

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 : MA3-07262

Private Proceeding
Huis clos

Claimant(s)		Demandeur(s) d'asile
Date(s) of Hearing	July 16 th , 2004	Date(s) de l'audience
Place of Hearing	Toronto, Ontario	Lieu de l'audience
Videoconferencing heard in	Montréal, Québec	Fait par vidéoconférence à
Date of decision	July 30 th , 2004	Date de la décision
Panel	Ludmila Pergat	Tribunal
Claimant's Counsel	Gregory J. LYNDON	Conseil du demandeur d'asile
Refugee Protection Officer	[deposit of documents]	Agent de la protection des réfugiés
Designated representative	N/A	Représentant désigné
Minister's Counsel	N/A	Conseil du ministre

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is a 22 year-old male and a national of Guatemala. He alleges a well-founded fear of persecution on the grounds of membership in a particular social group, that of sex, being bi-sexual. Furthermore, the claimant alleges that he faces a risk to life or cruel and unusual punishment or treatment should he return to Guatemala.

ALLEGATIONS

The claimant alleges that he has been bisexual since high school but did not start to tell people about his sexuality until the year 2000, after he finished high school. He lost some of his friends when he told them of his bisexuality. In 2001, the claimant alleges that he received threats by telephone and notes to his house, threatening to fix him up and also death threats from his neighbourhood. He said that he did not pay much attention to the threats until 2002, when he was attacked by five men, their faces covered, when he was on his way home from work, at [redacted]. They insulted him, threatening to kill him and kicking him like an animal. They stopped only when they heard police sirens. The assailants told the police that the claimant was a homosexual and they were teaching him a lesson. The police told them to finish the claimant or they would do it themselves. They beat the claimant until he was almost unconscious. When the assailants left, the claimant went home, decided to quit his job and come to Canada. He left Guatemala on [redacted] 2002 and arrived in Canada on the same day. He claimed refugee protection on April 16th /24th 2002.

DETERMINATION

The Refugee Protection Division finds the claimant neither to be a "Convention refugee"¹, as he not established that he has a well-founded fear of persecution for a Convention ground in Guatemala nor is he a "person in need of protection"². Furthermore, there is no credible basis to his claim.

ANALYSIS

The claimant's identity was established by his original passport (A-2), which he submitted to Immigration. There was nothing to indicate that the passport is fraudulent. The claimant also submitted a birth certificate, an identity card, a driver's license as well as other identity documents in his personal document brief (C-2). The tribunal accepts the identity of the claimant.

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The claimant's claim for refugee protection hinges on the allegation that he is a bisexual. The tribunal found the claimant's testimony to be contradictory, inconsistent and generally not credible. The following are some examples. In his Personal Information Form (PIF), the claimant alleges that he started to have problems when he started telling his friends about his bisexuality in the year 2000, after he finished high school. However, he told Immigration, in his Port of Entry Notes (POE) that some friends found out. When confronted with this contradiction he said that he should have said that he told his friends when they asked if he was bisexual and the claimant responded to them that he was bisexual. He said that it was a mistake in the POE notes, that the Immigration officer misunderstood. He said that the assailants were persons from his area. He clearly wrote in his PIF that he told some friends. He later said that one friend knew about his bisexuality. The claimant speaks, reads and writes in English very well. He testified in English during the hearing and wrote his story himself without the services of an interpreter. Even if the tribunal were to believe that the immigration officer made a mistake, as the claimant often claimed during the hearing when confronted with contradictions, that would not explain why he write in this PIF that he told some friends. The tribunal does not believe the claimant's explanation for the contradiction and found that he was adjusting his testimony when confronted with the contradiction.

The claimant wrote in his PIF that he was attacked by a group of five men with their faces covered and did not recognize them. He told Immigration, in his POE notes, that he was beaten by a group of friends that he used to hang around with, that found out that he was bisexual. When confronted with this contradiction, he once again said that the immigration officer made a mistake. His counsel asked him whether he had seen the POE before the hearing to which he responded no. The notes were disclosed to counsel as required by law. The tribunal would have considered the claimant's allegations of serious errors in the POE notes if it believed that there was a possibility that there was a major misunderstanding between the immigration officer and the claimant. No such allegation was made at the beginning of the hearing. It was only when confronted with the contradictions that the claimant alleged that the POE notes were incorrect. Given the various versions of this element of the story and the claimant's general lack of credibility, the tribunal does not believe the claimant's explanation for the contradiction.

The claimant said that he decided to ask for international protection in 2002. He arrived in Canada on February 28th 2002 but did not claim refugee protection until the 16th and 24th

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of April 2002. When asked the reason for the delay in claiming, he said that he waited because he did not know how to do it and that he was only told at the Center in Etobicoke in mid April. The claimant was confronted with the fact that he was living with his aunt and two cousins since arriving in Canada and all three have been accepted as « Convention refugees ». He then said that he told his aunt that he was bisexual only one month after his arrival, and that his aunt did tell him about protection. The claimant gave some vague explanation that she did not tell him exactly where to claim.

On the issue of the delay of claiming, the tribunal concluded that the claimant misunderstood the *raison d'être* of the Refugee Protection Division and quotes the Honorable Judge Hugessen when he said:

“The appellant’s position is based on a fundamental misconception of Canada’s refugee determination system; the purpose of that system is to provide safe haven to those who genuinely need it, not to give a quick and convenient route to landed status for immigrants who cannot or will not obtain it in the usual way.” (*Urbánek, Kristian v. M.E.I.*³)

The tribunal does not find it plausible that he lived with three relatives that not only claimed refugee protection but went through the entire refugee process, were accepted and yet they did not tell the claimant how to proceed. In *Farney vs Chorny*⁴, the Justice said that;

“In short, the real test of truth of the story of a witness in such a case must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions.”

Once again the tribunal believes that the claimant was adjusting his testimony.

The claimant alleges that he is a bisexual today but he is not involved in the gay community nor does he know where there is a gay community in Toronto. He does not belong to any organization nor participate in any events. He testified that he was not even aware of any areas where and how he could meet other persons of his sexual preference. He said that it is difficult to trust people.

The claimant has been in Canada for two years. If in fact the claimant is a bisexual and left Guatemala because he could not live as a bisexual, the tribunal does not believe that he would not be not aware of any areas in Toronto, clubs, events of organizations where he could meet persons of his sexual orientation. The tribunal believes that the claimant fabricated the story in order to justify his leaving Guatemala.

The claimant produced a medical certificate (C-2 – 10.2) attesting to injuries that he sustained during an assault in Guatemala. The tribunal has no reason to doubt the authenticity of the certificate and believes that the claimant was assaulted. The tribunal will not speculate as to how or why the claimant sustained these injuries; however, it does not believe that the assault occurred as a result of his alleged bisexuality for reasons already discussed.

The burden of proof remains with the claimant who must demonstrate that he has a well-founded fear of persecution in Guatemala. He has not discharged this burden of proof to the satisfaction of the tribunal.

Consequently, the tribunal finds that there is not a serious possibility of persecution should the claimant return to Guatemala.

The tribunal, having come to the conclusion that claimant was not able to establish that there is a serious possibility that he would be persecuted by the persons who assaulted him, turned to see if there was any evidence submitted to determine if any of the claimant is a “person in need of protection”. The tribunal analyzed the claim from the perspective of “persons in need of protection” and has determined that the claimants neither face a risk to life or a risk of cruel and unusual treatment or punishment nor is he a “person in need of protection” as defined in the *Immigration and Refugee Protection Act (IRPA)*.

CONCLUSION

Based upon the above analysis, the tribunal determines I not to be a “Convention refugee”, as defined in section 96 of the *Immigration and Refugee Protection Act* nor is he a “person in need of protection”, as defined in section 97(1) of the same Act. Furthermore, pursuant to 107(2) of the same Act, there is no credible basis to the claim.

Ludmila Pergat

Ludmila Pergat

July 30th, 2004

Date

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1 " 96. A Convention refugee is a person who, by reason of a well-founded fear of persecution for reasons of race, religion, nationality, membership in a particular social group or political opinion,

(a) is outside each of their countries of nationality and is unable or, by reasons of that fear, unwilling to avail themselves of the protection of each of those countries; or

(b) not having a country of nationality, is outside the country of their former habitual residence and is unable or, by reason of that fear, unwilling to return to that country."

2 " 97. (1) A person in need of protection is a person in Canada whose removal to their country or countries of nationality or, if they do not have a country of nationality, their country of former habitual residence, would subject them personally

(a) to a danger, believed on substantial grounds to exist, of torture within the meaning of Article 1 of the Convention Against Torture; or

(b) to a risk to their life or to a risk of cruel and unusual treatment or punishment if

(i) the person is unable or, because of that risk, unwilling to avail themselves of the protection of that country,

(ii) the risk would be faced by the person in every part of that country and is not faced generally by other individuals in or from that country,

(iii) the risk is not inherent or incidental to lawful sanctions, unless imposed in disregard of accepted international standards, and

(iv) the risk is not caused by the inability of that country to provide adequate health or medical care."

3 *Urbanek, Kristian v. M.E.I.* (F.C.A., no. A-222-90), Hugessen, MacGuigan, Desjardins, June 19, 1992. Reported: *Urbanek v. Canada (Minister of Employment and Immigration)* (1992), 17 Imm. L.R. (2d) 153 (F.C.A.)

4 *Faryna v. Chorny*, [1952] 2 D.L.R. 354 (B.C.C.A.).