

**Date: 20071211**

**Docket: IMM-6192-06**

**Citation: 2007 FC 1297**

**Ottawa, Ontario, December 11, 2007**

**PRESENT: The Honourable Mr. Justice O'Keefe**

**BETWEEN:**

**CONTRERAS HERNANDEZ,  
JOSE ARTURO**

**Applicant**

**And**

**THE MINISTER OF CITIZENSHIP  
AND IMMIGRATION**

**Respondent**

**REASONS FOR JUDGMENT AND JUDGMENT**

**O'KEEFE J.**

[1] This is an application pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (IRPA) for judicial review of the decision of the Refugee Protection Division of the Immigration and Refugee Board (the Board), dated November 1, 2006, which found that the applicant was neither a Convention refugee nor a person in need of protection.

[2] The applicant is requesting that the decision be set aside and the matter referred back to a newly constituted panel of the Board for redetermination.

### **Background**

[3] Jose Arturo Contreras Hernandez (the applicant) is a citizen of Mexico. The applicant sought refugee status on the basis of his membership in a particular social group, namely, homosexual men living in Mexico. The circumstances which led to his claim for refugee status were set out in the narrative portion of his Personal Information Form (PIF).

[4] The applicant was born in Victoria City. At the age of fourteen, he was thrown out of his home by his family upon discovering his sexual orientation. The applicant went to live with his godmother for seven to eight months. One day, he saw his father on the street. His father grabbed him by the neck and assaulted him; the applicant was left with a black eye and a bleeding mouth. The applicant then decided to leave Victoria City and moved to Monterrey where he worked as a farmer for several years.

[5] In May 2001, the applicant was attacked in a workplace washroom by three men working on the same floor as him in the Department of Agriculture in Mexico City. The three men made comments about how gay people smelled bad. The applicant reacted and one of the three men kicked the applicant. The applicant tried to stop the man, but another man grabbed his neck. The initial aggressor then put his face close to the applicant's and told him that they did not like him at

all and that they were watching him. The applicant did not complain to his boss, or report the incident

[6] In December 2001 while leaving the El Taller nightclub in downtown Mexico City, the applicant was assaulted by four men. The men kidnapped the applicant in their car, put a gun in his mouth and forced him to beg for his life. The men eventually left the applicant alone on a highway where he hailed a taxi. The applicant did not report the incident.

[7] At this point, the applicant decided to leave Mexico to learn English for a year in Canada. The applicant arrived in Canada in April 2003 and filed a claim for refugee status in April 2005. In 2005 while in Canada, the applicant was diagnosed HIV-positive. An immigration hearing took place on June 26, 2006 and a negative decision was rendered on November 1, 2006. This is the judicial review of the Board's decision.

### **Reasons for Decision**

[8] The Board stated that the determinative issue in this particular claim was whether state protection was available to the applicant in Mexico. The Board was persuaded by the documentary evidence on Mexico that the applicant's fear was not objectively well-founded. The Board noted that local failures to provide effective policing do not amount to a lack of state protection. The Board found that the documentary evidence was more credible and trustworthy, and therefore gave it more weight than the applicant's opinion. The Board noted that the documentary evidence

indicated that there continues to be strong homophobic attitudes among the general public in Mexico, and that gays and lesbians face discrimination. However, the Board stated that the applicant has an obligation to first seek protection in his country of origin, and that he had not done so. The Board found that there was no objective basis for the applicant's fear.

[9] The Board also stated that the documentary evidence indicated that the government adequately addresses the issue of sexual orientation and health care. The Board stated that the documents indicated that in recent years, there had been substantial political and legal gains for sexual minorities, particularly at the federal level. The Board noted that following the lead of Mexico City, the states of Aguascalientes and Chiapas adopted antidiscrimination laws that explicitly refer to sexual orientation, and penalties for "crimes against personal dignity". Given the documentary evidence, the Board found that the onus of approaching the state for protection was not unreasonable in these circumstances.

[10] The Board found that it was unreasonable for the applicant not to have made efforts to seek police protection or protection of other state authorities. The Board also found it further unreasonable for the applicant not to have taken any steps or measures to access the protection of the state of Mexico.

[11] With regards to the applicant's claim of protection on the basis of his HIV-positive condition, the Board perused the documentary evidence and noted that the HIV/AIDS program in the City of Mexico provides full antiviral cocktail therapy for all persons afflicted with HIV/AIDS

who could not otherwise afford treatment. The Board further noted that according to the program director, any resident of the Federal District who can provide a voter registration card plus proof of current residency is eligible for assistance.

[12] In conclusion, the Board found that having considered all of the evidence, the applicant was not a Convention refugee, nor was he a person in need of protection.

### **Issues**

[13] The applicant submitted the following issue for consideration:

1. Did the Board make a capricious or perverse credibility finding, without due regard to the evidence properly before it?

[14] I would rephrase the issues as follows:

1. What is the appropriate standard of review?
2. Did the Board err in its finding that the applicant had not rebutted the presumption of state protection?
3. Did the Board err in finding that there was adequate state protection for the applicant as an individual with HIV?
4. Did the Board err in failing to address the applicant's risk of persecution as a cross dresser/transgender individual?
5. Did the Board err in finding that the applicant's testimony was implausible?

### Applicant's Submissions

[15] Firstly, the applicant submitted that the Board's analysis reflects a highly selective use of the documentary evidence with regards to state protection. The applicant submitted that while the Board is not required to refer in its decisions to all of the documentary evidence, it may not base its findings on a highly selective use of the evidence, ignoring significant evidence contrary to its findings (*Hassanzadeh-Oskoi v. Canada (Minister of Employment and Immigration)*, [1993] F.C.J. No. 644). The applicant noted that in its decision, the Board stated at page 3 that "the documentary evidence indicates that the government adequately address[ed] the issue of sexual orientation and health care." The applicant submitted that this finding was in contradiction to evidence before the Board including the *Amnesty International Report on Mexico* released 2005 (page 1), and the *World Policy Reports* entitled "*Sex Orientation and Human Rights in the Americas*" (pages 3, 55, 59, 60 to 61). Essentially, these documents support the conclusion that homosexuals in Mexico are often targets of various forms of abuse and discrimination and that while the law may indicate otherwise, police officers and members of the judiciary have used their positions in society to further victimize homosexuals in Mexico. Moreover, the applicant submitted that the Board failed to consider a letter dated June 1, 2006 from Grupa Hola (a Toronto based Latin American gay and lesbian organization) wherein the organization provided evidence of the continual victimization of all homosexuals in Mexico and of the reluctance of victims to seek state protection. The applicant submitted that while the Board is not obliged to address all the evidence relied on by counsel, it does not dispose of its duty by merely discounting evidence contrary to its decision without explaining its reasons for doing so.

[16] The applicant's second argument was to the effect that the Board failed to assess the applicant's risk of persecution as a cross dresser/transgender individual who is a more visible target to homophobic persons. The applicant submitted that according to page 61 of the *World Policy Reports*, which was before the tribunal at the time of the decision, transvestites in Tijuana were being abused and extorted by municipal police officers who targeted them because they knew where they lived and waited for them to leave their homes.

[17] The applicant's third argument was that the Board erred in its determination that state protection exists for persons who suffer from HIV/AIDS in Mexico. The applicant submitted that the Board relied on government documents as to the funding programs available, but did not assess the actual evidence as to whether the medication is readily available to the applicant. The applicant also submitted that the Board ignored the information at page 61 of the *World Policy Reports* which stated that the President of the Human Rights Commission of the state of Yucatan had advocated that "AIDS patients should be quarantined, and if an infected person crosses an established security line, he should be shot dead.... It's better if they die. They should be on an island where they can't infect others." The applicant submitted that the Board's failure to consider this evidence is a reviewable error (*Owusu-Ansah v. Canada* (1989), 8 Imm. L.R. (2d) 106 (F.C.A.)).

[18] And finally, the applicant alleged that the Board erred in concluding that the applicant's testimony was implausible. The applicant submitted that the standard of review for implausibility findings is reasonableness: are the inferences drawn by the Board so unreasonable as to warrant the

intervention of the Court? (*Aguebor v. Canada (Minister of Employment and Immigration)* (1993), 160 N.R. 315)

### **Respondent's Submissions**

[19] The respondent submitted that it is trite law that the Board is presumed to have taken all of the evidence into consideration whether or not it indicates having done so in its reasons, unless the contrary is shown. The respondent submitted a review of the reasons suggests that the Board did indeed consider the totality of the evidence before it (*Hassan v. Canada (Minister of Employment and Immigration)* (1992), 147 N.R. 317 (F.C.A.)). The respondent submitted that this is especially true given page 3 of the Board's reasons wherein the Board recognizes that the documentary evidence shows that there continues to be "strong homophobic attitudes among the general public in Mexico, and that gays and lesbians face discrimination and that despite legislation, some police officers engage in arbitrary harassment and even arrest, particularly of vulnerable groups such as homosexuals and lesbians." The respondent submitted that the adequacy of state protection is reviewable on a standard of patent unreasonableness (*Malik v. Canada (Minister of Citizenship and Immigration)*, [2005] F.C.J. No. 1453).

[20] With regards to the applicant's argument that the Board failed to consider the applicant's risk of persecution as a transvestite, the respondent submitted that the applicant has not pointed to any evidence to show how he is more at risk in Mexico than a non-transvestite homosexual. The respondent also noted the inconsistencies in the applicant's submissions on his identity.

Specifically, at paragraph 13 of the applicant's memorandum, he claims to be transgender, and then he submitted he is a cross-dresser, yet at paragraph 14, he states that he is a transvestite. Moreover, the respondent noted that none of these allegations appears in the applicant's PIF and in his affidavit he states that he is a cross-dresser, but does not state he is transgender.

[21] With regards to the presumption of state protection, the respondent submitted that the applicant submitted that the burden of proof rests on the applicant. The respondent submitted that the more democratic the state's institutions, the more the applicant must have done to test the state's ability to protect (*Kadenko v. Canada (Solicitor General)* (1996), 143 D.L.R. (4th) 532 (F.C.A.)). In the case at bar, the applicant made no effort at all to seek protection.

[22] The respondent submitted that the applicant's claim that he would be persecuted because of his HIV-positive status must fail. The respondent submitted that the inability of a country to provide medical care is not a valid basis for a refugee claim. In any event, the Board considered this argument and came to the conclusion that HIV drugs were widely available in Mexico. Furthermore, the respondent submitted that the applicant's claim that he would be subject to persecution by others must fail. The respondent submitted that as proof of this fact the applicant has provided one quotation from a government official who spoke of quarantining those infected with HIV. The respondent submitted that a statement from one official, over five years ago, from a state in which the applicant has never lived, far from supports any argument that all persons with HIV/AIDS in Mexico are at greater risk of persecution. The Board considered this argument and

came to a reasonable conclusion in relying on the objective evidence before it that Mexico has in place sweeping antidiscrimination laws.

[23] And finally, the respondent submitted that the applicant's submission that the Board made an implausibility finding is simply not true. At no time did the Board conclude that any aspect of the applicant's story was implausible.

### **Analysis and Decision**

#### [24] **Issue 1**

What is the appropriate standard of review?

With regards to the issue of adequacy of state protection, the respondent submitted that the appropriate standard of review is patently unreasonableness (*Malik* above). In *M.P.C.R. v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 772, this Court articulated the following at paragraph 42:

The prevailing view is that while the underlying factual findings are subject to the standard of patent unreasonableness, the Board's findings on the adequacy of state protection is a question of mixed fact and law that is reviewed on a standard of reasonableness simpliciter (see *Machedon v. Canada (Minister of Citizenship and Immigration)*, [2004] F.C.J. No. 1331 and *Chaves v. Canada (Minister of Citizenship and Immigration)*, [2005] F.C.J. No. 232.)

[25] In my opinion, the applicant takes issue with the Board's overall finding on the adequacy of state protection and as such, the appropriate standard of review is reasonableness.

[26] I wish to now deal with Issue 4.

[27] **Issue 4**

Did the Board err in failing to address the applicant's risk of persecution as a cross dresser/transgender individual?

The applicant submitted that the Board did not consider in its decision the ability of the state to protect individuals such as the applicant who is a cross dresser and transgender. From a review of the decision, there is no consideration of the applicant's identity as a cross dresser and transgender individual. The decision does not contain an assessment of Mexico's ability to adequately protect such individuals.

[28] I have reviewed the Certified Tribunal Record (CTR) and while the applicant's PIF and Port of Entry examination are silent on this, there is a letter dated June 20, 2006 from applicant's counsel at page 120 of the CTR wherein the applicant amends his PIF to include the fact that during the night club incident, he "was dressed as a woman". Moreover, at page 133 of the hearing transcript, the applicant discloses that he fears danger to return to Mexico because he is a homosexual and likes to dress as a woman. When asked by the presiding member at the hearing why the applicant left the fact that he was a cross-dresser and transgender individual out of his PIF, the applicant said at page 136 of the transcript that he was ashamed to tell his lawyer even once in Canada. At pages 137 to 138, the presiding member once again questioned the applicant on his identity as a cross-dresser and transgender individual and in response the applicant explains his fear of reporting the incident to the police.

[29] In my opinion, there was ample evidence before the Board to alert them to the fact that the applicant's identity was not only a homosexual man, but also a cross-dresser and transgender individual. In failing to assess the state's ability to adequately protect homosexual individuals that are cross-dressers and transgendered, the Board erred.

[30] Because of my finding on Issue 4, I need not deal with the other issues.

[31] The application for judicial review is therefore allowed, the decision of the Board is set aside and the matter is referred to a different panel of the Board for redetermination.

[32] Neither party wished to submit a proposed serious question of general importance for my consideration for certification.

**JUDGMENT**

[33] **IT IS ORDERED that** the application for judicial review is allowed, the decision of the Board is set aside and the matter is referred to a different panel of the Board for redetermination.

“John A. O’Keefe”

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Judge

## ANNEX

**Relevant Statutory Provisions**

The relevant statutory provisions are set out in this section.

The *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (IRPA):

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| <p>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,</p> <p>(a) is outside each of their countries of nationality and is unable or, by reason of that fear, unwilling to avail themselves of the protection of each of those countries; or</p> <p>(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.</p> <p>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</p> <p>(a) to a danger, believed on</p> | <p>96. A qualité de réfugié au sens de la Convention — le réfugié — la personne qui, craignant avec raison d’être persécutée du fait de sa race, de sa religion, de sa nationalité, de son appartenance à un groupe social ou de ses opinions politiques:</p> <p>a) soit se trouve hors de tout pays dont elle a la nationalité et ne peut ou, du fait de cette crainte, ne veut se réclamer de la protection de chacun de ces pays;</p> <p>b) soit, si elle n’a pas de nationalité et se trouve hors du pays dans lequel elle avait sa résidence habituelle, ne peut ni, du fait de cette crainte, ne veut y retourner.</p> <p>97.(1) A qualité de personne à protéger la personne qui se trouve au Canada et serait personnellement, par son renvoi vers tout pays dont elle a la nationalité ou, si elle n’a pas de nationalité, dans lequel elle avait sa résidence habituelle, exposée:</p> <p>a) soit au risque, s’il y a des</p> |
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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.

(2) A person in Canada who is a member of a class of persons prescribed by the regulations as being in need of protection is also a person in need of protection.

motifs sérieux de le croire, d'être soumise à la torture au sens de l'article premier de la Convention contre la torture;

b) soit à une menace à sa vie ou au risque de traitements ou peines cruels et inusités dans le cas suivant:

(i) elle ne peut ou, de ce fait, ne veut se réclamer de la protection de ce pays,

(ii) elle y est exposée en tout lieu de ce pays alors que d'autres personnes originaires de ce pays ou qui s'y trouvent ne le sont généralement pas,

(iii) la menace ou le risque ne résulte pas de sanctions légitimes — sauf celles infligées au mépris des normes internationales — et inhérents à celles-ci ou occasionnés par elles,

(iv) la menace ou le risque ne résulte pas de l'incapacité du pays de fournir des soins médicaux ou de santé adéquats.

(2) A également qualifié de personne à protéger la personne qui se trouve au Canada et fait partie d'une catégorie de personnes auxquelles est reconnu par règlement le besoin de protection.

**FEDERAL COURT**

**NAME OF COUNSEL AND SOLICITORS OF RECORD**

**DOCKET:** IMM-6192-06

**STYLE OF CAUSE:** CONTRERAS HERNANDEZ, JOSE ARTURO

- and -

THE MINISTER OF CITIZENSHIP AND  
IMMIGRATION

**PLACE OF HEARING:** Toronto, Ontario

**DATE OF HEARING:** November 21, 2007

**REASONS FOR JUDGMENT  
AND JUDGMENT OF:** O'KEEFE, J

**DATED:** December 11, 2007

**APPEARANCES:**

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