



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
TA2-06587

CLAIMANT(S)

DEMANDEUR(S)

DATE(S) OF HEARING

December 10, 2003

DATE(S) DE L'AUDIENCE

DATE OF DECISION

March 17, 2004

DATE DE LA DÉCISION

CORAM

Stephanie Thomas

CORAM

FOR THE CLAIMANT(S)

**El-Farouk Khaki
Barrister and Solicitor**

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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The claimant, _____, is a citizen of Mexico and claims a well-founded fear of persecution on the basis of his membership in a particular social group, namely, gay males. In addition, he claims to be a person in need of protection because he would be subjected personally to a risk to life or to a risk of cruel and unusual treatment or punishment, or to a danger of torture in Mexico.

Allegations:

The claimant alleged as follows. He grew up in Puerto Vallarta and realized he was gay by the time he was in the fifth grade. In early 1997, when the claimant was eighteen years old, he was drinking and flirted with a male fellow student called

_____ repulsed his advance, pushing the claimant and telling him that he was not a "puto" (prostitute). On _____ 1997, the claimant was returning from a party with a gay friend when they encountered _____ and several other friends in a truck. _____ appeared friendly and invited them to come drinking, they accepted, and initially all seemed well. However the "puto" issue arose, resulting in an argument and fight, culminating with _____ running to the truck to get a gun, which he fired at the claimant and his friend, wounding the friend. The friend received a superficial graze and was treated in hospital. He did not want to complain to the police as he didn't want further trouble with _____ and _____ neither he nor the claimant approached the police. Several days later, on _____,

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1997, the claimant was eating dinner at a restaurant with friends when started yelling at him from the street to come out and fight. threatened to kill the claimant the next time he saw him alone. Police were called, the claimant reported this incident, and was detained at the police station for several hours, and eventually fined 100 Pesos for trying to start a fight. At the hearing the claimant alleged continual harassment by forcing him to move every 3 or 6 months. He also alleged general public and police intolerance for gays, a breach with his mother over his sexual preference, and an incident on 2000, when punched and insulted him. The claimant had a Canadian friend who suggested he could live openly in Canada, and he decided to see for himself, entering as a visitor on 2000. In 2001 he returned to Mexico to visit his family for a few weeks, but he was called names, and decided to sell his car, rent his apartment, and return to Canada after a week. On 2001, he filed his refugee claim.

Determination:

I find the claimant is neither a Convention refugee nor a person in need of protection for the following reasons.

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Analysis:

The claimant's identity was established by production of a Mexican passport and oral testimony, and I find that he is a citizen of Mexico and who he claims to be.

I find, on a balance of probabilities, that the claimant is a gay man. He provided credible testimony regarding gay relationships in Mexico and Toronto, his experiences as a gay man, and corroborating written and photographic evidence situating him as a regular at a gay bar in Toronto.¹

I find, on a balance of probabilities, that the claimant was not continually harassed by after 1997, did not consequently have to move every 3 to 6 months, and that the claimant was not punched by on 2000. The claimant presented a detailed 38 paragraph Personal Information Form (PIF). He failed to allude to any of the three above-noted areas of allegation in his lengthy PIF. His explanation for their absence was that he didn't believe he had to put in every incident, and that the shooting was the incident with the most impact for him. When the Member pointed out there was a problem, as the PIF required *all* significant incidents be reported, the claimant had no further response. The claimant is an intelligent, resourceful, and well-educated young man who was studying law before he quit university. During his time in Canada he has become fluent in English, to the extent that his hearing was conducted in English at his

¹ Exhibit C-3, Letter and Pictures.

request. I do not find his explanation reasonable in his particular circumstances, especially as the three areas cover more than a three-year time period after the one police report, and culminate in the alleged reason he left Mexico. They are in essence the basis for alleging a well-founded *prospective* fear of persecution by — otherwise seven years would have passed without incident with

I also note that as of 1997, the police were aware that had threatened to kill the claimant if he saw him alone. I do not find it plausible in these circumstances that would have continued serious harassment and committed an assault more than three years later. The claimant testified that was of a number of family-owned restaurants and enjoyed a prosperous lifestyle. As such, he would have much to lose. In addition, I do not find it plausible that an intelligent and resourceful person such as the claimant would have continually failed over the course of three years to seek any help from the authorities if he had truly been harassed to this extent and beaten. I further note that his friend who was wounded became his lover and that they co-habited since the 1997 (although the claimant testified that by the time he left Mexico they had become only roommates). The claimant asked this friend to come with him to Canada, but he chose to remain in Puerto Vallarta, where he remains. I conclude that the claimant embellished in order to provide a stronger basis for his claim.

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I find that the claimant has not displaced the presumption that state protection was available to him. The claimant admitted the police acted on the one incident he reported to them, a matter corroborated by the police report filed in evidence.² He felt that the 100 Peso fine was inadequate, and represented the fact that [redacted] could "fix everything with money". While the claimant testified repeatedly that the police don't respect or protect gays in Mexico, he admitted his own experience when he filed the report resulted in action against [redacted] and that the officer who took the report was "serious" and did his job. His complaint was that several off-duty officers laughed at him when he reported, because he was gay. The claimant chose not to report the shooting incident or any other alleged continual incidents over the course of three years. On the one occasion when he provided information to the police, the claimant did not provide *full* information about the entire course of incidents with [redacted]. He merely indicated that [redacted] had been aggressive with him on various occasions. Therefore the action taken against [redacted] by the police failed to reflect the gravity of the alleged course of events, as a direct result of the claimant's incomplete statement. In these circumstances a 100 Peso fine for a minor offence did not plausibly represent evidence that [redacted] could "buy his way" out of everything. In order to rebut the presumption of state protection the claimant must provide clear and convincing evidence of the unwillingness or inability of the state to

² Exhibit C-3, Incident Report.

provide protection, which need not be perfect protection.³ The action taken by the police was consistent with the incomplete information provided to them by the claimant. The claimant successfully invoked state protection on the only occasion that he sought it, even though several police officers laughed at him in the police station because he was gay. His conclusion that the police would not act to protect gays was not supported by his own experience. I conclude that state protection was available to the claimant.

The claimant also alleged that as an openly gay male he would be subjected in any part of Mexico to persecution or the harms set out in s. 97(1) (a) and (1) (b) of the Immigration and Refugee Protection Act (IRPA). He stated that an openly gay man would eventually suffer repercussions because society in general, and the police in particular, were hostile to gays and would not accept a man living with another man or bringing home boyfriends. He alleged that his own mother ejected him from the family home because he was gay, and that people looked at him strangely and made disparaging comments. His Counsel cited numerous examples of discrimination and violence practiced upon gays in many parts of Mexico, including the cities suggested during the hearing as a possible internal flight alternative (Cancun, Mexico City, Guadalajara, Vera Cruz, and Acapulco). These examples were derived from the documentary evidence submitted by *both* the Refugee Protection Officer and Counsel. After carefully studying

³ Canada (Attorney General) v. Ward, [1993] 2 S.C.R. 689 and Canada (Minister of Employment and Immigration) v. Villafranca (1992), 18 Imm. L.R. (2d) 130 (F.C.A.).

all of the evidence⁴ I conclude that there is indeed some discrimination, and in some instances persecution or violence, against individual gays in Mexico. However, I also conclude that social and state attitudes are in a process of transition toward acceptance of openly gay people, in connection with an increasing emphasis on establishment of human rights legislation, increasing social tolerance, and efforts to combat police and other state authorities' corruption and abuse of power. I conclude that the claimant's evidence has failed to rebut the presumption of state protection *in his particular case*, both with respect to persecution, and to the risk of the harms set out in s. 97(1)(a) and (1) (b) of the IRPA.

In addition to the allegations outlined above, the claimant produced a medical report from a psychiatrist in Toronto.⁵ I have considered it carefully in reaching my decision. I accord it little or no weight for the following reasons. The information upon which it was based was provided by the claimant, and includes allegations that I have found to be embellishments. (For instance, the statement in the report that the claimant "was stalked by the people who beat him up and shot at him for months"⁶). The report does not enhance and is not determinative of the claimant's credibility. The report clearly ascribes the claimant's emotional condition to a number of events, including the major trauma of seeing his father killed in an accident when he was five years old, and

⁴ Exhibit R-2, Basic Disclosure Mexico Sept 2003, July 2003, January 2003, December 2002, October 2002 and Exhibit C-5, Country Documents.

⁵ Exhibit C-4.

⁶ Ibid. at p. 2.

consequently growing up without the support of a male parent. It also states that while he experienced hostility and insults from the heterosexual community, "it was his mother's rejection that caused him the most distress".⁷ These events are unfortunate, but are insufficient to establish his claim. The death of his father and rejection by his mother are personal issues he must resolve as a young adult, whether he is in Mexico or Canada. In addition, the report *links* these events with those he alleged as a basis for his claim, as the causes for his psychological condition. It does not state the *relative causative effects* of these events versus his allegations in accounting for his psychological condition. Finally, the report states that the claimant was functioning at 30% when first seen, is now functioning at 80-90%, and that a "return to the scene of the tragic events that marred his life over the years could only send him into regression".⁸ It indicates that "he is terrified about being sent back, and has seriously considered suicide as a way out".⁹ However the report makes no allowance for further psychological treatment to enable the claimant to address the issues around his parents or any potential sequela or re-traumatization. The claimant is an intelligent, well-educated and resourceful person who could avail himself of such treatment in Mexico if it were necessary. I conclude that while the report might

⁷ Ibid. at p. 3.

⁸ Ibid. at p. 5.

⁹ Ibid. at p .4.

support humanitarian and compassionate consideration, which is not within the Panel's jurisdiction, it is not sufficient to support his claim.

For the above reasons I find that while the claimant may encounter some intolerance, he does not face a serious possibility of persecution if he were to return to Mexico.

The current state of the jurisprudence regarding the standard of proof for risk for s. 97 harms appears to be divided. One line of cases suggests the standard is a "serious possibility", (the same standard applied to s. 96 of IRPA);¹⁰ another suggests the higher standard of a "balance of probabilities"¹¹ that the claimant will *personally* suffer the s. 97 harms. Clearly a failure under the lesser standard necessarily results in a failure under the higher standard.

In assessing the claimant's risk of suffering the s. 97 harms, taking into account my findings regarding his testimony and the documentary evidence, I find that the claimant does not personally face a serious possibility of risk to life or of cruel and unusual treatment or punishment, or torture, if he were to return to Mexico.

¹⁰ Tameh, Ali Farrokhi v. M.C.I. (F.C., no. IMM-6266-02), Blanchard, December 15, 2003.

¹¹ Thangasivam, Kantheepan v. M.C.I. (F.C., no. IMM-8986-03), Snider, November 25, 2003.

Conclusion:

The Refugee Protection Division finds that _____ is not a
Convention refugee or a person in need of protection.

"Stephanie Thomas"

Stephanie Thomas

DATED at Toronto this 17th day of March, 2004.

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