



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
TA5-01012

s.19(1)

CLAIMANT(S)

DEMANDEUR(S)

(a.k.a.)

DATE(S) OF HEARING

September 1, 2005

DATE(S) DE L'AUDIENCE

DATE OF DECISION

September 9, 2005

DATE DE LA DÉCISION

CORAM

S. Alidina

CORAM

FOR THE CLAIMANT(S)

**Hart A. Kaminker
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 Costa Rica. He claims refugee protection pursuant to sections 96, 97(1)(a) and 97(1)(b) of the *Immigration and Refugee Protection Act (IRPA)*.

ALLEGATIONS

The claimant alleges that, as a result of his sexual orientation, that being, a bisexual male, he was discriminated against by the general public. On 2002, the police came to the discotheque where he worked looking for a group of drug dealers. The claimant gave the police names of the individuals involved in drugs, and, as a result, they were arrested and jailed. After they served their terms and were released from jail, they physically abused him and issued death threats against him. He filed complaints against them with the police but received no help from them, since police do not provide protection to individuals who are gay. s.19(1)

ANALYSIS

The determinative issue in this case is the availability of state protection to the claimant in Costa Rica.

Based on the evidence adduced, and for the following reasons, the panel finds that there is adequate state protection for the claimant in Costa Rica.

The panel finds that the claimant has not met the burden of establishing "clear and convincing" proof of lack of state protection in the country of origin.

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 lack of state protection" in the country of origin. 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"² is not clear and convincing proof of the state's inability to protect its citizens, 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 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 of the state in question: the more

¹ Canada (Attorney General) v. Ward, [1993] 2 S.C.R. 689, 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.).

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

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

The Chairperson has the authority under s. 159(1)(h) of the *Immigration and Refugee Protection Act*⁵ to identify decisions of the Board as *Jurisprudential Guides* to assist members in carrying out their duties. The Board's *Policy on the Use of Jurisprudential Guides* is available on the Board's website.⁶ Effective May 15, 2003, the Chairperson identified two decisions of the Refugee Protection Division as *Jurisprudential Guides*.⁷ Members are to consider and follow these decisions when determining claims in which the availability of state protection in Costa Rica is the determinative issue in claim profiles of risk due to sexual orientation or general criminality.⁸ The first question the panel has to determine is whether decision TA0-15870 applies in this case.

The panel determines that the facts and the evidence regarding country conditions in this claim are sufficiently close to RPD decision TA0-15870.⁹ This is because the

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

⁵ S.C. 2001, c. 27.

⁶ http://www.irb.gc.ca/en/about/policies/jurisguides_e.htm

⁷ RPD TA0-15870, 2003 and RPD TA2-14980, 2003.

⁸ http://www.irb.gc.ca/en/about/policies/jurisguides_e.htm

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⁹ Exhibit R/A-1, Jurisprudence Guidelines Documentary Package, May 2003, Costa Rica – Criminality, item A, 20 March 2003.

harm the claimant fears on account of his sexual orientation emanates from drug traffickers who were targeting him because he had given evidence against them to the police. The claimant also fears discrimination from the general public and the police who do not provide protection to the gay population in Costa Rica. The profile of the claimant, based on his sexual orientation and the alleged agents of persecution, in this claim, are substantially similar to that described in the *Jurisprudence Guide*. Also, the documentary evidence entered in this claim is the same as that entered in the *Jurisprudence Guide*. In addition, the panel also considered the RPD Information Package of April 2003 and the US Department of State Report 2004 in Exhibit R/A-1.

In this case, the claimant testified that he fears members of an unknown gang who were involved in drug trafficking. In addition, he indicated that, because he was bisexual, he was discriminated against by the general public and police who do not provide assistance to the gay population in Costa Rica.

With regards to obtaining state protection, the claimant testified that he contacted the police on two occasions but received no help from them. The first time he contacted the police was after he was pushed around on -- --, 2002. The police came to his place of work but did not offer any protection. The second time he contacted the police was when his friend and he were beaten by unknown individuals sent by the drug traffickers. This time the police took a report of the incident but did nothing to provide protection. The claimant admitted that failing to obtain assistance from the police, he did

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not make any attempt to seek redress, regarding the mistreatment he had received from the drug traffickers, from state agencies like the Ombudsman's office, the Office of Judicial Investigations and the courts. He admitted that he had no knowledge about the existence of the Ombudsman's office in Costa Rica, and he did not go to the courts because it takes a long time to get decisions from the courts. Instead, he elected to leave Costa Rica to seek international protection.

The documentary evidence¹⁰ indicates that Costa Rica is a longstanding, stable constitutional democracy. The Ministry of Public Security and the Ministry of the Presidency share responsibility for law enforcement and national security. There are other state agencies the claimant could have sought assistance from, if he felt that police were not assisting him. The claimant, living in a democratic country, is obliged to seek help from the state agencies of the country of his nationality first prior to seeking international protection. In this case, the panel finds that the claimant elected not to avail himself of state protection from the state agencies other than the police. He did not file a formal complaint with the Ombudsman's office against the police for their misconduct and against the drug traffickers and the general public for mistreating him. The panel finds that the claimant, living in a democracy, simply did not reasonably exhaust all courses of action open to him in attempting to avail himself of state protection in Costa

¹⁰ Exhibit R/A-1, item 2.1, p. 32, Costa Rica: Country Reports on Human Rights Practices for 2002, US Department of State, March 31, 2003.

Rica. Therefore, the panel finds that the claimant has not discharged the onus of showing clear and convincing proof of the state's inability or unwillingness to protect him.

The availability of state protection for bisexuals like the claimant has been comprehensively analysed in the *Jurisprudential Guide*, RPD decision TA0-15870,¹¹ and the reasoning applies to the facts of this claim. As a result, in this case, the panel adopts the reasoning as well as state protection in TA0-15870.

Based on the reasoning and availability of state protection in TA0-15870, the panel finds that adequate state protection is available to individuals in similar situation as the claimant in Costa Rica.

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 being targeted by criminals in Costa Rica. In this case, the panel prefers to give more weight to the documentary evidence describing the country conditions produced by reliable sources having no interest in the outcome of this case, than to the written evidence and the oral testimony given by the claimant. Based on the documentary evidence, the panel does not believe that the claimant would not receive assistance from state protection agencies should he return to Costa Rica.

¹¹ Exhibit R/A-1, Jurisprudence Guidelines Documentary Package, May 2003, Costa Rica - Sexual Orientation, item A, Schlanger, 31 March 2003.

For example, regarding law enforcement efforts against drug traffickers, the documentary evidence¹² indicates that the Judicial Investigative Police under the umbrella of the Supreme Court and the Ministry of Public Security's Drug Control Police operates a small but highly professional Narcotics Section which specialises in investigating international drug trafficking. The Drug Control Police investigates both domestic and international drug smuggling and distribution and are responsible for airport interdiction as well as land-based interdiction at the primary ports of entry. Both entities routinely conduct complex investigations of drug smuggling organisations, resulting in arrests and the confiscation of cocaine and other drugs, using the full range of investigative techniques permitted under the country's counter-narcotics statutes.

In this case, the police took action against the drug dealers by arresting them and having them sentenced after they received evidence regarding their activities from the claimant on . . . 2002. Based on the evidence adduced, the panel does not find s.19(1) lack of state protection against drug traffickers.

In regards to police presence, police training and protection against criminals, the documentary evidence indicates that:

With regard to homicide rates, Jorge Rojas, the director of the OIJ, reported that the rates had decreased in 2001 from the previous year (*La Nacion* 6 Jan. 2002). Rojas attributed the decrease to an improved and more visible police presence. These results might also reflect the fact that since 1997, a policy has ensured improved police training, a better

¹² Exhibit R/A-1, item 2.2, International Narcotics Control Strategy Report, March 2003.

quality community police presence, and an increase in the number of officers as well as technical equipment.¹³

And later:

In May 2002, Rojas announced that there was a decrease in personal assaults, home robberies, car and livestock theft in the first trimester of 2002 compared to the first trimester in 2001.¹⁴

Based on the documentary evidence, the panel finds that the state authorities are making serious efforts to provide visible police presence, and provide training to the police to contain crime in Costa Rica.

In regards to whether investigations and prosecutions of violent crimes such as robberies, assaults and death threats are carried out against offenders, the documentary evidence indicates there is availability of state protection against such crimes. The documentary evidence indicates that:

A total of 3,886 trials were held throughout Costa Rica in 2000; 2,672 of the trials resulted in sentences for offenders, while in 1,214 trials, the offenders were acquitted. ...

In 2000, low-level courts (*juzgados penales*) in Heredia had received 4,184 cases, while 4,639 cases had been concluded. ...

With regards to specific crimes, 477 persons were sentenced for aggravated robbery (*robo agravado*) in Costa Rica in 2000.¹⁵

¹³ Exhibit R/A-1, Response to Information Request CRI40288.E, November 7, 2002.

¹⁴ Ibid.

¹⁵ Ibid.

Based on the documentary evidence, the panel finds that the state authorities are making serious efforts to investigate and prosecute criminals who issue death threats in Costa Rica.

In regards to the quality of judicial system in Costa Rica, the *Central America Report* stated that:

Costa Rica is the most advanced country in the region (Central America) regarding penal reform and prison conditions. Because the right to a speedy trial is enforced, Costa Rican prisons have the fewest number of non-sentenced inmates in all Central America. According to Tidball, this is due to a properly functioning and well-funded judiciary (which receives 6% of the national budget).¹⁶

The panel does not have any persuasive evidence to suggest that the claimant would not have received help from the judiciary had he sought such help in Costa Rica.

The documentary evidence indicates that there is an Ombudsman's office where the citizens could complain about police misconduct as well as complain about violations of their human rights. In regards to the Ombudsman's office, the documentary evidence indicates that:

An effective mechanism for lodging and recording complaints of police misconduct exists. The Ombudsman's office served as a recourse to citizens who had complaints about violations of their civil and human rights and about deficiencies in public and private infrastructure. It investigated complaints and, when appropriate, initiated suits against officials.

The Ombudsman's office received 44 reports of police abuse of authority or misconduct. At year's end, 24 reports were still being investigated, 12 were determined to be legitimate, and 8 were determined to be without

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Exhibit R/A-1, Response to Information Request CRI40288.E, November 7, 2002.

merit. This compared with 21 legitimate complaints received in 2001 and 52 in 2000.¹⁷

Based on the documentary evidence, the panel does not have any persuasive evidence to indicate that the Ombudsman's office would not have ensured that adequate protection is available to the claimant in Costa Rica.

If the claimant felt that police were unable or unwilling to help him, it is reasonable to expect him to have filed a report with the Ombudsman's office to complain about the police inefficiency and police misconduct. As well, the claimant could have sought help from the Costa Rican judiciary. He simply did not reasonably exhaust courses of action open to him in attempting to avail himself of state protection in Costa Rica.

The panel can reasonably infer from the above documentary evidence that the Costa Rican state authorities are making "serious efforts" to protect its citizens from criminals. The panel finds that the claimant has not rebutted the presumption of state protection with "clear and convincing evidence" that the state is not capable of protecting persons like him in Costa Rica, given his unwillingness to seek protection with agencies other than the police. The panel finds that there is adequate, if not perfect, state protection available to the claimant in Costa Rica.

¹⁷ Exhibit R/A-1, RPD Information Package – Costa Rica, General Information, Updated April 2003, item 2.1, US Department of State, Costa Rica: Country Reports on Human Rights Practices for 2002, March 31, 2003.

CONCLUSION

Since the panel finds that adequate state protection is available to the claimant, there is not a serious possibility that the claimant would face persecution, a risk to his life, a danger of torture, or a risk of cruel and unusual treatment or punishment should he return to Costa Rica.

Accordingly, the panel determines that _____ is neither a Convention s.19(1) refugee nor a person in need of protection. The Refugee Protection Division, therefore, rejects his claim for refugee protection.

"S. Alidina"
S. Alidina

DATED at Toronto, Ontario this 9th day of September 2005.