

0801679 [2008] RRTA 270 (15 July 2008)

DECISION RECORD

RRT CASE NUMBER: 0801679

DIAC REFERENCE(S): N99/001489

COUNTRY OF REFERENCE: Republic of Congo

TRIBUNAL MEMBER: Hugh Wyndham

DATE DECISION SIGNED: 15 July 2008

PLACE OF DECISION: Sydney

DECISION: The Tribunal affirms the decision not to grant the applicant a Protection (Class AZ) visa.

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

1. This is an application for review of a decision made by a delegate of the Minister for Immigration and Citizenship to refuse to grant the applicant a Protection (Class AZ) visa under s.65 of the *Migration Act 1958* (the Act).
2. The applicant, who claims to be a citizen of the Republic of Congo, arrived in Australia and applied to the Department of Immigration and Citizenship for a Protection (Class AZ) visa. The delegate decided to refuse to grant the visa and notified the applicant of the decision and his review rights.
3. The delegate refused the visa application on the basis that the applicant is not a person to whom Australia has protection obligations under the Refugees Convention, since he had a right of entry and residence in country X
4. The matter is now before the Tribunal.

RELEVANT LAW

5. Under s.65(1) a visa may be granted only if the decision maker is satisfied that the prescribed criteria for the visa have been satisfied. In general, the relevant criteria for the grant of a protection visa are those in force when the visa application was lodged although some statutory qualifications enacted since then may also be relevant.
6. Section 36(2) of the Act, as in force before 1 October 2001, provided that a criterion for a protection visa is that the applicant for the visa is a non-citizen in Australia to whom Australia has protection obligations under the 1951 Convention Relating to the Status of Refugees as amended by the 1967 Protocol Relating to the Status of Refugees (together, the Refugees Convention, or the Convention).
7. Further criteria for the grant of a Protection (Class AZ) visa are set out in Part 866 of Schedule 2 to the Migration Regulations 1994.

Definition of 'refugee'

8. Australia is a party to the Refugees Convention and generally speaking, has protection obligations to people who are refugees as defined in Article 1 of the Convention. Article 1A(2) relevantly defines a refugee as any 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, is unable or, owing to such fear, is unwilling to return to it.
9. The High Court has considered this definition in a number of cases, notably *Chan Yee Kin v MIEA* (1989) 169 CLR 379, *Applicant A v MIEA* (1997) 190 CLR 225, *MIEA v Guo* (1997) 191 CLR 559, *Chen Shi Hai v MIMA* (2000) 201 CLR 293, *MIMA v Haji Ibrahim* (2000) 204 CLR 1, *MIMA v Khawar* (2002) 210 CLR 1, *MIMA v Respondents S152/2003* (2004) 222 CLR 1 and *Applicant S v MIMA* (2004) 217 CLR 387.

10. Sections 91R and 91S of the Act qualify some aspects of Article 1A(2) for the purposes of the application of the Act and the regulations to a particular person. These provisions were inserted on 1 October 2001 and apply to all protection visa applications not finalised before that date.
11. There are four key elements to the Convention definition. First, an applicant must be outside his or her country.
12. Second, an applicant must fear persecution. Under s.91R(1) of the Act persecution must involve “serious harm” to the applicant (s.91R(1)(b)), and systematic and discriminatory conduct (s.91R(1)(c)). The expression “serious harm” includes, for example, a threat to life or liberty, significant physical harassment or ill-treatment, or significant economic hardship or denial of access to basic services or denial of capacity to earn a livelihood, where such hardship or denial threatens the applicant’s capacity to subsist: s.91R(2) of the Act. The High Court has explained that persecution may be directed against a person as an individual or as a member of a group. The persecution must have an official quality, in the sense that it is official, or officially tolerated or uncontrollable by the authorities of the country of nationality. However, the threat of harm need not be the product of government policy; it may be enough that the government has failed or is unable to protect the applicant from persecution.
13. Further, persecution implies an element of motivation on the part of those who persecute for the infliction of harm. People are persecuted for something perceived about them or attributed to them by their persecutors. However the motivation need not be one of enmity, malignity or other antipathy towards the victim on the part of the persecutor.
14. Third, the persecution which the applicant fears must be for one or more of the reasons enumerated in the Convention definition - race, religion, nationality, membership of a particular social group or political opinion. The phrase “for reasons of” serves to identify the motivation for the infliction of the persecution. The persecution feared need not be *solely* attributable to a Convention reason. However, persecution for multiple motivations will not satisfy the relevant test unless a Convention reason or reasons constitute at least the essential and significant motivation for the persecution feared: s.91R(1)(a) of the Act.
15. Fourth, an applicant’s fear of persecution for a Convention reason must be a “well-founded” fear. This adds an objective requirement to the requirement that an applicant must in fact hold such a fear. A person has a “well-founded fear” of persecution under the Convention if they have genuine fear founded upon a “real chance” of persecution for a Convention stipulated reason. A fear is well-founded where there is a real substantial basis for it but not if it is merely assumed or based on mere speculation. A “real chance” is one that is not remote or insubstantial or a far-fetched possibility. A person can have a well-founded fear of persecution even though the possibility of the persecution occurring is well below 50 per cent.
16. In addition, an applicant must be unable, or unwilling because of his or her fear, to avail himself or herself of the protection of his or her country or countries of nationality or, if stateless, unable, or unwilling because of his or her fear, to return to his or her country of former habitual residence.

17. Whether an applicant is a person to whom Australia has protection obligations is to be assessed upon the facts as they exist when the decision is made and requires a consideration of the matter in relation to the reasonably foreseeable future.

CLAIMS AND EVIDENCE

18. The Tribunal has before it the Department's file relating to the applicant. The Tribunal also has had regard to the material referred to in the delegate's decision, and other material available to it from a range of sources.
19. The applicant appeared before the Tribunal to give evidence and present arguments. The hearings were conducted in English.
20. The applicant was represented in relation to the review by his registered migration agent. The representative attended the Tribunal hearing.

Primary claims

21. The applicant's primary application was submitted in another name (name B) He claimed to have been born in village A, Republic of Congo. He stated that he had had over a decade of education at college, although he only stated that he had attended school. He stated that he spoke, read and wrote English and "Nmurukutubah" (which I take to have been a reference to Monokutuba – also known as Kituba or Kikoongo - one of the languages spoken in the Congo).
22. The applicant claimed to be a citizen of the Republic of Congo, but also included a reference to having lost his citizenship "because of the war in my country". He showed his previous addresses, prior to arrival in Australia, as being in country X and country Y for a number of years. As to past employment, he claimed that he had been self-employed as a manager, without indicating where.
23. His claim to fear persecution was based on the political situation in the Congo. He stated that his father was a campaign manager for a political party and had been arrested more than once and detained for months at a time. One of his brothers was detained and subsequently killed and he and other family members went into hiding to escape the same fate. He said that, if he had to return to the Congo, he would be beaten, tortured, imprisoned and/or killed.
24. The passport on which he had travelled to Australia had been issued in name A. In acknowledging receipt of his protection visa application, the Department used that name, rather than the name on the application. It did so after checking with the Australian Embassy in country X about the circumstances of the issue of a visa to the applicant. The department learned that the applicant had been a resident of country X and had been previously rejected for a visa. However, it had issued the visa on this occasion after checking with the applicant's business partner.

Claims and evidence at Review – the Tribunal first constituted

25. The applicant submitted to the Tribunal initially constituted a number of documents on the subject of his identity. They included a photocopy of a Congolese national identity card showing his address as being in Brazzaville, a certificate giving him the right to reside in country X, and a copy of a Congo birth certificate.

26. Following the hearing the Tribunal wrote to the applicant stating that it had been established at hearing that he had lived in country X from mid 1990s until he had departed for Australia and that he had the right to return. The Tribunal then went on to canvass the possibility that, as a result, it may find that he had no right to protection in Australia as he had the right to enter and live in country X, where he did not claim to fear persecution.
27. The applicant replied by a hand-written letter, in which he stated that he could not find effective protection in country X, because of the racism and crime in the country. He stated that, while he was trading in the street, Government agents confiscated the goods he was trading and allocated his place to an indigenous person.
28. The applicant wrote to the Tribunal stating that he had written to the country X Government informing it that he had left the country permanently and accepted the cancellation of his residence permit.

Claims and evidence at Review – the Tribunal presently constituted

29. The Tribunal presently constituted wrote to the applicant a letter which included the following:

“You are invited to comment on or respond to information that the Tribunal considers would, subject to any comments or response you make, be the reason, or a part of the reason, for affirming the decision that is under review.

The particulars of the information are:

- On [date], you told the Australian Embassy in [country X] that you had a half share in a [company], which was paying your fare for a visit to Australia, that you had been a permanent resident of [country X] for [number] years and that you had a wife and [number] children. The Embassy also spoke to your [partner], who confirmed this information.
- On [date], you submitted an application for a protection visa in the name of [name]. In that application, you claimed to have been in [country Y] from [date] to [date] You also claimed to have been employed only from [date] to [date].
- You did not mention in that application fact of which you later informed the Tribunal previously constituted, namely that your family had spent almost 20 years in [country Z] and that you had worked for about [] years as a seaman.
- On [date], the Department of Immigration and Multicultural Affairs wrote to you putting this information to you and asking you to sign a form giving permission to the Department to seek information regarding you from the [country X] authorities. You did not reply to this letter of give this permission.
- On [date], you submitted an application to the Refugee Review Tribunal seeking a review of the decision of the Minister’s delegate to refuse you a protection visa, which was made on [date]. The application to the Tribunal was in the names of [name B] and of [name C]. In your application, you stated that you were not [name A], but his twin brother.
- You wrote a letter to the Tribunal on [date], in which you used the name [name A], the name on the passport you used to enter Australia and which you have used since.

This information is relevant to the review because it may lead the Tribunal to conclude that you are not a truthful person and will say anything which you believe at the moment may assist your cause. Specifically, it may lead the Tribunal to conclude:

- That you were married in country X and had [number] children there;
- That your name is [name A] and none of the other names you have used;
- That you do not have a twin brother living in[country X];
- That you have invented a fictitious history on which to base your claim for protection.

You are invited to give comments or respond to the above information in writing.”

30. The applicant replied by way of a Statutory Declaration. In it, he rehearsed the history of his application for a visa in country X and for his protection visa, He said that, in country X, he had asked a man for help to obtain an Australian visa and he had no idea what the visa application contained. In Australia, a man helped him prepare his protection visa application, advising him to use a false name, in order that the country X authorities, when asked by the Australian authorities, would not say that he had protection there.
31. He also said that some of what was in his protection visa application was untrue. The truth was that he was born in the village in the Congo and lived there until he was several years of age. His family were from the Monokutuba tribe and are Christians. His family moved to country Z, where his father worked in a mine. They lived on the outskirts of village B and he went to a local primary school. He finished primary school but did not want to continue to secondary school.
32. In late 1980s, the family returned to live in village A. His father became involved in politics (as campaign manager for a Presidential candidate) and moved to Brazzaville. He wanted the applicant to take up his studies again, so he moved to Brazzaville and went to a school there. After just some time, he dropped out and went to work in city 2. Then, after working in city 2, he moved back to Brazzaville, where he worked. His father’s involvement in politics meant that many people came to the house and he came to know all of them. He was known to many people through his schooling, his work and his father’s political activity. After sometime, he returned to city 2, where he worked for another year.
33. He then returned to Brazzaville, to find his father was not there, so he returned to village A. Shortly thereafter, his father was detained. (The man his father had supported had been unsuccessful.) Despite efforts by his political associates to secure his release, he was killed. The family was warned that they were in danger. Shortly after his father’s funeral, his older brother was detained. When men came to his house looking for the family, he and his younger brother fled out the back. They separated and he did not see him again. He went to Brazzaville and, with the assistance of friends and family, he obtained a passport and a ticket for country X.
34. In country X, he wrote letters to his family in the Congo, but received no reply. Eventually, he received word from a cousin that his older brother was dead. He has no news of his mother or siblings.
35. The applicant then stated several reasons why he feared to return to the Congo. He referred to the political instability, the possibility that his entire family has been killed, leaving him without protection, the dangerous diseases which have broken out in village A and, finally, the danger arising from his being his father’s son.

36. The hearing was profoundly unsatisfactory. I drew the attention of the applicant to his claim that his family was from the Monokutuba tribe and said that it was a language, not a tribe and was a trade language principally spoken between Brazzaville and the coast, not in the area from which he claimed to come. This led to a discussion in which the applicant said that the tribe lived all over the Congo. His adviser said that he had seen Monokutuba listed on the web site of the Joshua Project as a tribe.
37. Regarding the applicant's claims to fear persecution as a result of his father's activities, I pointed out that the man with whom his father had worked was now back in the country and working with the Government. I also referred to my impression of the situation in the country – largely drawn from French language reports, including the Congolese press – as not being consistent with the picture the applicant painted. Finally, I said that the applicant's profile and his long absence from the country made his present claims implausible. The applicant was not able to answer in detail most of my questions about the present situation in the country.
38. The applicant said that people would suspect that he had returned bent on revenge for his father's and brother's deaths. He argued that the real situation in the country was not to be found on the internet.
39. I agreed to give the applicant a month to provide additional supporting material.
40. Accordingly the Tribunal received a submission from the applicant's adviser which advised that the confusion over the applicant's tribe and language resulted from a misunderstanding by his adviser. It also advised that no additional information was available in support of the applicant's claims.
41. In an attached Statutory Declaration, however, the applicant made an entirely new claim. This was supported in the covering submission and by 5 Statutory Declarations by the applicant's adviser, recording what were said to be true accounts of conversations the adviser had had with the applicant's former wife, his former supervisor and three friends. In these conversations, the people reported generally supported the applicant's new claim.
42. The claim set out in the applicant's Statutory Declaration read as follows:

“14. In addition to these reasons, I also fear that my life would be in grave danger in Brazzaville because of the way I have been treated by the African community in [Australia] and because of my sexuality.

Rumours about me in [Australia] which have made it back to Africa

15. Since about [year], people in [Australia] have been spreading rumours that I am gay. Because of it I have been banished from the community in [Australia]. The rumours have ruined my life. They caused my marriage to break up. They have made me an outcast from my own community.

16. I understand that the rumours began in about [year] on the [location] where I was working [company]. I was good friends with the [supervisor] His family and my family became friends and we often did things together. He and I sometimes went fishing together and we also would go camping. Because he was the boss at work and often had to discipline people, sometimes [supervisor] wasn't popular with everyone and the guys would talk about him behind his back. But I would always stand up for him. Most of the guys resented me for this. They then started to say that he and I were gay and that we were having an affair.

17. I believe that the person who started this rumour was an aboriginal man who was working on the [location] He became jealous of me and thought that I received favouritism from [supervisor] He was sacked but

later came back and began work again with the company. [Supervisor] didn't like him because he drank too much and misbehaved at work. He was senior to me and hated that [supervisor] liked me. He started telling everyone that [supervisor] and I were sleeping with each other. Soon everyone on the [location] was saying it. No one ever said it directly to my face but I overheard things and everyone started avoiding me. I felt really unwanted and disliked. It was awful.

18. Then, the rumour spread to my community. There were a few African guys that worked with [company] and I assume they started telling all the boys at soccer. Then the same thing started to happen to me with the African community. People started to avoid me and no one wanted anything to do with me. I started to feel paranoid and unwelcome. It was terrible

19. Socialising with the African community and participating in our soccer tournaments and friendly matches was my life in [Australia]. These were my people and my closest friends. I was a really popular person and all the younger guys looked up to me. I was coaching some of the soccer teams. My wife and children were part of the community and we were all very close. But the rumours destroyed all of that.

20. Homosexuality is totally taboo in African communities. It is not accepted and not tolerated. I didn't know anything about it in the Congo. To be called gay or a poofah is one of the worst insults you could make about someone. I knew that everyone was saying this about me and that I had lost all respect with the community. I was devastated.

21. Soon my wife also found out about the rumours. She confronted me about it and I told her it wasn't true. But she didn't believe me. She became really suspicious of me and didn't trust me. We started to argue and fight and our relationship broke down. She didn't respect me. She even began seeing another man, which crushed me. She believed I was gay and there was nothing I could do to convince her. Eventually she left me in late [year].

22. The rumour that I am gay has destroyed my life. Because of it I have stopped having anything to do with the community in [Australia]. I have been ostracised and now have no real friends. I am so embarrassed by what people have said. I am humiliated and have lost my dignity. I was too ashamed to tell my lawyer or the RRT about any of this. I couldn't talk to my lawyer about it in person. The only way I could raise it with him was by sending him an email. He then called me and we spoke about it on the phone and then in person. He has been very helpful and supportive.

23. The thing is that the rumours are true. But I have never been able to admit it. It's too shameful and embarrassing in my culture.

24. This is the first time I have ever spoken with anyone about it. Apart from the few people I associated with in the gay community in [Australia], which I discuss below, I have not told anyone what I am about to say.

25. The first time I knew about homosexuality was when I was raped in [country X]. I was robbed at gun point by a white man who raped me. I was so deeply humiliated and couldn't tell anyone about it.

26. After I had been in [Australia] a few years I met a few Irish guys who I became friends with. We would go for drinks after work and got on really well. One night in [year] I went to this Irish guy's place for a few drinks and he then took me out to a night club in [area] About 80% of the people there were men and I could tell they were gay. I really enjoyed the atmosphere and felt comfortable. The Irish guy told me to feel free and to be myself. He too was gay.

27. It's hard to explain what happened to me but I really felt like part of myself was being opened up. I started to go to the club in [area] regularly. I went with the Irish guy and he and I got together. I also later had an affair with a South American tourist whom I met at the club.

28. While I was going to the club I was terrified about someone seeing me. I was terrified that people in my community would find out. I tried to be careful to make sure I wouldn't be seen. I couldn't have an ongoing relationship with anyone as I was too worried about being found out. So I would just go to the club and never see anyone outside of that night. Being with men who weren't residents made this easier.

29. One night in [year] I saw an African guy at the clubs and I was shocked and I stopped going for fear of being caught. Since [year] I have been back again a few times because I can't help it and I want, but I am always worried about being discovered. I don't know if anyone in the community has found out that I have been to the

gay clubs.

30. When the rumours went around the community about me, I was so ashamed and humiliated. I know what everyone thinks about gay people. I knew that I could never tell anyone about it. If you know what African culture is like, you would know the danger I would be in if people knew that I was going to gay clubs and that I was actually having sex with men.

31. I wish that I could live openly and freely and explore my sexuality. Even if it was safe for me to do so, I fear it could take me a long time to have the courage to be comfortable with whom I am. Because of my culture and background, I live with shame and embarrassment about who I really am. It is very difficult for me to accept it. I hope that one day I can. I want to. I hate having to hide my true self. I know that if I had to go back and live in the Congo I would never be able to be myself. If I ever did have a relationship with a man, in any form, my life would be in real danger.

32. Unlike in Australia, in the Congo I would not receive protection from the police. Even though here I may face danger from people if I was able to be myself, at least here the police would protect me. In the Congo they would not only not protect me but they too would beat me up and call me a dog.

33. People in Australia are more accepting and tolerant of people being gay. It's not such a big issue for Australians. But in Africa it is. With the African community in [Australia] it is. It seems everyone in the community in [Australia] knows about it. They gossip about things like this, as it is sensational news, especially when it relates to someone well known and popular.

34. I fear that if I was in the Congo and people knew about it, I would be in real danger. My Congolese friend in [country X] already knows about it. He asked me if the rumours were true. People living in [Australia] told him. The African community is like that. Most of the community in Sydney are Australian citizens and often go back to Africa to visit family and friends. This includes a few people from the Congo. It also includes a lot more people from Kinshasa and it isn't difficult to see how word could spread to Brazzaville from those people, as the two cities are across the river from each other and people move freely between them. If you know how the African community operates and how gossip about these things spreads, you would know just how real the risk to me is if I went back to the Congo.

35. Please believe that this is all true. I realise the fact I didn't tell anyone about this before doesn't look good. But it is true. I really do fear that if I went back to the Congo my life would be in danger. For all of these reasons I fear that I would face serious harm in Congo and I ask the Australian government to protect me and not force me to return."

43. Following receipt of this submission, the Tribunal wrote to the applicant seeking his agreement to my telephoning the people mentioned in his adviser's Statutory Declarations. This agreement was received, with the result that I was able to speak with his former wife and former work supervisor. In light of what they told me, I did not make any other phone calls, but caused a letter to be sent to the applicant in the following terms:

"You are invited to comment on or respond to information which the Tribunal has received which may, subject to any comments or response you make, be the reason, or a part of the reason, for affirming the decision that is under review.

The information was received in telephone conversations foreshadowed in the Tribunal's letter of [date] with [supervisor] and with your former wife. The significant points to arise in these conversations were the following

- Your work for [company] was highly regarded and you were promoted to be [position], not the most popular man on [location]. The problems you had at [company], however, occurred when you were working at a [location] not supervised by [supervisor]. Some other supervisors were jealous of the work output you and one other worker achieved when under his supervision and, when he left, gave you and the other worker trouble. Insults were involved. The Union became involved on your behalf and on behalf of the other worker and the company management also was involved in settling the matter. Later, you were hospitalised for an extended period after developing a serious illness as a result of working with [chemicals]. These events

occurred in about [year]. When you returned to work, you [injured yourself] and he believes that you still may be receiving workers compensation as a result.

- Your former wife told the Tribunal that you were a good man who loved his children. Your children, especially your [child] loved you. However, your practice of staying out late with African friends led to arguments between you which in turn led to physical violence, which frightened the children. Having separated from you for this reason, she and you came together again to try to make your marriage work, but the same sequence of events led to your recent divorce. Your former wife referred to allegations made at the time of the dispute referred to above regarding your relationship with your former boss. She acknowledged that she, who had known you for [number] years or so, knew that the statements were not true. The reason for the breakdown of your marriage was as described above.

This information is relevant to the review because it may lead the Tribunal to accept your claims as to false allegations having been made about your relationship with [supervisor] but not to accept that these allegations were believed by your wife or your friends or that it is at all likely that they would have been repeated to anyone in your country. Were the Tribunal to make this finding, it may lead the Tribunal to give no weight to statements said to have been made by friends of yours to the contrary and not to accept that the matters claimed in your Statutory Declaration of [date] regarding the events discussed above constitute the basis for a well founded fear of persecution for a Convention reason.

You are invited to give comments on or respond to the above information at an interview with the Tribunal Member considering the case.”

44. The interview and the subsequent hearing were held. Beforehand, the Tribunal received a submission from the applicant’s adviser, in which he stated that his Statutory Declarations were made in strict adherence to the obligations of the relevant Act and were an accurate account of his conversations with each person.
45. The submission also stated that the statement to the Tribunal by the supervisor confirmed that there had been rumours of the applicant being gay. As to the evidence of the applicant’s former wife, the adviser also referred to her confirmation of the rumours that the applicant was gay. He argued that whether she believed them or not was beside the point. It was also argued that the reason for the breakdown of the applicant’s marriage was irrelevant to his claims to fear persecution.
46. The submission then went on to traverse the evidence in the other three Statutory Declarations regarding conversations with three friends and the applicant’s latest Statutory Declaration.
47. At interview, the applicant said that, when he realised after the last hearing, that he may be sent back to the Congo, he decided to reveal what he had kept secret, out of fear, both for himself and for his relationship with one his children However, as a result of the circulation of rumours about his relationship with his boss, all his friends had decided not to talk with him.
48. As to his marriage, he said that what his wife had said was right. In addition, he had erectile problems and had been treated for a year, taking medication prescribed by a doctor.
49. He said that “I still pretend not doing it”. When talking to a friend in country X, he said that he had heard the rumour (about the applicant’s sexuality), which the applicant denied.
50. At the start of the hearing, I played two recordings of a man speaking and asked the applicant if he could tell me in broad terms what the man was saying in each case. Not

only could he not do so, he could not even recognise the languages. I then told him that the first recording was of a man speaking Monokutuba and the second was of a man speaking Mbochi. The first was the language the applicant claimed to speak, read and write and the second was the language of the district in the Congo from which the applicant claimed to come.

51. I said that, in the circumstances, I was not sure that he was from the Congo. I repeated what I had said at the first hearing, that I had lived in two countries of Africa for over 5 years and had travelled widely in east and west Africa. I did not believe that any African would be as confused as the applicant was about his ethnicity. Moreover, the Congo press contained recent articles about the benefits of international sport in reducing ethno-tribal tensions, since they emphasised the national participation. It was not an issue, therefore, that was absent from the Congo.
52. We then discussed the applicant's claim to be gay. He said that he had had sexual relations with men occasionally before and during his marriage. Since his wife left him, he had gone to two gay clubs, which he mentioned. He had sought help for his erectile problem shortly before his wife left him. As the clinic to which he had paid a substantial sum of money would not cancel the contract and refund the money, he had continued the treatment and sought other female sexual partners. I asked why and whether he had not erectile problems with sexual relations with men. He said he did, but that he wanted to hide the fact of his being gay.
53. I asked how frequently he had sexual relations with men and when was the last time. The applicant said that it was infrequent, the last time being last year. He mentioned having been to two gay clubs, but could not remember when he last went – it was also last year.
54. At the end of the hearing, I referred again to the article in the Brazzaville press regarding the benefits of international sport for ethno-tribal relations. I underlined a sentence in the text I had with me of one such article, which was in French, and asked the applicant if he agreed with it. He looked at the article, but did not understand it and gave it back to me, saying that he had not been long enough at school to learn to read French, although he confirmed that that was the language of education and one of the languages that he used working in the Congo.
55. I then took another text and said I would read it to him. He stopped me saying that he had forgotten all his French. I said that I had been looking for a straw to clutch but had not found one.

Country information

56. The information on the languages of the Congo and where each is spoken was taken from www.ethnologue.com/show_country.asp?name=Congo, confirmed by other sources. The MP3 files of spoken Monokutuba and Mbochi were downloaded from the Global Recordings Network web site as follows:

<http://globalrecordings.net/program/C33191> (Monokutuba)

<http://globalrecordings.net/language/2833> (Mbochi)

FINDINGS AND REASONS

57. In light of the applicant's inability to demonstrate not merely understanding of the two African languages which, given his claims as to nationality, place of birth and personal history, he should understand well, but even to recognise them, I find that the applicant is not a citizen of the Congo. His inability in addition to understand any French – written or oral – the language which he stated at hearing was his language of education in the Congo and one of the languages he used when working there - leads me to find that he originates in an English-speaking country of Africa, but am unable to determine with confidence which. I reject his claim that the passage of time since he left the Congo has caused him to forget Monokutuba and French entirely. Given that his family originated – according to his claims – in village A, he should have at least some familiarity with Mbochi, but clearly had none.
58. I give no weight to the documents – passport, identity card etc. – which the applicant presented in support of his claimed identity and nationality. I believe that they have been bought and do not reflect his true identity and origins.
59. I therefore reject entirely all his claims arising from his claimed nationality and the claimed political activities of his father.
60. I cannot be sure, indeed, that the name the applicant uses is one to which he is entitled. That depends on the exact circumstances under which he obtained his passport and his other documents. Unfortunately, genuine passports can be purchased in parts of Africa with one's photo include but in a name of one's choosing. Whether that occurred on this occasion or not I cannot determine.
61. In these circumstances, I cannot assess his claims to fear persecution for reason of being gay against any country of reference. However, I do not believe these claims. It was clear that his former wife did not either. Contrary to his claim that these rumours caused the breakdown of his marriage, the failure of his marriage was due to the frequency of his late night partying with African friends. This partying with them – which he did not deny at hearing - also undermines his claim that his friends decided to ostracise him.
62. More fundamentally, I do not accept that a man would be suspected of being gay on the basis of his being called a poofter by a man who suffered disciplinary action as a result of union and management intervention following his mistreatment of the applicant and one other worker, out of jealousy at their output while supervised by another man.
63. As to the applicant's claim that he is in fact gay and has had occasional sexual relations with men before during and after his marriage, I do not believe it. He was extremely vague about when and how often he had had such relations, could not remember when he last had such relations and had had none this year. He explained his having had sexual relations with women after his wife left him in part because the clinic treating his erectile problems would not cancel the contract and return his money. I can only describe that explanation as bizarre. He also said that he wanted to hide his homosexuality. I do not accept that explanation either. Merely being seen in the company of a woman would have sufficed for the latter purpose.
64. In short, I do not accept that the applicant is either homosexual or bisexual (as some of his evidence would suggest, although he did not claim it). Accordingly, I do not accept

that there is a real chance of the applicant suffering harm of any kind amounting to persecution for reason of his being gay, whatever his country of origin in fact is.

65. Since I find that the applicant is not a citizen of the Congo, I find that the applicant does not have a well founded fear of persecution in the Congo for reason of his real or imputed political opinion, for reason of his membership of a particular social group – whether that of his father’s family or of homosexual or bisexual men – or for any other Convention reason.

Post script

66. This decision record was originally completed and signed before a submission was received from the applicant’s adviser asking that no decision be made before the Tribunal had received a report from a psychologist regarding the applicant’s homosexuality and the reasons for which he had hidden it for so long. The submission also refers to the finding of the previous decision maker that, on the basis that his passport is genuine, he was a citizen of the Congo.
67. As to the second point, the previous decision maker did not have the benefit of knowledge that the applicant was totally unfamiliar with any one of the three languages which he might reasonable be expected to speak were he a native of village A in the Republic of Congo. I am unmoved by the fact that his passport is genuine. From my personal; experience as High Commissioner of Australia in four West African countries, I am aware that such passports are readily available in Africa for a price. The fact that he has a genuine Congo passport, therefore, does not affect my firm finding that, for reason of his ignorance of certain languages, he is not Congolese.
68. For the same reason, I am not satisfied that there is a real chance that he would be persecuted should he return to his real country of citizenship, since I do not know what country that is and can make no judgement on the matter. Therefore, although I have expressed my disbelief in his claim to be gay, it would not affect my final decision, even if I were wrong and he were, as I have no country of reference against which to assess his claims and am therefore unable to reach the level of satisfaction on the matter required by law.
69. For these reasons, there is nothing to be gained by awaiting the psychologist’s report. I maintain all my findings expressed above.

CONCLUSIONS

70. The Tribunal is not satisfied that the applicant is a person to whom Australia has protection obligations under the Refugees Convention. Therefore the applicant does not satisfy the criterion set out in s.36(2) for a protection visa.

DECISION

71. The Tribunal affirms the decision not to grant the applicant a Protection (Class AZ) visa.

I certify that this decision contains no information which might identify the applicant or any relative or dependant of the applicant or that is the subject of a direction pursuant to section 440 of the Migration Act 1958.

Sealing Officer's I.D. PMRTKS