



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
TA2-13833

CLAIMANT(S)		DEMANDEUR(S)
DATE(S) OF HEARING	July 2, 2003	DATE(S) DE L'AUDIENCE
DATE OF DECISION	August 12, 2003	DATE DE LA DÉCISION
CORAM	Tom Pinkney	CORAM
FOR THE CLAIMANT(S)	Unrepresented	POUR LE(S) DEMANDEUR(S)
REFUGEE PROTECTION OFFICER	Selwyn Pieters	AGENT DE PROTECTION DES RÉFUGIÉS
DESIGNATED REPRESENTATIVE		REPRÉSENTANT DÉSIGNÉ
MINISTER'S COUNSEL		CONSEIL DE LA MINISTRE

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These are the reasons for the decision in respect of the claim of

My name is Tom Pinkney. I am a member of the Refugee Protection Division, and I have the responsibility for the determination of this claim.

INTRODUCTION

The claimant, [REDACTED], alleges that he is a 22-year-old citizen of Mexico. He claims to have a well-founded fear of persecution at the hands of his brother, [REDACTED] by reason of his being a member of a particular social group, that is, bisexual males.

In addition, I have considered whether he is a person in need of protection because he would be subjected personally to a danger of torture or a to a risk to his life or to cruel and unusual treatment or punishment in Mexico.

ALLEGATIONS

The claimant alleged that at the age of 18 years he had a sexual relationship with a life long friend, a male friend, named [REDACTED], and that they decided to keep their sexual relationship secret even as they continued to date their respective girlfriends. In other words, the claimant alleged that he is a bisexual male.

He said that at first no one knew about his relationship, but that in [REDACTED] of 2002 he was caught in a sex act with his friend when his brother came in and saw them with no clothes on.

After that time the brother began to insult and threaten the claimant, and eventually this led to fights. On one occasion, the claimant was threatened and thrown against the wall which caused some bleeding from his head. Although he told his parents about his problems and they accepted him, his brother kept harassing him.

Approximately one month later [redacted] told the claimant that he was coming to Canada and that he feared the claimant's brother. The claimant decided to come with his friend, [redacted], because he said he could not see his life in Mexico without him.

He professed to be afraid to go back because of his brother, and said it would make it very difficult for him to live with his family again.

DETERMINATION

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

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ANALYSIS**Identity**

The claimant's identity as a national of Mexico is established by his testimony, although there were problems with the supporting documentation.

To be specific, the claimant failed to produce the original of his passport at the hearing, and explained that he had simply forgotten to bring it that morning, although he knew that he was required to do so. In Exhibit M-1 there is a copy, a certified true copy of the claimant's passport with his photograph. This indicates that the claimant was born in Guanajuato, which is the place from which the claimant alleges that he comes. So, I accept, on a balance of probabilities, that the claimant is a national of Mexico and that he is who he says he is.

The claimant provided no other documentation in support of his claim, not even school graduation certificates, and so I am unable to verify the other aspects of his identity. This means, for example, that his claim to be a radio technician and his claim to have completed 11 years of education, are not verified.

Credibility

Despite the difficulties identified above with respect to the claimant's identity, I found that the claimant testified in a straightforward manner and I found him to be a

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generally credible witness, and I do believe the material aspects of what he has alleged in support of his claim.

Reason for Harm - Nexus

For a 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, membership in a particular social group, that is, bisexual males.

Harm Feared: Is it Persecution?

The claimant alleged that should he return to Mexico he would be subjected to the following harm, namely, continued harassment from his brother.

I find that the harm allegedly feared by the claimant does not constitute persecution, and my reasons are as follows.

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

First of all, according to the claimant's own testimony in the narrative of his Personal Information Form' (PIF), there was only one instance in which he suffered

Exhibit C-1, Personal Information Form, received 2002.

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physical abuse at the hands of his brother, and that was the day that his brother pushed him against the wall.

The claimant said that he started bleeding from his head, but it was not indicated that this was an intentional wound inflicted by the brother, and so I see very little reason to suspect that this will occur again.

The claimant provided additional details about his family's situation. He indicated that he had no problems with his second brother, that he had no problems with his father, and that, in fact, he was often in touch with his parents. By "often" he meant every month or every 20 days, according to his testimony, and, in fact, he testified that he missed them a lot.

The claimant also testified that in 2002 his boyfriend, returned to Mexico of his own volition. It appears that he abandoned a refugee claim in the process, and that he returned in all likelihood to , the home city of the claimant in this case.

The claimant has not had communication from the former boyfriend for several months, but he did indicate that his relationship with his boyfriend is now terminated and that as far as he knew his former boyfriend has not had any problems since he has returned to Mexico.

For these reasons I find that there is little likelihood of a repetition of the event which caused some injury to the claimant.

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To constitute persecution the harm feared must occur with repetition or persistence or in a systematic way.

I find that the harm complained of by this claimant amounted to an isolated incident, and given all the circumstances, on a balance of probabilities, there is no serious possibility that it will recur.

Harm Feared: Is it Cruel and Unusual Treatment or Punishment?

Even though the claimant made no such specific claim, the panel has considered whether if the claimant should return to Mexico he would be subjected to the following harm, namely, harassment and persecution at the hands of his brother, such that this could constitute a risk to his life or a risk of cruel and unusual treatment or punishment.

At issue is whether the harm which the claimant might face constitutes cruel and unusual treatment or punishment.

The terms cruel and unusual are not defined in the Immigration and Refugee Protection Act.² Canadian jurisprudence has interpreted the phrase cruel and unusual as punishment or treatment that shocks the conscience. In the case of cruel and unusual treatment, it has usually been equated with treatment that is inhuman or degrading. Inhuman treatment can be described as premeditated, applied for hours at a stretch, and causing, if not bodily harm, intense physical and mental suffering. Degrading treatment

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

can be described as arousing in its victims feelings of fear, anguish and inferiority capable of humiliating and debasing them, and possibly breaking their physical and moral resistance.

I find that the treatment feared by this claimant is not cruel and unusual treatment for the following reasons.

One instance of a pushing match involving the claimant's brother, which led apparently to an accidental wound to the claimant's head, does not constitute inhuman treatment or degrading treatment.

While the claimant may have some fears about how he will be treated by his brother, I think that given the circumstances of his family situation, in all likelihood the assault by the brother would remain as an isolated incident and not be acceptable family behaviour.

The claimant advanced no evidence to suggest substantial grounds exist to believe he would be subjected to torture if removed to Mexico.

For these reasons I find that Section 97 of the Act³ does not apply to this claimant, and he is not a person in need of protection.

³ Idem.

State Protection

Another issue before me included whether it was objectively unreasonable for the claimant to have sought state protection. While states are presumed to be capable of protecting their nationals, it was open to the claimant, according to the law, to rebut the presumption of protection with clear and convincing evidence.⁴

This claimant, when asked whether he reported the assault by his brother to the police responded in the negative by saying “no”. When the claimant was asked why he had not gone to the police, he said it was because he thought that it would not be a solution.

I find that the claimant has not met the responsibility that he faces in the law to rebut the presumption of protection, and so I have no reason to find that state protection is not available to the claimant.

For the reasons stated above, I find that the claimant is neither a person in need of protection nor a Convention refugee.

Internal Flight Alternative

I have considered whether a viable internal flight alternative (IFA) exists for this claimant, as this issue was raised with the claimant both before and at the hearing.

⁴ Canada (Minister of Employment and Immigration) v. Villafranca (1992), 18 Imm. L.R. (2d) 130 (F.C.A.), at 132-133.

On the evidence before me I find that there is no serious possibility of the claimant being persecuted or being in danger of torture or subjected to a risk to life or a risk of cruel and unusual treatment or punishment in many other parts of Mexico, almost any part of Mexico away from . . . where the family lives.

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The claimant was asked about the possibility of an IFA, and he said that he had considered one. He mentioned that he had considered Cancun, and that he hadn't come to a final conclusion about the possibilities of living there.

Cancun is a place which is identified in the documents as disclosed in Exhibit R-1, as being a place where gay bars are accessible as they are in a number of other places including Guadalajara, Monterrey, and Puerto Vallarta, and 24 other Mexican cities. There is a very active gay village in Mexico City.

The documents also reveal that there are a large number of bars for gay and presumably bisexual males in places such as Mexico City. There are some 33 gay bars in Mexico City according to one document, and Internet web sites list other gay bars and discos for different classes of society. The U.S. gay magazine, Out, apparently reports about 40 gay discos and bars for the middle and upper classes in Mexico City. Mexico has no sodomy laws. The age of sexual consent is 18.

Mexico City has a gay rights law that bans some anti-gay discrimination. The law prohibits provocation or incitement of hate and violence and bans bias in employment

and public accommodation and services. The penalty for violation of the law is one to three years in prison, and/or a fine equal to 50 to 200 days salary and/or 25 to 100 days of community service. It even notes that Pedro Joaquim-Coldwell, who is the ambassador for Mexico to Cuba, is openly bisexual.

Other documentation relates to the prospects for internal relocation of groups such as bisexual males, and basically identifies three groups for whom internal relocation would be difficult. One is an effeminate man including transvestites, and I note that this claimant is not effeminate, at least in an outward manner. He appeared to be a healthy, strong male, and showed no effeminate mannerisms during the hearing.

A second group for whom relocation would be difficult if not impossible is an HIV positive person, because they would not have access to insurance. This claimant provided no evidence to indicate that he is HIV positive.

The third group for whom internal relocation in Mexico would be difficult, is apparently political activists and whistle blowers where their homosexuality or bisexuality could potentially be used against them either for blackmail or mistreatment by police. But again this claimant provided no evidence to indicate that he is a political activist or whistle blower, rather he is a young male who has had a homosexual relationship, now apparently ended, with another friend from his hometown.

The documents identify that the climate towards homosexuals in many big cities means that gays and lesbians and bisexuals can live in greater tolerance than ever before. There are many instances identified of improvements in their living conditions in a variety of locations.

With respect to the first prong of the requirements to establish an IFA, I note that the claimant would have no difficulty getting to Mexico City from Canada, or for that matter to Cancun since there are direct flights from Toronto to both places.

Mexico City is four hours away, according to the claimant's testimony, from his hometown. Therefore, he would presumably be safe there.

With respect to the second prong, the issue becomes whether it would be unreasonable for the claimant to seek refuge there. In all likelihood the claimant would be able to successfully relocate there. He is 22 years old, and has considerable flexibility. He apparently has 12 years of education. He described himself as a technician, and said that he is able to earn a living by being a technician. Certainly if that is the case, he would be able to do so in Mexico City.

So, for all these reasons I find that it is not objectively unreasonable for the claimant to seek refuge in either Cancun, an area that he was personally attracted to in considering, or in Mexico City.

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Risk of Harm

To establish his status as a Convention refugee or a person in need of protection the claimant had to show that there was a serious possibility or a reasonable chance that he would be subjected personally to persecution, or a risk to life, or a risk of cruel and unusual treatment or punishment if removed to Mexico, or that there are substantial grounds to believe that he would be tortured.

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.

CONCLUSION

For the foregoing reasons the Refugee Protection Division concludes that the claimant, _____ is not a Convention refugee and not a person in need of protection, and therefore rejects his claim.

"Tom Pinkney"
Tom Pinkney

DATED at Toronto this 12th day of August, 2003.

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