IMMIGRATION AND REFUGEE BOARD
(REFUGEE PROTECTION DIVISION)

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

s.19(1)

IN PRIVATE
HUIS CLOS
TA3-14773

CLAIMANT(S)		DEMANDEUR(S)
DATE(S) OF HEARING	**December 3, 2004**	DATE(S) DE L'AUDIENCE
DATE OF DECISION	**December 22, 2004**	DATE DE LA DÉCISION
CORAM	**S. Alidina**	CORAM
FOR THE CLAIMANT(S)	**Andres Quiroga**	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 Chile. He claims to be in need of refugee protection pursuant to sections 96, 97(1)(a) and 97(1)(b) of the *Immigration and Refugee Protection Act*.

ALLEGATIONS

The claimant alleges that he is bisexual. Because of his homosexual relationship with _ . he was targeted by his partner's family and individuals who were sent by the family to harm him. He filed reports with the police, but the police would not provide him protection against 's family and their accomplices, and, therefore, he fled Chile.

ANALYSIS

The determinative issue in this case is state protection—whether state protection is available to the claimant should he return to Chile. For the following reasons, the panel finds that the claimant does not need international protection because he has not met the burden of establishing "clear and convincing" proof of lack of state protection in Chile, his country of citizenship.

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 the state's inability to protect. 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" is not clear and convincing proof of the state's inability to protect its citizens,[2] 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 in the state in question: the more

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1 Canada (Attorney General) v. Ward, [1993] 2 S.C.R. 689, 103 D.L.R. (4th), 1, 20 Imm. L.R. (2d) 85; reversing [1990], 2 F.C. 667, 67 D.L.R. (4th) 1, 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 regards to the case at bar, the claimant testified that he only feared 's family and the individuals hired by them to harm him in Chile. 's family and their accomplices were motivated to harm him because he conducted a homosexual relationship with They asked him to break off his relationship with The claimant testified that he filed one report with the police two days after the incident of , 2000. He told the police what had happened and who was responsible for his injuries. His complaint was dismissed because of lack of evidence and witnesses to support his claim; the witnesses who had assisted him to go to the hospital after the incident declined to provide evidence. Besides going to a police station on one occasion, the claimant testified that he never went to the police again to file another report against his assailants. He testified that he did not file any police report after he was ambushed and beaten by three individuals in . 2002 because he managed to defend himself on that occasion.

In his testimony, the claimant alleged that he made four to five phone calls to the police against his assailants but received no help from them. The claimant admitted that he was aware that this information was omitted in his PIF narrative but had no knowledge

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

as to why any mention about making four to five phone calls to the police was omitted. There is no mention about the claimant seeking help from any state agency in Chile during his interview with the immigration officer on July 13, 2003.[5]

The panel does not accept his explanation to be reasonable. At the hearing, the claimant was represented by counsel. Question 41 in his PIF clearly instructs the claimant to provide details of any steps he took to obtain protection from authorities in his country. Failing to obtain help from the police is central and material to the claimant's claim particularly when he left Chile because of alleged lack of state protection. It is expected of the claimant to have specifically mentioned in his PIF narrative about making four to five phone calls to the police. Omission of this evidence in his PIF narrative and his interview with the immigration officer raises a serious doubt in the panel's mind as to whether the claimant ever made those alleged phone calls to the police in Chile. Based on the above evidence, the panel is not persuaded to believe that the claimant ever made the alleged four to five phone calls to seek help from the police in Chile. The panel, therefore, does not believe that the claimant made the alleged four to five phone calls to the police.

After failing to obtain satisfactory assistance from the police, the claimant admitted that he did not seek help from any other state agency in Chile. He did not seek redress regarding the mistreatment he had received at the hands of s family and

s.19(1)

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5 Exhibit R/A-2, Citizenship and Immigration Canada Port of Entry documents.

their accomplices by seeking help from state agencies other than the police in Chile. He had knowledge about the Investigations Police and the judiciary in Chile. He testified that he did not seek help from the Investigations Police because he felt they investigated cases of homicide only. He admitted that he did not seek help from the Chilean judiciary because he had no financial resources to hire a lawyer and because the country is 80% Catholic, and 's family was well known, and the judiciary would not support his claim.

s.19(1)

Documentary evidence[6] indicates that Chile is a multiparty democracy with a constitution that provides for a strong executive and a bicameral legislature. It has a functioning police force, an Investigations Police, an army and an independent judiciary and the government generally respects its citizen's rights. The claimant, living in a democratic country, is obliged to seek help from his country of nationality first, prior to seeking international protection. In this case, besides filing one police report, the claimant simply did not reasonably exhaust all courses of action in availing himself of state protection in Chile. In the context of the country of origin, and in the circumstances of this claimant in particular, the panel finds that the claimant has not taken reasonable steps to seek protection against his assailants from state agencies in Chile prior to seeking international protection. Therefore, the panel finds that the claimant has not discharged

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6 Exhibit R/A-1, RPD Information Package – Chile, Updated July 2004, item 2.1, US Department of State, Chile: Country Reports on Human Rights Practices – 2003, February 25, 2004.

the onus of showing clear and convincing proof of the state's inability or unwillingness to protect him.

Furthermore, the documentary evidence entered as Exhibit R/A-1 contrasts markedly with the claimant's allegations of lack of state protection for persons like him in Chile. In this case, the panel prefers to give more weight to the documentary evidence, which describes the country conditions, than to the written evidence and the oral testimony given by the claimant about lack of protection for persons like the claimant in Chile. Based on the documentary evidence, the panel does not have any persuasive evidence to believe that the claimant would not have received state protection had he sought help from state authorities other than the police in Chile.

Evidence indicates that the *Carabineros* (the uniformed national police) and the civilian Investigations Police are under operational control of the Ministry of Interior.[7] The Investigations Police is responsible for criminal investigations and controlling immigration. Their personnel are located throughout the country's urban areas.[8] The claimant lived in Santiago prior to leaving Chile. He could have made an attempt to seek help from the Investigations Police when he felt he was not making any headway with the National Police. He did not.

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7 Exhibit R/A-1, RPD Information Package – Chile, July 2000, item 2.1, US Department of State, Chile: Country Reports on Human Rights Practices – 1999, February 25, 2000.

8 Exhibit R/A-1, Response to Information Request CHL25124.EX.

The Constitution calls for a judicial system independent of the other branches of the Government. There is also a mechanism for appeals against cases decided by the lower courts. The Constitution provides for the rights to legal counsel and persons who cannot afford are given such help. The Human Rights Office of the Metropolitan Legal Aid Office, an arm of the Justice Ministry, presented 70 cases to the civilian or military courts in 1998 in connection with abuses by the police.[9]

s.19(1)

Rolando Jimenez, the president of the *Movement of Integration and Liberation of Homosexuals* (MOVILH), in his second report of Human Rights of Homosexual Minority in Chile, emphasized on article 373 of the Code of Law. This law fights against "arbitrary offences of good habits", and, therefore, it is used to protect transsexuals, gays and lesbians.[10] A Judge of the Eight Court of Law was supportive of this understanding when she released transsexual who was wrongfully arrested by the riflemen who had applied article 373 inappropriately.[11] In addition, due to the great pressures from the MOVILH, a homosexual student was reinstated by the Ministry of Education at the Polytechnic Centre after she was expelled due to her sexual orientation.

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9 Exhibit R/A-1, item 2.1, US Department of State, Chile: Country Reports on Human Rights Practices for 1999, February 25, 2000.

10 Exhibit C-2, *MOVILH*, April 24, 2004.

11 Exhibit C-2, *MOVILH*, January 16, 2004.

In this case, the claimant could have sought help from the MOVILH if he felt police were not providing any help against s parents and their accomplices. No evidence was adduced that he sought help from the MOVILH.

Based on the aforementioned documentary evidence, the panel is not persuaded to believe that there is lack of protection for individuals in similar situations as the claimant in Chile. After failing to obtain protection from the police, the claimant simply did not make any attempt to seek help from any other state agency, nor made any effort to seek guidance from the MOVILH, the activist group supporting the sexual minorities.

Having considered the aforementioned measures of redress available in Chile, the panel finds that, if the claimant were to return to Chile and to encounter aggression from 's family and their accomplices, he has the Investigations Police and the Chilean Judiciary where help could be obtained to protect his rights. The claimant could seek the guidance of the MOVILH or similar organizations to obtain information in accessing state agencies for any future threats, physical and sexual. Since Chile is a democracy and since there is no persuasive evidence to suggest that the state authorities would not have offered him protection, the claimant, consequently, has not met the burden of establishing "clear and convincing proof" of lack of state protection for individuals like him in Chile.

As the panel finds that there is adequate state protection available to individuals like the claimant in Chile, it determines that the claimant is not a Convention refugee nor

is he a person in need of protection pursuant to section 97(1)(a) and 97(1)(b) of the *Immigration and Refugee Protection Act.*

Therefore, the Refugee Protection Division rejects the claim of for refugee protection.

"S. Alidina"
S. Alidina

DATED at Toronto, Ontario this 22nd day of December 2004.