



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
TA5-09633

CLAIMANT(S)

DEMANDEUR(S)

DATE(S) OF HEARING

May 18, 2006

DATE(S) DE L'AUDIENCE

DATE OF DECISION

October 2, 2006

DATE DE LA DÉCISION

CORAM

Puttaveeraiah Prabhakara

CORAM

FOR THE CLAIMANT(S)

N/A

POUR LE(S) DEMANDEUR(S)

REFUGEE PROTECTION OFFICER

K. Fainbloom

AGENT DE PROTECTION DES RÉFUGIÉS

DESIGNATED REPRESENTATIVE

REPRÉSENTANT DÉSIGNÉ

MINISTER'S COUNSEL

CONSEIL DE LA MINISTRE

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INTRODUCTION

is a 49-year-old married male citizen of Malaysia who claims to be a Convention refugee because of a well-founded fear of persecution at the hands of the police authorities in Malaysia by reason of membership in a particular social group, namely, married men who practice bi-sexuality. Mr. alleged that the police authorities in Malaysia are actively seeking him to arrest him. The claimant stressed in his oral testimony that he fears to return to Malaysia because of the persecution that he would face as a result of the revelation of his alleged bisexuality.

In addition, I considered whether he is a person in need of protection either a) by a danger of torture or b) by a risk to his life or to cruel and unusual treatment or punishment in China.

The hearing was held pursuant to sections 96, 97(1) (a) and 97(1) (b) of the Immigration and Refugee Protection Act (IRPA). The evidence consisted of the claimant's oral testimony, his Personal Information Form¹ (PIF), and documentary material filed by the claimant² and the Refugee Protection Officer (RPO).³ The panel considered the RPO's observations and the claimant's submissions, rendered orally at the end of the hearing, in its deliberations prior to arriving at the decision.

¹ Exhibit C-1.
² Exhibits C-2.
³ Exhibits R/A-1 and R/A-2.

PRELIMINARY MATTERS

Counsel of record Mr. Calvin Houg requested at the outset of the hearing that he be permitted to withdraw his services as the claimant's representative. Apparently, there was a dispute regarding the retainer. The claimant stated that he would have no objection to the withdrawal of his counsel's services and that he would represent himself. The claimant did not seek postponement of the hearing.

The panel granted counsel's request and took a short break of about twenty minutes. The panel directed the RPO during the break to brief the claimant on the nature of the proceedings and to review the relevant documentary evidence that would be entered into evidence. When the hearing resumed after the break, the RPO gave a report respecting his briefings to the claimant. According to his report, matters pertaining to his PIF, nature of the proceedings, his personal documents and documents related to country conditions being entered into evidence and the familiarity with relevant country conditions were covered. In addition, I, as the lone member of the panel, gave detailed instructions respecting refugee protection law, the hearing process and what is expected of the claimant in establishing his claim for refugee protection. The legal issues that govern the hearing and the areas of concern for the panel were told and explained to the claimant. The claimant's testimony was given through an accredited interpreter proficient in Cantonese and English languages.

ALLEGATIONS

The allegations of the claimant are a matter of record on the PIF; therefore, the panel is not going to repeat them.

DETERMINATION

After considering all of the evidence, the panel determines that the claimant is not a Convention refugee, as he does not have a well-founded fear of persecution for a Convention ground in Malaysia, nor is he a person in need of protection, for the following reasons. The panel determines further that there is no credible basis to the claim for refugee protection.

The panel finds that there is not a serious possibility that the claimant would face a risk to life, or risk of cruel and unusual treatment or punishment should the claimant return to Malaysia. Nor are there any grounds, on a balance of probabilities,⁴ to believe that he will be subjected personally to a danger of torture.

ISSUES

At the outset of the hearing, the following issues were identified: credibility; identity - personal and his sexual orientation; delay in making the refugee claim after his

⁴ Li, Yi Mei v. M.C.I. (F.C.A., no.A-31-04), Rothstein, Noel, Malone, January 5, 2005, 2005 FCA 1.

arrival, failure to claim elsewhere, re-availment as elements of the well-founded subjective fear of persecution; agents of persecution; state protection, Internal Flight Alternative (IFA) in Kuala Lumpur as elements of the objective basis. The claimant's personal identity as a citizen of Malaysia was accepted by the panel. This was established by the claimant's genuine Malaysian passport and his National Identity card (NIC).⁵

ANALYSIS

Credibility Findings

The claimant asserted, when questioned by the RPO right at the outset of the hearing, **that the first time he realized his bisexuality was in the year 1996 when he was in England** (highlighted for emphasis). Allegedly, he developed homosexual relationship with a certain _____ in England that lasted for two years before he returned to Malaysia in _____ 1999. The claimant went to England as a visitor in 1996, but stayed illegally as he found work as a kitchen help in a restaurant where he met _____

The panel citing the special knowledge that has been acquired by sitting on hundreds of refugee claims asked towards the end of the hearing why the claimant was not aware of his attraction for other men after attaining his puberty and why his homosexuality did not manifest until he was nearly thirty-nine years old. The claimant was evasive in his responses; he stated that he was aware of his homosexuality in Malaysia but did not have an opportunity to practice until he came to England. The panel

⁵ Exhibits C-2 and R/A-2 – certified true photocopies of the passport pages.

noted that this was not what the claimant stated when he was asked by the RPO. It was open to the claimant to mention that he had the urges as a young man and that he knew of his homosexuality at an early age when he was in Malaysia. The panel finds his failure to acknowledge his awareness of homosexuality the first time he was asked about it detracts from his overall credibility respecting his bisexuality. Notwithstanding the above anomaly, the claimant was unable to provide any explanation that the panel could accept as reasonable as to why he did not seek protection in England despite being resident there for more than two and a half years. He knew that bisexuality was illegal and punishable by imprisonment in Malaysia. His explanations were varied, some of which were contradictory. One of his explanations was that he had no information whether bisexuality was tolerated or not in England. The panel draws a negative credibility inference from his failure to make a refugee claim in England; he did not even make any enquiries how he could stay permanently in England.

More importantly, it was the recurrent assertion of the claimant that he could not return to Malaysia because the police are continuously looking for him. The claimant testified that he learned from his sister that police went to his house frequently. Apparently, his sister has divulged to his wife the claimant's bisexuality and why he had to leave Malaysia on [redacted] 2000, within three days after being caught red-handed in a sexual act with [redacted]. Purportedly, the claimant never returned to his home after running away from [redacted]'s home following the discovery of his sexual

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relationship with [redacted] by [redacted]'s brother. While he was staying with a friend, his sister made all the flight arrangements for him to fly to Canada. It was put to the claimant why he did not mention the frequent police visits in the written PIF narrative. The panel finds his explanations irrelevant and ridiculous noting his statement that he could not return because of the police interest in him. His explanations were: the story happened in 2000; he telephones his sister occasionally; and PIF was submitted in the year 2005. The claimant testified that he learned as recent as a few months back that the police were still asking about him and that he could not return to any part of Malaysia because of the nation-wide arrest warrant for him. The claimant has failed to provide any supporting documents to corroborate that the police are still looking for him. The panel finds it highly implausible that the police would be still interested in the claimant, if at all they are interested, over a complaint of homosexual act that was made five years back. Would the police expend their resources over an alleged single transgression that happened five years ago that was not caught during the act by the police? The panel does not think so. Given all of the above, the panel finds that the claimant is not credible in this area of his evidence.

Supporting the above finding is the claimant's inability to provide a persuasive and consistent account of the event that precipitated his hurried departure. To begin with, he stated the date of the event erroneously as [redacted] 2000. He corrected it to [redacted], 2000 on being asked whether he was sure of the date and the month. The

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claimant testified that [redacted]'s brother hit both of them. Allegedly, [redacted] intervened to stop his brother from beating him severely. This is contradicted by his written PIF narrative that says that [redacted]'s brother wanted to hit him and that [redacted] held back his brother and let him run away. Further, no credible evidence was produced to indicate that the police took any action against [redacted]. Purportedly, the claimant has had no contact with [redacted] since that fateful day of the event.

Delay in Making the Refugee Claim

For a claim for refugee protection to succeed, the claimant must demonstrate that he has a fear in his own mind that is well-founded. How can one establish that a fear has valid basis if the fear itself does not exist? Madam Justice Tremblay-Lamer recognised the importance of the subjective fear in *Kamana*⁶ wherein she stated, in part, as follows:

The lack of evidence going to the subjective element of the claim is a fatal flaw **which in and of itself** warrants dismissal of the claim, since both elements of the refugee definition – subjective and objective – must be met [emphasis added].

Further, the panel wished to cite Mr. Justice Simpson who ruled in

Cruz,⁷ the following:

Delay is an important factor in the assessment of a refugee claim because it addresses the existence of a subjective fear of persecution. This is an essential element of a Convention refugee claim. *The finding with respect to delay was therefore dispositive of the Applicant's claim.* The Board did not accept that he had the required subjective fear. It considered his explanations for the delay but rejected them as unsatisfactory. There were other aspects of the Board's decision that were open to criticism...However, even if these conclusions had involved reviewable errors, they would have been inconsequential *in view of the Board's*

⁶ *Kamana, Jimmy v. MCI (FCTD, IMM-5998-98)*, Tremblay-Lamer, September 24, 1999
⁷ *Cruz, Fernando Rodriguez v. M.E.I. (F.C.T.D., no. IMM-3848-93)*, Simpson, June 16, 1994;
Cruz, Fernando Rodriguez v. M.E.I. (F.C.T.D., no. IMM-3848-93), Simpson, January 31, 1995.

determination that the Applicant lacked the necessary subjective fear [emphasis added]

This panel is also mindful of the *Huerta*⁸ decision that delay in making a refugee claim is not “a decisive factor” but “a relevant element” for assessing the credibility of the alleged actions and deeds of a claimant. Depending upon the circumstances of the case, the “relevant element” gains added significance. In the opinion of the panel, the circumstances in the case at hand warrant significant weight to be given to the delay in making the claim for refugee protection.

The claimant made a hurried departure from Malaysia within three days of the alleged discovery of his homosexuality and the subsequent complaint to the police. He arrived in Canada on 2000 and did not claim refugee protection until .

2005. Thus, there was an inordinate delay of four years and seven months, during which period of time he worked illegally in Canada. His visitor's status had expired within six months after his arrival in Canada⁹ and no credible evidence was presented that he attempted to get his visitor's visa extended. His explanations for the delay were varied. He did not want to reveal his sexual orientation; he would wait if things would get normalized in Malaysia for him to return; he was given advice to wait for the validity of his Malaysian passport to expire. The panel rejects his first explanation considering his later testimony that he was visiting the establishments such as pubs, saunas catering to the homosexuals in

⁸ *Huerta v. Canada (Minister of Employment and Immigration)* (1993), 157 N.R. 225 (F.C.A.).
⁹ Exhibit C-1, answer to question 11 on page 6.

Toronto since 2003 to actively seek and find a partner. He maintained steadfastly that he was monitoring the situation back home to decide whether it was safe to go back. But, the point is that seeking and obtaining refugee status would not have prevented him to go back to Malaysia when and if he found out that the conditions had changed to his liking. The validity of the claimant's Malaysian passport expired on 2004; yet, the claimant did not apply for refugee status for nearly another year. His explanation was that he was still waiting to ascertain whether the police were still looking for him. His explanations does not make any sense in light of his statements that he continued to hear from his sister that he was being actively sought by the police as current as a few months prior to the hearing date. It is of note that the claimant was putting himself at great risk of being caught and deported to Malaysia by his failure to even make enquiries, let alone applying for refugee status, as to how he can stay in Canada legally.

For all the above reasons, the claimant had unequivocally demonstrated a conduct that is totally inconsistent with his alleged fear of arrest and imprisonment by the Malaysian police. The courts have ruled that a conduct not consistent with a well-founded fear of persecution could be construed as indicative of a lack of subjective fear.¹⁰ Accordingly, the panel draws a negative credibility inference from the inordinate delay in making the refugee claim respecting his allegations that he is wanted by the police because of the alleged

¹⁰ *Radulescu, Petrisor v. M.E.I.* (F.C.T.D., no. 92-A-7164), McKeown, June 16, 1993.
Caballero, Fausto Ramon Reyes v. M.E.I. (F.C.A., no. A-266-91), Marceau, (dissenting) Desjardins, Létourneau, May 13, 1993.

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exposure of his homosexuality. The claim for refugee protection should, therefore, be rejected on this count alone.

Documentation

The claimant submitted documentation in the form of testimonial letters that speak of his volunteer work for the cause of helping victims of the dreadful Aids disease and the disadvantaged people.¹¹ While the panel commends the claimant for his voluntarism and generosity, these acts on the part of the claimant have no relevance to his claim for refugee protection. As such, I do not give any probative value to these documents.

Objective Basis

Even if I were to find the claimant credible respecting his alleged bisexuality that led to him being caught in a homosexual sexual act, which finding I did not make, I determine that, on a balance of probabilities, the objective basis do not support his contention that the police would persecute him. As he himself stated, he may face societal discrimination, but not persecution at the hands of his relatives and general populace.

The panel notes in the latest documentary evidence that the Malaysian penal code prohibits homosexuality.¹² As per Section 377, the punishment is caning and imprisonment up to twenty years. I take guidance from the Federal Court rulings that the mere existence of an oppressive law does not constitute persecution *per se*. Further, it

¹¹ Exhibit C-2.

¹² Exhibit R/A-2, RIR No. MYS42857.E, dated 13 August 2004.

has been ruled that sporadic implementation of an oppressive law does not put it into the ambit of persecution. The above cited document also states that the laws are rarely enforced and that, in general, homosexuals are “left alone if they keep to themselves.”¹³ The same document goes on to say that homosexuality is loudly condemned but widely practiced. It appears on the average approximately 100 men are arrested annually in Malaysia by the morality police for “attempting to commit homosexual acts.” There is nothing in the documentary evidence to indicate that the police would take complaints against sightings of homosexual acts in private so seriously that they would pursue to arrest the culprits. As a matter of fact, the same document goes on to say that there are no specific reports of arrests, convictions and/or charges brought against lesbians and homosexuals, particularly from between January 2002 and August 2004. When these were put to the claimant for his comments, he did not rebut them. He acknowledged that there is no problem as long as they are not caught in the sexual act. Based on the documentary evidence, the panel finds that, on a balance of probabilities that the police would not come after people who practice bisexuality, particularly if they are discreet in their homosexual relationship.

In the case at hand, it would not be unreasonable for the claimant to relocate to : to get away from his relatives and friends and settle down with his wife and children, if his wife accepts him back. Even otherwise, he could get another wife and

¹³ Ibid.

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continue his bisexual life style discreetly. In other words, the claimant has a viable IFA in Malaysia, specifically in a big metropolis with a large homosexual community with lots of clubs that exist serving this community for the purpose of fraternity and mutual support.

Summary

For all of the aforementioned reasons as discussed, I find that the claimant is not bisexual, as he alleges. It is my finding that his entire story about him being a bisexual is a fabrication contrived solely for the purpose of buttressing the refugee claim. The panel recognizes, on the other hand, that homosexuals, in general, face a lot of discrimination in Malaysia. However, in the case at bar, the debate over whether bisexuals are discriminated or persecuted in Malaysia is moot, given the panel's finding that the claimant is not a bisexual.

For the same reasons I found the claimant not credible, I also find that the claimant is not a person in need of protection in that there exist no grounds, on a balance of probabilities,¹⁴ to believe that he will be subjected personally to a danger of torture nor is there a serious possibility that he will be subjected personally to a risk to his life or to

¹⁴ Li, Yi Mei v. M.C.I (F.C.A., no.A-31-04), Rothstein, Noel, Malone, January 5, 2005, 2005 FCA 1.

cruel and unusual treatment or punishment in Malaysia.

Conclusion

For the reasons as discussed in the above analysis and after considering all of the evidence, the Refugee Protection Division finds that the claimant is not a Convention refugee, nor is he a person in need of protection.

Further, I determine that there is no credible basis to the claimant's claim for refugee protection.

"Puttaveeraiah Prabhakara"
Puttaveeraiah Prabhakara

DATED at Toronto, Ontario, this 2nd day of October, 2006.