



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
TA3-07587

CLAIMANT(S)

DEMANDEUR(S)

(a.k.a.)

DATE(S) OF HEARING

29 March 2004

DATE(S) DE L'AUDIENCE

DATE OF DECISION

8 April 2004

DATE DE LA DÉCISION

CORAM

E.S. Schlanger

CORAM

FOR THE CLAIMANT(S)

**Andrea S. Clarke
Barrister and Solicitor**

POUR LE(S) DEMANDEUR(S)

REFUGEE PROTECTION OFFICER

n/a

AGENT DE PROTECTION DES RÉFUGIÉS

DESIGNATED REPRESENTATIVE

REPRÉSENTANT DÉSIGNÉ

MINISTER'S COUNSEL

CONSEIL DE LA MINISTRE

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is a 29-year-old citizen¹ of Uruguay. He claims to have a well-founded fear of persecution in Uruguay and Argentina at the hands of society and the police for reasons of his membership in a particular social group, namely bisexual men. He also claims protection as a person who faces a risk to life or cruel and unusual treatment or punishment, and as a person in danger of torture.

The claimant lived in Argentina from childhood until 2001. He alleges that once his sexual orientation was discovered at his workplace in Argentina, he was subjected to harassment by his colleagues and discrimination by his bosses, through unpaid overtime, and the assignment of the worst shifts. He alleges that when his landlord subsequently found out about his sexual orientation, he was asked to leave the apartment at the end of the contract. He alleged that in 2001, he quit his job due to the harassment and discrimination he experienced, and decided to live in Uruguay with his parents in order to avoid problems. He alleges that on 2002 he was assaulted by four or five men who told him they hated homosexuals. He alleges that on 2002, he was picked up by police who took him to the central police and placed him in a cell where he was raped by three inmates whom the police had advised of his sexual orientation. He alleges that on 2002, he was released and warned against saying anything about what had happened. He alleges that he left Uruguay on 2003, remained

¹ Exhibit R-2-Photocopy of pages of the claimant's Uruguayan passport was certified to be true by Canada Immigration

in the U.S. for a visit, and arrived in Canada on 2003 when he made a refugee claim. His wife whom he married on 1999, and their two children are citizens of Argentina and they remain living in Argentina.

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 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.² Further, members of the gay community publish a monthly magazine *La Brújula* and are served by at least seven social clubs.³ Gays, lesbians and transvestites are also represented by at least four public organizations: *Homosexuales Unidos (HU)*, *Asociación de Travestis de Uruguay (ATU)*,

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² Exhibit R-1, item 6, p. 117, Response to Information Request URY32841, October 14, 1999, DIRB, IRB

³ Ibid.

Movimiento de Integración Homosexual (MIH) and *Grupo Diversidad*, and gay pride marches have been held in Montevideo yearly since 1992.⁴ In 1998, the Montevideo-based *Cooperativa Bancaria* extended health care and other benefits to same sex couples.⁵ 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.⁶

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.⁷ 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.⁸ The *Parliamentary News Program (PRONEP)*, *Programa Nexo Parlamentario*, a parliamentary consultancy group associated with majority whip of the Chamber of Deputies, Washington Abdala,

⁴ Ibid.

⁵ Ibid.

⁶ Ibid.

⁷ Exhibit R-2, item 9, p. 105, Response to Information Request URY37044.E, May 30, 2001, DIB, IRB

⁸ Ibid.

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.

On July 10, 2003, the Parliament of Uruguay passed amendments to Penal Code articles 149.2 and 149.3, provisions punishing with imprisonment violent acts committed by reason of a victim's sexual orientation.⁹

The panel considered the homophobic comment¹⁰ 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 on-going improvements, and a willingness to continue to address the issue of protection for sexual

⁹ Exhibit R-1, item 9, p. 100, Response to Information Request URY41914.E, September 8, 2003, DIRB, IRB

¹⁰ Ibid. and Exhibit C-2, item 4

minorities.

Although a 1997 report¹¹ 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, subsequent to the above report did not reveal any reports of police harassment or violence against members of sexual minorities. Further, the documentary evidence before the panel does not make any reference to these practices continuing after 1997. The panel further notes¹² 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 (*Fiscalia Letrada de Policia*) was created on August 22, 1997, to prevent and stamp out irregular actions by police.¹³ The functions of the National Inspection of

¹¹ *Supra*, footnote 2

¹² Exhibit R-1, items 2.1, p. 31 and 2.3, p. 45

¹³ Exhibit R-1, item 7.1, p. 121 Response to Information Request URY37188.E, 29 May 2001, DIRB, IRB

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 internal investigations of irregular or illicit police actions.¹⁴ Although the internal police investigative body is understaffed and can only issue recommendations for disciplinary action, prosecutions have been occurring more frequently.¹⁵ 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 abuse¹⁶ Ministry of Interior authorities act promptly if accusations of alleged police brutality are reported.¹⁷ A Montevideo-based non-government human rights organization, *Servicio de Paz y Justicia*¹⁸ (SERPAJ), 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 for the protection of a right which cannot be protected through an application of other

¹⁴ Ibid.

¹⁵ Ibid.

¹⁶ *Supra*, footnote 3

¹⁷ *Supra*, footnote 3

¹⁸ Exhibit R-1, item 10.2, p. 132, Response to Information Request URY40360, 7 January 2003, DIRB, IRB

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 is making serious efforts to protect all of its citizens including sexual minorities.

In the case at bar, the claimant testified that he never reported to any state authority in Uruguay any of the aggression that he suffered as a result of his sexual orientation 1) because of "the police handling", 2) because of the police's lack of education, 3) because he had been abused by people on the street and 4) because the police had not helped him while he was being assaulted in the cell by inmates. The panel recognizes that the claimant may not have been able to get the assistance of the rogue policemen who detained him and were acquiescent in what happened to him while in their custody. However, considering the available measures to deal with illicit police actions, the panel finds that the claimant ought to have taken the matter to the Public Prosecutor's Office of Police or the National Inspection of Police, rather than remaining in Uruguay without taking any state protection measures for six months, and then seeking protection abroad. Considering the seriousness of the alleged abuse, that is rape, the claimant ought to have sought out the guidance of one of the existing gay activists groups to help him pursue the matter of state protection through the available legal channels. The panel also finds that the claimant ought to have reported to the police the assault he experienced in 2002.

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The panel considered that Uruguay¹⁹ 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 protection in Uruguay. Therefore, it finds 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 and 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 the claimant 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.

¹⁹ Exhibit R-1, item 2.1, p. 31, U.S. Department of State Report, Country Reports on Human Rights Practices, 2002, Uruguay, March 2003.

Accordingly, the panel rejects the claim of
protection.

for refugee

"E.S. Schlanger"

E.S. Schlanger

DATED at Toronto this 8th day of April 2004

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