



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
TA3-13541

CLAIMANT(S)		DEMANDEUR(S)	s.19(1)
DATE(S) OF HEARING	July 12, 2004	DATE(S) DE L'AUDIENCE	
DATE OF DECISION	September 1, 2004	DATE DE LA DÉCISION	Deleted: July
CORAM	S. Alidina	CORAM	
FOR THE CLAIMANT(S)	John Grant Barrister & Solicitor	POUR LE(S) DEMANDEUR(S)	
REFUGEE PROTECTION OFFICER		AGENT DE PROTECTION DES RÉFUGIÉS	
DESIGNATED REPRESENTATIVE		REPRÉSENTANT DÉSIGNÉ	
MINISTER'S COUNSEL		CONSEIL DE LA MINISTRE	

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is a citizen of Chile. The claimant claims to be in need of refugee protection pursuant to sections 96, 97(1)(a) and 97(1)(b) of the *Immigration and Refugee Protection Act*.

ALLEGATIONS

The claimant alleges that being a homosexual, he feared the police and the general public in Chile. In 1998, he asked his wife to leave their home because he wanted to bring his homosexual partner to live with him. His public life with his partner was not a success as he was discriminated against and physically abused. In 2002, he was physically attacked when he was shopping. He made a denunciation with the police, but they did not provide him any assistance.

In 2003, he made a telephone denunciation with the police when individuals broke his glass window in his home. That time the police did not show up to see the damage. In 2003, during an anti-gay police raid, he was detained by the police because he was seen kissing his partner as they left a restaurant. In detention, he was sexually abused by his inmates. He went to see his lawyer to put an end to this abuse, but his lawyer told him that there were no laws in Chile to protect gays and therefore he left Chile.

ANALYSIS

The determinative issue in this case is state protection, whether state protection is available to the claimant should he return to Chile.

State Protection

For the following reasons, the panel finds that the claimant does not need international protection. He has not met the burden of establishing "clear and convincing" proof of lack of state protection in his country of citizenship.

The law states that there is a presumption that a state is capable of protecting its citizens. The claimant may rebut this presumption by providing "clear and convincing proof" of the state's inability to protect. The claimant must approach his or her state for protection, providing state protection might be reasonably forthcoming.¹

Evidence that protection being offered is "adequate though not necessarily perfect" is not clear and convincing proof of the state's inability to protect its citizens,² as no government can guarantee the protection of all its citizens at all times." However, where a state is in effective control of its territory, has military, police and civil authority in place and makes serious efforts to protect its citizens, the mere fact it is not always

¹ Canada (Attorney General) v. Ward, [1993] 2 S.C.R. 689, 103 D.L.R. (4th), 1, 20 Imm. L.R. (2d) 85; reversing [1990], 2 F.C. 667, 67 D.L.R. (4th) 1, 10 Imm. L.R. (2d) 189 (C.A.).

² Zalzali v. Canada (Minister of Employment and Immigration), [1991] 3 F.C. 605 (F.C.A.); (1991), 14 Imm. L.R. (2d) 81; 126 N.R. 126 (F.C.A.).

successful at doing so will not be enough to justify a claim that the victims are unable to avail themselves of protection.³

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 member 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 the democracy in the state in question: the more democratic the state's institution, the more the claimant must have done to exhaust all courses of action open to him or her.⁴

With respect to the case at bar, in his oral testimony, the claimant alleged that, because of his sexual orientation, he fears persecution from the police and the general public in Chile. To redress his fear of alleged persecution from the public, the claimant testified that, after the incident of 2003, when his glass window was broken by his soccer friends, he filed one police report in person in Chile. The police insulted him and told him to leave because homosexuals were not good for Chile. His PIF narrative⁵ indicates that the incident of 2003 was reported to the police on the telephone, but

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³ Canada (Minister of Employment and Immigration) v. Villafranca (1992), 18 Imm. L.R. (2d) 130 (F.C.A.).

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

⁵ Exhibit C-1.

the police did not show up at his house to see the damage. There is no mention about going to the police in person to file a denunciation.

When asked to explain this discrepancy, the claimant indicated that he went to the police station because the police did not come to his home to examine the damage to his glass window.

When asked to explain as to why he had not mentioned anything about going to the police in person in his PIF narrative, the claimant could not provide any reasonable response. He said that he had not included that detail in his PIF narrative.

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The panel does not accept the claimant's explanation as being reasonable. The claimant left Chile to seek international protection because of the alleged lack of protection for homosexuals in Chile. Information about going to the police station to file a report in person because police did not show up at his home is central and material to the claimant's claim. At the hearing, the claimant was represented by a counsel who made amendments to the claimant's PIF but failed to include information about the claimant going to the police in person in the claimant's PIF narrative. Also, question 41 of the PIF clearly instructs the claimant to provide details of the steps he took to obtain protection from authorities in his country. Omission of this significant information in his PIF raises a serious doubt in the panel's mind whether the claimant made a police report for the 2003 incident as alleged.

Based on the evidence adduced, the panel does not have any persuasive evidence to believe that the claimant filed a police report after the 2003 incident. The panel therefore, does not believe the claimant's allegations that a police report was filed for the 2003 incident.

The claimant also testified that he sought legal help after he was released from the police detention in 2003. The claimant testified that he went to the Lawyer's Association to seek legal help from a lawyer. Initially, the claimant indicated that he obtained no help from the law office because the lawyer told him that there was no protection for gays in Chile. Later, the claimant testified that the Lawyer's Association did not pay much attention to him because he had no financial resources to pay for their services. He felt that the lawyers could have helped him if he had money to pay them for their services.

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Based on the evidence adduced, the panel finds that the claimant did not make a serious effort to seek protection from the legal system in Chile because of financial constraints.

Documentary evidence⁶ indicates that Chile is a multiparty democracy with a constitution that provides for a strong executive and a bicameral legislature. It has a functioning police force, an army, and an independent judiciary, and the government generally respect its citizen's rights. The claimant, living in a democratic country, is

⁶ Exhibit R/A-1, Country Reports on Human Rights.

obliged to seek help from his country of nationality prior to seeking international protection. In this case, the claimant simply did not reasonably exhaust all courses of action in availing himself of state protection in Chile. The panel does not believe that he ever sought help from the police, and the panel finds that he did not make a serious effort to seek help from the judiciary and the legal system in Chile.

In the context of the country of origin and in the circumstances of this claimant in particular, the panel finds that the claimant has not taken all reasonable steps to seek protection in Chile prior to seeking international protection. Therefore, the panel finds that, in this case, the claimant has not discharged the onus of showing clear and convincing proof of the state's inability or unwillingness to protect him.

Furthermore, in his testimony, the claimant indicated that his relationship with his partner started in 1998 and lasted for three months, and, thereafter, he did not have any more homosexual relationships until such time he left Chile.

Based on the aforementioned testimony, the panel does not find it plausible that the claimant was detained by the police in the first week of 2003 when he was seen by the police kissing his partner as they left a restaurant.

When asked to explain this implausibility, the claimant was vague and evasive. He indicated that he was confused with dates.

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The panel finds that the alleged incident of 2003 when he was allegedly detained by the police for two days is a significant incident. It is central and material to the claimant's claim particularly when the claimant's PIF narrative indicates that he did conduct a homosexual relationship after of 1998. It is expected of the claimant to have testified that he continued with homosexual relationships after 1998. Because of the above implausibility and the claimant's inability to provide any reasonable explanation, the panel is not persuaded to believe that the incident of 2003, when the claimant was allegedly arrested and detained by the police, ever took place. The panel finds that the claimant's story about his detention by the police and his mistreatment by fellow inmates to be fabricated for the purpose of his refugee claim. The panel, therefore, does not believe that the claimant was ever detained by the Chilean Police and abused by fellow inmates while in detention.

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Furthermore, the documentary evidence entered as Exhibit R/A-1 contrasts markedly with the claimant's allegations of lack of state protection for persons like him in Chile. In this case, the panel prefers to give more weight to the documentary evidence, which describes the country conditions, than to the written evidence and the oral testimony given by the claimant. Based on the documentary evidence, the panel does not have any persuasive evidence to believe that the claimant would not have received state protection had he sought help from state authorities in Chile.

In regards to his fear of the police, the latest documentary evidence⁷ indicates that the police leave the gay clubs alone because they generate a lot of revenue and because many owners provide the local cops with a bit of extra cash, drinks and food.

In regards to police training on the rights of sexual minorities, the same document indicates that in November 2001, the Central Prefecture of Santiago agreed to participate in an education program on rights of sexual minorities created by MOVILH and aimed at police officers (MOVILH Nov. 2001). Juan Freire, the director of MOVILH, stated that it was the first time that Chilean police accepted such a dialogue with gays and lesbians. In January 2002, the civil police agreed to investigate the distribution of homophobic pamphlets in Santiago's Bellavista neighbourhood, at the request of MOVILH.

Based on the documentary evidence, the panel finds that the police do not generally bother gays in the gay clubs, and the state is making serious efforts to provide training to the police on the rights of sexual minorities in Chile.

In regards to acceptance of gays by the general public, the same document⁸ states that, in Santiago, the gay scene has exploded in the last four years, creating venues rivalling those of medium sized U.S. cities.

⁷ Exhibit R/A-1, Response to Information Request, CHL39413.E, August 6, 2002.

⁸ Exhibit R/A-1, Response to Information Request, CHL39413.E, August 6, 2002.

And later, the same document indicates that according to another guide posted on the Chicago-based GLBT Events Website, while Santiago's gay life is "developing", this city "has the best gay and lesbian life in the country".

In regards to the alleged mistreatment he received from his soccer friends and the general public in Chile, the documentary evidence indicates that:

... To that end, Chile might not be described as gay-friendly, but rather gay-tolerant. With a population in which roughly 40% are under 30, however, things are quickly changing for the better. This is especially true in Santiago, where the gay scene has exploded in the last four years, creating venues rivaling those of medium sized U.S. cities (31 Oct. 2001).⁹

And later:

... "[t]he scene in Santiago is fairly open and similar to most developed countries" (11 Dec. 2000).¹⁰

And later:

A 17 March 2002 article from *La Tercera* states that in the last five years, more than a dozen bars, discotheques and restaurants catering to homosexuals had opened around Forestal park in Santiago. The owner of a club called Bokhara stated that the increasing number of such venues was due to a change in mentality among the youth of the country, which was more open than that of ten years ago (*La Tercera* 17 Mar. 2002). However, the article mentions that such places are scarce outside of Santiago (*ibid.*).¹¹

⁹ Exhibit R/A-1, Response to Information Request CHL39413.E, 6 August 2002.

¹⁰ *Ibid.*

¹¹ *Ibid.*

Another document¹² presented by counsel at the hearing indicates that: as in many Latin countries, social life in Chile is more liberal than its laws. Santiago, the biggest city, offers dozens of gay and lesbian bars, and their patrons are not shy about their sexuality.

In regards to the Gay Pride march and the newspaper being published by the homosexual community, the document¹³ indicates that:

On 16 September 2001, a Gay Pride march was held in Santiago's Plaza Italia with over 2,000 participants (*El Mostrador* 19 Sept. 2001; *Weekly News Update* 23 Sept. 2001).¹⁴

And later:

On 13 June 2002, Inter Press Service (IPS) mentioned that *Opusgay*, the "first newspaper put out by Chile's homosexual community," had started to be distributed in Santiago. *Opusgay* reported on 24 June 2002 that the "Second Cultural Demonstration for Diversity and the End of Discrimination" (*Segunda Muestra Cultural por la Diversidad y la No Discriminación*), which had gathered 3,000 people the previous year, was slated to be held on 29 June in Santiago's Plaza de Armas. This event, coordinated by the Movement of Integration and Liberation of Homosexuals (Movimiento de Integración y Liberación Homosexual, MOVILH), was to gather various groups, such as indigenous peoples, youth, women, gays, lesbians and transvestites (*Opusgay* 24 June 2002).¹⁵

¹² Exhibit C-2.

¹³ Ibid.

¹⁴ Ibid.

¹⁵ Ibid.

Based on the documentary evidence, the panel also finds that Chilean Society is becoming more aware, open and tolerant to gays and lesbians particularly in Santiago where the claimant lived.

In regards to legal redress available, the documentary evidence indicates that the sexual minorities have two avenues to obtain help from the legal system in Chile.

The first one, the "appeal for legal protection," (*recurso de amparo*) is used when a right such as individual freedom or physical or psychological security has been threatened (*ibid.*). With the help of a lawyer, the appellant must fill out a form detailing the events (*ibid.*). The form will have to be presented to the court of appeal (*Corte de apelaciones*) which will have 24 hours to render a decision on the procedures to be followed (*ibid.*).¹⁶

Secondly:

When constitutional rights are breached by an action or omission (for instance, freedom of speech and religion, freedom of association, freedom of property, right to life and to the individual physical or psychological integrity, etc.), it is possible to present an "appeal of protection" (*Recurso de Protección*) to the court of appeal (*Corte de apelaciones*) (*ibid.*, section 1.3.3). If allowed, the court must decide immediately on any measures to protect the appellant (*ibid.*). This appeal requires greater precision in its wording, and therefore legal counselling for its submission is advised (*ibid.*).¹⁷

Furthermore, on December 23, 1998, Chile's Official Daily of the Republic published Law 1047 which modifies the Penal Code for Criminal Procedures and Law 18216 regarding Punishment in Chile. The new legislation repealed the section that

¹⁶ Response to Information Request CHL37939.E, dated 31 January 2002.

¹⁷ *Ibid.*

criminalized the same-sex relations between consenting adults and the age of consent for same sex activities was set at 18.¹⁸

Based on the documentary evidence, the panel finds that there is legal protection for sexual minorities in Chile and that the state is making serious efforts to provide legal protection to individuals like the claimant in Chile. The panel finds that the aforementioned documentary evidence contrasts with the claimant's allegations that his lawyer told him that there was no legal recourse for sexual minorities in Chile.

The panel finds that, in this case, the claimant simply did not reasonably exhaust all courses of action open to him in attempting to avail himself of state protection in Chile. Since Chile is a democracy and since there is no persuasive evidence that suggests that the police and the other state authorities would not have offered him protection, the claimant, consequently, has not met the burden of establishing "clear and convincing proof" of lack of state protection for individuals like him in Chile.

Therefore, based on the totality of the evidence, the panel finds that there is adequate, if not perfect state protection for the claimant should he return to Chile.

CONCLUSION

Since adequate state protection is available to the claimant in Chile, the panel finds that the claimant is neither a Convention refugee nor a person in need of protection

¹⁸ Exhibit R/A-1, The International Lesbian and Gay Association.

within the meaning of section 97(1)(a) and 97(1)(b) of the Immigration and Refugee Protection Act.

Accordingly, the panel determines that [redacted] is not a person in need of protection. Therefore, the Refugee Protection Division rejects his claim for refugee protection.

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"S. Alidina"
S. Alidina

DATED at Toronto, Ontario this 1st day of September 2004.