



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
TA4-13632

s.19(1)

CLAIMANT(S)

DEMANDEUR(S)

DATE(S) OF HEARING

May 3, 2005

DATE(S) DE L'AUDIENCE

DATE OF DECISION

August 25, 2005

DATE DE LA DÉCISION

CORAM

James V. Railton

CORAM

FOR THE CLAIMANT(S)

**K. Chandi Syed
Barrister and Solicitor**

POUR LE(S) DEMANDEUR(S)

REFUGEE PROTECTION OFFICER

J. Baptiste

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."

s.19(1)

Introduction

alleges he is a twenty-six-year-old citizen of Egypt who claims to have a well-founded fear of persecution at the hands of the Egyptian authorities, by reason of his membership in a particular social group, and by reason of his political opinion. He also claims to be a person in need of protection as a person in danger of being tortured, or at risk to life, or at risk of cruel and unusual treatment or punishment in Egypt. His claims are 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 Form² (PIF) or in his testimony, or both. The claimant is bisexual from an early age, but suppressed his feelings. The police have harassed him. He entered into a homosexual relationship with , a teacher in Egypt. The two went to a bar at the Hotel, which was frequented by foreign gay men. The police questioned the claimant about , who insisted to the police that they had no right to question people who are gay, in an angry fashion. A pulling match between and the police officer ensued, but when mentioned the United States Embassy, the police left, issuing vague threats.

¹ S.C. 2001, C.27, 49-50 Elizabeth II ("IRPA" or the "Act")
² Exhibit C-1.

The claimant applied for several foreign visas, and obtained one to visit Germany, which he did in 2001. While there, he met a woman from the United States (U.S.) online. The two developed an Internet and telephone relationship, which led to the woman meeting the claimant in Egypt where they married in 2002, after three days together. They lived together in Egypt for two weeks. The wife moved back to the United States and sponsored the claimant. He arrived in the U.S. in 2003 on the strength of his K3 visa. The couple separated after two months together.

In 2004, the claimant met his previous partner, and traveled with him to Niagara Falls. A security guard at a casino asked for identification. Without any, the guard handed the claimant over to the immigration authorities. They found out that the sponsor had withdrawn her petition and detained the claimant. The claimant came to Canada to make his claim.

The claimant fears to return to Egypt on account of his sexual orientation and because he does not want to perform the required military service in Egypt.

Determination

I find the claimant is not a Convention refugee as he does not have a well-founded fear of persecution for a Convention ground in Egypt. I also find that the claimant is not a person in need of protection in that his removal to Egypt 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 Egypt would subject him personally to a danger of torture. My reasons are as follows.

Analysis

Identity

The claimant's identity as a national of Egypt is established by his testimony and by the supporting documentation filed, namely, his school transcript and his marriage certificate³ as well as the documents disclosed by the claimant.⁴

Reason for Harm: Nexus

For the claimant to be a Convention refugee, his fear of persecution must be "by reason of" one of the five grounds enumerated in the Convention refugee definition. I find that the claimant's fear of persecution is linked to one of the five grounds, namely his membership in a particular social group. The claimant alleges that he is bisexual and s.19(1) from the testimony of the claimant, and the marriage certificate, I find that the claimant is bisexual. The *Ward*⁵ case established that sexual orientation is an innate or unchangeable characteristic and is embraced by the "particular social group" ground.

The claimant alleged that, should he return to Egypt, he would be subjected to the following harm, namely, that he will be harassed, assaulted and detained if he lives his life as a bisexual man. In addition, the claimant believes his successful evasion of

³ Exhibit R-2.

⁴ Exhibit C-2.

military service to date, based on his political opinion that violence is bad, would lead to his detention, should he return to Egypt.

To be considered persecution, the mistreatment suffered or anticipated must be serious. I find that the incidents complained of or feared amount to discrimination and harassment, but they do not amount to persecution for the following reasons.

To establish his status as a Convention refugee or as a person in need of protection, the claimant had to show that there was a serious possibility or reasonable chance that he would be subjected personally to a risk of persecution, a danger of torture or a risk to life, or to a risk of cruel and unusual treatment or punishment, if removed to Egypt. I find, however, that the evidence presented in support of the claimant's allegations does not establish a serious possibility that he would be subjected to such harm.

The documentary evidence indicates that Egyptian society is not tolerant towards lesbians, bisexuals, gays and transsexuals.⁵ Clearly, the authorities have harassed the community. In the claimant's situation, however, the police did not detain him when they found him in a hotel bar known to be friendly to gay men. Moreover, the evidence indicates that it is well known that Thursday night is a gay-friendly night at the Cairo Hilton Hotel. Clearly, on the evidence, the police are aware of this. If this is so, the

⁵ *Canada (Attorney General) v. Ward*, [1993] 2 S.C.R. 689, 103 D.L.R. (4th) 1, 20 Imm.L.R.(2d) 85.

⁶ Exhibit R/A-1, section 5.10 and Exhibit C-3, items 1, 2, 4, 6 & 7.

tolerance of the authorities belies the allegation that the police persecute the community. The actions of the claimant also belie his alleged fear.

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.⁷ Both subjective fear and an objective basis for it are crucial elements.

In *Kamana*,⁸ 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,⁹ failure to go into hiding immediately after learning that one may be in danger,¹⁰ 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

⁷ *Rajudeen, Zahirdeen v. M.E.I.* (F.C.A., no. A-1779-83), Heald, Hugesson, Stone (concurring), July 4, 1984.

⁸ *Kamana, Jimmy v. M.C.I.* (F.C.T.D., IMM-5998-98), Tremblay-Lamer, September 24, 1999.

⁹ *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.)

¹⁰ *Ramirez, Jose v. M.E.I.* (F.C.T.D., no. 92-A-7114), Noël, June 2, 1993.

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 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."

The fact that the claimant failed to leave Egypt at the first opportunity after the police allegedly began to target him, failed to claim asylum in Germany, returned to Egypt after sojourning in Europe, and failed to claim U. S. asylum, lead me to conclude that the claimant does not, subjectively, fear serious harm in Egypt. Each of these facts is significant when considering the claimant's subjective fear. Although the presence of any one of them may not necessarily be determinative, I find that these instances, when accumulated, are determinative.

The claimant submitted that while sponsored by his wife, his life was not at risk. However, the claimant and his wife separated after only two-months together. The claimant did nothing to protect himself for almost one year. It is not credible that a person that fears for his life would be so cavalier as to do nothing about his status after he and

" 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."

his wife separated. The claimant testified that his wife, . was fully aware of his relationship with before she married and sponsored him. Instead, the claimant told us, he left her because she was carrying on an E-mail relationship with her ex-husband.

After the U.S. Immigration authorities released the claimant from detention, rather than claim asylum in the U.S., the claimant skipped bail and made his way to Canada. The claimant explained that he just followed the advice he received. However, one's claim is one's own responsibility and bad advice cannot be transferred to a non-claimant.

I do not accept the claimant's explanations as to why he delayed in leaving Egypt, failed to claim in Germany, reavailed or failed to claim in the U.S. after his alleged persecution began in 1999 (one night detention) or in 2000 (Hilton Hotel bar incident). The claimant is well educated. I find that the claimant has not established that his stated fears because he is bisexual are serious or well founded.

In view of my finding that the harm feared regarding the claimant's sexual orientation is not serious, I also find that the harm feared does not amount to a risk to life, or to a risk of cruel and unusual treatment or punishment, or to a danger of torture, as the harm envisaged in all these instances must necessarily be of a serious nature for the following reasons.

Cruel and unusual treatment or punishment, although not defined in the *Act*, has been described as punishment or treatment that violates our sense of fundamental justice

or shocks the conscience.¹² Torture constitutes an aggravated and deliberate form of cruel, inhuman or degrading treatment, or punishment inflicted by or at the instigation of, or with the consent or acquiescence of, a public official or other person acting in an official capacity.

The claimant alleged in his PIF that the prosecution awaiting him in Egypt for failing to undertake military service constitutes persecution for a Convention reason. However, the claimant did not present any evidence on this basis, nor did his counsel provide any submissions on the claimant's behalf on this point. I find that the claimant's fear is speculative, at best, as he has, in his own words, successfully evaded military service to date through his studies. The claimant did not provide any evidence that he is a conscientious objector, or that the law is not one of general application, or that the penalty for failing to serve is persecutory.

Conclusion

Based on the foregoing analysis, I reject the claim of

s.19(1)

"James V. Railton"
James V. Railton

DATED at Toronto, Ontario, this 25th day of August, 2005.

¹² *R. v. Smith*, [1987] 1 S. C. R. 1045