

Immigration and Refugee Board
Refugee Protection Division



Commission de l'immigration et du statut
de réfugié
Section de la protection des réfugiés

RPD File # / No. dossier SPR : CA4-00051

Private Proceeding
Huis clos

Claimant(s)		Demandeur(s) d'asile
Date(s) of Hearing	May 4, 2004	Date(s) d'audience
Place of Hearing	Calgary, Alberta	Lieu de l'audience
Date of Decision	June 17, 2004	Date de la décision
Panel	Marnie Armstrong	Tribunal
Claimant's Counsel	Richard Bennett	Conseil du demandeur d'asile
Refugee Protection Officer	NIL	Agent de la protection des réfugiés
Designated Representative	NIL	Représentant désigné
Minister's Counsel	NIL	Conseil du ministre

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The claimant, _____ is a citizen of Chile and claims protection pursuant to sections 96 and 97(1) of the Immigration and Refugee Protection Act.

The claimant alleged

- (1) he came to Canada as a student in June 2002;
- (2) he is bisexual;
- (3) he has been mistreated because of his lifestyle in _____ 2001,
- (4) he and his gay friends were harassed by a group of students at college; he was beaten by this group;
- (5) because he has been a dancer he is seen to be homosexual;
- (6) in _____ 2002, while out with his gay friends, he and his friends were attacked by the same group from college; the perpetrators ran away when they heard police sirens; he was hospitalized for one week;
- (7) his family, especially his father, have not accepted his sexual orientation;
- (8) he feels he will continue to be socially and emotionally oppressed if he were to return to Chile;
- (9) he believes his life is at risk if he returns to Chile.

DETERMINATION

The panel finds that the claimant is not a Convention refugee. In addition, the panel finds that the claimant is not a person in need of protection in that there are no substantial grounds to believe that his removal to Chile will subject him personally to a danger of torture nor is there a reasonable possibility that he faces a risk to his life or to a risk of cruel and unusual treatment or punishment. There is adequate state protection for him.

ANALYSIS

The claimant's identity as a national of Chile was established by his testimony and the supporting documentation filed, namely, his passport and identity cards.

Having found that there is adequate state protection for the claimant in Chile, the panel has made no findings as to the claimant's credibility or the well-foundedness of his fear or the degree of harm. The panel's finding of state protection applies to all three grounds of protection.

In its consideration of whether adequate state protection would be available to the claimant in Chile today, the panel reviewed the jurisprudence, the documentary evidence on country conditions as well as the claimant's evidence.

The jurisprudence makes it clear that unless the state apparatus has completely broken down, there is a presumption that the state is capable of protecting its citizens.¹ In addition, where a country has democratic institutions in place, is in effective control of its territory and has its own military and civil authorities - all of which criteria are met by the state of Chile - rebutting that presumption will require evidence substantially impeaching an aspect of the system of protection itself.² Regarding the standard of protection a country is required to offer its citizens, the Federal Court has suggested that the standard is "adequate though not necessarily perfect",³ and that a government cannot guarantee the protection of all of its citizens at all times.⁴ In *Villafranca*, the Court of Appeal stated that it is not enough for a claimant merely to show that his government has not always been effective in protecting persons in his particular situation. In *Kadenko*, the Court stated that the more democratic the state's institutions, the more the claimant must have done to exhaust all the courses open to him.⁵

The United States Department of State Country Report of Human Rights Practices indicates Chile is a multiparty democracy. The panel also consulted the Freedom House survey of "Freedom in the World."⁶ The organization monitors the progress and decline of political rights and civil liberties in 192 nations of the world. Chile is classified as a free country (as opposed to partly free or not free). It scored "2" on the survey's comparative measure of political rights and civil liberties; the best rating is a "1." The BBC Country Profile states that Chile is relatively free of crime and official corruption.⁷

A recent Response to Information Request⁸ indicates that some police officers in Chile could act with impunity and refers to a special status, *fuero*, which precludes civilian courts from prosecuting them. The same document and source, however, also stated that distinctions should be made according to the police force in question, with *carabineros* more likely to be brought to justice than the military itself, and with the lower ranks relatively more exposed to being brought to justice. Another source from the same document, the National Coordinator of a Family Violence Prevention Program, states that police officers and army officials are subject to the same criminal and civil action as the civilian population when they commit offences or crimes in general, and when they commit specific offences such as physical assault resulting in injuries against any person. The same source goes on to say that where a police

department refuses to initiate proceedings against an officer working at that department, a complaint may be made to other institutions. Another document⁹ reports on the means by which any citizen can report a crime, including a complaint against a police officer. The document refers to statements by the deputy director of the Ministry of the Interior, indicating that the most appropriate place to lodge complaints against the police were the justice tribunals, using the help of the human rights offices of the Legal Assistance Corporation, an organization providing free legal aid to persons of limited resources.

Documentary evidence suggests that the accountability of the police in Chile falls short of the ideal but the panel finds that the state does have mechanisms in place through which police misconduct can be addressed, and apparently does encourage access to them. The latest report of the United States Department of State¹⁰ supports this finding, indicating that, while police violence has not decreased, citizens are more willing to report police mistreatment and there are increased numbers of arrests for certain types of crimes committed by the police. The panel once again refers to the above BBC statement that Chile is relatively free from official corruption.¹¹

Because the claimant alleged to be bisexual the panel consulted documentary evidence regarding the situation of similarly situated persons, such as gays and lesbians.

Although the laws banning sexual activity between consenting adults were repealed in 1998, public attitudes make life difficult for homosexuals throughout the country.¹² The panel acknowledges that leading an openly gay or alternative lifestyle could lead to problems. A recent Response to Information Request¹³ states that in April 2000 advocacy groups published a handbook in Spanish for leaders and members of the gay community, teachers, health workers and others interested, entitled Homosexuality and Human Rights. The handbook discusses the situation of gays and lesbians in Chile, indicating areas of concern and possible protection measures. The handbook describes the many difficulties gays and lesbians may encounter. It discusses avenues of redress and the effects of actions taken by advocacy groups. There are two avenues of redress presented. One is specific to individuals whose freedom, physical or psychological security has been threatened; the other describes the process when constitutional rights are breached. The document goes on to discuss the successes of certain groups in achieving recognition of issues and avenues of redress. The document concludes with a statement from the president of Movement and Liberation of Homosexual[s], "crimes against the homosexual community will not go unpunished as has generally happened in the past."

In November 2001, the Central Prefecture of Santiago accepted to participate in an education program on the rights of sexual minorities aimed at police officers. 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.¹⁴

The panel considered the information on state protection and all the information before it regarding gays and homosexuals and finds that there are sufficient laws, policies, initiatives and agencies to provide adequate¹⁵ state protection for the claimant.

While states are presumed to be capable of protecting their nationals, it was open to the claimant, according to the law, to rebut the presumption of protection with "clear and convincing" evidence.

The claimant stated in his narrative that he complained to college officials about his mistreatment at the hands of a homophobic group and they did nothing and blamed the claimant and his friends for being gay. The claimant was asked if he had ever gone to police regarding any of his problems. He explained that he had not because his friends had gone and not received satisfactory action; he added that he was just an individual and what use would it be. When asked about the police arriving at the club where he and his friends were being attacked, the claimant explained that the police patrolled the gay area of Santiago every hour or so and it was their sirens that caused the youths to run away; he did not know if they were responding to their situation. The claimant testified that although the police took him to the hospital they did not ask him any questions, including his name. He did not tell them anything or contact them later because they would have investigated and his father would find out about the incident. The panel notes that claimant acknowledged that the police would have, indeed, investigated the incident. Police must have information if they are going to be able to investigate a crime.¹⁶ The panel finds that the claimant has not rebutted the presumption of state protection with clear and convincing evidence.

The claimant expressed fear of his father who had told him he would prefer the claimant to be dead than gay. The panel notes that the claimant did live in the family home until he left Chile in 2002¹⁷ and his father was well aware of his work as a dancer. He indicated in his narrative that his father said he would not help him any more and that he was cut out of the family. Even if the claimant's father were to attempt to harm him, the finding of state protection applies.

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The panel finds that there is not a serious possibility that the claimant would be at risk of persecution by reason of his bisexual orientation. There is adequate state protection for him in Chile at this time.

The panel notes that a person in need of protection must establish that removal to the country of reference would subject them personally to the harm feared. The panel then considered the elements of S.97(1)(a). There is no evidence of the claimant being tortured or mistreated by a public official or a person acting in an official capacity or at the instigation of or with the consent or acquiescence of such a person in the past. The panel finds the principal claimant has failed to demonstrate that there exist substantial grounds to believe that he would be subjected personally to a danger of torture if he were to return to Chile. As well, there is adequate state protection.

The panel considered the elements under S.(97)(1)(b). The panel also finds for the reasons already given there is not a serious possibility that the claimant faces a risk to life or risk of cruel and unusual treatment or punishment if he were to return to Chile. There is adequate state protection.

The panel acknowledges the Statutory Declaration¹⁸ sent from five of the claimant's friends in Chile attesting to his character and personal situation. The panel's jurisdiction in this claim is restricted to a determination of whether or not the claimant is a Convention refugee or a person in need of protection as defined by the Immigration and Refugee Protection Act. While it is sympathetic to the claimant's situation, it has no humanitarian and compassionate jurisdiction to exercise in making this determination.

CONCLUSION

For the foregoing reasons, the panel determines . is not s.19(1)
a Convention refugee and not a person in need of protection and therefore rejects his claim.

"Marnie Armstrong"
Marnie Armstrong

DATED: June 17, 2004

- ¹ *Canada (Attorney General) v Ward*, [1993] 2 S.C.R. 689, 103 D.L.R. (4th) 1, 20 Imm. L.R. (2d) 85, at 725
- ² *M.E.I. v Satiacum, Robert* (F.C.A., no. A-554-87), Urie, Mahoney, MacGuigan, June 16, 1989, Reported: *Canada (Minister of Employment and Immigration) v Satiacum* (1989), 99 N.R. 171 (F.C.A.)
- ³ *Zalzali v. Canada (Minister of Employment and Immigration)*, [1991] 3 F.C. 605 (C.A.), at 614
- ⁴ *M.E.I. v Villafranca, Ignacio* (F.C.A., no. A-69-90), Huguessen, Marceau, Decary, December 18, 1992. Reported: *Canada (Minister of Employment and Immigration) v Villafranca* (1992), 18 Imm. L.R. (2d) 130 (F.C.A.)
- ⁵ *Kadenko: M.C.I. v. Kadenko, Ninal* (F.C.A., no. A-388-95), Huguessen, Décary, Chevalier, October 15, 1996. Reported: *Canada (Minister of Citizenship and Immigration) v. Kadenko* (1996), 143 D.L.R. (4th) 532 (F.C.A.)
- ⁶ Exhibit # R-2, Item A.2. Country Reports on Human Rights Practices 2002: Chile, U.S. Department of State, March 2003.
- ⁷ Exhibit # R-1, Item A.6, BBC Country Profile: Chile, June 18, 2002.
- ⁸ Exhibit R-2, Item C-2, Response to Information Request CHL32589E, DIRB, IRB, 30 August 1999
- ⁹ Exhibit R-2, Item C-6, , Response to Information Request CHL40872E, DIRB, IRB, 5 March 2003
- ¹⁰ supra, endnote # 6.
- ¹¹ supra, endnote # 7.
- ¹² Exhibit # R-2, Item F.1. *World Policy Reports*, Sexual Orientation and Human Rights in the Americas: Chile, December 2003.
- ¹³ *ibid.*, Item F.4, Response to Information Request # CHL37939.E, Chile: Treatment of gays and lesbians; availability of state protection, 31 January 2002.
- ¹⁴ *ibid.*, Response to Information Request # CHL39413.E, Chile: The gay lifestyle and the treatment of gays by police ... , 9 August 2002.
- ¹⁵ supra, endnote # 3
- ¹⁶ *Karaseva, Tatiana v. M.C.I.* (F.C.T.D., no. IMM-4683-96), Teitelbaum, November 26, 1997
- ¹⁷ Exhibit # C-1, Question 20.
- ¹⁸ Exhibit # C-3.