

AT AUCKLAND

Appellant:	BQ (China)
Before:	S A Aitchison (Member)
Counsel for the Appellant:	I Uca
Counsel for the Respondent:	No Appearance
Date of Hearing:	6 May 2015
Date of Decision:	25 May 2015

DECISION

[1] This is an appeal against a decision of a refugee and protection officer, declining to grant refugee status and/or protected person status to the appellant, a citizen of The People’s Republic of China (“China”).

INTRODUCTION

[2] The appellant is a Chinese Muslim of Han ethnicity. She is a citizen of China and a permanent resident of the United States of America (“United States”). She is transsexual; although born a male, she identifies as female and prefers to be known by her female name, AA. She claims that, in China, she will be ill-treated by the police and members of the local population because she is transsexual. She will be unable to find employment, and societal discrimination and a lack of family support will force her to work as a street prostitute, an illegal activity which will expose her to serious harm at the hands of the police and the local populace.

[3] The appellant further claims that, given her long absence from the United States while living in New Zealand, it is unclear whether she will have a right to return and reside there and, even if she can return, she will experience

harassment and ill-treatment from the local population. The police are unwilling to provide her with protection. Owing to societal discrimination, she will be unable to obtain employment and will be forced to work as a street prostitute.

[4] The central issues to be determined in this appeal are whether the appellant's claim gives rise to a well-founded fear of being persecuted in China, and whether she can be received back and protected from serious harm in the United States.

[5] Given that the same claim is relied upon in respect of all limbs of the appeal, it is appropriate to record it first.

THE APPELLANT'S CASE

[6] The account which follows is that given by the appellant at the appeal hearing. It is assessed later.

[7] The appellant, in her mid-20s, was born a male in W city, X province, in China. She is an only child. She attended primary and middle school in W, then moved to Y in her teenage years to complete her high school education, allowing greater freedom to explore her sexual identity, at that time, as a gay male. When the appellant told her mother that she was gay, her mother told her that she was mentally ill. The appellant avoided telling her father, who was physically violent towards her throughout her childhood.

[8] After leaving school, the appellant began working as a prostitute in Y. In 2007, she worked as a tour guide for an international agency in Y and attended gay bars and saunas in secret.

Ill-treatment by police

[9] In February 2008, the police conducted a raid on a gay bar and sauna in Y and arrested the appellant. She was detained at the police station and subject to physical abuse, including rape. Several weeks after the incident, the appellant made a complaint to the mayor of Y, and was later invited to attend the police station to discuss the matter. At the police station, she was assaulted and raped with batons. A week later, she sought medical treatment at hospital and was diagnosed with a sexually transmitted disease.

[10] The appellant obtained a false identity document and moved to W where she lived in hiding. Whilst in hiding, the local police in W contacted her family, seeking her whereabouts. The appellant was issued with a passport in November 2008 and visited the Philippines several times. In February 2009, she remained in the Philippines for approximately a year and travelled through Asia. During this period, the local police continued to contact her family, seeking her whereabouts.

Travel to, and living in, the United States

[11] On 10 September 2010, the appellant travelled to San Francisco in the United States, and applied for asylum. She was granted asylum status in November 2011. On 26 February 2012, she was issued a green card/permanent resident status, valid until 26 February 2023. The appellant has not applied for a United States passport. In order to do so, she would need to live continuously in the United States for a minimum of 180 days a year, for a five-year period.

[12] In 2010, the appellant rented an apartment in San Francisco, and continues to rent this apartment at the current point in time. When she first rented the property, she did not dress as a woman. She is aware that the landlady has difficulty accepting transsexuals. However, she has a good relationship with her.

Transgendering process

[13] In approximately 2012, the appellant began to perceive herself as a woman. Since this time, she has regularly attended counselling sessions with a psychotherapist in a San Francisco clinic, known as the ABC Clinic, to talk about her gender, identity and sexuality. She commenced hormone therapy and attended various other support groups for transgender persons. The appellant discussed with the psychotherapist the possibility of having gender realignment surgery in the future. However, the cost of US\$12,000 is prohibitive.

[14] In 2012, the appellant adopted the name of BB and began to refer to herself as a woman. From 2013, the appellant began using the name AA. She identifies as a Muslim and has attended a local mosque in San Francisco on several occasions. However, she does not feel accepted as a transgender person dressing as a Muslim. She prays at home and reads the Koran.

Attempts to find employment

[15] After obtaining permanent resident status in the United States, the appellant attempted on five or six occasions, over the period of a year, to find employment in restaurants and supermarkets, but was unsuccessful. When she told prospective employers of her intention to dress as a woman during employment, several of them told her that this would not be possible, and others simply told her that she was unsuccessful with her application.

[16] The appellant has worked as a prostitute in the United States to help pay her living expenses. From 2013, she began receiving a disability allowance from the government. This allowance pays little more than her rent. She has a United States bank account, which she continues to operate.

[17] The appellant receives health insurance under a Medicare package in the United States. She uses this to cover expenses such as counselling services and hormone treatment. However, she considers that a number of insurance companies in the country discriminate against transgender persons and do not include them in their policies.

Treatment as a transsexual in the United States

[18] The appellant does not feel safe dressing as a woman in the United States. People stare at her and insult her. There have been instances where she has been unwelcome at bars (where she has been accused of being there for drug dealing purposes). In some areas, she is unable to enter female toilets. On one occasion, a group of persons passing in a vehicle threw a bottle in her direction, narrowly missing her. When the appellant reported this matter to the police, the police told her they could not help as she had not been injured. On another occasion, the appellant noticed that a man was following her and called the police, but the police refused to act as they stated that no crime had been committed.

[19] The appellant is aware of high instances of transgender women being beaten and murdered in the United States. She considers that the country has the highest murder rate for transgender persons in the first world. She feels depressed about the way she is treated as a transgender person in San Francisco.

[20] In July 2014, while visiting her psychotherapist, the appellant explained that she was having emotional difficulties about people's negative reactions towards her, and had thoughts of revenge and of wanting to harm other people. The police

were called and she was taken to a mental health unit. She was released later that day. A priest friend, CC, collected her, explaining to the doctors that the appellant was not dangerous. She was released on agreement that CC look after her. When her federal disability allowance (previously a state allowance) was approved, this was paid direct to CC. After paying the appellant's rent for her each month, CC transfers any surplus funds to the appellant's personal bank account.

Travel from the United States

[21] From June to December 2013, the appellant travelled from the United States to various other countries in the Middle East region. The appellant also travelled to Thailand to meet her mother in early 2014. Upon return to the United States, she was questioned by airport officials about the reason for her travel and her finances, amongst other things. In March 2014, after returning from a short visit to Turkey, the appellant was similarly questioned by officials. She had not been questioned on other visits prior to being arrested by the police in July 2014 and considers that her name and identity as an arrested person is now accessible in police and immigration records.

Travel to New Zealand

[22] On 26 June 2014, the appellant departed San Francisco and travelled to New Zealand. She applied for refugee status on 1 September 2014, and was interviewed by the Refugee Status Branch (RSB) on 16 October 2014. The appellant has been assisted by a counsellor and general medical practitioner in New Zealand, and receives medication for obsessive compulsive disorder and depression, and hormone therapy.

Appellants fears in relation to China

[23] The appellant fears she will be stigmatised and socially ostracised as a transgender person if she returns to China. She states that Chinese persons consider transsexuals to be "freaks" and to be mentally ill. She would not be able to obtain work or receive any health insurance. She will not be able to afford hormone therapy. If she wants to have a sex change operation she will need her parents' permission. She would also be subject to police harassment and a repeat of the physical violence she had experienced as a gay man in China.

Evidence of Dr DD

[24] Dr DD, a general medical practitioner, gave evidence before the Tribunal, and provided copies of her medical notes for the appellant collated in a letter dated 14 April 2015.

[25] Dr DD stated that she first met the appellant on 3 December 2014. The appellant presented as depressed and disclosed behaviours which she considered to be consistent with obsessive compulsive disorder. Dr DD prescribed medication requested by the appellant for obsessive compulsive disorder, and hormone treatment.

[26] Dr DD stated that the appellant has been seeing a counsellor weekly, and has presented at the DEF Centre as a suicide risk. Her depression has worsened and her medication has been increased. She requires specialist psychological input and ongoing counselling. She needs to be in a supportive environment, without abrupt changes, to make decisions about her transgenering.

Material and Submissions Received

[27] On 17 April 2015, counsel provided a memorandum and further evidence (including medical notes from Dr DD, and correspondence and notes with the appellant's counsellor EE).

[28] On 20 April 2015, counsel applied for a six-month adjournment, and attached material in support. By Minute, dated 24 April 2015, the Tribunal declined the application for an adjournment.

[29] On 4 May 2015, the Tribunal provided counsel with country information. At the hearing on 6 May 2015, the Tribunal provided the appellant with additional country information.

[30] The Tribunal afforded counsel time to file further material in support of the appeal by 11 May 2015. The Tribunal afforded a further extension of time to file material by 18 May 2015. No additional material has been received from counsel.

ASSESSMENT

[31] Under section 198 of the Immigration Act 2009, on an appeal under section 194(1)(c) the Tribunal must determine (in this order) whether to recognise the appellant as:

- (a) a refugee under the 1951 Convention Relating to the Status of Refugees (“the Refugee Convention”) (section 129); and
- (b) a protected person under the 1984 Convention Against Torture (section 130); and
- (c) a protected person under the 1966 International Covenant on Civil and Political Rights (“the ICCPR”) (section 131).

[32] In determining whether the appellant is a refugee or a protected person, it is necessary first to identify the facts against which the assessment is to be made. That requires consideration of the credibility of the appellant’s account.

Credibility

[33] The Tribunal accepts the appellant’s account of her evolving understanding of her sexuality, first identifying as a gay male while living in China, and of the psychological and emotional need to identify as a female once living in the United States.

[34] The appellant appeared before the Tribunal, dressed as a woman, and Dr DD gave evidence of the appellant’s transsexual identity. According to the appellant’s medical records in New Zealand, she has been continuing the transgendering process here, receiving counselling and hormone therapy; see the compilation of Dr DD’s medical notes, 14 April 2015, and medical notes of EE (from 19 December 2014 to 15 April 2015).

[35] The appellant’s psychotherapist in the United States, FF, wrote in a letter dated 14 October 2014, that the appellant had been a patient at the ABC Clinic in San Francisco from 1 December 2011 to 25 June 2014. The appellant received primary medical care there, including cross-sex hormones, psychotherapy, psychiatry, case management and group services. FF describes the appellant’s gender identity as persistent and stable.

[36] In addition to accepting the appellant's transsexual identity, the Tribunal finds her evidence of treatment by police in China to be credible. This evidence was consistent with previous accounts, before the RSB and in her statements. The appellant's claim to have experienced harassment, and discrimination in employment, in the United States is also accepted as credible.

Factual Findings

[37] The Tribunal finds that the appellant is a Chinese transgender female in her mid-20s, who has been subjected to several instances of rape by police in China as a gay man, and has been harassed and subject to a level of employment discrimination in the United States. She rents an apartment in the United States and receives a benefit there. She suffers from depression and obsessive compulsive disorder. She entered New Zealand lawfully and has been receiving medication and counselling services here for her psychological condition and hormone therapy.

The Refugee Convention

[38] Section 129(1) of the Act provides that:

"A person must be recognised as a refugee in accordance with this Act if he or she is a refugee within the meaning of the Refugee Convention."

[39] Article 1A(2) of the Refugee Convention provides that a refugee is a 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 as a result of such events, is unable or, owing to such fear, is unwilling to return to it."

[40] In terms of *Refugee Appeal No 70074* (17 September 1996), the principal issues are:

- (a) Objectively, on the facts as found, is there a real chance of the appellant being persecuted if returned to the country of nationality?
- (b) If the answer is yes, is there a Convention reason for that persecution?

Assessment of the Claim to Refugee Status

[41] For the purposes of refugee determination, “being persecuted” has been defined as the sustained or systemic violation of core human rights, demonstrative of a failure of state protection – see *Refugee Appeal No 74665/03* (7 July 2004) at [36]-[90]. Put another way, persecution can be seen as the infliction of serious harm, coupled with the absence of state protection – see *Refugee Appeal No 71427* (16 August 2000) at [67].

[42] In determining what is meant by “well-founded” in Article 1A(2) of the Convention, the Tribunal adopts the approach in *Chan v Minister for Immigration and Ethnic Affairs* (1989) 169 CLR 379 (HCA), where it was held that a fear of being persecuted is established as well-founded when there is a real, as opposed to a remote or speculative, chance of it occurring. The standard is entirely objective – see *Refugee Appeal No 76044* (11 September 2008) at [57].

Nationality

[43] According to the Refugee Convention, a person must establish a well-founded fear of being persecuted in relation to each of the countries of which he/she is a national – Article 1A(2) Refugee Convention and UNHCR *Handbook and Guidelines of Procedures and Criteria for Determining Refugee Status*, (Geneva, 2011, at paras [106]-[107]).

[44] In refugee law, a nationality is understood in the sense of a legally recognised form of citizenship. Professor Hathaway and Michelle Foster in *The Law of Refugee Status* (Cambridge University Press, 2014) at p50 state:

“The choice of the state of nationality as the country of reference for risk analysis was driven by the Convention’s overarching goal of responding to the need to provide a new national home to persons driven from their country by the risk of persecution. The commitment of international law to individuals having a nationality in the legally recognized form of citizenship, and hence being “allocated” to a state, follows in part from the logic of the interstate system.”

[45] The appellant is a national and citizen of China. Although she is a permanent resident of the United States, she is not a national of that country at the time of this decision. She does not hold a passport, for example, has no right to vote, stand for election, or hold any government position. The appellant’s permanent resident status in the United States falls short of citizenship and a nationality.

[46] However, this is not the end of the enquiry. In New Zealand, there is a delimiting clause on the ambit of protection enacted in section 138 of the Act, where a refugee and protection officer may refuse to recognise a person as a refugee or a protected person, if he or she is satisfied that the person has the protection of another country and can be received back and protected there without risk of being returned to a country where he or she would be at risk of circumstances that would give rise to grounds for his or her recognition as a refugee or a protected person in New Zealand.

[47] Although the RSB found that the appellant was a national of the United States, and thus did not need to determine whether the appellant had protection elsewhere, the Tribunal in *AH (Egypt)* [2013] NZIPT 800268-272 found that it had an implied power to examine the question of whether or not an appellant has protection elsewhere, irrespective of whether this had been the basis of the decision by the RSB to decline the claim; see para [92].

[48] Further, the Tribunal stated that in order for the test to be met, the Tribunal must be satisfied that the transfer would (at [93]):

- (a) be practicable and accessible by way of proof of actual admission to the receiving state;
- (b) not give rise to a risk of *refoulement* from the receiving state back to a country or territory where the claimant would face a real chance of being persecuted or where there are substantial grounds for believing the person would be in danger of torture, arbitrary deprivation of life or cruel inhuman or degrading treatment or punishment;
- (c) not give rise to a real chance of being persecuted or substantial grounds for believing that the claimant will be subjected to arbitrary deprivation of life, torture or cruel inhuman or degrading treatment or punishment in the receiving state. Treatment in this context includes administrative treatment by the receiving state of the claimant as a refugee or asylum seeker which exposes the claimant to sufficiently severe socio-economic deprivation amounting to cruel treatment as defined under the Act;
- (d) afford access to fair and efficient asylum procedures in the receiving state. As a component of this, the person must not be subjected to arbitrary detention; and
- (e) where refugee status is involved, result in the claimant enjoying in the receiving state the range of refugee rights conferred on him or her under the Convention in New Zealand at the time it is proposed to transfer responsibility.

[49] The approach in *AH (Egypt)* is confirmed and adopted here. Accordingly, the Tribunal must first consider whether the appellant has a well-founded fear of being persecuted for a Convention reason in relation to appellant's country of nationality, China. If so, then the Tribunal must consider whether the appellant has the protection of another country or has been recognised as a refugee by

another country and can be received back and protected there without risk of being returned to a country where she would be at risk of circumstances that would give rise to grounds for her recognition as a refugee or a protected person in New Zealand.

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

[50] The Chinese government decriminalised homosexuality in 1997 and removed it from the list of mental disorders in 2001. The government also recognises change of sex through sex reassignment surgery. However, transvestism (cross-dressing) and transexualism, are still recognised as mental disorders on the Chinese Classification and Diagnostic Criteria of Mental Disorders (CCMD); “My Life is Too Dark to See the Light. A Survey of the Living Conditions of Transgender Female Sex Workers in Beijing and Shanghai” *Asia Catalyst* (January 2015) (“Asia Catalyst report”); United Nations Educational, Scientific and Cultural Organization, HIV Prevention and Health Promotion UNESCO Bangkok *Lesbian, gay, bisexual and transgender in China and their vulnerability to HIV* (13 March 2012) (“UNESCO Report”).

[51] Notably, there is a legal vacuum in China in terms of anti-discrimination legislation and protections relating to sexual orientation and gender identity. Existing employment law does not contain any specific anti-discrimination clauses in these areas, and there is no legal right, for example, to same-sex marriage, civil unions or registered partnerships of same sex relations.

[52] In the report *China: The Legal Position and Status of Lesbian, Gay, Bisexual and Transgender People in the People’s Republic of China* (24 March 2010) (“IGLHRC Report”), T Mountford from the International Gay & Lesbian Human Rights Commission emphasises that the silence of the Chinese government on lesbian, gay, bisexual and transgender (LGBT) issues has had two main effects:

“First, it has stalled any further developments in removing legal discrimination against LGBT people in China. Secondly, it means that the legal status and position of LGBT people is unclear, with varying official treatment across different parts of China. Discrimination against LGBT people continues to be written into many different areas of law in China. Furthermore, as LGBT people in China largely lack legal recognition and legal protections, there is no legal certainty as to their position. This results in a situation where the population is unable to clearly determine whether they will face official opposition in meeting together, organizing and providing services within the community.”

[53] In addition to a lack of legal and policy protections for LGBT persons, there is deeply entrenched official and social discrimination against LGBT persons in China. According to the UNESCO Report:

“While steps have been taken to improve the legal and policy environment for lesbian, gay, bisexual and transgender (LGBT) people, there remain many reports of social stigma and discrimination and further legal and policy action is needed...”

[54] The IGLHRC Report states that LGBT persons continue to suffer from police harassment and arbitrary detention. They report:

“[T]he police and public security services often use the sexual element of LGBT people’s sexuality against them, for example arresting LGBT people for suspected prostitution and using circumstantial items such as possession of condoms as prima facie evidence of alleged involvement in prostitution. There are continuing problems of LGBT people facing extortion and blackmail from the police and security services, as well as from broader society, at threat of revealing their sexuality.”

[55] In September 2010, Beijing police detained hundreds of gay men who they rounded up in a park. They detained and released them after sighting their personal identification and taking blood tests; Human Rights Watch *Promises Unfulfilled – An Assessment of China’s National Human Rights Action Plan* (January 2011).

[56] The IGLHRC Report states that transgendered people face serious levels of police harassment and particular difficulties in obtaining employment.

[57] The UNESCO Report states that social stigma and discrimination faced by LGBT persons can increase vulnerability and risk-taking. LGBT persons may enter into sex work due to challenges they face in employment; see also United Nations Development Program (UNDP) *Being LGBT in Asia: China Country Report* (2014) (“UNDP Report”). There is a risk of HIV transmission and people are afraid to seek HIV prevention and treatment services. The IGLHRC Report states:

“LGBT people continue to have difficulty in accessing accurate information on HIV/AIDS. Sufferers of HIV have difficulty accessing adequate medical and personal support. HIV/AIDS has become associated with homosexuality in the public mind in China. Discrimination continues in many contexts of Chinese life against HIV/AIDS sufferers, despite the express prohibitions against discrimination in the Regulation on Aids Prevention and Treatment 2006. There is a general prohibition against the donation of blood by homosexual people of either sex in China.”

[58] According to G Dominguez and J Ju in “Marginalized and Stigmatized – China’s Transgender Sex Workers” *Deutsche Welle* (2015), transgender sex workers are among the most vulnerable and marginalised populations in China

today. They are described as “an extremely hidden and isolated population, often forced to hide their identity and lead a double life given their limited options for employment, education and social activity”.

[59] As sex work is illegal in China, police are one of the greatest challenges faced by transgender sex workers. According to the *Deutsche Welle* report, many transsexual persons experience entrapment, extortion, verbal abuse and physical abuse at the hands of the police. They report:

“One of the victims of such abuse is Zhang Baizhi, who has been a sex worker for the past ten years: ‘The police forced me to take off my pants though I had clearly told them I’m not a real woman,’ Zhang told DW. ‘They called me a pervert and humiliated me.’ Zhang, who lives neither in Shanghai nor Beijing, says she is arrested at least twice a year.”

[60] According to the *Asia Catalyst* report, transgender persons they interviewed claimed to have experienced verbal and physical violence from the police. Transgender sex workers whose identity cards designated them as male were jailed together with men. The Canadian Immigration and Refugee Board *China: Situation and Treatment of Sexual Minorities, Particularly in Guangdong and Fijian; State Protection and Support Services* (2011 – February 2013) reports:

“[T]he police has a long record of maltreatment, censorship and persecution of sexual and gender minorities, and sexual and gender minorities will, categorically speaking, not turn to the police for protection.”

[61] There are only a few organisations across China that offer services for the needs of the transgender community, including mental health, psychological counselling, transitioning support, and hormone treatment. There are fewer than 10 medical establishments across China capable of providing the specialist advice necessary on hormone use and gender change; see the UNDP Report.

[62] Having reviewed these relevant country sources, the Tribunal now turns to the facts of this case. It finds that as a transgender person, the appellant would have a highly visible profile in China, a profile of which a large proportion of its residents and state security services are adverse to. As a transgender person, the appellant is not accepted by her family and cannot rely upon them for support. While her mother has some interest in now contacting the appellant, she states this is solely to secure her status and financial gain abroad. She is likely to experience extreme difficulty in finding employment without denying her gender identity, which is central to her core personality. There is a real chance that she would resort to working as a street prostitute, an illegal activity in China, and come to the attention of the police, who may subject her to serious harm in the form of

harassment, ridicule, psychological and physical abuse, including rape. Such forms of harm are in violation of her right to be free from cruel, inhuman and degrading treatment, as violations of Article 7 of the ICCPR. The intentional infliction of severe mental or physical pain or suffering, by or with the consent of state authorities, for a specific purpose, including to punish the appellant for being transsexual, may also constitute torture in violation of Article 7 of the ICCPR.

[63] The appellant has existing psychological vulnerabilities, including depression and obsessive compulsive disorder. The effect of performing sex work and the real chance of ill-treatment by the police would seriously damage her psychological well-being to the extent that she would suffer cruel, inhuman or degrading treatment. The heightened risk of her experiencing sexual disease and HIV from such activity, and the risk of abuse and violence from sex clients from whom she cannot seek adequate state protection, would also exacerbate her risk.

[64] Owing to stigma and ostracism, severely limiting the appellant's choice of employment, and the restricted availability of medical and counselling services to transsexual persons in China, the appellant's access to her socio-economic rights would also be compromised. Such rights include the right to work set out in Articles 6 and 7 of the *International Covenant on Economic Social and Cultural Rights* (ICESCR), and the right of everyone to the enjoyment of the highest attainable standard of physical and mental health set out in Article 12 of the ICESCR. Also, Article 2.2 proscribes any discrimination in the enjoyment of the right to employment and health. However, given the finding above with regards to cruel, inhuman or degrading treatment or punishment, it is not necessary to consider whether such violations rise to the threshold persecution; see *BS (Fiji)* [2012] NZIPT 800041 for a more comprehensive discussion of these issues.

[65] Accordingly, the Tribunal finds that there is a real chance of the appellant being persecuted in China. However, as the Tribunal has expounded in paragraphs [46] to [49] of this decision, the Tribunal may refuse to recognise a person as a refugee or a protected person, if satisfied that the person has the protection of another country and can be received back and protected there without risk of being returned to a country where he or she would be at risk of circumstances that would give rise to grounds for his or her recognition as a refugee or a protected person in New Zealand. The Tribunal must, therefore, consider whether the appellant has the right to return and reside in the United States and, if so, whether she can be protected there without risk of being *refouled*

to China and without risk of any circumstances that would be grounds for her recognition as a refugee or a protected person in New Zealand.

Whether the appellant has right to return and reside in the United States

[66] As a permanent resident of the United States, the appellant has the right to live permanently in the country, to work there, and be protected by all the laws of the United States; United States Citizenship and Immigration Services (USCIS) “Rights and Responsibilities of a Green Card Holder (Permanent Resident) at www.uscis.gov. According to the USCIS “International Travel as a Permanent Resident”, permanent residents are entitled to travel overseas, and temporary or brief travel does not usually affect their permanent resident status. A general guide used is whether such person has been absent from the United States for more than a year. Abandonment may be found to occur in trips of less than a year where it is believed a person did not intend to make the United States their permanent residence. The immigration officer may consider criteria such as:

“[W]hether your intention was to visit abroad only temporarily, whether you maintained U.S. family and community ties, maintained U.S. employment, filed U.S. income taxes as a resident, or otherwise established your intention to return to the United States as your permanent home. Other factors that may be considered include whether you maintained a U.S. mailing address, kept U.S. bank accounts and a valid U.S. driver’s license, own property or run a business in the United States, or any other evidence that supports the temporary nature of your absence.”

[67] According to the above source, if a trip abroad is planned beyond a year, it is advisable to apply for a re-entry permit. A returning resident visa can also be obtained from a United States consulate while abroad to assist in showing that the intention was to take only a temporary absence; USCIS “Maintaining Permanent Residence”.

[68] According to the USCIS “I am a permanent resident – How do I get a re-entry permit?” at www.uscis.gov:

“If you are an LPR planning to travel outside of the United States for 1 year or more, it is important that you apply for a re-entry permit before you depart the United States. If you stay outside of the United States for 1 year or more and did not apply for a re-entry permit before you left, you may be considered to have abandoned your permanent resident status. If this happens, you may be referred to appear before an immigration judge to decide whether or not you have abandoned your status. If you are in this situation, contact the U.S. consulate about a returning resident visa.”

[69] Having regard for the above, the Tribunal finds that the appellant has not been outside the United States for more than 12 months. She has maintained her apartment there and receives a monthly allowance from the government. She continues to operate a United States bank account from abroad in New Zealand.

She has community ties that include her friendship with CC, a local priest, and her psychotherapist and support group. There is no evidence to suggest that she cannot re-enter and maintain her status as a permanent resident in the United States. Since obtaining her permanent residence, the appellant has departed and re-entered the United States on three occasions. On one of these trips she was abroad for some seven months and she had no difficulty returning. There is no credible reason established in this case why the appellant would now face any difficulties on return. The Tribunal finds that the appellant has the right to return and be protected in the United States.

Whether the appellant is at risk of being refouled to China from the United States

[70] There is no risk of *refoulement* to China from the United States. She has been recognised as a refugee there and as a permanent resident. The appellant can return and remain in the United States.

[71] The remaining question to be asked is whether the appellant can be protected if returned to the United States.

Objectively, on the facts as found, will the appellant be protected if returned to the United States?

[72] As guidance, the Tribunal here refers to paragraphs [47] to [48] of its decision. It needs to be satisfied that a transfer to the United States would not give rise to a real chance of the appellant being persecuted or substantial grounds for believing she would be in danger of arbitrary deprivation of life, torture or cruel treatment if deported from New Zealand.

[73] The United States is an open democratic society, with strong constitutional protections for basic human rights. State laws, including in California (where the appellant lives), explicitly prohibit discrimination based on gender identity or expression. The law permits name change; see California Code of Civil Procedure section 1275) and allows a change of gender marker on birth certificates; see California Health and Safety Code 103425.

[74] The state Gender Non-Discrimination Act of 2003 explicitly protects transgender persons in employment and housing. In June 2014, President Obama signed an executive order prohibiting workplace discrimination on grounds of sexual orientation or gender identity for all companies awarded federal contracts and outlawed discrimination based on gender identity for federal employees. In

August 2014, the United States Department of Labour announced plans to issue new guidance that discrimination on the basis of transgender status is prohibited under the existing definition of discrimination based on sex in Title VII of the Civil Rights Act 1964; Human Rights Watch *World Report 2015 – United States* (29 January 2015).

[75] According to M Dunning in “Employers Move to Protect LGBT Workers from Bias” *Business Insurance* (2 February 2015), an increasing number of employers in the United States are expanding their non-discrimination policies to include transgender employees. M Rosenberg in “U S government lawsuits target transgender discrimination in workplace” (29 September 2014) at www.reuters.com, reports on the Equal Employment Opportunity Commission filing its first federal lawsuits for transgender discrimination.

[76] In addition to the Civil Rights Act of 1964, which prohibits sex discrimination in employment, state and local laws also explicitly prohibit discrimination based on gender identity or expression, including in California; National Centre for Transgender Equality *Know Your Rights* at www.transequality.org.

[77] The Insurance Gender Non-Discrimination Act of 2005 makes explicit that decisions by insurance companies motivated by anti-transgender bias are unlawful. However, some companies exclude coverage for sex transition procedures. The Affordable Care Act and Medicare removed exclusionary language barring transgender persons from getting transgender-related medical service; see San Francisco AIDS Foundation “Cecilia Chung: A Civil Rights Advocate for the Transgender Community” at www.sfaf.org (27 September 2014).

[78] The community resources for LGBT persons in California are vast and include health care, counselling and community assimilation; see San Francisco Bay Area Directory – Resources for Helping to Rebuild the Lives of LGBTI Refugees & Asylees (November 2013). Listed in this directory is the Berkeley Free Clinic, for example, which offers free medical and counselling services for transgender persons, and the ABC Clinic, which is committed to increasing the physical and mental wellness of LGBT persons.

[79] The San Francisco LGBT Centre also offers transgender employment services. Its services include job search support, mentorship, employment resources, networking opportunities and legal services. They also offer weekly drop-in “job clubs”, employment workshops, career fairs, and training.

[80] Despite these legal protections and community initiatives, there is evidence of discrimination and violence against transgender persons in the United States; see “Assailant Stabs Transgender Woman After Melee on Muni bus” *San Francisco Chronicle* (5 January 2015); “Family Mourns Transgender Woman Fatally Stabbed in San Francisco” *San Francisco Chronicle* (8 February 2015); and “Hate Crime Suspected in Transgender Death” *San Francisco Chronicle* (4 May 2012). Factors increasing risk for interpersonal violence include being a person of colour; J T Taylor and J Serim, San Francisco Lesbian Gay Bisexual Transgender Community Center *San Francisco Lesbian, Gay, Bisexual, Transgender, Queer & Intersex Violence Prevention Needs Assessment* (January 2015).

[81] The United States National Coalition of Anti-Violence Programs (NCAV) 2012 report documented that there were 26 anti-LGBT homicides in the United States that year and 2,016 incidents of anti-LGBT violence. A National Transgender Discrimination Survey found that one-fifth of transgender respondents across the United States had faced bias-motivated police harassment; NCAV *National Report on Hate Violence Against lesbian, Gay, Bisexual, Transgender, Queer and HIV-Affected Communities Released today* at www.avp.org.

[82] Turning to the facts before the Tribunal, the Tribunal finds that, in the United States, the appellant has been able to embark on a transgendering process, legally change her name, and assimilate herself into San Francisco society. She receives an allowance from the federal state, has maintained a rental address since 2010, and obtained access to medical treatment, including hormone therapy and counselling services. She receives health insurance, which covers hormone and counselling services. She has also been able to gain support through a variety of LGBT groups in the community.

[83] The appellant claims that she will be discriminated against to such a degree that she will not be able to find any employment other than street prostitution. Counsel submits that the appellant will suffer severe socio-economic deprivation amounting to cruel, inhuman or degrading treatment or punishment as a consequence.

[84] The right to work is set out in Articles 6 and 7 of the ICESCR. Article 7 recognises the right to the enjoyment of “just and favourable conditions of work” including fair wages and safe and healthy working conditions. In *General Comment No 18: The Right to Work (Article 6 of the Covenant)* 6 February 2006

E/C.12/GC/18, the ESCR Committee stresses the importance of assuring an individual's right to freely chosen decent work as a fundamental aspect of individual dignity and the importance of work for social and economic inclusion. The enjoyment of the right to work must be available without discrimination.

[85] However, the country reports and facts do not establish that the appellant has been, or will be, denied the right to work. The appellant states that over a one-year period she tried some five to six times to get a job, and was told on two occasions that she could not work as a transsexual. In terms of the other applications, she was simply told that she had not been selected. Such attempts do not represent a denial of her right to work. In addition to the legal protections available for non-discrimination in employment practices, there are support services available to assist LGBT persons to obtain employment. While discrimination in employment for transsexuals does exist amongst some employers, it is not established that the appellant will suffer such severe discrimination that she will not be able to access employment.

[86] The Tribunal accepts the appellant's claim to have experienced discrimination in other societal areas, including being unable to use some bathrooms as a female, and being taunted and insulted at bars. However, even when considered cumulatively, such instances of discrimination do not rise to the requisite level of severity to reach the serious harm threshold.

[87] Further, there is no evidence that the appellant will face serious harm owing to harassment, threats of violence or attacks on her, because of her transsexual status in the United States. An assessment of whether such instances reach the threshold of serious harm depends on the background to the claim and the circumstances and characteristics of the particular appellant; see *AC (Syria)* [2011] NZIPT 800035 at [81].

[88] As stated in *AC (Syria)* at [82]:

"[I]t is important to bear in mind that the level of harm required to constitute cruel, inhuman, or degrading treatment or punishment, whether for the purposes of the being persecuted analysis or as a stand-alone issue in the protected person jurisdiction, is a relatively high one. There is a broad acceptance in international jurisprudence and academic commentary that, whatever else may be required, the anticipated harm must be of sufficient severity or seriousness to bring it within the range of harm proscribed by the prohibition against cruel, inhuman, or degrading treatment or punishment. See generally, M Nowak and E McArthur *The United Nations Convention Against Torture: A Commentary* (Oxford University Press, Oxford, 2010) at p558; W Kalin and J Kunzli *The Law Of International Human Rights Protection* (Oxford University Press, Oxford, 2010) at pp320-333; K Wouters *International Legal Standards for Protection From Refoulement* (Intersentia, Antwerp, 2009) at pp381-391."

[89] While there is country information indicating some harassment of transsexuals and evidence of the appellant having experienced incidents of harassment in the past, such harassment does not reach the level of severity of cruel, inhuman or degrading treatment or punishment. The instances the appellant described to the Tribunal of the police failing to respond to her complaints cannot be said to demonstrate a failure of state protection. There is no evidence that the state is unable or unwilling to provide her with protection from any threats of serious harm.

[90] CC states in his letter of 16 April 2015 that, while San Francisco has a reputation for being a progressive and tolerant city, this is not the case. Street violence towards transgender persons is not infrequent and some communities are prejudiced towards transgender persons. In the last month, he states that a transgender person was shot on the street. There has also been recent uproar over San Francisco police officers who texted one another racist, homophobic messages. However, he also states that the District Attorney has been investigating and the Chief Police has dismissed eight police officers.

[91] There is country information recording isolated instances of attacks on transsexuals, in some cases causing death. While these are tragic occurrences, the risk that the appellant would be attacked and or killed is no more than remote and speculative. It falls well short of the real chance threshold.

[92] In making these findings, the Tribunal has taken into account the vulnerabilities highlighted by counsel, including the appellant's age, race, transgender status and mental health. While there is no psychological or psychiatric evidence that the appellant suffers from obsessive compulsive disorder and depression, the Tribunal has accepted the general practitioner's evidence before the Tribunal that the appellant suffers from these conditions and is receiving medication. There are also medical records that the appellant has suicidal ideation.

[93] However, having regard to these characteristics and the cumulative aspects of the claim, the appellant's psychological presentation is not attributable to any specific act or omission to act, and is not attributable to any 'treatment' for which the state can be held accountable. Nor will the appellant suffer treatment in the form of being prevented from accessing appropriate social support and mental health care, should she require it. Any treatment that is administered to the appellant in respect of her mental health would come within the 'lawful sanction' exemption in section 131(5) of the Act.

[94] The Tribunal is satisfied that the appellant would be able to enter and remain in the United States and be afforded effective protection and enjoy there the range of refugee rights conferred under the Convention in New Zealand.

Conclusion on the Claim to Refugee Status

[95] The Tribunal finds that, objectively, on the facts as found, there is a real chance of the appellant being persecuted if returned to China. However – having regard to section 138 of the Act and the Tribunal’s position stated in *AH (Egypt)* [2013] NZIPT 800268-272 at [92], that it has an implied power to examine the question of whether or not an appellant has protection elsewhere – the Tribunal may refuse to recognise a person as a refugee if satisfied that person has been recognised as a refugee in another country and can return there and be protected there without risk of being returned to a country where he or she would be at risk of circumstances that would give rise to grounds for recognition as a refugee or a protected person in New Zealand. Because the Tribunal has found that the appellant has the protection of the United States, she is not recognised as a refugee.

[96] Given that finding, the question of a Convention reason does not arise.

The Convention Against Torture

[97] Section 130(1) of the Act provides that:

“A person must be recognised as a protected person in New Zealand under the Convention Against Torture if there are substantial grounds for believing that he or she would be in danger of being subjected to torture if deported from New Zealand.”

[98] The appellant relies on the same evidence in support of her claim under the Torture Convention as she did to support her claim under the Refugee Convention. For the reasons already given at paragraph [62] of this decision, and having taken into account the appellant’s circumstances, the Tribunal finds that there are substantial grounds for believing that the appellant would be in danger of being subjected to torture if deported to China. However, as the appellant will be returning to the United States and will be protected there, she is not a protected person under section 130(1) of the 2009 Act.

The ICCPR

[99] Section 131 of the Act provides that:

“(1) A person must be recognised as a protected person in New Zealand under the Covenant on Civil and Political Rights if there are substantial grounds for believing that he or she would be in danger of being subjected to arbitrary deprivation of life or cruel treatment if deported from New Zealand.

...

(6) In this section, cruel treatment means cruel, inhuman, or degrading treatment or punishment.”

Conclusion on Claim under ICCPR

[100] For the purposes of her claim for protected person status under section 131 of the 2009 Act, the appellant has not advanced any evidence of a prospective risk of harm other than evidence relied upon in connection with her refugee and protection claim.

[101] For the reasons already given, the Tribunal finds that there are substantial grounds for believing that the appellant would be in danger of being subjected to cruel treatment if deported from New Zealand to China as set out in paragraph [62] of this decision. However, the Tribunal may refuse to recognise a person as a protected person if satisfied that the person has the protection of another country and can be received back and protected there without risk of being returned to a country where she would be at risk of circumstances that would give rise to grounds of her recognition as a protected person in New Zealand. Because the Tribunal has found that the appellant can be received in and has the protection of the United States, she is not recognised as a protected person in New Zealand.

[102] Accordingly, the appellant is not a protected person under section 131 of the 2009 Act.

CONCLUSION

[103] For the foregoing reasons, the Tribunal finds that the appellant:

- (a) is not a refugee within the meaning of the Refugee Convention;
- (b) is not a protected person within the meaning of the Convention Against Torture;

- (c) is not a protected person within the meaning of the Covenant on Civil and Political Rights.

[104] The appeal is dismissed.

"S. A. Aitchison"
S A Aitchison
Member

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