



IMMIGRATION AND REFUGEE BOARD
(REFUGEE PROTECTION DIVISION)

LA COMMISSION DE L'IMMIGRATION
ET DU STATUT DE RÉFUGIÉ
(SECTION DE LA PROTECTION DES RÉFUGIÉ)

IN PRIVATE
HUIS CLOS
TA2-23970

CLAIMANT(S)

DEMANDEUR(S)

DATE(S) OF HEARING

January 10, 2005

DATE(S) DE L'AUDIENCE

DATE OF DECISION

March 18, 2005

DATE DE LA DÉCISION

CORAM

Hope Sealy

CORAM

FOR THE CLAIMANT(S)

**El-Farouk Khaki
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 DU MINISTRE

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, the claimant, is a citizen of Uruguay.¹ He claims refugee protection pursuant to ss. 96 and 97 (1) of the *Immigration and Refugee Protection Act*.

At the start of the hearing the claimant showed cause why his claim should not be declared abandoned.²

Allegations³

The claimant is twenty-two years old. In 2002 he met Approximately one month later he began a sexual relationship with wanted the claimant to live with him. In 2002 asked the claimant to break off the relationship he had with a girlfriend, The claimant refused. . . . broke off the relationship when she learned that the claimant was having a relationship with a man. . . . advised the claimant's parents of the relationship he had with their son. The claimant's parents were upset. At work the claimant heard sarcastic comments regarding his homosexuality. He was told that his services at work were no longer needed and was sure that this was because of his sexual orientation. In 2002 three men beat up the claimant on the street. They threatened to kill him because they didn't like "faggots". . . . continued to urge the claimant to live with him. When the

¹ Exhibit R-2. Copy of pages of the claimant's passport provided by Canada Immigration (CIC). There is no notation on the copy to indicate that CIC regard the passport as fraudulent.

² Exhibit C-5.

³ Exhibits C-1 and C-3 Personal Information Form completed by the claimant and amended narrative completed by the claimant, summary of

claimant suggested that they stop seeing each other threatened to kill him. The claimant fearing that his life was not safe went to the police station. The police questioned him, asked him if he was gay and when hearing that he was, said that they had no time to deal with problems between "faggots". They told him to leave the police station if he wished to avoid being jailed. Two days later the claimant received a telephone call in which the caller said that he knew the claimant was a "faggot" and that he would pay for this. The claimant left Uruguay for Canada and arrived here on 2002. He claimed refugee protection on 2002.

Determination

The panel finds that the claimant is not a Convention refugee as he does not have a well-founded fear of persecution in Uruguay. The panel also finds that the claimant is not a person in need of protection in that his removal to Uruguay would not subject him personally to a risk to his life or to a risk of cruel and unusual treatment or punishment. No evidence was adduced that could lead the panel to find that there are substantial grounds to believe that his removal to Uruguay will subject him personally to a danger of torture.

Analysis

At the hearing the claimant described his sexual orientation as gay. The panel accepts, on a balance of probabilities, that this is so and makes its decision based on that acceptance of his sexual orientation.

He testified that he is afraid of the police in Uruguay and Uruguayan society itself.

In both the Personal Information Form (PIF) narratives the claimant provided he stated that threatened him with death.⁴ This same allegation appears in the claimant's reported answer to the question on what he feared on return to Uruguay on the form: Schedule 1 Background Information that he completed for Canada Immigration (CIC).⁵ At the hearing he said that had never said that he would kill him, had never threatened him with death. Rather, he said, in telephone calls following their last 2002 meeting, had said that if the claimant did not return to him, things would take a turn for the worse or that things would not be good. Asked why he had not so stated, rather than state that his life had been threatened, the claimant said that this is what he understood from saying that things could get worse. The panel finds the claimant to have exaggerated the threat from and does not believe, on a balance of probabilities, that threatened the life of the claimant.

In paragraphs 17 to 21 of his amended PIF narrative, the claimant writes as follows of events after had, as he wrote, threatened to kill him.⁶ "Despite all my fears, I decided to complain to the police because I felt that my life was not safe anymore. I had already been attacked, was subject to constant verbal harassment and threats and on

⁴ Exhibits C-1 and C-3.

⁵ Exhibit R-2. Question C on page 3 of 6.

⁶ Exhibit C-3.

top of all that, being harassed by . When I went to the police station I talked with the officer in charge. I explain to him that I had been assaulted and had a death threat from my attackers. The police started to interrogate me inquiring about the circumstances of the assault. I gave him the information he asked for, and told him of the threats from my former friend. The policeman looked at me incredulously and asked me sarcastically what kind of guy I was to get so many threat sin such a short period of time."

At the hearing the claimant was asked who "his former friend" was and responded that it was . The narrative therefore makes it clear that not only did the claimant report the threat he had received from to the police, but that this specific information led the police to deal sarcastically with him. At the hearing however the claimant stated that, although he had meant to report the threats he said he had received from he did not get around to doing so. Asked about this inconsistency, the claimant responded that it maybe was a mistake in the narrative.

The issue of what harm the claimant fears from . and the issue of police protection against such harm is central to the claim before the panel. Based on the evidence before it the panel finds, on a balance of probabilities, that . has not threatened the claimant with death, that the claimant never reported . s aggressive behaviour towards him to the police, (his testimony was that in . 2002

s.19(1)

dragged him into a car, took him to his home and masturbated in front of him), and that he therefore did not give the police in Uruguay an opportunity to assist him in this matter.

It was the claimant's testimony, and mentioned in letters from a friend,⁷ that continues to seek information about the claimant from the claimant's parents and that has been annoying the claimant's former girl friend. The claimant stated that his mother was bothered by 's telephone calls but that she has taken no steps to avoid these calls by changing her telephone number. The panel finds, on a balance of probabilities, that the harm the claimant faces from is harassment that does not amount to persecution. It does not find in the credible evidence before it that there is a reasonable chance that should the claimant return to Uruguay he would face behaviour that could be called persecutory from based on his sexual orientation. The panel, on a balance of probabilities, does not find that the claimant's life would be at risk at the hands of or that he would be at risk of cruel and unusual treatment or punishment from

The claimant was asked if he took steps to report the behaviour he said he had received from the police to whom he reported in , either to their superior officers to another police station or any other agency in Uruguay. He said he had not. He said he did not know where to go to lodge a complaint. He said that he hadn't sought any

⁷ Letters dated , 2002 and 2004 from (disclosed with translations by counsel post hearing under cover of his letter dated , 2005.

information as to where he could go to lodge a complaint. He said it hadn't occurred to him to take the matter further.

Documents before the panel outline the steps that Uruguayan citizens can take to complain of irregular behaviour by the police and bodies to which Uruguay citizens can appeal in cases such as assault and death threats.⁸ Response to Information Request URY40360 gives information from a 1999 report that refers to three instances of recourse: the criminal courts of the judiciary, the civil courts of the judiciary and, although this would not be relevant to the claimant's situation, the administration of compensatory justice. There is an internal police investigative unit that "receives complaints from any person concerning possible noncriminal police abuse of power." The report mentioning this unit states that the unit is understaffed and only can issue recommendations for disciplinary action. The panel lacks evidence that its recommendations are ignored. Throwing out a complainant from a police station is certainly an abuse of power and as such the panel regards it as an act that would, based on the information above, be worthy of investigation by this unit.

Regarding the police reaction to the complaint the claimant allegedly made to them of the beating he had received from three young guys, the claimant was asked if he either had a copy of the report he had made or had sought to obtain such a copy. He

⁸ Exhibit R-1. Responses to Information Requests: URY40360.E, January 7, 2003 and URY37188, May 29, 2001

answered in the negative. The panel advised him of its specialized knowledge that reports are provided by the police in Uruguay. He said he had not asked a relative to try to obtain such a report as he believed that a report did not exist. Based on the panel's knowledge of reports being provided by the Uruguayan police even in cases where the person making the report may not have been satisfied by the police follow up, the panel draws an adverse inference from the claimant's failure to even attempt to get such a report.

Regarding the claimant's alleged fear of the police, should he return to Uruguay the panel finds that it is unfounded. As stated above, the panel does not find before it credible evidence that the claimant went to the police to lodge complaints against or against the three young men who beat him up. The claimant testified that he believed that the person who telephoned him stating that the caller knew that the claimant was a "faggot" was a policeman. He stated that only the police and [redacted] had his telephone number. However, later he testified that persons at his school and at his former work place would have his number and the panel does not find that, on a balance of probabilities, the police telephoned the claimant threatening him because of his sexual orientation.

Response to Information Request URY32841.E of October 1999⁹ reports on arbitrary detention, harassment and violence on the part of the police against homosexual

⁹ Exhibit R-3.

persons as late as 1997. The same document however states that, "no reports of police harassment or violence against members of sexual minority communities could be found among the sources consulted for the period 1997- 1999".

Response to Information Request URY42738.E answers the following request. "Update to URY39133.E, of 14 August 2002 about the treatment of homosexuals and URY 41914.E, of 8 September 2003 regarding Penal Code amendments allowing for the punishment of violent acts committed by reason of a victim's sexual orientation; situation of gays and lesbians; availability of legal and state protection".¹⁰ Given the request for information on the "treatment of homosexuals", the panel would have expected to find information on persecution/harassment of homosexual persons by the police in the document should this be a reality. There is nothing in the document that tells of police persecuting homosexuals nor of police violence against them.

The panel has read through all the documents provided by counsel in support of the claim. It notes therein a 2002 report of the police in Punta Del Este withholding a sanitation permit for a homosexual bar in that city.¹¹ A 2001 document, also in the Board's own package, states that at that time a gay person could be arrested for acts that

¹⁰ Document disclosed to counsel through letter from the RPO dated . 2005, seeking his comments and allowing him to seek a reconvening should he feel this necessary.

¹¹ Exhibit C-2. Item 2.

the police consider to be "public indecency".¹² There is no recent document that would support a finding that there is a reasonable chance that the claimant, as a homosexual male, would face persecution from the police based on his sexual orientation, should he return to Uruguay.

There is nothing in the documents before the panel that would support a finding that the claimant's life would be at risk at the hands of the police in Uruguay, or that he would be at risk of cruel and unusual treatment or punishment at the hands of the police should he return to Uruguay.

Some of the documents before the panel regarding societal feelings towards homosexual persons is somewhat dated. Two 1999 documents tell of discriminatory behaviour towards these persons.¹³ Having read all the documents before it, the panel finds that clearly some in Uruguay are uncomfortable with homosexual persons, that these include church leaders, such as Archbishop Cotugno, who has spoken out against homosexuality treating it as morally deviant and an illness,¹⁴ and that even the president of the republic has stated his repugnance for homosexual persons.¹⁵

Of significance to the panel was the response to the statements by Archbishop Cotugno, response that indicates that there is societal revulsion to such homophobic

¹² Exhibit C-2, Item 6 and Exhibit R-1 pages 111 – 116.

¹³ Exhibit R-1. Response to Information Request URY37044.E, May 30, 2001 quoting a 1999 report and Response to Information Request URY32841.E, October 14, 1999..

¹⁴ Response to Information Request URY42738.E, July 16, 2004. Disclosed to counsel post hearing seeking his comment or request for a reconvening of the hearing.

¹⁵ Exhibit R-1. Response to Information Request URY37044.E, May 30, 2001.

statements. According to the Uruguayan Pride Coordination group, a coalition of nine gay and lesbian organizations, his comments received condemnation not only from sectors of society from which one would expect such condemnation, the Uruguayan Coordinator against Racism, Xenophobia and Discrimination, but also from political deputies from the five political parties of the national Chamber.¹⁶

Also of significance to the panel was that despite the 2001 reported anti-homosexuals statements by the President, the Uruguayan government subsequently, in 2003 approved amendments to articles 149.2 and 149.3 of the country's Penal Code Law making it illegal to provoke hatred and violence towards a person due to, among other things, their sexual orientation.¹⁷

There are other documents before the panel dealing with societal behaviour towards homosexual persons. The Gully, in a 2001 article looking particularly at the situation of homosexual persons in Uruguay, quotes a lesbian activist as saying that she feels that Uruguayan society at large, specifically in Montevideo, has changed more regarding lesbian and gay issues than the lesbian and gay community itself.¹⁸ She states that the issue has appeared more frequently in the media and in conversations among

¹⁶ Response to Information Request URY42738.E, July 16, 2004. Disclosed to counsel post hearing seeking his comment or request for a reconvening of the hearing.

¹⁷ Response to Information Request URY42738.E, July 16, 2004. Disclosed to counsel post hearing seeking his comment or request for a reconvening of the hearing.

¹⁸ Exhibits R-1 and C-2.

people, and that although there is still scorn and a lack of understanding, she perceives a greater willingness to listen and to accept.

The claimant lived in a dormitory suburb of Montevideo. As long ago as 1999 there were at least seven social clubs serving Montevideo's gay community, a monthly magazine published by the community and members of the community were represented on four public organizations. As long ago as 1998, the Montevideo-based Cooperative Bancaria extended health and other benefits to same sex couples.¹⁹

Whereas the 1999 Response to Information Request tells of the Gay Pride parade in Montevideo attracting only 200 gay and lesbian persons in 1994,²⁰ the panel notes that Response to Information Request URY42738.E issued in July 2004 states that this parade has become so popular since its inaugural event in 1993 that supportive heterosexual group such as the Federation of High School Students have joined in the celebration.²¹

This 2004 document states that in July 2003 the Parliament of Uruguay approved amendments to articles 149.2 and 149.3 of the Penal Code's Law 17677 that would make it illegal to provoke hatred and violence toward a person due to, among other things, their sexual orientation. These amendments came into force in August 2003. Opus Gay, a

¹⁹ Exhibit R-1. Response to Information Request URY32841.E, October 14, 1999.

²⁰ Exhibit R-1. Response to Information Request URY32841.E, October 14, 1999.

²¹ Disclosed to counsel post-hearing with seeing his comment or request for a reconvening of the hearing.

Chilean-based gay-rights advocacy magazine, writing about the amendments stated that Uruguay would become the first Latin American country that could punish those convicted of homophobic crimes with imprisonment. The prison terms range from three to eighteen months or six to twenty-four months for persons who publicly or through any media incite or indulge in hatred, disregard any form of moral or physical violence against one or more persons on the basis of their sex, sexual orientation or gender identity, profession, craftsmanship, or physical condition.

Counsel, in his post hearing comments, states that given the documentary evidence before the panel in Response to Information Request URY 37044.E of May 2001 of the strong homophobic traits in Uruguayan society, and the behaviour against homosexual persons portrayed therein, it would be contrary to common sense to assume that such deep-seated prejudice and ill-treatment has disappeared.²² Counsel writes that there is no indication that the treatment as evidenced in earlier documentary evidence has dissipated or eradicated.

Counsel is correct that the panel has nothing before it to indicate that ill-treatment or prejudice against homosexual persons in Uruguay has disappeared, been eradicated or dissipated. The panel does not need to find that prejudice or incidents of harassment have disappeared. The panel needs to find that there is state protection for gay men in

²² Counsel's letter of " ", 2005.

Uruguay. There is much evidence that this is so even if attitudes towards gay men are slow to change.

The panel, having read all the documents, finds that movement in Uruguay towards societal respect for homosexual persons has been steady. The government has increased protection for them and the panel does not have before it evidence that society as a whole, or powerful sections of society, have raised their voices against the government's actions. The same document that counsel drew the panel's attention to, Response to Information Request URY37044.E, of May 30, 2001,²³ while telling of the societal pressure that homosexual persons can face, states that regarding legal protection, the rights of sexual minorities would be included in the citizens' right that Uruguay protects. There is, it states, an abundance of legal jurisprudence in the country and sexual minorities may rely on the appropriate legal safeguards for protection.

There is, further, a Parliamentary Nexus Program, a parliamentary consultancy group associated with the country's majority whip, Washington Abdala, which has looked specifically at the situation of homosexual persons in Uruguay and published a report in 2000. In this report the group suggested ways in which to strengthen the protection available to homosexual persons in the country, e.g. establishing new legislation regarding marital status as to include both opposite- and same-sex couples, and adding sexual orientation or sexual identity as grounds for protection under the Penal

²³ Exhibit R-3.

Code's hate crimes' provisions given that homosexual persons are often victims of crimes expressing hate and contempt. The government has acted on this last recommendation, as the panel has earlier noted.

The panel has before it an October 2001 letter written by Coordinadora Orgullo, 2001, (Pride 2001 Coordination) in Uruguay to the then UN High Commissioner for Human Rights and published by Amnesty International.²⁴ This letter refers to the homophobic statement of the country's president mentioned earlier in these Reasons, mentions problems the Uruguayan section of Amnesty International were experiencing in getting a meeting with the Minister of Inner Affairs. The letter speaks of gay persons in Uruguay having a long way to go, but mentions positive signs that had been coming from the country's parliament and details one of them, the amendment to Article 149 of the Penal Code which the panel has already described.

The panel also had before it a later document from Amnesty International together with the U.S. Department of State on Human Rights Practices in Uruguay.²⁵ In neither of these documents is there mention of homosexual persons in the country being victims of systemic persecution, nor that the state is unwilling or unable to afford protection to them. Uruguay is described in the U.S. document as a country in which a number of

²⁴ Exhibit C-2. Item 5.
²⁵ Exhibits R-1 and R-4.

domestic and international human rights groups operate without government restriction, investigating and publishing their findings on human rights cases. Government officials, it says, are generally cooperative and responsive to their views. Given this, the panel would expect that were state protection a problem for homosexual persons to access in Uruguay there would be mention of this in these documents.

Uruguay is a constitutional republic with an elected president and a bi-cameral legislature. The country is a multiparty democracy with mandatory voting for those 18 years of age or older. The judiciary is independent. The government generally respected the human rights of its citizens, and the law and judiciary generally provided effective means of dealing with individual instances of abuse, although there were reportedly problems in some areas such as delays in the judicial process and poor prison conditions.

The panel finds the claimant's fear of persecution is not well-founded. He has failed to provide clear and convincing evidence that the state is unwilling or unable to protect him against persecution or risk to his life or risk of cruel and unusual treatment or punishment.²⁶ The burden of proof to establish absence of state protection is "directly proportional to the level of democracy in the state in question."²⁷ The panel finds that there is a high level of democracy in Uruguay.

²⁶ *Canada (Attorney General) v. Ward*, [1993] 2 S.C.R. 689, 103 D.L.R. (4th) 1, 20 Imm. L.R. (2d) 85, footnote 1, at 724-726.

²⁷ *M.C.I. v. Kadenko, Nina* (F.C.A., no. A-388-95), Hugessen, Décary, Chevalier, October 15, 1996.

Based on the foregoing, the panel rejects the claim for refugee protection of

"Hope Sealy"
Hope Sealy

DATED at Toronto this 18th day of March 2005

s.19(1)