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
TA3-23862

s.19(1)

CLAIMANT(S)		DEMANDEUR(S)
DATE(S) OF HEARING	**January 10, 2005**	DATE(S) DE L'AUDIENCE
DATE OF DECISION	**March 15, 2005**	DATE DE LA DÉCISION
CORAM	**James V. Railton**	CORAM
FOR THE CLAIMANT(S)	**Alan Franklin**	POUR LE(S) DEMANDEUR(S)
REFUGEE PROTECTION OFFICER	**P. Bono**	AGENT DE PROTECTION DES RÉFUGIÉS
DESIGNATED REPRESENTATIVE		REPRÉSENTANT DÉSIGNÉ
MINISTER'S COUNSEL		CONSEIL DE LA MINISTRE

"You can obtain, within 72 hours, a translation or a copy of these reasons for decision in the other official language by writing to the Editing and Translation Services Directorate of the IRB, 344 Slater Street, 14th floor, Ottawa, Ontario, K1A 0K1 or by sending a request to the following e-mail address: translation.traduction@irb.gc.ca or to facsimile number (613) 947-3213."

"Vous pouvez obtenir la traduction ou une copie de ces motifs de décision dans l'autre langue officielle dans les 72 heures, en vous adressant par écrit à la Direction des services de révision et de traduction de la CISR, 344, rue Slater, 14e étage, Ottawa (Ontario) K1A 0K1, par courrier électronique à l'adresse suivante : translation.traduction@cisr.gc.ca ou par télécopieur au (613) 947-3213."

Introduction

is a 26-year-old citizen of Pakistan who claims a well-founded fear of persecution in Pakistan on the grounds of his perceived political opinion and membership in a particular social group, namely, married men who practice bisexuality. He also claims to be a person in need of protection as a person in danger of being tortured or at risk to his life or being subjected to cruel and unusual treatment or punishment in Pakistan. His claim is made pursuant to both section 96 and subsection 97(1) of the *Immigration and Refugee Protection Act*.[1]

Allegations

The claimant alleged the following in his Personal Information Form (PIF)[2] and during his testimony. He was born and raised in Northern Areas, in Pakistan. He completed 15 years of education including a diploma course at the Islamabad, and attained a Bachelor of degree at the University of The claimant has had sexual experiences with both men and women but has found that he prefers men. He has had more sexual experiences with men than women. Fearing danger if found out in Pakistan, the claimant searched the Internet and concluded that, as a bisexual man, he would be safe in Canada. He then applied for and obtained a student visa, which he used to come to Canada.

---

1 S.C. 2001, C.27, 49-50 Elizabeth II ("IRPA" or the "Act").

In Canada, the claimant married a Canadian citizen. When she discovered that her husband, the claimant, was bisexual, she left him and withdrew her sponsorship of him as a permanent resident under the family class.

The claimant alleges that if he returns to Pakistan, he would not be able to live a bisexual lifestyle. He fears social, economic and penal sanctions in Pakistan and alleges that he would be persecuted and at risk to his life because he is bisexual.

Determination

The Refugee Protection Division finds that the claimant is not a Convention refugee, as he does not have a well-founded fear of persecution for a Convention ground in Pakistan. Furthermore, the Division finds that the claimant is not a person in need of protection in that his removal to Pakistan would not subject him personally to a risk to his life or to a risk of cruel and unusual treatment or punishment and in that there are no substantial grounds to believe that his removal to Pakistan would subject him personally to a danger of torture.

Analysis

I find that the determining issues in this case are credibility and lack of subjective fear.

---

[2] Exhibit C-1

Credibility

I find that the claimant lacks credibility, generally, as I noted above,[3] due to inconsistencies, blatant omissions of significant information material to the claim in his written narrative, contradictions and implausibilities that arose in the claimant's evidence and for which the claimant was unable to provide reasonable explanations. In making this finding, I have taken into account the cultural factors, the milieu of the hearing process, the anxiety that a claimant may feel in responding to a *viva voce* examination, and interpretation nuances. Having said this, it was also my observation that the claimant is a highly educated individual with a Bachelor's degree to his credit.

The Federal Court has also ruled that, in order for a claimant's narration to be deemed credible or trustworthy, the claimant's story must be "probably so, not just possibly so."[4] The claimant based his fear of serious harm as a man practicing bisexuality. He says and wrote that, nothing befell him in Pakistan, but he feared he would be found and then he "could face hatred" and that his life would be at risk.[5] s.19(1)

The panel finds some of the evidence contradictory. The claimant stated that he has been in a long-term relationship with his witness, , since 2002. The claimant is 26-years old; the witness is in his 50s.[6] Mr. declared that

---

3 *Sheikh v. Canada (Minister of Employment and Immigration)*, [1990] 3 F.C. 238 (C.A.), at 244.
4 *Orelien v. Canada (Minister of Employment and Immigration) (1991)*, 15 Imm.L.R. (2d) 1 (F.C.A.), at 11.
5 Exhibit C-1, narrative and oral testimony.
6 Ontario Birth Certificate # shown at the hearing but not tendered as evidence.

he is the of the .[7] Yet, when Mr. testified, he stated: that he has acted as a witness for other members of his club, that Mr. does not have a partner in the club, that he "dated" a few friends of the witness and that he has had sex with the claimant, too. He admitted to more than one encounter but insisted that the relationship was neither ongoing or continual, and that they had "broken up from dating," but were still good friends.

Another example that affects the claimant's credibility was his description of the trip to the United States (U.S.). The claimant stated in his narrative that he and his friends who crossed into the U.S. by automobile were picked up by a roving border patrol within a mile or so of the river crossing. The FOSS notes[8] indicate that the U.S. immigration service returned the claimant to the Canadian side into the hands of our immigration authorities after he had been found emerging from the rail tunnel. I find that the claimant's version of events is implausible. It does not make sense that the claimant and his friends would be waved through and then picked up later. I find the CIC version more plausible. I make a negative credibility finding as a result of the inconsistency between the claimant's testimony and the more plausible documentary evidence. This event is described in more detail in the section below.

---

7 The witness' testimony was given May 3, 2004. He described the as an "Asian and non-Asian gay male club."

8 Exhibit R/A-2. See the footnote below.

The claimant's actions belie his declared fear and his explanations for leaving Pakistan. The three major contradictions to his stated fear are the botched trip to the U.S., his delay in leaving Pakistan and his delay in claiming refugee protection in Canada.

Attempt to Enter the US

Within one month of arriving in Canada, purportedly to study at s.19(1)

the claimant crossed into the U.S. with some friends. I accept that the group attempted their entry through the Windsor-Detroit rail tunnel[9] and that, after being caught, the claimant was allowed back into Canada. Counsel submitted that this was a bunch of kids on a musical adventure and nothing negative should be read into it. However, the claimant says his friends all had documents satisfactory to get them into the U.S. but that he did not. The claimant also admitted he has a brother in the U.S. who he has not spoken with for some time since their cousin revealed to the claimant's brother his alleged sexual orientation. The problem with counsel's contention is the inherent risk for an unsuccessful attempt to enter the U.S. for such a trivial reason. I do not find it plausible that a person such as the claimant would risk being caught by U.S. authorities, detained by them and deported unless the claimant had no subjective fear. A person familiar with immigration matters might know that it is more likely that an illegal entrant to the U.S.

s.19(1)

[9] Ibid. FOSS notes: SUBJECT WAS CAUGHT BY USA PATROL AT WINDSOR/DETROIT ON 2001 ATTEMPTING TO SMUGGLE INTO THE USA VIA RAIL TUNNEL. WAS BROUGHT BACK AT AMBASSADOR BRIDGE BY USA PATROL ... WAS ALLOWED BACK INTO CANADA ON SUBSISTING STATUS.

from Canada would be returned here, but I find that it is implausible that a 21-year-old college student with temporary status in Canada would know that or risk the alternative.

Counsel further submits that we should not use our post-9/11 lens to view pre-9/11 events; that, to Canadian Immigration authorities, this escapade or lark was a non-event.[10] Instead, rather than view this event through our Canadian lens, I believe we should view it through the lens of an alleged Pakistani bisexual who had recently fled for his life to a country of safety. Why would he jeopardize his refuge in Canada for some concert? The answer, I find, is because he does not fear for his life in Pakistan or fear the risk of being deported back there. The reason he lacks subjective fear is that he is aware that persons of his bi-sexual orientation in Pakistan have no problems.

Sexual Orientation and Pakistan

The documentary evidence is clear that state protection would not reasonably be forthcoming to practicing homosexuals. Homosexuality is criminalized in Pakistan. The government of Pakistan and the police not only do not protect gays, they persecute them. Homosexuality in Pakistan has been "taboo" for many years but with the publicity of gay activism in the international press, conservative elements in Pakistan have become even more concerned about the spread of the gay lifestyle in Pakistan.[11] There was some discussion whether the claimant could live safely in Pakistan as he had in Canada: that is

---

[10] As they allowed the claimant back into Canada since he had a valid student authorization.

to say, by marrying a woman and satisfying his need for male partners clandestinely. Counsel remonstrated against this argument. If the claimant claimed to be homosexual and not bisexual, I might have agreed with counsel. As he is self-described as bisexual and not homosexual, I do not.

The panel recognizes the danger of drawing conclusions regarding a different cultural milieu from that of Canada but the Division must do it and, in fact, does it all the time. I am also cognizant of the wit, Jan van de Snepscheut, who wrote:

> "In theory, there is no difference between theory and practice. In practice, there is."

After a careful review of the Response to Information Requests: PAK42114.E and PAK42801.E,[12] as well as the Country Condition documents for Homosexuals[13] provided by counsel, I find that, in Pakistan, there is a divergence from theory to practice. Firstly, there is documentary evidence that the laws proscribing homosexual acts are rarely enforced.[14]

> The Boston Globe reported that most individuals interviewed for its article did not identify themselves as homosexual, despite engaging in homosexual relations, and believed that homosexuality should remain illegal because it is against Islam (11 July 2004).

---

11 Exhibit R/A-1, item 2.1, United States Department of State; 25 February 2004; *Country Reports on Human Rights Practices for 2003*: Pakistan, generally and items 6.1 (PAK42114.E) and 6.2 (PAK42801.E) specifically, plus the material found in Exhibit C-3, regarding homosexuals in Pakistan.

12 Ibid.

13 Exhibit C-3.

14 Exhibit R/A-1, items 6.1 and 6.2.

> Although societal attitudes towards homosexuality among the urban and educated population seem to be increasingly accepting, the conservative and religious population of the country views it as "an abnormality and religious sin" (Hindustan Times 2 July 2004; see also The Boston Globe 11 July 2004). Accordingly, most homosexuals adhere to the cultural requirement of marriage with a member of the opposite sex and have children (Hindustan Times 2 July 2004; The Boston Globe 11 July 2004). Some of these individuals continue to have homosexual relationships even through they are married to a member of the opposite sex and have had children with them (Hindustan Times 2 July 2004). Similarly, The Boston Globe reported that homosexuality is "tacitly accepted...as long as it doesn't threaten traditional marriage" (11 July 2004).[15]
>
> Sexual relations between males are also common in madrassahs (religious schools for boys) where "the situation resembles that found among prison inmates, where sex is mostly about availability and dominance rather than preference" (ibid.).[16]

In *the Eastgarden*,[17] after discussing the legal status of homosexuality, the article goes on to state:

> "This does not mean homosexual activity is uncommon. It is more underground and not as openly expressed as in the West. The restricted contacts between young men and women also makes it more common for men to have sex with men without necessarily being homosexual, like in many arab [*sic*] countries. The Pathan culture of north-western Pakistan allows men to have younger men as lovers."

After perusing the country conditions regarding homosexuals in Pakistan,[18] I find that serious problems do not necessarily arise on account of sex acts between two consenting males, it is that an openly gay lifestyle would be risky in Pakistan. However,

---

15 Exhibit R/A-1, item 6.2 at 6.2.1
16 Ibid, at 6.2.2
17 Exhibit C-2, p. 74.
18 Exhibits R/A-1 and Exhibit C-2.

the claimant in this case is not asking for protection in order to practice an openly gay lifestyle, as he is a self-proclaimed bisexual who married a woman in Canada.

The Marriage in Canada

Although the claimant says he has had more encounters with men than women, his longest relationship that we were told about was with a woman, his wife. The claimant admits, notwithstanding his claim to sexual encounters with men in Pakistan, that he has had no problems in Pakistan. If the claimant had married in Pakistan as a cover to a homosexual orientation, it would be different. The claimant courted a woman in Canada for one year then married her when there was no societal or legal pressure on him to do so.

The claimant had researched the Canadian scene on the Internet (including gay-oriented web sites) and knew he could live freely here and practice whatever orientation he wished. The claimant testified that he and his wife separated because she discovered that he had had sex with a male or males here in Canada, after their marriage to each other. He clearly stated that he did not intend to ruin his chances with his wife by having sex with men, but he could not refrain from it. This testimony is consistent with his avowed bisexuality. On the other hand, the evidence is also consistent with the documentary evidence analyzed above that suggests that men, especially married men, who have sexual encounters with another man, do not have problems in Pakistan.

Subjective Basis of the Claim

The subjective fear relates to the existence of a fear of harm in the mind of the claimant. The objective basis requires there be a valid basis for the fear.[19] Both subjective fear and an objective basis for it are crucial elements. In *Kamana*[20], Madam Justice Tremblay-Lamer held that the panel's finding that the claimant had not credibly established the subjective element was reasonable and that:

> "The lack of evidence going to the subjective element of the claim is a fatal flaw which in and of itself warrants dismissal of the claim, since both elements of the refugee definition—subjective and objective—must be met."

Examples of conduct that need to be explained by a claimant include delay in leaving one's country at the first opportunity after the occurrence of a persecutory event,[21] failure to go into hiding immediately after learning that one may be in danger,[22] failure to claim asylum in a country where the claimant resided or sojourned, or through which he or she has traveled before coming to Canada, returning to one's country of origin, obtaining or renewing a passport or travel document, or leaving or emigrating through lawful channels and delay in making a refugee claim in Canada. There is a presumption that a person fleeing persecution or the risk of serious harm will normally seek protection

---

19 *Rajudeen, Zahirdeen v. M.E.I.* (F.C.A., no. A-1779-83), Heald, Hugesson, Stone (concurring), July 4, 1984.

20 *Kamana, Jimmy v. M.C.I.* (F.C.T.D., IMM-5998-98), Tremblay-Lamer, September 24, 1999.

21 *Huerta v. Canada (Minister of Employment and Immigration)* (1993), 157 N.R. 225 (F.C.A.) and *Rosales v. Canada (Minister of Employment and Immigration)* (1993), 23 Imm.L.R. (2d) 100 (F.C.T.D.)

22 *Ramirez, Jose v. M.E.I.* (F.C.T.D., no. 92-A-7114), Noël, June 2, 1993.

at the first opportunity. As a result, the question of subjective fear is raised when a person voluntarily leaves a country where he or she could safely live or fails without valid reason to ask for protection in a country through which he or she has travelled.[23]

The claimant stated that he realized he was bisexual when he was about 17 or 18, which would be in or about 1995 or 1996. Allegedly, that was the year that he had his first sexual experience. Yet, the claimant did not leave Pakistan for another 8 or 9 years, notwithstanding the existence of section 377 of the *Pakistan Penal Code* proscribing homosexual acts. When he finally did, it was on a student visa that he took the time to apply for. The claimant arrived in Canada in May 2001. He applied for Canada's protection in December 2003, only after his estranged wife withdrew her sponsorship of him. The fact that the claimant delayed in leaving Pakistan, delayed in claiming protection in Canada and made an aborted attempt to enter the United States indicate that the claimant lacks a subjective fear of returning to Pakistan.

In addition, it is my determinative finding that the claimant has clearly exhibited conduct not consistent with a well-founded fear of serious harm. Taking guidance from the Federal Court,[24] I draw a negative inference reinforcing the previous negative

---

23 As pointed out in James C. Hathaway. *The Law of Refugee Status* (Toronto: Butterworths, 1991), at page 53, "the Convention establishes [in Article 31(1)] an obligation on refugees to 'present themselves without delay to the authorities and show good cause for their illegal entry or presence.' It seems right, therefore, to inquire into the circumstances of any protracted postponement of a refugee claim as a means of evaluating the sincerity of the claimant's need for protection. ... Where there is no reasonable excuse for the delay, an inference of evasion going to credibility is often warranted."

24 Radulescu, Petrisor v. M.E.I. (F.C.T.D., no. 92-A-7164), McKeown, June 16, 1993.

credibility findings. As the evidence, on a balance of probabilities, indicates that the claimant does not have a well-founded fear of serious harm in Pakistan, either subjectively or objectively, I find that there is no more than a mere possibility that the claimant would suffer persecution or other serious harm as enumerated under subsection 97(1) of the *Act* should he return to Pakistan.

Conclusion

Therefore, on behalf of the Refugee Protection Division, I determine that s.19(1)

is not a Convention refugee and is not a person in need of protection and I reject his claim.

"James V. Railton"
James V. Railton

DATED at Toronto, Ontario, this 15th day of March, 2005.