

071559324 [2007] RRTA 277 (26 October 2007)

DECISION RECORD

RRT CASE NUMBER: 071559324

DIAC REFERENCE(S): CLF2007/76700

COUNTRY OF REFERENCE: Mongolia

TRIBUNAL MEMBER: Namoi Dougall

DATE DECISION SIGNED: 26 October 2007

PLACE OF DECISION: Sydney

DECISION: The Tribunal affirms the decision not to grant the applicant a Protection (Class XA) 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 XA) visa under section 65 of the *Migration Act 1958* (the Act).
2. The applicant, who claims to be a citizen of Mongolia, arrived in Australia and applied to the Department of Immigration and Citizenship for a Protection (Class XA) visa. The delegate decided to refuse to grant the visa and notified the applicant of the decision and her 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.
4. The applicant applied to the Tribunal for review of the delegate's decision.
5. The Tribunal finds that the delegate's decision is an RRT-reviewable decision under section 411(1)(c) of the Act. The Tribunal finds that the applicant has made a valid application for review under section 412 of the Act.

RELEVANT LAW

6. Under section 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.

7. Section 36(2)(a) of the Act provides that a criterion for a protection visa is that the applicant for the visa is a non-citizen in Australia to whom the Minister is satisfied Australia has protection obligations under 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).

8. Further criteria for the grant of a Protection (Class XA) visa are set out in Parts 785 and 866 of Schedule 2 to the Migration Regulations 1994.

Definition of ‘refugee’

9. 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:

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.

10. The High Court has considered this definition in a number of cases, notably *Chan Yee Kin v MIEA* [1989] HCA 62; (1989) 169 CLR 379, *Applicant A v MIEA* [1997] HCA 4; (1997) 190 CLR 225, *MIEA v Guo* [1997] HCA 22; (1997) 191 CLR 559, *Chen Shi Hai v MIMA* [2000] HCA 19; (2000) 201 CLR 293, *MIMA v Haji Ibrahim* [2000] HCA 55; (2000) 204 CLR 1, *MIMA v Khawar* [2002] HCA 14; (2002) 210 CLR 1, *MIMA v Respondents S152/2003* [2004] HCA 18; (2004) 222 CLR 1 and *Applicant S v MIMA* [2004] HCA 25; (2004) 217 CLR 387.

11. 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.

12. There are four key elements to the Convention definition. First, an applicant must be outside his or her country.

13. Second, an applicant must fear persecution. Under section 91R(1) of the Act persecution must involve “serious harm” to the applicant (section

91R(1)(b)), and systematic and discriminatory conduct (section 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: section 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.

14. 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.

15. 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: section 91R(1)(a) of the Act.

16. 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.

17. 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.

18. 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

19. The Tribunal has the following documents:

T1 – Tribunal case file 071599324, folio numbered 1-57.

D1 – Department case CLF2007/76700, folio numbered 1-54.

20. Evidence was given at the hearing by the applicant. A summary of the evidence on the files, including from: the Department's Movement Records and Integrated Client Services Environment (ICSE) databases; material referred to in the delegate's decision; other material available to the Tribunal from a range of sources; and the oral evidence follows. The applicant was represented by a registered migration agent who attended the hearing. An interpreter was present.

21. The applicant arrived in Australia on a visa which was granted several months prior to her arriving in Australia.

22. The applicant lodged a protection visa application (the application). Provided with the application was a statement (the statement). The applicant was interviewed by a Departmental officer (the interview). The delegate made a decision not to grant the applicant a protection visa. At the hearing the Tribunal referred to the application and statement being in English and asked the applicant if she spoke English which she answered no. She stated that the person who shares with her, helped her with it. Her friend has good English and she translated the questions and asked me the questions and then wrote my answers down. The applicant confirmed that her friend read back the application form to her, before she signed it. In relation to the statement the Tribunal showed the statement on the Department file and asked how it was prepared. The applicant stated that she told her friend what is in the statement and her friend translated it. The Tribunal asked if she told her friend her story or did she write it down and give it to her. The applicant stated that she wrote her story in Mongolian and she gave it to her friend to translate. The applicant confirmed that before she signed the statement her friend read it back to her and the contents were correct.

23. After arriving in Australia the applicant, with the help of her friends, had lived in various cities.

24. Provided to the Department and to the Tribunal was a copy of the details pages, pages with any exit or entry stamps or pages where visas were affixed of the applicant's Mongolian passport. The applicant's passport was issued on a particular year. At the interview the applicant was asked why her passport was issued so early when she did not leave for Country A some months later. She stated that first she applied for passport and then got her visa. At the hearing the Tribunal asked why did she apply for a passport in a particular year and she stated that she had a passport before then and this is a new passport. She got the passport when she applied for a job in Country A.

25. In the application the applicant stated that she was born in Mongolia. Her citizenship and a former habitual residence is Mongolia. The applicant also stated that Country A was a country of former habitual residence. At the hearing the applicant stated that her Country A visa was a working visa. There is not a translation of the applicant's Country A visa which is in her passport. However, the visa does appear to have been granted for a period of time.

26. In the application the applicant stated that she was educated in her home town. The applicant listed in the application a number of close relatives. In the statement the applicant stated the circumstances of her parents. She and her siblings were taken care of by her relative. The applicant also stated in the application that she was employed for some years. At the hearing the applicant stated that her family still live in her home town in Mongolia.

27. In the application the applicant stated that she had lived in Ulaanbaatar, Mongolia for a few years. She undertook further studies in Ullanbaatar, Mongolia during this time. After her graduation she returned to her home province.

28. In the application the applicant stated that she lived in her home town in Mongolia for several years. In her statement the applicant stated that after she returned to her home province she started to work locally. At the hearing the applicant stated that she was employed for a few years and then she resigned. Everyone knew about her relationship and she could not go out. Even her friends treated her as if she had done something wrong.

29. The applicant claimed in her statement that she was living with and looking after her relative. Living next door was a young woman, Person I and her husband. The applicant claimed that every week Person I's husband would hit her and very often at night Person I would come to her home seeking help and to hide from her drunken husband. They became very close friends and shared their thought and secrets. The applicant claimed in her statement that several months later they celebrated a festival and had a lot to drink and that night they had their first intimate moments. From then on, the applicant claimed, that they very often spent the night together.

30. At the interview the applicant stated that Person I's husband was employed. She also stated that her relative knew about her special relationship with Person I and she understood.

31. At the hearing the Tribunal asked the applicant why she went to Country A and she stated that her relative was sick and she had to look after her. Her neighbour was a couple. The husband was older than the wife and the wife was the applicant's age. The husband was a drinker and when he drank he always beat his wife and they fought. They did not have any children. He worked between the applicant's home town and other centres. When he returned from trips he was always drunk and he would abuse his wife and she ran away. The applicant would take the wife in and hide her. This usually happened every week. The couple became the applicant's neighbours in a particular month. Their relationship developed when they celebrated a festival

together and this was the first time they stayed together overnight. From then on they would spend nights together quite frequently, fortnightly or monthly, at her relative's home. She stated that her relative was the only person who understood her and she let her. The applicant claimed she had spoken to her relative and she understood her neighbour's situation which was bad.

32. The applicant claimed in her statement that later on Person I's husband found out about their relationship. The applicant claimed that shortly afterwards, when her relative was in hospital with a medical condition, Person I's husband and several men came to her place. Person I's husband hit Person I and she was injured by her husband and the men. The men harassed and insulted them.

33. At the hearing the applicant stated her relative was sick and went to hospital. Her relative was in hospital for sometimes and shortly after her relative went to hospital, Person I had come to the applicant's home to spend the night. Person I's husband returned and he was drunk. He came to her house with several men and broke down the door. He came into the applicant's home and shouted that he knew what they were doing and he beat Person I. The other men were beating the applicant without any reason. The Tribunal referred the applicant to her statement that they beat her 'with no reason' and asked if anything was said while they were beaten. She stated that Person I's husband stated that he knew of their relationship and why was she doing this again as she has broken his name. This was the first time that she found out that the husband knew about her and Person I. The husband stated that he was going to take them to the police and he dragged them onto the street. They beat her. No one came to their assistance. The husband took Person I to their home and the other men left.

34. In the statement the applicant claimed that the next day Person I's husband had made a complaint to the police about the applicant. The police came and put the applicant in to detention for 2 days and after they released her they would not listen to her complaint.

35. At the hearing the applicant stated that in the morning the neighbour's husband called the police and several policemen came to her house. The police said they had a call from Person J and they had to interview her at the police station in relation to the complaint from Person J. The complaint was that she had come to break his family. She claimed that the police held her for 72 hours and questioned her, however, she told the police that there was nothing between them but the police still abused her. She was kept in a cell where people are kept temporarily. Later on she was released and the police stated that if she did it again she would be gaoled and they told her to go away. The Tribunal asked what would they gaoled the applicant for and she stated that she insisted that she had not done anything wrong. However, the police said if she did it again they would charge her. She did not know what they would charge her with. The Tribunal asked if the police did anything else apart from interviewing and insulting her and she stated that they hit her with a stick when they put her in the cell. She claimed that she thought that one of the

policemen was a friend of Person J and this policeman was more likely to hit her. The police did this a number of times. They did not do anything else.

36. The applicant claimed in her statement that when she returned to home, her whole town knew of her shame. Members of her family hit her more as they blamed her for burying the family honour and killing the life of her younger siblings. The applicant claimed that she left her job and got sick and the only person who stood by her was her relative. She lost contact with Person I but heard that she had left to work in country B.

37. At the interview the applicant was asked what led to Person I leaving and the applicant confirmed she left in a particular month for Country B. She stated that since Person I left it was very hard for the applicant to live because everyone in her town knew. At the interview the applicant stated that in Mongolia there is a strong religion called Shamanism. People believe that if you go against this religion it can do bad things. It was believed that because of her, her relative became sick and it made it very hard for her to live there. Her conduct was not acceptable in her home town when she walked in the town she was spoken about as a bad person and abnormal. The applicant stated that she could not go to Ullanbaatar as it would be the same as things are the same all over in Mongolia and people from her town live there also.

38. At the hearing the applicant stated that after she was released she stopped seeing Person I and sometimes later Person I and her husband moved. She stated that everyone in her home town knew. She was very frightened and scared to go out as they would try and kill her so she decided to leave. The Tribunal asked who would try to kill her and she stated that Person J, his family and friends. They believed in a powerful religion called Shamanism. They cannot hurt a person physically but through their religion they can do something to you. The applicant stated that she believes in Shamanism.

39. At the hearing the applicant stated that while she was in detention her relative was still in hospital. Her family visited their relative in hospital. She remembered that one of her family members did visit but other family members live far away. The Tribunal asked how far away and she stated about 1 hour by walk. The Tribunal asked if that was correct for all of her family members and she stated that one of them lived one way from her home town while other lived the other way.

40. At the hearing the Tribunal asked if her family were concerned about her being detained by the police. The applicant claimed that one of the family members was told by Person J. This family member did not come to the police station but he abused her and hit her. He said to her she had broken the family name and made it low. He hit her about 6 or 7 times. The Tribunal asked if this family member came on his own. The applicant stated that he came by himself the first time and the second time he came with another member. The Tribunal asked what happened the second time. They asked her why she did this and why did she not think about her family. They beat her and it was really horrible for her. The Tribunal asked if her relative was home and the applicant stated that she was not there the first time but she was there the second time.

The Tribunal asked what her relative did when the family members were hitting her. The applicant stated that they pushed her relative as she was trying to protect her and they said to her relative why did you hide this from us. The Tribunal asked if anything else happened and she stated that after that she saw an advert on the television about people working in Country A. She then contacted the people and they organised papers and visa. Her relative helped her buy an airline ticket. She left for Country A a few months later. The Tribunal asked why the applicant waited for a few months to leave when her visa was approved earlier. The applicant stated that she could not afford to pay for the ticket so she had to wait until the money was collected.

41. In the statement the applicant stated that shortly after seeing the advert she applied for contract work in Country A and obtained a working visa. The people who arranged for her travel took her to a factory and they took her to a small flat near the factory. She stated that she lived with others from the workplace. In the application the applicant stated that she lived at an address in Country A for a period of time. However, in her visa application she stated that she lived at a different address. At the hearing the applicant stated that she lived at various addresses during her stay in Country A.

42. In the statement the applicant stated that she was employed in a factory in Country A. She also claimed that she did call Mongolia once but her family members told her that people insulted her relative and she was sick.

43. In her statement the applicant stated that a few months after arriving in Country A she met a Mongolian who was a citizen of Country A, Person K. She claimed that they had a good relationship and she did not tell him of her shame. They even spoke of marriage. She claimed that they wanted to travel, however, Person K was very busy with work and they only travelled for one day.

44. At the interview she stated that she meet Person K at the zoo. She stated that they lived together since a particular month. In the visa application it stated that they intended to marry. At the interview she stated that they intended to marry in the following year.

45. At the hearing the Tribunal asked why she moved. The applicant stated that she went to the zoo and met Person K. He asked her to move into his place. At the hearing the Tribunal asked what their relationship was like. She stated that she did not tell him about her previous life. She stated that while they lived together their relationship was not too bad. They discussed marriage 3 months later. They talked about the marriage and he wanted to see other places. They travelled together for 1 day as Person K could not go for 3 days. They did not travel anywhere else as they applied for a visa for Australia.

46. The applicant stated in her statement that they applied for a visa for Australia and planned to go to Australia 3 months later. However, the applicant claimed that there were many people from Mongolia and from her home province who worked with her. These people knew the gossip about her and started to bully her and they told her boyfriend everything. She claimed

that her boyfriend shouted at her, hit her, insulted her and threatened to kill her. The next day she decided to return to Mongolia and hide with her relative, however, she could not reach her relative. She ran away from her boyfriend's place and stayed with a Mongolian family. When she called her family she was told that her relative had died earlier and they blamed her. The applicant claimed that she could not go back to Mongolia or stay in Country A where her boyfriend was threatening her and her only escape was Australia. At the interview the applicant stated that the last time she call her family was the day when her relative died.

47. At the interview the applicant stated that her relationship with Person K broke down. She stated that many Mongolians worked at the factory including one from her home town. That person told Person K about her relationship with Person I and that the applicant was only using Person K that she was using him to get citizenship. She stated that Person K was upset and angry and he threw her out of his home. She went to live with a Mongolian couple. The applicant was asked why this person waited several months before telling Person K about her relationship with Person I. The applicant stated that the person did not know she lived with Person K. She knew (or lived) only two months with Person K.

48. At the interview it was stated that she had residence rights and employment and she did not have to leave Country A. The applicant stated that she did not have a job and she could not speak the language. The applicant was asked why she did not have a job and she answered that the person who told Person K also told the factory owner. The owner sacked her. The delegate asked why she did not get another job and she stated that she would not get another job.

49. At the interview the applicant was asked about who paid for her travel to Australia if she did not have a job. The applicant stated that she had some savings and her plan was to return to Mongolia to see her relative. When asked how she got a ticket she stated she went to an agency. She was asked what she planned to do in Australia with no language and no job. Her plan was to go to Mongolia but her relative was dead. She had a visa approved and homosexuality is accepted in Australia. There is law in Mongolia about human rights but the people and society still do not accept homosexuality and she will suffer again. The applicant was asked what would happen to her if she returned to Mongolia and she stated that if she returned firstly there is Person I's husband who is a person who could do anything even kill her. Her family believe the reason her relative passed away was due to the applicant. Shamanism is a very strong religion and if they want to do anything bad to people they do.

50. At the hearing the Tribunal asked the applicant why she travelled to Australia on her own. The applicant stated that there were some Mongolians who worked at the factory in Country A, they had information about her previous life. There was people from her home town. A woman who worked with her told Person K. After discovering about the applicant he came home that night and said that she had a relationship with him as he is a citizen of

Country A. The Tribunal asked further questions about the woman who spoke to Person K. The applicant stated that the woman had worked with her since she arrived in Country A. The woman was with her when she met Person K at the zoo and they had been out together once. The Tribunal asked why this woman waited for sometime to tell Person K when they had met Person K several months ago and the applicant stated that she does not know. When Person K came home they had an argument. He told her he could kick her out and he could do anything to her as he is a citizen and she does not speak the language and she does not have any place to go. He abused her and kicked her out and she ended up on the street. She asked that she knew if she could temporarily stay. She intended to go to Mongolia.

51. At the hearing the applicant stated that she had tried to contact her relative. She had to send an invitation for calling and her relative would come to the place for the call at the set time and date. She knew that her relative was sick so she decided once she had finished with Person K to return to Mongolia to look after her. When she could not contact her relative she contacted her family. A family member shouted at her that she is a killer and that she killed her relative. He told her that the relative had died. The applicant claimed that she could not go to Mongolia as people could do anything to her. She knew she could not live in Mongolia as they frightened her. Later at the hearing the applicant stated she had not formed a relationship in Australia. The Tribunal asked the applicant why she can not return to Mongolia that she is frightened to return to Mongolia for the same reasons she left Mongolia. She is frightened that she would be killed. The people who might kill her are Person J and she is worried about her family. Her family members believe that Shamanism made her relative sick and that is why the relative died. The Tribunal referred to the applicant's earlier statement that Person I and her husband had moved away. She stated that they still lived in the same town. The Tribunal asked why the applicant could not live in the capital. The applicant stated that it is not any better in the capital as it is a small place. The Tribunal stated that the applicant has college friends and asked why she could not get their help. She stated that she could not get help from them. The Tribunal referred to her friends helping her after arriving in Australia. The applicant stated that she did not have any other way so she begged the person in Australia to help her.

52. At the hearing the Tribunal asked why her family members would blame her for killing her relative when she had a medical condition and they had visited their relative in hospital. The applicant stated that one of her family told her that the reason her relative died was because Person J had contacts with Sharma. The Tribunal asked if the real reason the applicant did not want to return to Mongolia was because she is afraid of Shamanism. The applicant stated that it is right she is afraid of Shamanism and she also fears her family and Person J. The Tribunal asked how far from her home town is the capital and the applicant answered certain kilometres and then changed her answers.

53. At the hearing the Tribunal stated that it was concerned about the inconsistencies between what the applicant had stated to the Department and what had been stated at the hearing. The Tribunal asked that she listen to the inconsistencies and provide any comment at the end. The Tribunal also stated

that, after listing the inconsistencies, the applicant could comment at the hearing or wait until the Tribunal sent her a letter. The inconsistencies discussed at the hearing are set out in the paragraphs below. The applicant provided comments on the inconsistencies even before the Tribunal had time to explain that she was entitled to seek additional time to respond. For this reason and as the Tribunal had not, at the time of the hearing, decided what was all the information that would be the reasons, or part of the reasons, for affirming the review, the Tribunal wrote to the applicant pursuant to section 424A of the Act.

54. The Tribunal stated that there was no mention of Shamanism in her statement. The applicant did not comment on this issue at the hearing.

55. Her passport was granted on a particular date and she just must have applied for her passport before that. She stated at the interview and the hearing that she applied for her passport so she could work in Country A but the advert she saw about the job was several months after receiving her passport. The applicant stated that she got her passport in a particular month and before that she had another passport so she just renewed her passport.

56. The Tribunal discussed the different addresses in Country A and that there were inconsistencies between the address provided in the visa application and where she stated she was living at the hearing. The address where she stated at hearing she lived is not in the application. The applicant stated that she did not remember the address where she lived before she left Country A as she was not registered. When she applied for the visa she definitely lived at a particular address, she does not know why the other address is in the visa. The applicant confirmed that Person K had completed the form and the Tribunal asked if that was the case why would he put another address in the form when she was living with him and they had been discussing marriage. The applicant stated that she does not know why he did that.

57. In the statement the applicant stated that she was detained for 2 days in her home town and at the hearing she stated that she was detained for 72 hours. Further, there is no mention of the police hitting her in her statement. At the time she did her statement she said 2 days, it is probably a mistake. She also stated that she could remember telling the person who prepared the statement for her that the police hit her and abused her.

58. In the statement it refers to an attack where one of her family members hit her. However, at the hearing the applicant referred to two incidents and that two of her family members hit her and her relative was present. She stated that she told the person who prepared the statement for her about the two incidents with her family members.

59. At the hearing she stated that she left work on a particular date. Prior to this there were rumours spread about her and people distanced themselves from her. She waited until she was paid before she left. The Tribunal asked

how she supported herself after leaving her work. The applicant stated that she had savings.

60. At the end of the hearing the Tribunal referred to country information which indicated that the laws that were used against homosexual relationships were repealed in 2002. Further, country information indicates that the Courts in Mongolia are independent. Although there is harassment of people in homosexual relationships the country information indicates that the situation for homosexuals in Mongolia is improving. The Tribunal also asked for more comments on why the applicant cannot live in Ulaanbaatar when the applicant responded to the Tribunal's letter. The applicant stated that she was nervous and she missed some points and her statement missed some information. She remembers telling matters but it seems that the translation missed these things.

61. At the hearing the Tribunal asked why, if the applicant moved to Ulaanbaatar, she could not report to the police about the threats or any attacks. The applicant stated that the police would not protect her. The Tribunal asked why would Person J and her family members attacking her when they are very far away. The applicant stated that there are relatives of Person J in Ulaanbaatar and people from the same town. The Tribunal asked how she knew Person J had relatives in Ulaanbaatar and she stated that she knows that she has a very big family and he threatened her by saying that wherever she went he would find her. The Tribunal asked when were these threats made and the applicant stated it is common using Shaman and hurting someone using Shaman especially in her town. The Tribunal asked the question again and the applicant stated that probably he does not know where she is now. The Tribunal asked the question again and she stated when the incident happened when he beat his wife and other men beat her. The Tribunal asked why she did not say that earlier and she stated that he abused her and threatened her.

62. A hearing was held and what was discussed at the hearing is set out above. At the hearing the applicant's representative provided to the Tribunal information and reports on the situation for homosexuals in Mongolia obtained from the internet.

63. After the hearing the Tribunal sent the applicant a letter inviting the applicant, pursuant to section 424A of the Act, to provide comments on information that the Tribunal considered would be the reasons, or a part of the reasons, for affirming the decision under review. The information and its relevancy, as set out in the letter, is set out below. For ease of reference the applicant's response received by the Tribunal (the response) is referred to in paragraphs under the relevant part of the Tribunal's letter:

There are contradictions and inconsistencies between what was stated:

in your [visa] visa application lodged on [date] (the visitor visa application);

in your protection visa application lodged on [date] (the application);

in your statement [date] provided with your protection visa application (the statement);

what you stated in your interview on [date] (the interview);

and what you stated at the hearing before the Refugee Review Tribunal on [date] (the hearing);

as follows:

- In your statement you stated that your family blamed you for the death of [applicant's relative]. There is no mention of Shamanism or religion in your statement or application.

At your interview you referred to Shamanism and stated that it was believed that due to you, [applicant's relative] became sick. You also subsequently stated that your family believed that [applicant's relative] got sick was because of you and that Shamanism is a very strong religion and if they wanted to do something bad to a person they can.

At the hearing you stated that your family believed in Shamanism and [Person I]'s husband, [Person J] and his family and friends also have this powerful religion, Shamanism. You stated that [Person J] had a connection with Shamanism. You stated that you believed in Shamanism and have seen that things can happen and the Shamans can do anything they want. You stated that they cannot hurt you physically but through their religion they can do something to you. You stated that one of the reasons you did not want to return to Mongolia was your fear of Shamanism.

64. In the response the applicant stated that her family blamed her for the death of her relative and called her a killer. She further claimed that she was not aware that she had not mentioned Shamanism in her statement. She also stated that she told her translator about Shamanism but due to her level of translation she was not able to translate the issue so told the applicant to explain it in more detail at the interview.

- Your passport's issue date is [date].

In your statement you stated that in [date] you saw on TV an advertisement for work in [Country A].

At the hearing you stated that got the passport when you applied for the job in [Country A].

Later at the hearing when you were referred to the inconsistency between the above two statements you stated that you had a passport earlier and you renewed that passport. Later you saw the advertisement.

65. In the response the applicant confirmed the date that her passport was issued. She stated that she applied for her passport prior to her applying for a job in Country A. She made a mistake at the hearing and she did not state in her statement that she got her passport and then applied for jobs in Country A.

- At the hearing you stated that at the end of [date] [Person I]'s husband, [Person J] and [number] men broke into [applicant's relative]'s home. [Person J] said to [Person I] that he knew what [Person I] and you were doing, and started to beat [Person I]. The [number] men were beating you. Subsequently you were asked if they said anything, and you stated that [Person J] kept saying he knew about your relationship and he said to [Person I] why are you doing this again, you have broken my name. You also stated that [Person J] had said to [Person I] that he could not believe that she had started again, he thought [Person I] and you were just friends but [Person I] and you are doing this, having a night together. He also threatened to give up [Person I] and you to the police.

Towards the end of the hearing you stated that [Person J] had relatives in Ulaabatar and people from [applicant's home town] who could use Shaman. You also stated that [Person J] had threatened you by saying he could find you.

In your statement there is no mention that [Person J] threatened you by saying he could find you.

66. The applicant in her response stated that Person I's spouse and other men broke into her house. Person J was very angry and started to beat her. The applicant also claimed that he is a Shamanist and will now try to kill her by curses and spells. Her life is in grave danger. The applicant also claimed that her translator told her that she could not translate some things and asked the applicant to explain them when interviewed.

- At the hearing you stated that you were detained for 72 hours and you were beaten by the police maybe [number] times.

In your statement you stated that you were detained for 2 days and there is no mention of you being beaten.

67. The applicant claimed in the response that she told her translator that she had been detained for 72 hours but it was translated to 2 days. In Mongolia the primary action taken in cases is to detain for 72 hours.

- At the hearing you stated that when you returned home your [family member] came to your home and abused you about breaking the family name and making it very low. You also stated that he beat you.

At the hearing you stated that your [family member] returned to your home a second time, this time with [another family member]. They abused you and asked you why you had done this and why you did not think of your [family]. They also beat you at that time. You also stated that [applicant relative] was present this second time and your [family member] pushed her away when she tried to protect you and they threatened to kill you both.

In your statement you stated that after you were released by the police you returned to your home and [family members] hit you again. There was no mention of: you being

beaten twice by [family members]; [applicant relative]’s involvement; or [family members’] threats to kill you both, in the statement.

68. The applicant in her response referred to stating in her statement that after she was released she was beaten up by her family members. She stated that she did not say that this happened just once on one day. She did not specify a number in her statement as it was more like a general statement.

- In your [visa] visa application lodged on [date] you stated that you lived at [address].

In your application you stated that from [date] to [date] you lived at [address].

At the hearing you stated that from [date] to [date] you lived at [address] from when you arrived in [city] until [date]. From [date] to [date] you lived at [address].

In your application you did not state where you lived from [date] to [date]. At the hearing you stated that you lived at [address].

69. The applicant stated in her statement that she told the translator about her addresses and the periods she lived at the addresses. The applicant claimed that the translator made a translating mistake.

The inconsistent statements are relevant to the review as they indicate that your claims that you had a relationship with a woman in Mongolia, were beaten and threatened by her spouse, and then detained by the police and beaten by the police may not be true. They are further relevant as they indicate that your claims that you were a beaten and threatened by [family members] may not be true. They are further relevant as they indicate that your claims that you were abused and beaten and threatened by your boyfriend, Person K may not be true.

The inconsistent statements are relevant as they indicate that you may not be a truthful witness and that you may not have told the truth in the information provided to the Department, the Tribunal and at the Tribunal hearing in support of your protection visa, and that your claims in relation to being a refugee may have been made for migration purposes. If the Tribunal makes these findings it may also find that you do not meet relevant criteria for the grant of a protection visa.

FINDINGS AND REASONS

70. The Tribunal accepts that the applicant is outside her country of nationality, Mongolia. The applicant claimed that Mongolia and Country A were her countries of former habitual residence. The Tribunal accepts the applicant’s evidence that her Country A’s visa was a working visa and that the visa expired. Therefore, the Tribunal will assess the applicant’s claims in relation to her country of nationality Mongolia.

71. The applicant has claimed that she has suffered harm in Mongolia and Country A because she is a lesbian. She also claims that she will suffer harm if she returns to Mongolia because she is a lesbian, as her family blame her for the death of her relative and due to the practice of Shamanism. The Tribunal

did not find the applicant to be a credible witness for the reasons set out below. In particular there are a number of inconsistencies and contradictions in the statements made by the applicant, both written and orally, to the Department and the Tribunal which are of such a magnitude that it indicates that the applicant is not a lesbian and that she has not suffered the harm she claims to have suffered.

72. At the beginning of the hearing the Tribunal asked the applicant how her application and statement were prepared as she did not speak English. The applicant stated that she wrote her story in Mongolian and her friend, who speaks good English, translated it. The applicant also confirmed that before she signed her statement her friend read it back to her and the contents were correct.

Lesbian claims

73. There are important inconsistencies in relation to the harm the applicant claimed she suffered in Mongolia because she is a lesbian. In the statement, at the interview and the hearing the applicant claimed that Person J and other men broke into her relative's home where Person I and she were staying together. Person J beat Person I while the other men beat her. The applicant was specifically asked by the Tribunal if Person J and the other men said anything to her and she stated that Person J kept saying he knew about their relationship and he said to Person I why you are doing this again, you have broken my name. The applicant also stated that Person J had said to Person I that he could not believe that she had started again, he thought Person I and the applicant were just friends but Person I and the applicant were doing this, having a night together. He also threatened to give up Person I and the applicant to the police. It was only towards the end of the hearing when the applicant was being questioned about why she could not live in Ulaanbaatar that the applicant claimed that Person J had threatened her by saying he could find her. The applicant also stated that he had relatives in Ulaabatar and people from her home town who could use Shaman. There is no mention in the statement that Person J threatened her by saying he could find her. The applicant stated in the response stated that the person who translated for her said she could not manage to translate some of the things asked the applicant to explain further when interviewed. However, the Tribunal does not accept this explanation, as set out above, the applicant stated at the hearing that her friend spoke good English and the contents of her statement were correct. No mention was made at the hearing that her friend had told her to explain things that the friend could not translate at the interview. Although the applicant did state in relation to some inconsistencies that she did tell her friend what she stated at the hearing.

74. The applicant claimed in her statement that the day after Person I and she were beaten, she was detained by the police for 2 days. However, in her statement the applicant stated that she was detained for 72 hours. More importantly at the hearing the applicant stated that she was beaten many times by the police. There is no mention in the statement of her being beaten by the police. The fact that a person is beaten by the police is such an important and

distressing event that it would be included in any statement provided to the Department to support an applicant's claim to be a refugee. In her response the applicant claimed that she did tell her translator that she had been detained for 72 hours and in Mongolia the primary action taken in any case is to detain for 72 hours not 2 days. The Tribunal does not accept this explanation for the reasons set out above that she stated at the hearing that her friend spoke good English and the statement was read back to her and the contents were correct. The applicant in the response just repeats that she was beaten by the police. The Tribunal in relation to the inconsistencies relating to this claim does not accept the applicant's claim that there were problems with the translation for the same reasons as set out above. Further, the applicant in her statement was able to set out detail of Person I and her being beaten by Person J and other men, so the applicant and her translator could explain this sort of incident.

75. The applicant in her statement claimed that after she was released her family members hit her. At the hearing the applicant described two incidents. In particular the applicant stated, in relation to the second incident, that her relative was pushed away by one of her family member when her relative tried to protect the applicant. Further, this family member threatened to kill both of them. There was no mention in the statement of the applicant being beaten twice by her family members, her relative's involvement, or her family members' threats to kill them both. In the response the applicant stated that she had not, in her statement, said that her family members beat her on one day. She did not specify a number as her statement was a general statement of the incident. The Tribunal does not accept this explanation. In the statement the applicant stated that she lived with her relative and looked after her. The applicant also stated that after Person I and she were attack and she was detained, the only person who stood by her was her relative. Similar statements were made at the hearing. As her relative was a very important person to the applicant it would be expected that the fact she was pushed by the applicant's family member and both of them were threatened with being killed would be included in any statement provided to the Department to support an applicant's claim to be a refugee.

Shamanism

76. The applicant claimed in her statement that her family blamed her for her relative's death. At her interview that applicant stated that her family believed that her relative got sick because of the applicant and that Shamanism is a strong religion and if they wanted to do something bad to a person they can. At the hearing the applicant claimed that her family believed in Shamanism and Person J and his family and friends also have this powerful religion. The applicant claimed that Person J had a connection with Shamanism. The applicant stated that she believed in Shamanism and she has seen that things can happen and the Shamans can do anything they want. The applicant also stated that they cannot hurt you physically but through their religion they can do something to you. The applicant claimed that one of the reasons she did not want to return to Mongolia was her fear of Shamanism. However, the applicant did not mention her concerns in relation to Shamanism in her statement. As the applicant is so concerned about Shamanism and it is

part of the reason why her family blame her for her relative's death, a person who was important to the applicant, it would be expected that this claim would be included in any statement provided to the Department to support an applicant's claim to be a refugee. In the response the applicant stated that her family believes in Shamanism and is extremely scared of it. She also claimed that if she returned to Mongolia her life is in grave danger as they could kill her by cruse and spell. However, the applicant also claimed that she was not aware that she had to mention Shamanism when she first lodged her documents. The applicant stated at the hearing that one of the reasons she could not return to Mongolia was her fear of Shamanism. Her claimed fear of what her family will do if she returns to Mongolia is linked to Shamanism as is her claimed fear of what Person J will do to her if she returns to Mongolia. The applicant's claims in relation to Shamanism are an important part of the claimed harm she fears will happen to her if she returns to Mongolia and as such it would be expected that this claim would be included in any statement provided to the Department to support an applicant's claim to be a refugee. The applicant in her response stated that the person translating for her could not translate some of the things and asked her to explain further at the interview. However, the Tribunal does not accept this explanation because to the reasons already set out above. Further, the applicant's claim as to Shamanism is so central to the claimed harm she fears will happen if she returns to Mongolia. Also, the statement does set out a number of other events and incidents that happened to the applicant in detail. Even if the expression Shamanism could not be translated the applicant and her translator could have explained, in simple terms, about a religion where harm can be done without physical harm. For the above reasons, and as the Tribunal has found that the applicant is not a truthful witness, the Tribunal also finds that the Tribunal is not satisfied that the applicant will suffer harm from her family or Person J and his family and friends due to Shamanism in the reasonably foreseeable future if she returns to Mongolia.

77. In the Tribunal's view there is no plausible evidence before it that the applicant has suffered persecution in Mongolia because of her political opinion, her imputed political opinion, her membership of a particular social group, her imputed membership of a particular social group, her religion, her imputed religion or for any other Convention reason. Nor in the Tribunal's view does the evidence establish that there is a real chance that the applicant will suffer persecution for a Convention reason either now or in the reasonably foreseeable future if she returns to her country. Having regard to the above the Tribunal is not satisfied, on the evidence presently before it, that the applicant has a well founded fear of persecution for a Convention reason if she returns to Mongolia in the foreseeable future.

CONCLUSIONS

78. Having considered the evidence as a whole, 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 section 36(2)(a) for a protection visa.

DECISION

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