



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  
TA3-11547

CLAIMANT(S)

DEMANDEUR(S)

DATE(S) OF HEARING

12 January 2005

DATE(S) DE L'AUDIENCE

DATE OF DECISION

21 January 2005

DATE DE LA DÉCISION

CORAM

William T. Short

CORAM

FOR THE CLAIMANT(S)

Michael Campbell  
Barrister and Solicitor

POUR LE(S) DEMANDEUR(S)

REFUGEE PROTECTION OFFICER

K. Spooner

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DESIGNATED REPRESENTATIVE

REPRÉSENTANT DÉSIGNÉ

MINISTER'S COUNSEL

CONSEIL DE LA MINISTRE

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s.19(1)

is a citizen of Chile, who claims to be a Convention refugee and a person in need of protection within the meaning of sections 96 and 97(1) of the Immigration and Refugee Protection Act.

#### **ALLEGATIONS**

The claimant alleges that he is a gay or bi-sexual man and would be in danger from his brother-in-law, should he return to Chile.

#### **DETERMINATION**

The panel accepts the valid Chilean passport as tendered into evidence and finds that the claimant is a citizen of Chile.<sup>1</sup> The panel accepts the claimant's evidence on point and finds that he is a gay or bi-sexual man. The panel further finds that the claimant is not a Convention refugee and is not a person in need of protection.

#### **ANALYSIS**

The panel finds that the claimant, as a gay or bi-sexual man, is a member of a particular social group and he has accordingly demonstrated a linkage to one of the grounds, which describe a Convention refugee.<sup>2</sup> The panel has, however, found the claimant not to be a Convention refugee because he failed to seek the protection of the law enforcement authorities in Chile, prior to seeking refugee protection in Canada.

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<sup>1</sup> Exhibit R/A-2

<sup>2</sup> Canada (Attorney General) v. Ward [1993] 2 S.C.R. 689

The allegations of fact made by the claimant can be briefly summarised. He testified that he had married his wife through societal pressure and that he had entered into his marriage so that he would appear more "normal" to the outside world. His wife knew why the claimant had married her and she accepted that fact.

The claimant further testified that in 1997 his wife's brother became aware of his sexual orientation and became hostile. In 1998, the couple's daughter came to live with them and the attitude of the claimant's brother-in-law became worse.

The claimant testified how on , 2002 the family had a birthday party for the couple's daughter. At that time, the brother-in-law, who was not welcome in their house, burst in and began to threaten the claimant. The claimant was assaulted by his brother-in-law and threatened that he would be killed, should he not leave his wife.

No report was made to the police.

On 2002, the claimant and his wife and daughter were at home in the claimant's country house, when the brother-in-law burst in. After insulting the claimant, he set fire to the house. The claimant and his family fled outside and although the claimant summoned the local volunteer fire brigade on his cellular telephone the dwelling was completely consumed by the time that they arrived. Although the claimant told the firefighters what had happened, he did not report the matter to the police.

The claimant also related how his brother-in-law had screamed insults at him from the street, while he was staying with friends in Santiago in of 2003. The

claimant also testified that he had subsequently been beaten up twice on the street by his brother-in-law after the incident at the friend's house.

None of these incidents was reported to the police.

After the above incidents, the claimant said that he went into hiding. He came to Canada on 2003.

The claimant said that he did not seek the protection of the police because the police in Chile are semi-military and on a number of occasions he had the opportunity to observe how they mistreated gays. He went on to say that his wife thought it better not to proceed against her brother, as no one had been hurt and the building that was destroyed was of minimal value. It would be better to pursue the alternative solution of the claimant leaving the country.

In *Ward*,<sup>3</sup> the Supreme Court reiterated the principle that refugee protection is a surrogate and can only be properly sought after the claimant has first sought the protection of his own state. The Court went on to say that there is an underlying presumption that a state can protect its citizens, which presumption may only be rebutted by clear and convincing proof to the contrary. Where a claimant has not approached his own state for protection in circumstances where it was objectively unreasonable for him not to have done so, the claim will fail. Furthermore, the Federal Court of Appeal in

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<sup>3</sup> *Ward, supra*

*Villafranca*<sup>4</sup> held that the protection offered by a state to its citizens need not be perfect, but that the state must undertake serious efforts to protect its citizens.

In *Kadenko*,<sup>5</sup> the Federal Court of Appeal held that when the state is a democratic one the claimant must do more than simply show that he or she went to see some members of the police force and that his or her efforts were unsuccessful. The burden of proof that rests on the claimant is directly proportional to the level of democracy in the state in question: the more democratic the state's institutions, the more the claimant must have done to exhaust all the course of action open to him.

A local refusal to provide protection is not a state refusal in the absence of evidence of a broader state policy to not extend state protection.<sup>6</sup>

Moreover, a claimant must take all steps reasonable in the circumstances to seek state protection in his home country.<sup>7</sup> Indeed it has been held that in taking reasonable steps to seek protection in his home country, a claimant must exhaust all avenues of protection, in addition to police protection.<sup>8</sup>

At this point it is appropriate to look at the political situation in Chile in general and the position of gays in particular.

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<sup>4</sup> Canada (Minister of Employment and Immigration) v. Villafranca (1992), 18 Imm.L.R. (2<sup>nd</sup>) 130 (F.C.A.)

<sup>5</sup> M.C.I. v. Kadenko, Ninal (F.C.A., no. A-388-95) at pages 2-3

<sup>6</sup> Zhuravlev, Anatoliy v. M.C.I. (F.C.T.D., no. IMM-3603-99)

<sup>7</sup> Jane Doe v. Canada (M.C.I.), November 21, 1996 (IMM-1514-95), Rothstein J.

<sup>8</sup> Sandor Szucs v. the Minister of Citizenship and Immigration, (IMM-6248-99) Blais J.

Chile is a multiparty democracy with a constitution that provides for a strong executive, a bicameral legislature and a separate judiciary. In January of 2000, President Ricardo Lagos of the Socialist Party was elected in a free and fair election.<sup>9</sup>

Problems do, however, remain with the use of excessive force by the police. The Carabineros, or uniformed police, have primary responsibility for public order, safety, traffic control and border security. The civilian Investigations Police are responsible for criminal investigations and immigration control. While under the operational jurisdiction of the Ministry of the Interior, they take their guidance from the prosecutor or judge responsible for a criminal investigation. The police force has an extremely low rate of corruption.<sup>10</sup>

That having been said, relations between the gay community and the police are far from ideal. The Movement for the Integration and Liberation of Homosexuals (MOVILH) published a report in 2002, which named the Carabineros police force as one of several institutions responsible for cases of homophobia. Much of that report, however, speaks of the unwillingness of the uniformed police to investigate the death of sex trade workers and transvestites. Meetings have been held between the chief of police for Santiago and MOVILH with a view to discuss such problems.<sup>11</sup>

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<sup>9</sup> Exhibit R/A-1, page 34, U.S. DOS Country Report On Human Rights Practices – 2003; February 25, 2004

<sup>10</sup> Ibid.

<sup>11</sup> Ibid., page 147, Response to Information Request CHL40645.E, March 21, 2003

While Chile is still a strongly conservative country, and Chile may not be described as “gay-friendly” things are quickly changing for the better, particularly in Santiago, where the gay scene has exploded in the last four years, creating venues rivaling those of medium sized U.S. cities.<sup>12</sup> The [redacted] blames the Church, which it says has created attitudes allowing unenlightened police to justify aggression against gays. In [redacted] of 2001, the Central (Police) Prefecture in Santiago agreed to participate in an education program on the rights of sexual minorities created by [redacted] and aimed at police officers.<sup>13</sup>

All of this means that the position of a gay, or bi-sexual man, seeking the assistance of the police, may very well, depending on the particular circumstance, be problematic. It does not, however, mean that had the claimant made at least some attempt to seek the assistance and protection of the authorities in his own country, such assistance would not have been forthcoming.

The claimant’s complete failure to take any steps whatsoever to seek the assistance of the Chilean authorities and instead to seek the “alternative solution” of leaving the country was in the circumstances (particularly after the burning of his house), objectively unreasonable and his claim must accordingly fail.

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<sup>12</sup> Ibid., page 142, Response to Information Request CHL39413.E, August 6, 2002

<sup>13</sup> Ibid., page 143

The panel also considered whether the claimant is a person in need of protection because of a risk to his life or a risk of cruel and unusual treatment or punishment or because he faces a danger of torture. No evidence was adduced that would support a finding that the claimant faces a danger of torture. With respect to a risk to life or cruel and unusual treatment or punishment, the panel's finding that it was objectively unreasonable for the claimant not to have sought the protection of the Chilean authorities applies to that ground as well

#### CONCLUSION

The Refugee Protection Division determines that the claimant is not a Convention refugee and further finds that the claimant would not face a danger believed on substantial grounds to exist of torture, nor would he face a serious possibility of risk to life, cruel and unusual treatments or punishments if he were returned to Chile and he is, therefore, not a person in need of protection within the meaning of subsection 97(1) of the Immigration and Refugee Protection Act.

His claim for refugee protection is, therefore, rejected.

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"William T. Short"  
William T. Short

DATED at Toronto this 21st day of January 2005

