

REFUGEE STATUS APPEALS AUTHORITY
NEW ZEALAND

REFUGEE APPEAL NO 76052

AT WELLINGTON

<u>Before:</u>	C M Treadwell (Member)
<u>Representative for the Appellant:</u>	The appellant represented himself
<u>Appearing for the Department of Labour:</u>	No appearance
<u>Date of Hearing:</u>	17 September 2007
<u>Date of Decision:</u>	23 October 2007

DECISION

INTRODUCTION

[1] This is an appeal by a single man from the Czech Republic, aged in his late 20s, against a decision of a refugee status officer declining him the grant of refugee status.

BACKGROUND

[2] The crux of the appellant's claim is that he is homosexual. He says that, as such, he is at risk of being persecuted by members of the Czech community, against whom the government cannot protect him.

[3] The central issue on appeal is the question whether the appellant's anticipation of being persecuted is well-founded. In other words, whether there is a real chance of him suffering serious harm, against which he cannot obtain state protection, if he returns to the Czech Republic.

THE APPELLANT'S CASE

[4] The account which follows is a summary of the evidence given by the appellant on appeal. It is assessed later.

[5] According to the appellant, he is the son of middle class parents – a farm worker and a clerical officer – from a town of some 100,000 people in north-eastern Bohemia, approximately 100 kilometres from Prague. The appellant's parents separated when he was about 13 and his mother then remarried. He has two half-siblings.

[6] The appellant had an unremarkable childhood, until he reached adolescence and began to realise that he was attracted to men rather than women.

[7] The appellant explored his emerging sexuality with great interest, undertaking research into it and, in particular, into its place in Czech society. He did not reveal his homosexuality to anyone, being afraid of the reaction.

[8] In 1991, the appellant began attending a polytechnic institute. He learned from his research and enquiry that homosexuals were occasionally attacked and beaten outside gay bars and nightclubs. He heard of one particular bar being demolished by homophobic elements in society.

[9] In the mid-1990s, when the appellant was aged about 18 and working as a chef, he began to visit gay bars and clubs. He did not experience any difficulty in doing so and he continued to keep his sexuality hidden from his family and friends.

[10] That secrecy came to an end in early 1996, when the appellant told his mother, step-father and half-siblings that he was homosexual. They reacted with revulsion and rejection, particularly his half-brother, who became aggressive towards him. Thereafter, the appellant's relationship with his family cooled to the point that they would exchange only social pleasantries if they happened to pass in the street.

[11] In mid-1997, the appellant formed his first serious gay relationship. His partner also chose to keep his homosexuality relatively private, though the two of them would frequent gay bars and clubs. The relationship ended in 2001.

[12] On one occasion, in 2000, the appellant happened to witness a group of men assault a gay man outside a bar. The appellant knew the man but did not intervene, aware that he could do little to assist the man and that he would simply suffer the same beating himself. He did, however, have the bar staff telephone the police. He learned later that the victim was hospitalised with a number of broken bones.

[13] The appellant undertook varied employment throughout 2001-2003, with mixed success. In particular, he lost a considerable sum on a failed ski-resort hotel venture.

[14] In August 2003, the appellant left the Czech Republic for New Zealand, ostensibly for a holiday. He arrived here on 26 August, after which date he lost contact with his family. He has not contacted them in the last four years.

[15] Since his arrival in New Zealand, the appellant has formed a relationship with, and lives with, a New Zealand man, AA. The relationship is now some 6 months old.

[16] The appellant says that he does not wish to return to the Czech Republic for the following reasons:

- (a) As a gay person, he would be at risk of discrimination and harassment from the public;
- (b) As a gay person, he would be at risk of serious physical harm at the hands of homophobic elements of the public;
- (c) He would likely be forced to separate from his partner AA;
- (d) He is likely to have to pay a substantial accrual of 'social security' tax which will have built up because he failed to inform the authorities that he was leaving the country.

Evidence of AA

[17] The appellant's partner, AA, also gave evidence to the Authority. He confirms the genuineness of their relationship.

[18] AA has not been to the Czech Republic and is unfamiliar with it. If the appellant is forced to leave New Zealand, AA will be faced with the difficult choice of separating from him or abandon his own tertiary studies in New Zealand, as well as move away from his own family, with whom he is close.

Documentary evidence

[19] At the conclusion of the appeal hearing, the Authority granted the appellant leave to produce any further country information as to the circumstances for gays in the Czech Republic by 12 October 2007. Such leave was considered appropriate in light of the fact that the appellant is self-represented. No further country information or other evidence or submissions have been received, however.

[20] The Authority and the appellant have been provided with the file of the Refugee Status Branch, including copies of all documents submitted by the appellant at first instance.

THE ISSUES

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

"... owing to a 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."

[22] 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

[23] The appellant's account is accepted as truthful. In particular, it is accepted that he is homosexual, that he is estranged from his family as a result and that he is living in a genuine relationship with a New Zealand man, AA.

Objectively, on the facts as found, is there a real chance of the appellant being persecuted if returned to the Czech Republic?

[24] In summary, the appellant says that should he return to the Czech Republic he will face discrimination and harassment as well as physical harm at the hands of members of the public. The appellant's case is that it is his sexual orientation which exposes him to these forms of harm.

[25] The issue is whether a person of his characteristics facing these particular situations can be properly described as having "a well-founded fear of being persecuted".

[26] It is accepted that where there is a real chance of an individual being persecuted for reason of his or her sexual orientation, it is appropriate for refugee status to be recognised: See *Refugee Appeal No 74665/03* [2005] NZAR 60. In adjudicating a claim to refugee status based on sexual orientation a decision-maker does not apply any special rules of interpretation. Rather, the exercise is a conventional one of applying the language of the Convention to the facts as found. In this exercise the phrase "being persecuted" is to be understood as the sustained or systemic violation of basic human rights demonstrative of a failure of state protection. As it is sometimes expressed, Persecution = Serious Harm + The Failure of State Protection. See *Refugee Appeal No 74665/03* at [41] and [53]. Understanding "being persecuted" in these terms requires the presence not only of the breach of a fundamental human right, it also requires a risk of serious harm. The breach of a fundamental human right, such as the right to privacy or the right to non-discrimination, is insufficient on its own to satisfy the "being persecuted" limb of the definition.

Discrimination and harassment by members of the public

[27] We accept that there is a real chance that the appellant may suffer occasional acts of discrimination and harassment by members of the public if he

returns to the Czech Republic. Such treatment is to be regretted. The issue, however, is whether such breaches of the right to non-discrimination and the right to privacy constitute serious harm, in the context of “being persecuted”.

[28] We are satisfied that, even if the appellant is to suffer occasional derogatory comments and slurs about his sexual orientation from others on return to the Czech Republic, such treatment will cause no more than transient and short-lived feelings of hurt and rejection. They will not amount to serious harm, such as to constitute “being persecuted”.

Physical harm by members of the public

[29] The appellant also points to the risk of being the victim of random assault by intolerant individuals. His own experience of seeing a gay man being beaten outside a bar is illustrative of the harm he anticipates.

[30] There is no doubt that Czech society contains an element of homophobic individuals who engage in ‘gay-bashing’, just as can be found in New Zealand and most countries of the world. Their conduct is to be condemned. Nevertheless, the question to be addressed in the context of refugee law is whether the incidence of such harm is so prevalent in the Czech Republic that the risk of a random assault becomes elevated, for this appellant, to the level of a real chance.

[31] Country information satisfies the Authority that the incidence of assaults on homosexuals, for reason of their sexual orientation, is no more than occasional. Indeed, the Czech Republic is notable in Europe for its tolerance. As the *Gay and Lesbian World Review* dated November 2003, “A Tale of Two Eastern European Cities”, records:

“Both Dr Cierna [director of the social service organisation of the Evangelical Church of Czech Brethren] and Mr Havlik [of Gay Initiativa] spoke of the tolerance of the Czech people, anchored in a strong conviction that someone’s sexual behaviour is a private matter that’s not suitable for discussion. Even though most Czechs probably regard homosexuals as “strange” (in Cierna’s words) this does not make it wrong – or even noteworthy. It is this strong conviction in privacy, no doubt borne in part of history as a nation occupied by outsiders (the Austro-Hungarians, the Nazis, the Communists) that makes the Czech wary of imposing restrictions on personal behaviour.”

[32] The same report notes that homophobic violence in Prague, which has a thriving gay and lesbian scene, is almost unheard of. *Spartacus 2005/2006*, an international gay guide, states:

“Prague is a liberal city where many gay Czechs choose to live....

Czech society is liberal and open minded, perhaps because the church never had much influence within the society.”

[33] The tolerant attitude of Czech society towards gays is also reflected in the fact that homosexuality was decriminalised there as early as 1961 and the remaining laws against homosexual activity were repealed in 1990. Same-sex marriages were legalised in July 2006 – the Czech Republic being the first European state to do so.

[34] There are, of course, occasional problems. The United Kingdom Home Office’s *Country Report: Czech Republic* (October 2003), noted the occurrence of an attack by skinheads on a gay club in Liberec on 11 August 2001. It went on to comment, however, that it was only the second attack of this kind since 1989. It also reported that there are some 30 gay and lesbian organisations in the Czech Republic.

[35] As to the question of state protection, there is no evidence that the police fail to take appropriate steps to investigate offences against gays and to prosecute those responsible. Indeed, in respect of the attack on the gay nightclub in Liberec, the *Gay and Lesbian World Review* noted, from its interview with Mr Havlik:

“He too replied that there was no violence against gay people in Prague. After a moment he remembered an incident a year or two earlier in which some “skins” had attacked a gay bar in Liberec (in Bohemia). The crime had been promptly and thoroughly investigated, and it turned out the target had not been premeditated. The skinheads were drunk and had determined to cause trouble for the next people they saw.”

[36] Having put the foregoing country information to the appellant, the Authority extended to him the opportunity to submit any contradictory reports he might locate. He has not submitted any.

[37] In spite of the appellant’s concerns, the Authority is satisfied that there is no more than a remote chance of him suffering physical harm in the Czech Republic because of his sexual orientation – certainly well below the ‘real chance’ threshold.

Separation from AA

[38] It is accepted that, if the appellant is forced to return to the Czech Republic, it might mean that he will be separated, at least in the short term, from his partner AA. Such separation would, however, be likely to be temporary only given that New Zealand immigration law recognises same-sex de facto relationships and same-sex civil unions. The opportunity to test the appellant's eligibility for permanent residence on relationship grounds clearly exists. Any necessary separation would be disagreeable to both the appellant and AA but it would fall far short of constituting serious harm and would not be for any Convention reason.

Social Security tax

[39] Finally, the appellant expresses concern at returning to the Czech Republic because, when he left, he failed to notify the Czech authorities of his departure. As a result, he says, he will have accrued substantial unpaid mandatory social security payments – a form of tax which all Czech nationals are required to pay, unless they notify the authorities that they are departing the country. The appellant apprehends that demand will be made of him for the outstanding sum if he returns to the Czech Republic.

[40] It is not possible to determine (and the appellant did not know) whether he is able to get the accrual remitted by providing evidence of his absence from the country. In any event, the point is moot in terms of the appellant's claim to refugee status. The short point is that the collection of lawfully-due taxation is neither persecutory nor, being a law of general application for the sole purpose of revenue-collection, is it for any of the Convention reasons.

Conclusion on the “being persecuted” and well-foundedness issues

[41] Having examined the strands of the appellant's case separately and cumulatively, none of them on their own or taken together satisfy the Convention requirement that there be a well-founded fear of being persecuted. A person having all of the characteristics of the appellant facing the particular circumstances he has identified does not face a real chance of being persecuted in the Czech Republic. For the reasons given, the Authority concludes that the answer is “No”. The appellant does not face a real chance of being persecuted should he return to the Czech Republic.

[42] It follows that the second issue raised by the Convention definition, namely that of the reason for the anticipated harm, does not arise for consideration.

CONCLUSION

[43] For the foregoing reasons, the appellant is not a refugee within the meaning of Article 1A(2) of the Convention. Refugee status is declined. The appeal is dismissed.

"C M Treadwell"

C M Treadwell
Member