

REFUGEE STATUS APPEALS AUTHORITY
NEW ZEALAND

REFUGEE APPEAL NO 76015

AT AUCKLAND

<u>Before:</u>	B A Dingle (Member)
<u>Counsel for the Appellant:</u>	The appellant represented himself
<u>Appearing for the Department of Labour:</u>	No Appearance
<u>Date of Hearing:</u>	26 April 2007
<u>Date of Decision:</u>	14 November 2007

DECISION

INTRODUCTION

[1] This is an appeal against the decision of a refugee status officer of the Refugee Status Branch (RSB) of the Department of Labour (DOL), declining the grant of refugee status to the appellant, a national of Bolivia.

[2] The appellant is a man in his mid-30s who is now separated from his second wife. He has two children from his first marriage who live with their mother in Chile. He claims that he is at risk of being persecuted on return to Bolivia on account of his physical disability (leg amputation) sustained as a result of an accident. He also fears that he would resume his previous addiction to painkillers which would lead him into a cycle of extreme poverty.

[3] The issue to be determined in this case is whether or not the appellant's claim to be at risk of being persecuted is well-founded.

THE APPELLANT'S CASE

[4] The appellant is the oldest of three children born to parents who both worked as highly trained professionals in Bolivia. At the time of the appeal hearing, the appellant's father continued working in his professional capacity while his mother had emigrated to the United States and was working in a low-skilled job there.

[5] For the purposes of this refugee appeal, the appellant's early life was unremarkable.

[6] The appellant completed primary and high school in Bolivia before attending university in Chile to study as a sound engineer. From 1993 until the end of 1998, the appellant was employed as a sound engineer.

[7] At the end of 1998, the appellant was involved in a serious motorcycle accident in which he sustained a broken leg. He was taken to a public hospital for treatment where the leg was operated on and a metal pin was inserted to keep the bone in place. Unfortunately for the appellant, the first operation on his leg caused further serious medical complications and he was readmitted to hospital within days of the accident. The appellant suffered a series of further medical mishaps and complications in relation to his original leg injury which meant that his rehabilitation from the injury was slow.

[8] It is not intended to detail the ongoing medical complications suffered by the appellant. Suffice it to say from 1999 until 2006, he was required to undergo in excess of 30 surgical operations, including a bone transplant and numerous operations which attempted to remove infection from the injured leg. The medical treatment was financed partially by the appellant's parents and partially by the appellant selling items of sound engineering equipment which he had bought earlier to set up a business. The ongoing medical difficulties experienced by the appellant were caused by negligence on the part of the medical staff who initially operated on his leg after the accident.

[9] In February 1999, the appellant and his wife and two children returned to Bolivia from Chile. They lived with the appellant's parents and the appellant continued to receive medical treatment.

[10] In approximately March 1999, the appellant was employed as a teacher in a tertiary education institution. He retained that job until approximately May 2000, at which time he resigned his position because he was finding it difficult to fulfil his

teaching responsibilities at the same time as having ongoing medical treatment including surgery.

[11] From 2000 until 2002, the appellant and his family continued to live with his parents who helped to support them. The appellant himself found some casual work although he found that his physical impairment prevented him from doing jobs which involved climbing up ladders or lifting heavy sound equipment. The appellant's first wife also undertook some work in order to support them financially.

[12] In early 2002, the appellant's first wife left and returned to Chile with the children. Although the appellant won custody of the children through the courts later in 2002, the children have continued to live with his first wife in Chile until the present time. Throughout 2003, the appellant continued to live with his parents and enjoy their financial support. However, ever since the leg injury in 1998, the appellant had been using painkillers. He developed an addiction to the painkillers and there was increasing tension between the appellant and his parents because of this situation. In early 2004, the appellant's parents sent him to a rehabilitation centre. Although the appellant did not want to go to the centre, he recognised that he had an addiction he was unable to break and considered that, in the absence of his parents providing a home for him, he had nowhere else to go.

[13] While at the centre, the appellant experienced two incidents of sexual abuse. On the first occasion, a fellow patient entered the appellant's bedroom, exposed his penis and asked the appellant to perform sexual acts on him. The appellant refused and then struggled physically with the other patient who was then disturbed by the arrival of a cleaner outside the door and who then left the room. The appellant did not complain to staff about the incident but he did tell his parents who, in turn sought the advice of the appellant's psychologist. In the event, the appellant's parents did not believe the appellant's story and considered that he was simply fabricating events in an attempt to secure his release from the rehabilitation centre.

[14] Some weeks later, the appellant was approached by a group of men who suggested that he might want to join them watching a game of football. However, when he accompanied them to the football field, it became obvious that no game was being played. The appellant was taken by the men into a garden utility shed where his crutches were taken from him and used to pin him down on a table. The appellant was then sexually abused by three of the men. In his attempts to struggle against them, the appellant was also punched in the face and on the body

and sustained serious bruises as a result. In a state of complete shock, the appellant retrieved his crutches and returned to the living quarters where he showered. The next day, he approached the reception area and asked for his doctor to be contacted. On the direction of the doctor, the appellant was interviewed by one of the assistant nurses about the incident. That nurse then approached the alleged perpetrators who simply denied the allegations and asserted that the appellant had received the bruises because he had fallen over. The appellant then asked his doctor to request his parents to visit him which they did within days of the incident. The appellant told them what had happened and they approached the centre director to request that the appellant be allowed to leave. The appellant received permission to leave the next day according to the centre regulations.

[15] After leaving the centre, the appellant approached the police to make a formal complaint. The police arranged for him to be seen by a forensic doctor who, after examining and interviewing the appellant, made a forensic report which the appellant provided to the police. The police then undertook a preliminary investigation of the matter. However, on following the case up, the appellant was told by police that as the perpetrators were “mentally incapable”, a criminal investigation and prosecution would not be pursued. Instead, the police had advised the rehabilitation centre that an internal investigation of the incident should take place. The appellant is not aware of any such investigation having been completed.

[16] Even after the incident, the appellant’s parents wanted him to return to the rehabilitation centre. However, on his refusal, they let him resume living at the family home. The appellant was not happy there because his parents were monitoring his movements and doing such things as checking his pockets and bags for evidence that he had resumed using painkillers. The appellant felt dissatisfied living under his parent’s roof and having to abide by their rules, he determined to find a way to leave.

[17] As part of this plan, the appellant started an internet relationship with a Russian woman, YY, and when she travelled to Bolivia in mid-2004, the appellant left his parent’s house and took up residence with her in a rented flat. YY was financially independent and was able to provide money for both her and the appellant to live. The appellant also undertook small amounts of casual work and sometimes borrowed monies from friends or family to subsidise his income. The

appellant's family did not approve of YY, whom they considered to be a low class "internet bride".

[18] In late 2004, the appellant and YY married.

[19] Throughout 2005, the appellant undertook several trial periods at various workplaces, but he found that his immobility and use of crutches meant that none of the jobs were suitable. In addition to problems finding suitable employment, he found it difficult to access public transport and public buildings around his city. For example, the buses had narrow doorways, high steps and often the aisle would be obstructed by people's bags. Furthermore, the pavements were often potholed or narrow and this made it difficult for the appellant to use them with crutches. The appellant and his wife also suffered some harassment which the appellant attributes to his being on crutches. On a number of occasions when they were walking down public streets, YY would receive unwanted attention because of her blond hair and exotic looks and the appellant was unable to defend her from verbal harassment because he was on crutches. There were also occasions on which the appellant was inadvertently pushed over by strangers who would not stop to help him or apologise.

[20] In mid-2005, the appellant and YY travelled to Chile, for the appellant to pursue a medical negligence case against Chilean doctors who had originally performed surgery on his leg. However, for various reasons which are not material to this appeal, the appellant's attempts to get legal redress for his medical difficulties were not successful. They returned to Bolivia in late 2005.

[21] In early 2006, the appellant's leg again became infected and was finally amputated to avoid the infection spreading. When the infection had flared up, the appellant had moved back into his parent's house and he returned there to recuperate from the amputation surgery. However, because of the strained relationship between the appellant and his parents due to his marriage to YY and their insistence on monitoring his use of painkillers, the appellant soon moved back to his rented flat.

[22] Following the surgery, the appellant made enquiries about getting a prosthetic limb but he was unable to source one of sufficient quality that he would be able to afford.

[23] Following the amputation, the appellant was also informed by the relevant authorities that he could no longer hold a driver's license because he had only one leg.

[24] In March 2006, the appellant sold his last remaining piece of sound equipment and borrowed money from an uncle in the United States to fund his trip to New Zealand. He was accompanied here by YY. They applied for and were granted valid New Zealand visas and arrived at Auckland International Airport on 7 May 2006. They were duly issued visitors' permits valid to 5 October 2006.

[25] On 16 May 2006, the RSB received the appellant's confirmation of claim form. YY also submitted an application for refugee status. However, within weeks of their arrival, YY and the appellant agreed to separate and, in early June 2006, YY returned to Russia.

[26] The appellant fears that if he returns to Bolivia he will immediately become addicted to the painkillers which are freely available there. He believes that this addiction will lead him into a cycle of poverty which will be exacerbated by his difficulties in finding employment because of discrimination against disabled people. The appellant does not wish to go and live back with his parents because of their insistence on monitoring him and making rules about his use of painkillers. The appellant therefore asserts that he will end up either begging for alms on the street or as a patient in the rehabilitation centre, where he fears that he will suffer further sexual assaults. The appellant further believes that because he is accustomed to a relatively high quality of life, his inability to maintain that standard of living makes his feared situation all the more severe.

OTHER MATERIALS

[27] In support of his refugee appeal, the appellant has submitted the following material under cover of a letter dated 28 May 2007:

- (a) a quote from Prosalud (a non-profit provider of health services in Bolivia) for the cost of a prosthetic limb and physiotherapy (total cost USD \$1350.00) ;
- (b) four newspaper articles from *Los Tiempos* concerning disability issues in Bolivia (accompanied by informal translations);
- (c) a medical certificate written by Dr A Vargas Andia, Forensic Pathologist of the Instituto Medico Legal, Cochabamba, dated 3 May 2007 (recorded as

being a copy of the original certificate dated 23 February 2004), outlining the forensic medical results of the examination of the appellant following the physical and sexual assault on the appellant; and

- (d) a medical certificate from Dr K M B Gandarillas of Cochabamba, Bolivia, dated 16 April 2007, (accompanied by informal translation) recording the appellant's previous addiction to Dextropropoxifeno and related medical treatment in 1999. The letter states that the appellant should be "maintained in a context in which he does not have access to this substance" in order to maintain his recovery.

[28] In advance of the appeal hearing, the appellant also submitted a letter, dated 17 March 2007, which outlined his previous painkiller addictions and revealed, for the first time, the incidents of sexual assault in 2006. All of these materials have been read and considered and will be referred to, where appropriate, below.

THE ISSUES

[29] The Inclusion Clause in Article 1A(2) of the Refugee Convention provides that a refugee is a person who:

"... owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it."

[30] In terms of *Refugee Appeal No 70074/96* (17 September 1996), the principal issues are:

- (a) Objectively, on the facts as found, is there a real chance of the appellant being persecuted if returned to the country of nationality?
- (b) If the answer is yes, is there a Convention reason for that persecution?

ASSESSMENT OF THE APPELLANT'S CASE

CREDIBILITY

[31] The Authority accepts the credibility of the appellant. His evidence to the Authority was largely consistent with the evidence he presented to the RSB and the Authority has no reason to doubt it. The Authority does have some concerns that the appellant had not previously revealed the incidents of sexual assault. However, the appellant explained his non-disclosure in a straightforward and plausible manner and the Authority extends to him, to the extent necessary, the benefit of the doubt that the incidents did occur.

IS THERE A REAL CHANCE OF THE APPELLANT BEING PERSECUTED IN BOLIVIA?

[32] Whether a particular appellant is at risk of persecution for a Convention reason is a forward looking test; the decision-maker must undertake an assessment of the future risk to the person. Past persecution is not a prerequisite to refugee status. In some cases, however, past experience may be indicative of the fate of a person upon their return; see *Refugee Appeal No 71404* (29 October 1999).

[33] Persecution has been defined by the Authority as "the sustained or systemic denial of basic or core human rights such as to be demonstrative of a failure of state protection"; Hathaway *The Law of Refugee Status* (Butterworths, Toronto, 1991) pp104-108, as adopted in *Refugee Appeal No 2039* (12 February 1996) and *Refugee Appeal No 74665/03* [2005] NZAR 60.

[34] This decision turns on whether the appellant faces a real chance of being persecuted upon return to Bolivia.

THE RISK OF SEXUAL ASSAULT

[35] The appellant claims that he if he returns to Bolivia, he will immediately be addicted to pain-killers again, which will cause his family to re-admit him to the rehabilitation centre where he is at risk of suffering further sexual assault. This, the appellant states, puts him at real risk of being persecuted.

[36] The appellant's claim in this respect must fail. His evidence does not support the assertion that his family will force him to go back to the rehabilitation centre. While the appellant was initially admitted to the centre by his parents, they

did not force him to return there after the sexual assaults. Instead, he resumed living at their home and with their financial support, albeit under some supervision aimed at curbing his use of painkillers. There is simply no basis for the appellant's contention that they would force him back to the centre against his will.

THE RISK OF SOCIO-ECONOMIC DISCRIMINATION AT THE LEVEL OF "BEING PERSECUTED"

[37] While it is well-established in refugee jurisprudence that a refugee claim may be founded on a violation of one or more economic, cultural or social rights contained in the International Covenant on Economic, Social and Cultural Rights (ICESCR), it is important to stress that a refugee claimant must establish a real chance of being persecuted in their country of origin for a Convention reason. The breach must go to the core of the right and must occasion serious harm. A breach at the margins of a right or one that does not bring about serious harm, will not reach the being persecuted threshold.

[38] Further, as noted above, the evidence must establish both that there is a risk of serious harm (via a sustained or systemic violation of a core human right) and a failure of state protection. Absent one, the claim to refugee status cannot succeed.

THE APPELLANT'S DISABILITY

[39] The appellant repeatedly referred to the discrimination that he claimed he would face in Bolivia on account of his disability and asserted that this amounted to a risk of being persecuted. In particular, the appellant stated that he would suffer discrimination in finding professional employment and asserted that he would therefore be unable to support himself and would be denied the necessities of life. He also asserted that his city lacks sufficient mobility aids for disabled people (for example pavement ramps) and that access to public transport is difficult for the disabled because the buses are narrow and crowded. Further, he stated that the fact that he could not access a prosthetic limb of the quality available in New Zealand or have his current prosthetic limb adequately maintained in Bolivia was a component of his claim.

[40] The Authority finds that none of these assertions supports a finding that the appellant is at risk of serious harm should he now return to Bolivia.

[41] It is important to note that the substantive scope of socio-economic rights enunciated in the International Covenant on Economic, Social and Cultural Rights (ICESCR) falls well short of a guarantee of access to a full range of high quality social services; see for example CESCR, *General Comment No 3*; J.C. Hathaway, *The Law of Refugee Status*, (1991) p 121.

[42] As noted by Hathaway, in relation to those rights recognized by the ICESCR “it is only an ‘adequate standard of living’ that is guaranteed by law, not access to the full range of desirable commodities and services” (Hathaway, p121).

“...[The] carefully crafted qualifications within the ICESCR mean that an absence of state protection can be said to exist only where a government fails to ensure the non-discriminatory allocation of available resources *to meet the most basic of socio-economic needs*. It is in this context that refugee protection becomes relevant – not as a means of access to “the good life”, but rather only to vindicate the right of everyone to those social, economic, and cultural attributes *which are essential to human dignity*.” (emphasis added) [Hathaway, p.117]

[43] This point is echoed by Michelle Foster. In discussing the right to health, for example, she postulates that a refugee claim may not succeed “merely on the basis that medical treatment [the refugee applicant] could or is receiving in the asylum state is superior to that available in the country of origin...”; M Foster *International Refugee Law and Socio-Economic Rights: Refuge from Deprivation*, (Cambridge University Press, Cambridge, 2007) p 226.

A. Medical services

[44] Contrary to the appellant’s assertions, there is no fundamental human right to have free health care in Bolivia to the same standard that is available in New Zealand. Rather, the appropriate inquiry is whether the Bolivian government is unable or unwilling to provide medical services to the “highest attainable standard” (see Article 12 of ICESCR). If the state can fairly be said to do so, taking into account its resources and the demands made upon them, then no matter how far short of another country’s standard they may be, there is no breach of Article 12.

[45] In the particular circumstances of this appellant, there is no evidence before the Authority to establish that Bolivia does not meet the “highest attainable” standard of health care such that it would be in breach in terms of the appellant’s future needs. The appellant has confirmed to the Authority that he does not expect to need any further surgery in relation to his leg injury. The only significant future health care need is in relation to his prosthetic leg. It may well be that the appellant will not be able to access a prosthetic limb to the standard provided in

New Zealand but he concedes that such limbs are available, albeit of a lesser quality or for a greater expense. He has not produced any evidence (and we can find none) to show that Bolivia could (but fails to on discriminatory grounds) provide a higher standard. Further, the availability of such limbs reduces the harm to below the level of 'serious'.

B. Employment

[46] Similarly, the appellant's assertion that he faces a risk of being persecuted because he cannot access the professional job of his choice cannot be sustained. The appellant has provided no evidence to the Authority that he has suffered, or will suffer, a sustained or systemic violation of his right to work. The limit of his evidence is that he now finds it difficult to continue some forms of his previous work as a sound engineer because of his inability to carry heavy sound equipment or climb ladders. The ability of the appellant to find work in his former professional field since his injury has also been seriously limited by his need for ongoing surgery and recuperation periods (precipitating, for example, his voluntary resignation from his university teaching job in 2002), and his painkiller addiction. He has made only very limited attempts to look for work which does not require him to lift sound equipment or climb ladders or outside his field of immediate expertise. These circumstances establish neither a situation of serious harm, nor do they establish a failure of state protection.

C. Mobility and access

[47] As to his claims about the lack of mobility aids around the city, the appellant could provide the Authority with no evidence that the limited provision of such aids is a violation of a fundamental human right such that it would cause serious harm for him. While the Authority accepts that buses may be more crowded than in New Zealand, and the city may be more difficult to move around, the appellant has nevertheless been able to travel around his city while using crutches. It is reasonable to assume that now that he is fitted with a prosthetic limb, such access will become easier.

D. Other socio-economic rights

[48] For the sake of completeness, it is noted that, on the evidence put before the Authority, there is no basis for a finding that the appellant has suffered discrimination in relation to any other ICESCR rights such that he could be said to

be at risk of being persecuted. His evidence is that he has always been able to access rental housing and health care without discrimination. There is no evidence before the Authority which indicates he has ever been denied the opportunity to exercise his fundamental human rights. Furthermore, the relative wealth of the appellant's parents and their willingness over the years to support him and pay considerable sums for his ongoing medical treatment mean that the appellant has been able to access specialist medical and psychological treatment not available as a matter of course in Bolivia.

[49] The Authority has also considered the provisions of the Convention on the Rights of Persons with Disabilities (although the Convention is not yet in force) but finds that the provisions therein do not lend any further support to the appellant's claim to be at a risk of being persecuted in Bolivia.

Conclusion on well-foundedness

[50] The central issue is whether a person, having all of the characteristics of the appellant, in his predicament, faces a real chance of being persecuted. As a relatively young Bolivian man, from a well-off family, with clear parental support, requiring the particular social services needed by an amputee and the inevitable restrictions on the spheres of potential employment, the appellant simply does not face a real chance of being persecuted if he returns to Bolivia. Such inconvenience, distress or limitations on services as he faces falls short of “serious harm” by a demonstrable margin.

[51] On the evidence before it, the Authority finds that there is no basis which supports a finding that the appellant has a well-founded fear of being persecuted on return to Bolivia. The first issue framed for consideration having being answered in the negative, the second issue as framed does not arise for consideration.

CONCLUSION

[52] For all the reasons given above, the Authority finds that the appellant is not a refugee within the meaning of Article 1A(2) of the Refugee Convention. Refugee status is declined. The appeal is dismissed.

“B A Dingle”
B A Dingle
Member