



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
TA3-24496
TA3-24497
TA3-24498
TA3-24499
TA3-24500

s.19(1)

CLAIMANT(S)

DEMANDEUR(S)

DATE(S) OF HEARING

August 13, 2004

DATE(S) DE L'AUDIENCE

DATE OF DECISION

August 25, 2004

DATE DE LA DÉCISION

CORAM

S. Alidina

CORAM

FOR THE CLAIMANT(S)

**Jonathan Otis
Barrister & Solicitor**

POUR LE(S) DEMANDEUR(S)

REFUGEE PROTECTION OFFICER

AGENT DE PROTECTION DES RÉFUGIÉS

DESIGNATED REPRESENTATIVE

REPRÉSENTANT DÉSIGNÉ

MINISTER'S COUNSEL

CONSEIL DE LA MINISTRE

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(hereinafter "the claimant"),
(hereinafter "the claimant's wife"), and their children,
and are citizens¹ of Uruguay.
The claimants claim to be in need of refugee protection pursuant to sections 96, 97(1)(a)
and 97(1)(b) of the *Immigration and Refugee Protection Act*.

ALLEGATIONS

The claimant alleges that he is bisexual and because of his sexual orientation, he was discriminated against at work, and his partnership in a hardware business was terminated by his partner. He was insulted and beaten by two unknown individuals, and his wife's business was vandalized and graffiti painted. Also, his wife and he received threatening calls from unknown people. After his wife's was vandalised, he filed a police report and he mentioned to the police about the threatening calls his wife and he had been receiving. The police took their report but did nothing for him and therefore he had to close down the and leave Uruguay.

¹ Exhibit R/A-2, Photocopy of pages of the claimant's Uruguayan passport certified to be true by Citizenship and Immigration Canada.

ANALYSIS

The determinative issue in this claim is state protection in Uruguay, the claimant's country of nationality. In making this assessment, the panel considered all of the evidence, including the medical and police reports² and counsel's submissions. The panel closely perused the documentary evidence pertaining to sexual minorities, the police, mechanisms for lodging complaints of police abuse, recourses for victims of violence and discrimination, and the level of democracy in Uruguay.

The documentary evidence indicates that there are no laws in Uruguay prohibiting or restricting homosexual behaviour among consenting adults.³ Further, members of the gay community publish a monthly magazine, *La Brújula*, and are served by at least seven social clubs.⁴ Gays, lesbians and transvestites are also represented by at least four public organizations: *Homosexuales Unidos (HU)*, *Asociación de Travestis de Uruguay (ATU)*, *Movimiento de Integración Homosexual (MIH)* and *Grupo Diversidad*, and gay pride marches have been held in Montevideo yearly since 1992.⁵ In 1998, the Montevideo-

² Exhibit C-6.

³ Exhibit R/A-1, item 6, p. 117, Response to Information Request URY32841, October 14, 1999, DIRB, IRB.

⁴ Ibid.

⁵ Ibid.

based Cooperativa Bancaria extended health care and other benefits to same sex couples.⁶ In 1999, the *Grupo Diversidad* announced that it would send a questionnaire to presidential candidates from the main political parties in order to canvass their views on issues of concern to sexual minorities in Uruguay.⁷

The panel recognizes that despite on-going improvements, discriminatory societal attitudes towards sexual minorities still exist in Uruguay. Nevertheless, while the situation for sexual minorities in Uruguay may not be perfect, just as it is not in most societies, there have been considerable improvements. For instance, there is a greater openness in Uruguayan society to listen to the issues and accept them, and there is also greater media coverage dedicated to sexual orientation issues.⁸ Although there are still areas for improvement in the area of legal protection for sexual minorities, there is an abundance of legal jurisprudence in the country, and sexual minorities may rely on the appropriate legal safeguards for protection.⁹

⁶ Ibid.

⁷ Ibid.

⁸ Exhibit R/A-2, item 9, p. 105, Response to Information Request URY37044.E, May 30, 2001, DIB, IRB.

⁹ Ibid.

The latest documentary evidence¹⁰ indicates that on July 10, 2003, the Parliament of Uruguay approved amendments to articles 149.2 and 149.3 of the Penal Code's Law 17677 which came into force on August 17, 2003 which made it illegal to provoke hatred and violence towards a person due to, among other things, their sexual orientation. *OpusGay*, a Chilean-based gay-rights advocacy magazine, in reference to reforms to the penal code, stated that Uruguay would become the first Latin American country that could punish those convicted of homophobic crimes with imprisonment. As a result, in July 2003, for the first time in Uruguay's legal history, a gay person was awarded compensation of US \$14,000.00 in "moral damage" for the death of his partner.

The *Parliamentary News Program (PRONEP)*, *Programa Nexo Parlamentario*, a parliamentary consultancy group associated with majority whip of the Chamber of Deputies, Washington Abdala, published in October 2000 a report on sexual diversity in Uruguay recognizing the legal safeguards for sexual minorities, and identifying three areas where the legislation may be improved: 1) discrimination against sexual minorities to be protected under the Penal Code's hate crimes provision; 2) state regulation of sex change operations and change of sexual identity; and 3) new legislation regarding marital status to include same-sex couples.

¹⁰ Exhibit R/A-3, Response to Information Request URY42738.E.

The panel considered the homophobic comment¹¹ made by the Uruguayan president Jorge Batlle, during a newspaper interview in February 2001. Although not condoning the President's comment in 2001, the panel has to look at the totality of the evidence, which reveals that it was later his own government that amended the Penal Code to include protection for sexual minorities. This is clearly a sign of ongoing improvements and a willingness to continue to address the issue of protection for sexual minorities.

The declarations condemning homosexuality made by the Archbishop of Montevideo received condemnation from various sectors of society such as the Uruguayan Co-ordinator against Racism, Xenophobia and Discrimination and political deputies from the five political parties of the national Chamber.¹²

Although a 1997 report¹³ stated that sexual minorities continued to face arbitrary detention, harassment and violence from the police, it does not give any indication of its frequency. The research conducted by the IRB's research directorate (DIRB) in 1999,

¹¹ Ibid.; and Exhibit C-2, item 4.

¹² Exhibit R/A-3, Response to Information Request URY42738.E.

¹³ Exhibit R/A-1, item 6, p. 117, Response to Information Request URY32841, October 14, 1999, DIRB, IRB.

subsequent to the above report did not reveal any reports of police harassment or violence against members of sexual minorities as alleged by the claimant. Further, the documentary evidence before the panel does not make any reference to these practices continuing after 1997. The panel further notes¹⁴ that the *United States Department of State Report on Human Rights Practices* and *Amnesty International* make no mention of human rights violations against sexual minorities. Given the numerous domestic and international human rights groups operating in Uruguay without restriction as well as gay advocacy groups, one would expect that if such incidents were occurring they would be reported as they have been in the past.

Concerning the police in general, the panel notes that the Public Prosecutor's Office of Police (*Fiscalía Letrada de Policía*) was created on August 22, 1997, to prevent and stamp out irregular actions by police.¹⁵ The functions of the National Inspection of Police (*Inspección Nacional de Policía*), established as a unit of the Ministry of the Interior on November 1, 1992, were expanded by decree on August 22, 1997 to improve its coordination work with the Public Prosecutor's Office of Police with regards to

¹⁴ Exhibit R/A-1, items 2.1, p. 31 and 2.3, p. 45.

¹⁵ Exhibit R/A-1, item 7.1, p. 121, Response to Information Request URY37188.E, 29 May 2001, DIRB, IRB.

internal investigations of irregular or illicit police actions.¹⁶ Although the internal police investigative body is understaffed and can only issue recommendations for disciplinary action, prosecutions have been occurring more frequently.¹⁷ For instance, at least eight police officers have been jailed for abusing detainees, and over 400 police officers have been indicted in the last three years for violations ranging from corruption to abuse.¹⁸ Ministry of Interior authorities act promptly if accusations of alleged police brutality are reported.¹⁹

A Montevideo-based non-government human rights organization, *Servicio de Paz y Justicia* (SERPAJ),²⁰ published in its annual report a section on the following legal recourses and compensation available in Uruguay: 1) the criminal courts of the judiciary hear in the capital and provinces all matters related to prescribed offences; 2) the civil courts of the judiciary throughout the country which handle all "civil consequences" stemming from offences related to an *amparo* recourse, with such recourse being issued

¹⁶ Ibid.

¹⁷ Ibid.

¹⁸ Exhibit R/A-1, item 6, p. 117, Response to Information Request URY32841, October 14, 1999, DIRB, IRB.

¹⁹ *Supra*, footnote 3.

²⁰ Exhibit R/A-1, item 10.2, p. 132, Response to Information Request URY40360, 7 January 2003, DIRB, IRB.

s.19(1)

for the protection of a right which cannot be protected through an application of other existing legal provisions; and 3) administration of compensatory justice for government actions that have caused damage.

In view of all of the above, the panel finds that the Uruguayan government and its judiciary having implemented the Penal Code's Law 17677 is making serious efforts to protect all of its citizens including sexual minorities and to take actions against corrupt police officers.

In the case at bar, the claimant testified that he filed one police report after his wife's was vandalised on , 2003. He reported to the police the graffiti and the threatening calls his wife and he had been receiving. The police took his report but did nothing for him. At the hearing, although he expressed his dissatisfaction at police action, he never made any attempt to file a report about his dissatisfaction of police action and being targeted because of his sexual orientation, to any other state agency in Uruguay. He testified that he did not file a report with the Uruguayan judiciary because, to his knowledge, the police was the maximum authority in Uruguay, and he had no knowledge as to how long it took for the judiciary system to act. He admitted that he never sought any guidance from the gay activist groups because he never had any contact with them. If he felt dissatisfied with police action, it is reasonable to expect of him to

TA3-24496
TA3-24497
TA3-24498
TA3-24499
TA3-24500

have sought help from the other state agencies to redress police misconduct and the mistreatment he had received at work and at his wife's His wife and he are fairly educated persons capable of operating a in Uruguay. Both had the ability to, but elected not to, seek help from other state agencies after they were not satisfied with the police action.

Considering the seriousness of the alleged discrimination and mistreatment by unknown criminals and lack of confidence in the police to address his situation, the claimant ought to have sought out the guidance of one of the existing gay activist groups to help him pursue the matter of state protection through the available legal channels.

The panel considered that Uruguay²¹ is a constitutional republic with an elected president, a bicameral legislature and an independent judiciary providing effective means to deal with individual cases of abuse. In the context of the country of origin, and in the circumstances of this claimant in particular, the panel finds that the claimant has not taken all reasonable steps to seek available protection in Uruguay. The panel finds that the claimant, living in a democratic country, did not reasonably exhaust all courses of action available to him in seeking state protection in Uruguay. Therefore, the panel finds

²¹ Exhibit R-1, item 2.1, p. 31, U.S. Department of State Report, Country Reports on Human Rights Practices, 2002, Uruguay, March 2003.

that he has not discharged the onus of showing clear and convincing proof of the state's inability or unwillingness to protect him.

In assessing this claim for refugee protection pursuant to ss. 96, 97(1) of the *Immigration and Refugee Protection Act (IRPA)*, the panel considered all of the evidence and counsel's submissions. Given the finding with respect to the availability of state protection in Uruguay, the panel finds that the claimant is not a Convention refugee and that he is not a person in need of protection because of a risk to his life or a risk of cruel and unusual treatment or punishment. No evidence was adduced that would support a finding that the claimant faces a danger of torture in Uruguay.

Accordingly, the panel rejects the claims of

and

for refugee protection.

"S. Alidina"
S. Alidina

DATED at Toronto, Ontario this 25th day of August 2004.