



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
TA5-07054

CLAIMANT(S)

DEMANDEUR(S)

(a.k.a.)

DATE(S) OF HEARING

December 12, 2005

DATE(S) DE L'AUDIENCE

DATE OF DECISION

December 15, 2005

DATE DE LA DÉCISION

CORAM

M. Freilich

CORAM

FOR THE CLAIMANT(S)

POUR LE(S) DEMANDEUR(S)

REFUGEE PROTECTION OFFICER

Nil

AGENT DE PROTECTION DES RÉFUGIÉS

DESIGNATED REPRESENTATIVE

Nil

REPRÉSENTANT DÉSIGNÉ

MINISTER'S COUNSEL

Nil

CONSEIL DE LA MINISTRE

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s.19(1)

These are the reasons for the negative decision of the Refugee Protection Division (RPD) with respect to the claim of (the claimant), a s.19(1) 26-year-old citizen of Brazil.¹ The hearing for this claim was held pursuant to subsection 170(b) of the Immigration and Refugee Protection Act² (IRPA).

The claimant alleged that he has a well-founded fear of persecution if he were to return to Brazil by reason of his membership in a particular social group, that is, a person who is bisexual. In addition, he claims to be a person in need of protection by reason of either, a danger of torture within the meaning of Article 1 of the *Convention Against Torture* or to a risk to his life or to a risk of cruel and unusual treatment or punishment.

ISSUES AND DETERMINATION

The determinative issue in this claim is whether the claimant has a well-founded fear of persecution in Brazil by reason of a Convention ground, including whether the claimant has rebutted the presumption of state protection.

Having considered the totality of the evidence, the panel finds that the claimant has not rebutted the presumption of state protection and is not a Convention refugee nor a person in need of protection.

¹ Exhibit R/A-2, certified true copy of the claimant's Brazil passport.

² Immigration and Refugee Protection Act, S.C. 2001, c. 27.

ALLEGATIONS

The claimant's testimony of past events going to the basis of his fear is contained in his narrative to his Personal Information Form³ (PIF) and was given orally by the claimant during the hearing. For the purposes of these reasons, the panel will not repeat all of the allegations in these reasons. However, the panel has considered all of the evidence as well as the documents before it and counsel's submissions.

ANALYSIS

The panel is not convinced, as it must be,⁴ within the preponderance of probability category, that the state would not be reasonably forthcoming with serious efforts to protect the claimant if he were to return to Brazil. The panel finds that the totality of the evidence does not support a conclusion of state breakdown, nor does it rebut the presumption that a state is able to protect its nationals. A state is not expected to be able to provide perfect protection to its citizens.

State Protection

The issue is whether the Brazil government is making serious efforts to provide adequate protection to individuals in Brazil.

The panel is guided by the Federal Court of Appeal decision of Kadenko:⁵

Where there has not been a complete breakdown of the government apparatus and where a State has political and judicial institutions capable of protecting its citizens, does the refusal by certain police officers to

³ Exhibit C-1.

⁴ Xue, Jian Fei v. M.C.I. (F.C.T.D., no. IMM-4477-99), Rothstein, October 23, 2000.

⁵ Canada (Minister of Citizenship and Immigration) v. Kadenko (1996), 143 D.L.R. (4th) 532 (F.C.A.).

take action suffice to establish that that State in question is unable or unwilling to protect its nationals?

The court answered the question in the negative:

Once it is assumed that the state (Israel in this case) has political and judicial institutions capable of protecting its citizens, it is clear that the refusal by certain police officers to take action cannot in itself make the state incapable of doing so....

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 members 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 democracy in the state in question: the more democratic the state's institutions, the more the claimant must have done to exhaust all the courses of action open to him or her.

In Villafranca,⁶ the Federal Court of Appeal found that the mere fact that a country is not always successful at protecting its citizens is not enough to justify a claim. It found that no government could guarantee the protection of all of its citizens at all times. In Milev,⁷ the Federal Court noted that the fact that the state does not provide perfect protection is not, in itself, a basis for determining that the state is unwilling or unable to offer reasonable protection in the circumstances. International refugee protection is not meant to permit a claimant the opportunity to seek better protection abroad than he or she would receive at home.⁸ The panel finds that Ward⁹ set out that there is a presumption that except in situations where the state is in a state of complete breakdown, the state

⁶ Canada (Minister of Employment and Immigration) v. Villafranca (1992), 18 Imm. L.R. (2d) 130 (F.C.A.).

⁷ Milev, Dane v. M.C.I. (F.C.T.D., no. IMM-1125-95), MacKay, June 28, 1996.

⁸ Manorath, Rahonie v. M.C.I. (F.C.T.D., no. IMM-2369-94), Cullen, January 26, 1995.

⁹ Canada (Attorney General) v. Ward [1993] 2 S.C.R. 689.

must be presumed capable of protection their citizens. This presumption can be rebutted by "clear and convincing" evidence of the state's inability to protect.¹⁰ In other words, the claimant must show that it was reasonable for him or her not to seek state protection.¹¹

The claimant alleged that he is a bisexual, which he realized at the age of 15. The claimant alleged that in 1999, he was a victim of an attack in his neighbourhood by skinheads who broke his nose, requiring a one night of hospitalisation. The claimant alleged that this attack was due to the fact that he was walking hand-in-hand with his male friend, and that he believed he was attacked due to his bi-sexual orientation. The claimant indicated that he went to the police to report this incident, the police went back to the location of the assaults, but found no one was there. The claimant indicated that the police did not write up a report because he requested that they not do so, as he feared further retaliation. The claimant stated that his friend was able to escape and suffered no injuries. The claimant stated that there was another incident in either 2003 or 2004, when again skinheads allegedly saw him holding hands with another man, but he was able to run away and was not physically harmed. The claimant stated that he advised the police of this incident but that the police said that nothing happened to him and therefore there was nothing they could do for him. The claimant alleged that he also suffered verbal abuse and humiliation at work due to his bi-sexual orientation. The claimant stated that

s.19(1)

¹⁰ Ibid.

¹¹ Ibid.

he would date both women and men at the same time, he never resided with either a man or a woman at any time in Brazil, as he continued to reside with his parents. When asked if he had been in a homosexual relationship between 1999 and 2003, the claimant indicated he had not been in a relationship, he was just with people. When asked if he had been in a homosexual relationship from 2003 until he left Brazil in 2005, he indicated that he had not been in a serious relationship during that period of time, he just had friends. The claimant stated that most of the problems occurred when he went to bars that were frequented by bisexuals and homosexuals.

The panel accepts that the claimant was attacked in 1999 and had his nose s.19(1) broken. The panel notes that the claimant has never resided with either man or a woman before leaving Brazil; he has not been physically attacked in the six-year period from 1999 until he left for Canada in 2005. The panel accepts that the claimant s.19(1) may be bi-sexual, but the panel does not believe that the claimant could not get protection from the authorities if he were to return to Brazil. The claimant resides in Sao Paulo Brazil. The panel further notes that when the claimant went to the police in 1999, they did not refuse to assist him; they in fact went back to a location of the fight with him to write up a report, which the claimant refused. The fact that the police were unable to apprehend the individuals who assaulted the claimant, is not indicative of a lack of police protection. Even when the claimant went to the police on the second occasion when he was chased, the police did not refuse to assist the claimant but rather told him that since

nothing had happened to him, and he was not injured, there was nothing they could do to assist him.

The panel takes note of the documentary evidence¹² that states:

Brazil is a constitutional federal republic composed of 26 states and the Federal District. The federal legislative branch exercises authority independent of the executive branch. In October 2002, voters elected President Luiz Inacio Lula da Silva ("Lula") of the Workers' Party (PT) to a 4-year term in a free and fair election. The Constitution provides for an independent judiciary; however, it was inefficient and, particularly at the state level, subject to political and economic influences.

The military is responsible for national defence and generally played little role in internal security. The federal police force is very small and primarily investigative; most police forces fall under the control of the states. The "civil police" are plainclothes officers with an investigative role, and the "military police" are uniformed police responsible for maintaining public order, with a separate judicial system. While civilian authorities generally maintained effective control of the security forces, members of the security forces committed numerous serious human rights abuses, primarily at the state level.

The panel accepts that there has been a history of societal violence against homosexuals in Brazil. The panel further notes however that Brazil has taken major steps to assist people of alternate sexual orientation, in Brazil, the documentary evidence¹³ further states:

... Although the Constitution does not prohibit discrimination based on sexual orientation, state and federal laws do prohibit such discrimination, and the federal and state governments remained committed to combating it.

According to the Ministry of Health, there were approximately 180 killings of homosexuals during the year.

In December 2003, state prosecutors charged Mayor Elcio Berti of Bocaiuva do Sul, Parana State, with violating state and federal antidiscrimination laws and abuse of administrative power for issuing a decree in December 2003 prohibiting homosexuals from living in the town. The town's public prosecutor convinced Berti to revoke the

¹² Exhibit R/A-1, RPD Information Package, September 2005, United States Department of State, Country Reports on Human Rights Practices for 2004, February 28, 2005.

¹³ Ibid.

decree to avoid a public investigation and filing of the case. In a hearing on June 16 for a civil case against the mayor, filed by the human rights NGO Grupo Dignidade, Berti claimed that the decree was an internal joke that was mistakenly released to the press. Grupo Dignidade filed a further case against the mayor with the National Council to Combat Racism. The case remained pending at year's end.

During the year, four gang members convicted in the 2000 killing in Sao Paulo of Edson Neris da Silva received sentences ranging from 2 to 19 years in prison.

The Secretariat of State Security in Rio de Janeiro, in partnership with NGOs, operated a hotline and offered professional counseling services to victims of anti-homosexual crimes.

In November, Rio de Janeiro state lawmakers reversed the governor's veto on a bill that gives same-sex partner benefits to government employees. The state's 70-member assembly voted 37 to 21 to override the veto and the law went into effect. In July, a Sao Paulo state court ordered 15 health insurance companies to recognize same-sex couples in their coverage.

In April, the Special Secretariat for Human Rights launched the "Brazil Without Homophobia" program, which sought to stop violence against homosexuals, provide legal counsel to victims of violence, and prevent anti-homosexual sentiment by providing tolerance training for school-aged children. According to the National Secretariat for Human Rights, the program aims to strengthen public institutions and NGOs that promote homosexual rights and combat homophobia; offers training to professionals and representatives in the homosexual community; creates publicity campaigns to raise awareness and disseminate information about homosexual rights and to promote homosexual self-esteem; and encourages reporting of violence against homosexuals.

As well, the following information is found in the Response to Information

Request¹⁴ dated August 21, 2002 in regards to Sao Paulo, where the claimant resided:

Regarding mechanisms in place to protect and promote the rights of the gay community, *Latinamerica Press* reported that, in December 2000, the Justice Ministry opened an office in Brasilia "to promote gay rights nationwide" (8 Oct. 2001). The office consisted of "representatives of gay rights groups and government and legislative offices". More detailed information on the function or mandate of the office is not provided. EFE also reported that in October 2001, a non-governmental organization opened Brazil's first gay ombudsman office with the financial support of the Justice Ministry (29 Oct. 2001). The office is located in Sao Paulo and was to be run by three attorneys who will "offer free legal advice to homosexuals who are the victims of discrimination and violence"...

¹⁴ Exhibit R/A-1, item 4.2, Response to Information Request, number BRA39447.E, August 21, 2002.

As well the International Lesbian and Gay Association¹⁵ (ILGA) report states that in 1991, the government of Brazil's forth largest city Salvador banned discrimination on the grounds of sexual orientation and that in 1994, seventy-three Brazilian cities and towns, three states and the federal capital district (Brasilia-law protect gays and lesbians from discrimination. Among them are the cities of Sao Paulo and Rio de Jamerio.

The panel finds that when analysing the issue of state protection in the context of the documentary evidence, the claimant has failed to rebut the presumption of state protection with clear and convincing evidence.

The panel assigns far greater probative value to the documentary evidence than to the testimony of the claimant. The documentary evidence cited herein is drawn from a variety of reliable and independent sources, none of whom can have any vested interest in whether or not the claimant is determined to be a Convention refugee. To that extent they are free of bias. When analysing the issue of state protection in the context of the documentary evidence, the panel finds that the claimant has failed to rebut the presumption of state protection with clear and convincing evidence.

After careful consideration of all the evidence and because of the reasons set out above, the panel finds that the claimant does not have a well-founded fear of persecution by reason of any of the enumerated grounds. Given that the panel finds that adequate

¹⁵ Exhibit R/A-1, item 4.1, World Legal Survey, The International Lesbian and Gay Association, June 23, 2000.

state protection would be available to the claimant in Brazil. The panel therefore finds that the claimant is not a Convention refugee.

Having found that the claimant is not a Convention refugee, the panel also considered the applicability of sections 97(1)(a) and 97(1)(b) of the Act, and finds that no evidence was adduced that would support a finding that the claimant faces a danger of torture. With respect to a risk to his life or to a risk of cruel and unusual treatment, the panel's finding with respect to the availability of state protection applies to this ground as well. Having found that there is adequate state protection, the claim fails under section 97 of the Act.

CONCLUSION

For these reasons, the Refugee Protection Division determines that the claimant is not a Convention refugee nor is he a person in need of protection and therefore, rejects his claim for refugee protection.

"M. Freilich"
M. Freilich

DATED at Toronto this 15th day of December 2005.