area of the country they are currently serving. The panel has not been provided with evidence that supports a finding that former military colleagues of the claimant in 2004 still remember the claimant, care about him, are seeking for him or wish to harm him. The panel lacks evidence on which to find that there is a reasonable chance that the claimant will face persecutory actions from his former army colleagues. The panel also finds that there is protection available to the claimant should he find himself in

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situations where that is required, despite the panel's finding that there is not a reasonable chance that this would happen.

The claimant did not report the assaults of _____ and _____ 1999 to the police. He stated that he had no faith in the police. He said that in 1999 the police were part of the armed forces, because of the military rule then in place. Documents before the panel do not support the claimant's testimony that in 1999 military rule was still in place in Chile though that was certainly the case in his earlier years in military service.⁷ He testified that he knew that the police are now separate from the army and now report to the Ministry of the Interior.⁸

It is the panel's finding, for reasons that it will set out below, that should any of his former colleagues attempt to harm him the Chilean state would be willing and able to provide him with protection from such harm.

Police abuse of their authority is a problem in Chile particularly through excessive use of force and physical abuse in jails and prisons.⁹ There are undoubtedly in Chile's police force officers who have a homophobic attitude and show that attitude in unacceptable fashion to homosexuals with whom they are in contact.¹⁰ There are also

⁷ Exhibit R-3. Human Rights Watch World Report 2003. Discreet Path to Justice:Chile, Thirty Years after the Military Coup.

⁸ Exhibit R-1. U.S. Department of State Report on Human Rights Practices in Chile in 2003.

⁹ Exhibit R-1, U.S.A. Department of State Report on Human Rights Practices in Chile in 2003.

¹⁰ Exhibit R-3. Responses to Information Request CHL39413.E, August 6, 2002 and CHL37939.E, January 31, 2002.

clearly judicial decisions that shock – such as that of the country's Supreme Court, in a 3-2 ruling that overturned the decision of two lower courts awarding custody of children to a mother who happened to be lesbian based on her sexuality.¹¹

However, the documents before the panel also tell of channels that can be used to report rogue police officers, ways in which the police force has been educating its members on the matter of homosexuality and of reasonable response by those in government to complaints brought to them regarding inappropriate state behaviour against homosexual persons in Chile. And with regards to the controversial Supreme Court decision the panel notes that it has led to a public debate that's described as similar to the debate in the U.S.A. regarding state-sanctioned marriage for same-sex couples. It has not been swept under the carpet or ignored. A newspaper poll indicated that whereas 50% of those polled approved of the court's decision 46% opposed it.

Sodomy in Chile was decriminalized at the end of 1998¹² and since then the situation between homosexual persons and the state has not remained static. (Counsel's document on page 7 in Exhibit C-3 regarding the illegality of sodomy is out of date as is clearly shown in another document on page 4 of the same package). One of the organizations within the country that had worked towards this change in the country's

¹¹ Exhibit C-3 – Items 1 and 2.

¹² Exhibit R-3. Response to Information Request CHL37939.E. 31 January 2002.

law was the Movimiento de Integración y Liberación Homosexual (MOVILH) (Movement of Integration and Liberation of Homosexual).¹³

Following an October 2001 meeting between Rolando Jiménez of MOVILH, other groups and Chile's Interior ministry undersecretary, regarding ways of dealing with the problems of "intolerance and xenophobia within Chile," it became possible for future cases of police abuse against a minority to be presented directly to the interior undersecretary. There are avenues of redress beyond the direct appeal to the undersecretary. A December 2001 complaint to a judge by MOVILH regarding the distribution of flyers seeking "no more gay places" in a neighbourhood, led the judge to order a criminal investigation of the matter and of the persons behind the flyers and their distribution. As a result of the official follow up on this matter the president of MOVILH had this to say. "Crimes against the homosexual community will not go unpunished as has generally happened in the past".¹⁴

Other avenues open to homosexual persons seeking redress are described in a document put out by the Corporación de Promoción y Defensa de los Derechos del Pueblo (Corporation of Promotion and Defence of People's Rights, CODEPU).¹⁵ There is

¹³ Exhibit R-3. Response to Information Request CHL37939.E 31 January 2002.

¹⁴ Exhibit C-3, Response to Information Request CHL37939.E, January 31, 2002.

¹⁵ Exhibit C-3. Response to Information Request CHL37939.E, January 31, 2002

the appeal for legal protection, (recurso de amparo) and the appeal of protection, (Recurso de Protección). The first is available when a right such as individual freedom or physical or psychological security has been threatened. To access this, the appellant, with the help of a lawyer, must fill out a form detailing the events. The form must be presented to the court of appeal and the court then has 24 hours to render a decision on the procedures to be followed. The appeal of protection comes into play when constitutional rights are breached by an action or omission, for example freedom of property, right to life and the individual physical or psychological integrity. This appeal requires greater precision in its wording and legal counselling for its submission is advised. This also has to be presented to the court of appeal, and if allowed, the court must decide immediately on any measures to protect the appellant.

Courses in human rights are part of the core curriculum in police academies.¹⁶ In November 2001, the Central Prefecturer (Prefectura Central) of Chile's capital city, Santiago, accepted to participate in an education program on the rights of sexual minorities. This program had been created by MOVILH and is aimed at police officers and was the first time that Chilean police had accepted such dialogue with gays and lesbians.¹⁷ In 2004 MOVILH reported the unacceptable behaviour of police officers from

¹⁶ U.S. Department of State Report on Human Rights Practices in Chile in 2003.

¹⁷ Exhibit R-2. Response to Information Request CHL39413.E, August 6, 2002.

three police stations. They had visited local bars and verbally attacked homosexual persons there. The undersecretary of the police officers undertook to look into stopping this practice.¹⁸ The panel does not find in the documents support for a finding that the state would be unwilling or unable to provide the claimant with protection from those he fears.

The claimant lived in small communities in Chile, communities situated near the south of the country. The panel is aware that it is not uncommon for the attitude towards homosexuals or other minority groups to be less helpful or responsive in small communities than in larger urban areas. The panel therefore explored with the claimant the option of his locating himself on return to Chile in capital city Santiago rather than his small hometown. His response was that the army was present throughout Chile and that because he had broken army rules his actions would not be forgotten. The panel has already found that it lacks evidence that anyone in the army today is seeking to find or harm the claimant. The panel finds that there is not a reasonable chance that the claimant would face persecution in Santiago from his former colleagues in the army.

Lesbian and Gay New York (LGNY) newspaper in October 2001 described Santiago as a city where the gay scene had exploded in the last four years, creating

¹⁸ Document submitted by counsel after the hearing. Pais: Mohilh denounce police harassment – October 12, 2004

venues rivalling those of medium sized U.S. cities. A Gay Guide to Santiago published on the Gay Santiago Website in December 2000 stated that the scene there is fairly open and similar to most developed countries. Participants in the city's Gay Pride march rose from 600 in 1999 to 2,000 in 2001. In 2002 Inter Press Service mentioned that Opusgay, the "first newspaper put out by Chile's homosexual community" has started to be distributed in Santiago. The panel finds that in Santiago the claimant would be living in a climate where he would be free to approach the police should former military colleagues attack him or seek to harm him, something the panel has earlier found there is not a reasonable chance of happening.

While in military school the claimant lived in Santiago for four years. He testified that he did not think he would have a problem finding work in Santiago. The claimant in his military life moved around his country. The panel does not find that it would be unreasonable for him to relocate to Santiago on return to Chile.

The panel has read through all documents before it including those sent post-hearing by counsel. It is clear that there can be discrimination against homosexual persons in Chile. There can also be persecution. However the documents and the claimant's testimony do not provide the rebuttal that is necessary to the presumption that as a democratic state, with civil institutions that have been operating for years, the state is

willing and able to protect its citizens, including those who are homosexual by nature. The panel finds that the claimant has not discharged the onus of showing clear and convincing proof of the state's inability or unwillingness to protect him.¹⁹ The panel finds that the claimant's fear of persecution is not well-founded.

The panel had before it a psychiatric assessment from Dr. [redacted] based on a session with the claimant on [redacted] 2004.²⁰ Dr. [redacted] states that the claimant presents symptoms of Post Traumatic Stress Disorder, particularly with symptoms of depression as well as anxiety. She states that the claimant told her of feelings of low self-esteem and that he related that to the fact that he is gay and the fact that he was raised in a Catholic upbringing where this was not acceptable. The panel accepts the psychiatric diagnosis of Dr. [redacted]. However, the determinative issue in this claim is the availability of state protection in Chile. Dr. [redacted]'s report does not lead the panel to find that the claimant would not have available to him in Chile the protection of the state against those he fears.

Neither this report nor the testimony of the claimant regarding the problems he faced in Chile lead the panel to find that there are compelling reasons why he should not return to Chile. According to the claimant after the first beating he was unable to walk, his mother who happened to be walking by helped him home and treated him. He did not

¹⁹ Canada (M.C.I.) v. Kadenko (1996), 143 D.L.R. (4th) 532 (F.C.A.).
²⁰ Exhibit C-2.

need the attention of a doctor. He said that the second beating left him by the side of the road and that after awhile he stood up and walked to his home that was not far away. Again he was not in need of the attention of a doctor. The panel heard of no need for medical treatment after the beating he received in the army in 1999. When the jurisprudence with respect to compelling reasons is considered, the persecution the claimant described is not appalling, atrocious or "cruel and harsh". As noted by the Federal Court of Appeal in *Obstoj*,²¹ the compelling reasons exception envisaged by subsection 108(4) must surely apply to "only a tiny minority of present day claimants". The panel does not find the claimant to be one of such a minority.

Based on all the documents before it the panel finds that the claimant's life would not be at risk should he return to Chile, nor would he be at risk of cruel and unusual treatment or punishment beyond the risk faced generally by all persons there.

Accordingly, the panel finds rejects the claim for a refugee protection of .

"Hope Sealy"
Hope Sealy

DATED at Toronto this 17th day of December 2004

²¹ ²¹ M.E.I. v. Obstoj, [1992] 21 F.C. 739 (C.A.)

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