

Immigration and Refugee Board of
Canada

Refugee Protection Division



Commission de l'immigration et du statut
de réfugié du Canada

Section de la protection des réfugiés

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VA4-02258
VA4-02259
VA4-00260
Private Proceeding
Huis clos
Demandeur(s) d'asile

Claimant(s)

Date(s) of Hearing

January 19, 2006

Date(s) d'audience

Place of Hearing

Toronto, Ontario

Lieu de l'audience

Videoconferencing held in

Vancouver, BC

Fait par vidéoconférence à

Date of Decision

March 8, 2006

Date de la décision

Panel

S.M. Beckow

Tribunal

Claimant's Counsel

El-Farouk Khaki
Barrister & Solicitor

Conseil du demandeur d'asile

Refugee Protection Officer

Nil

Agent de la protection des réfugiés

Designated Representative

Nil

Représentant désigné

Minister's Counsel

Nil

Conseil du ministre

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These are the reasons for the decision of the Refugee Protection Division (RPD) in the refugee-protection claims of (the "male claimant"), (the "female claimant"), and (the "minor children"), all citizens of Mexico.

In determining whether the claimants are Convention refugees or persons in need of protection, I have considered all the evidence, including the claimants' Personal Information Form(s) (PIF)¹, oral testimony, the documentary evidence filed by counsel and the Refugee Protection Officer (RPO), counsel's submissions, the *Immigration and Refugee Protection Act* (IRPA), and the relevant caselaw.

ALLEGATIONS

In his PIF, the male claimant alleges that he is a bisexual man from Mexico who came under the hostile attention of his wife's half brother, The first incident occurred by accident when observed the male claimant at a gay party kissing another man. Following that, s harassments and interferences increased to the point of assaults and threats against the claimant's life.

The claimant discovered in 2003 that he was HIV positive. He returned to and pondered his situation as an HIV positive bisexual man and decided to flee to Canada.

In her PIF, the female claimant adds that held a gun to her son's head, tried to kidnap her son, tried to run her over, and fired into the air upon seeing her. Afraid for her life and the safety of her children, she followed her husband to Canada.

ISSUES

The determinative issue in the claim was credibility. The panel also canvassed the question of whether the claimant's HIV/AIDS condition provided grounds for a positive determination.

¹ Exhibit 1.

ANALYSIS

Credibility

There were major problems with the testimony of both claimants, which points to their story of the male claimant being bisexual being a fabrication. However, the evidence that the male claimant has AIDS is credible and will be examined below.

The male claimant alleged that he did not tell [redacted] until after they were married that he was bisexual. The panel pointed out that [redacted] s half-brother, [redacted] had told [redacted] that the male claimant was gay after the first gay party he saw the claimant at, which was prior to the marriage. He responded that he had always denied [redacted] s allegations.

The claimant further alleged that he had not told [redacted] until after he received support from the Canadian group that he was attending, which would place matters far past when they were married. The claimant was married in 1997 and came to Canada in 2003. However, the Canadian group he was attending, as the claimant testified, was not a group for the socialization of gays, but a group for the adjustment of HIV/AIDS sufferers. Moreover his PIF suggests that [redacted] revealed the claimant's gayness a second time prior to his leaving Mexico, which resulted in the male and female claimant seeking psychological help.

[redacted] told my wife and in-laws that I was bisexual, which led to many problems. We went to a psychologist but stopped going fearing a lack of confidentiality and public exposure.²

His PIF therefore contradicts his claims to telling his wife after he reached Canada; it contradicts his claim that his Canadian group helped him reveal the secret to her. The panel finds that the claimant is misleading at many turns and concocting a story of alleged bisexuality.

The male claimant has stated in his PIF that his brother-in-law, [redacted] physically attacked him because he was gay. [redacted] is alleged to have beaten the claimant and tried to run him over in his car. Meanwhile, the claimant owns a business ([redacted]) and at no time has

² Exhibit 1, PIF, answer to question 41, para 21.

— simply thrown a rock through the window or come into the business and harassed the claimant.

The panel asked the claimant if — had ever appeared at his business or threatened it. The claimant responded with testimony that suggested that he knew —'s intentions in this regard. The claimant said that he (the claimant) was seldom at the nightclub, which is why never found him there. The claimant added that what — was seeking was to cause him harm, not to harm his property.

The panel asked the claimant how he could know what — was thinking and he replied that — had actually told him on several occasions that all — wanted to do was to hurt or kill him or kill someone close to him. When asked to supply the conversational context in which these remarks fit, the claimant could not do so. I find the allegations that the claimant knew what was in —'s mind and that — had said he just wanted to harm the claimant to be highly improbable.

The claimant's description of the party that led to his unmasking as a gay man and started his troubles with — featured more coincidence and implausibility than the panel can accept. On the one hand, the claimant represented himself and the Villahermosa gay community as being very secretive. Yet, he also describes the gay party as being held outdoors in the backyard of a spacious mansion, with loudspeakers mounted by the back door and the swimming pool. Questioned about why the gay community would want to focus such attention on itself, he retreated and said that the loudspeakers were not very big.

The panel asked the claimant why a person wishing to stage a secret house party for gays would allow the person who rented them the sound system — to remain at the party, thereby opening themselves to identification and possible extortion. The claimant answered evasively and was warned about evasion.

The panel has difficulty accepting that — who is anti-gay, would be invited or would want to stay at an event that is staged by gays. Yet the claimant alleges that — actually stayed at the party at the host's invitation. The claimant went on to confuse events, saying that — told him at the party that he had nothing against gays. The claimant added that — probably did not want to react violently with him at the party because — was afraid of being attacked

himself. But his PIF states that [redacted] did attack him at the party and that he made the comment about having nothing against gays in a phone conversation that happened the next day.

In May 1997, I went to a gay party – for the first time. To my surprise, I saw [redacted]'s brother [redacted]. He rented sound systems for parties. When he saw me, he raised a stink. He even beat me.

I was afraid that he would tell [redacted]. He did not. He called me the next day. He said he had nothing against gays, but was angry because I was deceiving [redacted].

When this discrepancy was brought to his attention and an explanation requested, he attempted to bridge both accounts saying that [redacted] did attack him at the party but also said he had nothing against gays, most probably because he feared being attacked. When asked why the two stories are different, he blamed the circumstance on his counsel. I find this explanation to be another indication that the claimant's story about [redacted] is a fabrication.

[redacted]'s employment history changed from the male claimant's to the female claimant's PIF. The panel will discuss below how it changed again from the female claimant's PIF to her testimony. As we saw above, the male claimant alleges that [redacted] rented sound systems for parties. But the female claimant identifies [redacted] her half-brother, as a former police officer. Here is an extract from her PIF:

I went to the police station in the [redacted] neighbourhood close to my house. It is part of the [redacted] station. This is the same station where [redacted] used to work as a police officer.

In his testimony, the male claimant took these allegations further by saying that [redacted] was now a *madrina*. A *madrina* is a clandestine police irregular who is paid to do "dirty work." The panel asked the claimant why he was making this claim at this late stage of the proceedings and he replied that he did not know why he was. The panel pointed out that the claimant described him in his PIF merely as a person who rented sound systems and asked for an explanation. The claimant responded evasively.

Later in the hearing the male claimant was again asked why he did not mention that [redacted] was a former police officer and explained that he had forgotten to do so. When the panel asked how he could forget such an important circumstance, he changed his testimony and said that it

³ Exhibit 1, PIF, answer to question 41, paras 5 and 6.

was not that he forgot but just that he did not take the matter into account at the time. I find the claimant's omission of a mention that [redacted] was a former police officer to be too important to be credible and his explanation to be implausible. I find the addition of a history of employment as a police officer, which later expanded to being a *madrina* or clandestine police irregular, to be an embellishment and a fabrication.

The panel asked the male claimant why [redacted] would want to return to [redacted] if [redacted] lived there and he replied that her situation had changed because he was not going to be living with her. But the allegation that he did not live with her conflicts with the common-sense meaning of his PIF where he says: "[redacted] wanted to return to [redacted] to her family. We did so." When asked to explain, he replied evasively.

Counsel asked the claimant to talk about his socialization as a gay man in Canada. The claimant's answers were wooden and lacked detail. He simply said that he participated fully in gay activities and had a lot of friends. I find the claimant's inability to give any meaningful details on any aspect of a lifestyle he has come to Canada to pursue to refute his allegations of being gay or bisexual.

The panel asked him what it was he feared in Mexico and the claimant now dropped all discussion of [redacted] and simply responded that, if he were in Mexico, he would not have the means to survive. He said there were few medical treatments available to extend one's life. What is available is very expensive. Here in Canada the claimant is given access to life-extending medications. I find, as a fact, that the male claimant is here because he has AIDS and is seeking medication. I find his elaborate story of being a bisexual to be a concoction in whole and in part.

The female claimant's claim rests again upon the alleged hostility of her brother [redacted] towards the male claimant.

In her Port of Entry (POE) Notes, the female claimant mentions that [redacted] tried to kill her husband and then came and threatened her and her children in their home. The panel asked her why she did not mention the fact that [redacted] tried to kidnap her son and tried to run her down –

why did she mention only the one incident related to her. She replied that she mentioned everything that occurred to her. The panel pointed out that she appears to have mentioned only two things from a much larger set of events and she changed her explanation and said now that she was trying to summarize. I find her failure to mention events so important as [redacted] s alleged attempt to kidnap her son and run her down to be omissions too important for the panel to overlook.

The panel asked the female claimant why she had not stated in her PIF that [redacted] was a *madrina*. She deflected the question, replying that she had mentioned that [redacted] was a policeman. She added that she may not have been specific enough, but did mention that he was a member of the police. The panel notes that *madrinas* are not *members* of the police, but henchmen who do jobs considered too "dirty" for the police themselves to handle.

In the course of the panel's questions, the female claimant revealed that, not only did [redacted] live in the same city of [redacted] as the female claimant moved back to, but in fact he lived next door to her. The panel again expressed surprise that the female claimant would choose to move back to a house located next door to the alleged agent of persecution and she explained that she lacked money to do otherwise. When questioned about why she did not ask her parents for help, the female claimant replied evasively.

The panel notes that the female claimant has said in her PIF and testimony that [redacted] tried to kidnap her son, has seen her on the street and tried to shoot her, has tried to run her down. All the time, [redacted] lives in the house next door to her. The claimant states in her PIF that [redacted] would come over to her house for almost the period of a year and insult and threaten her. The female claimant wishes the panel to believe that [redacted] would go to the trouble of arranging to kidnap his sister's child from school or shoot at her on the street when all the time he lives next door to her.

The panel observes that the female claimant has not mentioned that [redacted] lived next door to her in her PIF and that the information emerged only by a chance remark on her part that [redacted] overheard a comment said by the family. Only in seeking to know how he could have overheard it did the panel discover that [redacted] lived next door and had free access to the female claimant's home.

The panel asked the female claimant to explain how it could be that [redacted] lives next door and is constantly threatening her life and yet her family allows him to freely enter and leave their house. The female claimant responded that her family was afraid to find themselves in the same position as the female claimant. I find the claimant's scenario to be too implausible to believe.

The panel notes in passing that the emergent allegation that [redacted] lived next door to the family in [redacted] implies that the male claimant, in coming back to [redacted] with his wife, would have moved in next door to [redacted] as well.

The female claimant's story rests upon the panel's acceptance of the male claimant's story, which the panel has found to be not credible. Her new evidence is implausible and contradictory. In places, it violates common sense. I find her story of [redacted] persecution to be a fabrication in whole and in part.

To find the male and female claimants to be Convention refugees, I would need sufficient trustworthy or credible evidence before me upon which to base my determination. I find that I have insufficient evidence.

By the same token, to find the claimants to be persons in need of protection, I would need sufficient, trustworthy, or credible evidence before me upon which to base that determination. I find that I have insufficient evidence.

In addition, and after review of the country documents, I find that there was no other evidence before me that could have led me to conclude that the male and female claimants were Convention refugees or persons in need of protection.

HIV/AIDS

The panel accepts that the male claimant has HIV/AIDS on the basis of the documents he has given the Board.⁴ To investigate whether the male claimant's medical condition provides grounds upon which to base a positive determination under Secs. 96 or 97(1)(b), the panel invited counsel to make post-hearing submissions. The panel has read the caselaw and the IRB's

⁴ Exhibit 6, Letters from the [redacted] and Dr. [redacted] s Hospital.

own decisions. It has read all the documents that counsel has disclosed on the claim relating to the matter.

How one views the Mexican response to AIDS depends very much on what chronological period of Mexico's recent history one looks at. Prior to the turn of the century, AIDS was viewed very much in Mexico as a "gay problem."

Documents in the disclosure package written in the period 1999-2000, such as *Aids in Mexico: A Human Rights Problem*, or Andrew Reding's analysis of IFA in *Mexico: An Update on the Treatment of Homosexuals*, both written in the period 1999-2000, highlight the stigmatization of gays with AIDS and stress the difficulties of getting antiretroviral and other medicines. Here is an example of that viewpoint from *AIDS in Mexico*:

Due to existing prejudices and taboos around issues of sexuality, HIV/AIDS, which is as fatal and regrettable as diabetes or cancer, has become stigmatized in society because it is most frequently transmitted sexually, and because it is fatal. Several social groups which have been marginalize[d] throughout history (gays, women – especially lesbians and prostitutes – prison detainees, minors, poor people, indigenous people, migrants, disabled people, etc.) have been targets of such stigmatization. People belonging to these traditionally discriminated groups are excluded further, and conditions, which would enable them to exercise their rights in the context of their illness, are removed.

Stigmatisation of HIV/AIDS is as old as the discovery of the illness, as it was found that the patients who were first diagnosed were gay. The illness soon began to be referred to as a homosexual condition, until a short while later cases of heterosexual men and women were registered. By then it was too late: the rumour that it was an exclusively homosexual disease had spread.

In Mexico, sensationalist media coverage of HIV/AIDS caused society to associate AIDS with homosexuality and death. ... homophobia was exacerbated, physical rather than moral violence against homosexual[s] became more frequent.... Discrimination by HIV/AIDS status has become a mechanism with which to erode the rights of individuals, because stigmatization of this pandemic removes information from young people and adults, and inhibits families from discussing sexuality and prevention of sexually transmitted diseases with their young.⁵

Here is an example from Andrew Reding. Writing in 1999, Reding stated that among gays who would not find an IFA in Mexico are "HIV-positive persons who do not have access to

⁵ Exhibit 9, Miguel Agustin Pro Juarez Human Rights Centre, *Aids in Mexico: A Human Rights Problem*, at pp. 1-2. No date of publication appears, but the latest bibliographic entries are 1999.

insurance, and who do not have the means to pay for anti-HIV medicines, which typically cost well over ten times the minimum wage.”⁶ Later in the same essay, he continued:

Another group that is highly vulnerable are persons who are HIV-positive. For all but the most prosperous Mexicans, access to effective health care, including anti-retroviral drugs, depends on participation in payroll insurance plans. But with HIV-testing commonly a condition of employment, and with employers routinely excluding those who test positive, prospects for decent care for those who are infected are not good.⁷

However, that assessment changed dramatically when the United States began to see the Mexican response to AIDS as “critical to U.S. national interests and the protection of U.S. citizens.”⁸ The interest of the U.S. arose because “Mexico serves as a transit country for thousands of Latin American migrants seeking work in the United States.”⁹ The extensive cross-border traffic forced American authorities to pay attention to and begin funding a concerted Mexican response to the pandemic.

A second factor is Mexican demography. Mexican officials have realized that “most infections are in the 25-to-34-year age group,” the category of people who are either economically most active or approaching their most active years.¹⁰ Thus, the economic impact on Mexico of ignoring the increasing pandemic increased as the numbers affected with AIDS increased.

A third factor which operates at a conceptual level to de-stigmatize AIDS sufferers is the fact that the United Nations has begun a high-profile campaign designed to eradicate AIDS from the world by 2015.¹¹

By mid-2002, the United States was actively entering the fray against AIDS in Mexico. MEX38749.E reports:

⁶ Exhibit 9, Andrew Reding, *Mexico: Update on Treatment of Homosexuals*. 1 November 1999, at p.30.

⁷ *Ibid.*, at p. 31.

⁸ Exhibit 4, U.S. Agency for International Development, “Mexico,” *Country Profile*, at number p. 49.

⁹ Exhibit 4, U.S. Agency for International Development, “Mexico,” *Country Profile*, at number p. 48.

¹⁰ Exhibit 4, U.S. Agency for International Development, “Mexico,” *Country Profile*, at number p. 48.

¹¹ Exhibit3, *Program for Action on HIV/AIDS and STI Prevention and Control*, at p. 7.

According to the United States Agency for International Development (USAID), USAID estimates it will provide Mexico with \$22.415 million in 2002, a portion of which will help public and private agencies combat HIV/AIDS (n.d.).

By early 2004, *MEX42621.E* states that:

President Vicente Fox announced in August 2003, that the government would subsidize medication costs for all its citizens with AIDS (AP 5 Aug. 2003). Though it was unclear if such a subsidy would be for new patients as well as for those who are already HIV positive, the president stated that his administration would pay medication for all AIDS patients by the end of the year (ibid.). The AP article also noted that there were already 10,000 AIDS patients receiving some governmental financial support to pay for medication (5 Aug. 2003).¹²

Again, more recently, the United States Agency for International Development (USAID) states that the Mexican Secretariat of Health "has pledged to provide antiretrovirals to all who need them by 2006 and estimates coverage is approaching 90 percent."¹³

The panel does not find it necessary to analyze whether or not the claimant would be perceived as a gay and denied antiretroviral or other AIDS medications or treatment. The panel finds that Mexico is aware of the pandemic nature and social costs of AIDS and is aggressively battling it. The documents show that the Mexican government is accepting financial responsibility for supplying medication to those in its population suffering from the condition, whether gay or not.

For the same reason, the panel, though it has read the Convention Refugee Determination Division (CRDD)/RPD decisions and Federal-Court caselaw disclosed on the claim, believes that it does not need to analyze it because AIDS treatment in Mexico is being made available to gays and non-gays alike. Thus, the question of differential treatment of gays and non-gays does not arise. The panel therefore finds that the claimant's HIV/AIDS condition does not provide him with nexus to the U.N. Convention.

The panel finds that the male claimant does not face a risk in Mexico contemplated by section 97(1)(b). Rather, his claim is that he faces a risk "caused by the inability of that country

¹² Exhibit 4, *MEX42621.E*, 15 April 2004.

¹³ Exhibit 4, U.S. Agency for International Development, "Mexico," *Country Profile*, at number p. 48.

to provide adequate health or medical care", pursuant to section 97(1)(b)(iv). As stated by the Federal Court in the case of *Singh*:

A risk to life under section 97 should not include having to assess whether there is appropriate health and medical care available in the country in question.¹⁴

Thus, in the additional question of whether the male claimant's HIV/AIDS medical condition affords a basis for a positive determination under secs. 96 or 97(1)(b), the panel finds that it does not.

The claims of the minor children are entirely dependent on those of their parents. Having determined their parents not to be Convention refugees or persons in need of protection, I also determine that the minor children are not as well.

DETERMINATION

In light of these findings, I determine that , I , and
are not Convention refugees or persons in need of protection, as defined in *IRPA*, sections 96 and 97(1) and I therefore reject their claims for refugee protection.

"S. M. Beckow"

S.M. Beckow

March 8, 2006

Date

s.19(1)

¹⁴ *Singh v. Canada (Minister of Citizenship and Immigration)*, [2004] 3 F.C.R. 323 (F.C.).