

1003995 [2010] RRTA 580 (7 July 2010)

DECISION RECORD

RRT CASE NUMBER:	1003995
DIAC REFERENCE:	CLF2010/29497
COUNTRY OF REFERENCE:	Bangladesh
TRIBUNAL MEMBER:	Wendy Boddison
DATE:	7 July 2010
PLACE OF DECISION:	Melbourne
DECISION:	The Tribunal remits the matter for reconsideration with the direction that the applicant satisfies s.36(2)(a) of the Migration Act, being a person to whom Australia has protection obligations under the Refugees Convention.

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 s.65 of the *Migration Act 1958* (the Act).
2. The applicant, who claims to be a citizen of Bangladesh, arrived in Australia [in] February 2010 and applied to the Department of Immigration and Citizenship for a Protection (Class XA) visa [in] February 2010. The delegate decided to refuse to grant the visa [in] May 2010 and notified the applicant of the decision and his review rights by letter [on the same date].
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 [in] May 2010 for review of the delegate's decision.
5. The Tribunal finds that the delegate's decision is an RRT-reviewable decision under s.411(1)(c) of the Act. The Tribunal finds that the applicant has made a valid application for review under s.412 of the Act.

RELEVANT LAW

6. Under s.65(1) a visa may be granted only if the decision maker is satisfied that the prescribed criteria for the visa have been satisfied. In general, the relevant criteria for the grant of a protection visa are those in force when the visa application was lodged although some statutory qualifications enacted since then may also be relevant.
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 the 1951 Convention Relating to the Status of Refugees as amended by the 1967 Protocol Relating to the Status of Refugees (together, the Refugees Convention, or the Convention).
8. Further criteria for the grant of a Protection (Class XA) visa are set out in Part 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:

owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence, is unable or, owing to such fear, is unwilling to return to it.

10. The High Court has considered this definition in a number of cases, notably *Chan Yee Kin v MIEA* (1989) 169 CLR 379, *Applicant A v MIEA* (1997) 190 CLR 225, *MIEA v Guo* (1997) 191 CLR 559, *Chen Shi Hai v MIMA* (2000) 201 CLR 293, *MIMA v Haji Ibrahim* (2000) 204 CLR 1, *MIMA v Khawar* (2002) 210 CLR 1, *MIMA v Respondents S152/2003* (2004) 222 CLR 1 and *Applicant S v MIMA* (2004) 217 CLR 387.
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 s.91R(1) of the Act persecution must involve “serious harm” to the applicant (s.91R(1)(b)), and systematic and discriminatory conduct (s.91R(1)(c)). The expression “serious harm” includes, for example, a threat to life or liberty, significant physical harassment or ill-treatment, or significant economic hardship or denial of access to basic services or denial of capacity to earn a livelihood, where such hardship or denial threatens the applicant’s capacity to subsist: s.91R(2) of the Act. The High Court has explained that persecution may be directed against a person as an individual or as a member of a group. The persecution must have an official quality, in the sense that it is official, or officially tolerated or uncontrollable by the authorities of the country of nationality. However, the threat of harm need not be the product of government policy; it may be enough that the government has failed or is unable to protect the applicant from persecution.
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: s.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 before it the Department's file relating to the applicant. The Tribunal also has had regard to the material referred to in the delegate's decision, and other material available to it from a range of sources.
20. The applicant appeared before the Tribunal [in] June 2010 to give evidence and present arguments. The Tribunal also received oral evidence via telephone from his wife, [name deleted: s.431(2)] and his brother, [name deleted: s.431(2)]. The Tribunal hearing was conducted with the assistance of an interpreter in the Bengali and English languages. The applicant was represented in relation to the review by his registered migration agent. The representative did not attend the Tribunal hearing.
21. The applicant is [age deleted: s.431(2)] and was born in Munshigonj Bangladesh. He arrived in Australia [in] February 2010 on a photo-substituted passport in someone else's name. The applicant completed a Bachelor of Arts in 1994 and worked as a self-employed tutor between January 1995 and September 2009. In his protection visa application he claimed that he left Bangladesh due to his social status as a gay person and because of his involvement in politics. He feared that he would be stoned to death for being a gay person. The religious leaders "Mullahs" with the tacit support of the Government authorities would harm him. He believed this would happen because of his social status as a gay person coupled with his political opinion. The authorities of Bangladesh would not protect him because they were the perpetrators. The following statement accompanied his protection visa application.

I am a citizen of Bangladesh and a Muslim by faith. I neither have citizenship nor have a right to reside in any other country.

I graduated around 1994 and hold a degree in Bachelor of Arts. I was giving private tuition to students before fleeing to [location] in September 2009.

Around 1997 I became acquainted with a fellow teacher [Mr A] and found out he was a gay. We both became attracted to each other and enjoyed others company. I later found out that I too shared the same sexual desire. We slept together and went out for parties, marriages and other civil functions together. However our gay relationship remained secret.

I got married in 2003 and my wife started having doubts about my sexual preferences. She later confronted me and found out that I am a gay and having relationship with my colleague [Mr A]. She was devastated and betrayed me by informing her relatives and the authorities about my sexual preference.

The gay relationship is a cardinal sin under the religious law, and the Mullahs conveyed and about to summon me the following Friday to deliver their verdict. I was told by my students that the punishment for this sin is death by stoning after placing me in a ditch.

I was mortally scared and fled to [location] and lived with my sister [name] before fleeing to China and then to Australia. I use to move houses and on few occasions lived at a house of a BNP party member [Mr B].

In the meantime, I was also active in politics from student days and am a member of the Bangladesh National Party (BNP). I was participated in a protest rally organized against the change of the name of the international airport. Despite the protest the name of the airport was changed recently to Shah Jalal. Subsequently many of the participants in the rally were arrested and languishing in Jail. I came to know that the authorities are looking for me and it further exacerbated my problems.

[Mr B] arranged me a false passport and facilitated my departure to Australia via China.

I am now fearful that I will face persecution for convention reasons and beg protection.

22. The applicant was interviewed by the delegate [in] March 2010. In that interview he clarified that although he and [Mr A] had attended some of the same social events, they had never been invited, or attended, as a couple.
23. [In] June 2010 the Tribunal received a letter from the applicant's representatives in which it was submitted that the applicant had a well founded fear of persecution for reasons of his gay relationship and his political opinion being a member of, and activist of the Bangladesh National Party. They referred to two previous decisions relating to gay men in Bangladesh and a previous decision relating to political motivated false charges being laid against people in Bangladesh.

Evidence at the Hearing

24. The Applicant explained that in Bangladesh he lived with his extended family. His parents, his three brothers, and he and his wife and son all lived in the same home. The applicant's oldest brother was not married. A lot of pressure had been put on the applicant's brother to get married but he said that he was not interested. Similar pressure was then put upon the applicant to get the married however he succumbed to the pressure primarily because his mother had a heart condition and she wanted to see him married.
25. The applicant was a tutor at a private primary school between 1996 and 2000 After 2000 he opened his own tutoring business and he would teach students at home. [Mr A] had worked for him as tutor since 1997 and came to his home to teach the students part time. [Mr A] also had his own students that he tutored at home. At the time the applicant left his home he had roughly 40-50 students. [Mr A]'s visit to his home decreased after he was married even though the number of students that they tutored increased.
26. The applicant explained [Mr A]'s work history and background history. He described [Mr A]'s interests. [Mr A] was currently living in Dhaka city. He was staying with some people in a boarding house and he was not working.
27. The applicant explained that ever since he was married he had not had good relations with his wife. His wife did not trust him. In September 2009 [Mr A] and he were in a room watching a pornographic movie which depicted both men and women. They were performing some sexual acts when she walked in and she did not like what she saw. She began yelling and

screaming and [Mr A] left and so did the applicant. Due to his wife's shouting the whole family came to know what she had seen and, as their home was in a compound shared by other families, some of the other families also became aware of what had happened. After the incident the applicant's wife left their home and went to stay with her parents. The applicant was aware that later his father went to his in-laws home in an attempt to smooth things over but the applicant had already left home by this time. As the local people in the area knew what had happened, the Mullahs at the mosque came to know about the incident as did the local political leaders who knew that they could use this against the applicant. The applicant explained that 65% of Bangladesh was influenced by the Mullahs and only 35% were influenced by political power. The people would follow the rulings of the Mullahs even though the applicant had not been legally tried in a court.

28. The applicant lived in Dhaka with his sister between September and January 2010. This house was [distance deleted: s.431(2)] kilometres from his local village and was in a city area. He did not contact [Mr A] after this time because since the incident he was not really interested to communicate with him. He did not really want to continue the relationship as he could see the suffering that it caused. It was not possible for him to go back to his village as people were aware of what happened and they accepted what the mullahs said they should do.
29. It was put to the applicant that given that he had finished his relationship with [Mr A] he could stay in Dhaka as the problems seem to be confined to his local village. He responded that he would always be in fear that somebody from his local area would come to Dhaka and it meant that he could never visit his local area. Further his political opponents could use this against him as he was quite politically active.
30. The Tribunal attempted to telephone the applicant's wife and she indicated that she was too mentally unwell to speak to the Tribunal but it could try to call her later. The Tribunal then spoke to the applicant's brother, [name deleted: s.431(2)]. The applicant's brother said that the applicant left Bangladesh because he was involved in politics. He was the organisational secretary of a political group. Further there had been a family disruption problem as a result of brother's homosexuality.
31. The applicant's brother confirmed that the Applicant was living in Dhaka with their sister prior to him coming to Australia. As far as the applicant's brother was aware, the applicant had only had one homosexual relationship, namely with [Mr A]. The family found out about this because his wife discovered them and shouted and informed the family and other people. The applicant's brother was not home when this happened but he was nearby.
32. The applicant's brother said that they followed the Muslim religion and when this came to light he told his brother to leave his house and that they had severed their relationship. As far as the applicant's brother was aware, the applicant had known [Mr A] since 1997. They came from the same village and they grew up together. [Mr A] and the applicant had been tutoring children. The applicant's brother believed that if the applicant returned to Bangladesh he would have serious problems because of his involvement in politics. Further due to his misdeeds as a homosexual, people would mistreat him and the shame of his actions would last for three generations. Further there was some problem with the local people as there was the local fatwa by the religious people. The applicant's brother indicated that the applicant left his family, his son and everything in order to survive and this was why he had come to Australia.

33. The Tribunal then spoke to the applicant's wife. When asked why her husband had left Bangladesh she said that after there was an incident at home, she left the husband's home and went to live with her parents. She said there was troubles with the local people. There was a fatwa and everyone in the village had asked him to leave the village. She now did not have any relationship with her husband. She described how she walked in on her husband while he was watching a movie on TV. Every time she thought about what she saw she felt sickness and mental sickness. She said that after they were married she noticed he had a very close friendship with [Mr A]. Over time she came to understand how close their relationship was. Further some people around the village gossiped about their relationship. She believed that if the applicant returned to Bangladesh the local people would kill or harm him. She was looking after their son and doing the best she could. Even if he came back they would not have any further relationship. In Bangladesh, people like the applicant were targeted by the local leaders. They led isolated lives and if they were not killed first they often committed suicide. (The applicant became extremely upset whilst his wife was giving evidence).
34. The Tribunal attempted to telephone [Mr A] several times during the hearing but could only get a recorded message stating the service was unavailable.
35. The applicant explained that he first joined the Bangladesh National Party in the middle of 2009. He had however been involved in politics since he was a student. When he first joined the party the members of the opposing party in the local area threatened him. They told him to either leave the party or leave the area. They made these threats to his face. The applicant was asked as he was involved in student politics, why did he wait until 2009 to actually join the political party that he supported. The applicant explained that it was only after the caretaker government took control in 2006, when they were trying to get rid of the bad politicians and were asking good people to become involved in politics, that he decided to join the party. He described the problems with politics in Bangladesh regarding the two parties, the corruption and also how when one party was in power they targetted the other party and vice versa. He also stated that the opposing politicians would use the fact that it was publicly know that he was involved in homosexual activities to get back at him.
36. The applicant went through a number of newspaper articles with the Tribunal which reported on attacks on politicians, even at the local level. Some newspaper articles also described how Fatwas were handed out at the local level and how the High Court of Bangladesh had commented on these Fatwas. He also referred to newspaper articles where people had spoken in public and had either been censored or threatened for what they said about the Government.
37. The applicant was asked about two photographs that he had provided to the Department. It was put to the applicant that they were clearly the same photograph and in one photograph his wife had been digitally removed from the photo. The applicant maintained that they were two different photos. They were taken at his home shortly after one another.
38. The applicant was asked whether he had thought about his sexual orientation, whether he felt that he would continue to have relationships with men, whether he would return to his wife or another woman or whether he had not thought about these issues at all. The applicant responded that he had not really thought about these issues.
39. At the hearing the applicant provided to the Tribunal:
 - A letter from the Bangladesh Human Rights Council dated [in] June 2010;

- A letter from [Council deleted: s.431(2)] dated [in] June 2010;
- A letter from the office of [name deleted: s.431(2)] Munshigonj;
- The applicant's membership card for the BNP;
- A letter from the applicant's mother;
- A letter to the Department of Fatwa from the applicant's brother seeking a religious opinion regarding homosexuality.
- A document from the Fatwa (judgement) Department Jimiah Qurania Arabia Lalbagh Madrasah, Dhakan in response to the applicant's brother's request.

40. [In] June 2010 the Tribunal received a further submission from the applicant.

Independent Country information

41. The UK Home Office *Country of Origin Information Report Bangladesh* (April 2006) stated that:

‘According to the International Lesbian and Gay Association (ILGA) website, accessed 24 March 2006, same-sex male and same-sex female relationships are both deemed to be illegal. Section 377 of the Penal Code provides: “Whoever voluntarily has carnal intercourse against the order of nature with any man, woman or animal, shall be punished with imprisonment for life, or with imprisonment of either description for a term which may be extended to ten years, and shall also be liable to fine”. A Bangladeshi lawyer, in a statement to the Swedish Embassy in Dhaka, commented: “You will notice that the word ‘homosexual’ or ‘homosexuality’ have not been used in the statute. The instances of prosecution under this section is extremely rare. In my twenty years of law practise, I have not known or heard of a case where a person has been prosecuted for or convicted of homosexuality under the aforesaid section. Such a prosecution in fact would be extremely difficult, if not impossible, for lack of witness or evidence.” (UK Home Office, Country of Origin Information Service, *Country of Origin Information Report Bangladesh*, April 2006, paragraph 6.139)

42. The US State Department *Country Report on Human Rights Practices 2009 Bangladesh*, released on 11 March 2010 states that:

Societal Abuses, Discrimination, and Acts of Violence Based on Sexual Orientation and Gender Identity

Homosexual acts remained illegal but in practice the law was rarely enforced. There were a few informal support networks for gay men, but organizations to assist lesbians were rare.

Attacks on lesbians and gay men occurred on occasion, but those offenses were difficult to track because victims desired confidentiality. Strong social stigma based on sexual orientation was common and repressed open discussion about the subject. Local human rights groups did not monitor the problem, and there were few studies on homosexuality in the country.

Although overt discrimination against lesbians, gays, bisexuals, and transgender individuals was fairly rare—partly because few individuals openly identified their

orientation—there was significant societal discrimination. Openly gay individuals, particularly those from less affluent backgrounds, found their families and local communities ostracized them. Some sought refuge in the transgender or "hijra" community.

43. Dr Gary Dowsett, Associate Professor in Sociomedical Sciences at the Mailman School of Public Health at Columbia University, advised the Tribunal in February 2003 that very few men called themselves 'gay' in Bangladesh. He said that *kothis* were a recognised social form in Bangladesh even if they were by no means fully accepted or acceptable but he believed that 'gay' men would reject identification as *kothis* because they thought of themselves as men. He said that there was an issue of masculinity involved. At the same time he noted that most *kothis* expected and wanted to get married whereas 'gay' men elsewhere generally did not. He said that it was virtually unthinkable that two men would live together as a couple on their own in Bangladesh in the way that 'gay' men did in Australia or the USA. He said that men who had sex with men were frequently beaten, threatened, robbed and quite often raped (occasionally pack-raped) by police and *mastaans*. He said that he suspected that any 'gay' man who wanted to live even a moderately 'gay' life in Bangladesh was inviting danger (Dr Gary Dowsett, 'Men Who Have Sex With Men in Bangladesh', 28 February 2003).
44. Human Rights Watch, in a report published in August 2003, said that men who had sex with men in Bangladesh were abducted, raped, physically assaulted and subject to extortion by police and *mastaans*. The report stated that they were sometimes arrested and abused without being charged with any crime. However, it is apparent that virtually all the men interviewed by Human Rights Watch were sex workers. Some experts had reported that a significant proportion of *kothis* engaged in sex work either occasionally or as their primary source of income and it cited in the footnotes a comment by one researcher that many *kothis* were difficult to find. However this does not appear to have been an obstacle to the survey conducted by the Naz Foundation in 1997, not cited by Human Rights Watch. The report noted that male sex workers reported that police and *mastaans* also extorted money from their clients. The report suggested that section 377 of the Penal Code (referred to above) effectively criminalised the status of being a *kothi* or any man who had sex with men but Human Rights Watch reported that it had been unable to find any case in which section 377 had actually been used. It reported that the Dhaka Metropolitan Police Act prohibited the buying or selling of sex in public and that it was this provision which was used to justify the arrest of both male and female sex workers under section 54 of the Code of Criminal Procedure, which provided for arrest without warrant. It reported that most commonly arrests of sex workers were used as a means of extortion and that sex workers were never charged or tried (Human Rights Watch, *Ravaging the Vulnerable: Abuses Against Persons at High Risk of HIV Infection in Bangladesh*, August 2003, pages 28-29, 37-43).
45. The UK Home Office *Bangladesh Country Assessment*, Country Information and Policy unit August 2009 report noted that over 80 percent of Bangladesh's population is Muslim and that same-sex sexual relations are prohibited in Islamic Sharia Law. In relation to the societal treatment and attitudes to homosexuality it stated:

In a BBC News report of 21 June 2005, Roland Buerk wrote: "Non-traditional sexuality of any kind is deeply frowned upon in Bangladesh which, although a relatively tolerant Muslim country, remains conservative in sexual matters... The condemnation from society of anyone found to be gay is deterrent enough for most to remain very firmly shut in the closet." [20q] In an article published in *Himal Magazine* in 2004, Afsan Chowdhury observed that families tend to respond with

dismay and “a kind of corporate shame” when one of their members first declares a preference for gay sex, or ‘comes out’.

46. LGBTI Bangladesh, *An Analysis of Homosexuality in Bangladesh* 21 March 2009 stated:

[In rural areas] The secret same sex relationships lasts till the society has no clues about it. On revelation of any such activities most couples are forced to break off their relationship and bluntly deny their forbidden love to the society. If a homosexual couple fails to oblige to these dictatorial social norms, they are subjected to the holy grail of the Islamic justice the fatwa which may include public humiliation, canning or a forced eviction from village. In fact the government law enforcers stand as mute spectators fearing the wrath of religious fanatics and society members for obstructing justice to the sodomisers. It notes the increasing influence of fundamentalists in Bangladesh <http://lgbtblangladesh.wordpress.com/2009/03/28/an-analysis-of-homosexuality-in-bangladesh/>

47. On 2 June 2009 there was a landmark Delhi High Court judgment which found that the criminalization of same sex behaviour was unconstitutional in India. In August 2009, in Bangladesh the following reaction was noted

Justice Rabbani recently commented with a strong reaction against homosexuality, stating that the Penal code cannot be changed and even if it can be changed homosexuality can never be accepted because the Quranic Law has forbidden it.

Incidentally he is perceived to be one of the foremost judicial reformers of Bangladesh, who outlawed the issuance of fatwas by Islamic Courts in a landmark High Court Judgement in 2000. This earned him a notorious infamy among the Islamists who promptly declared Justice Golam Rabbani as *Nastic Murtad* (Disgusting Infidel) with subsequent life threatening attacks on him.

<http://lgbtblangladesh.wordpress.com/2009/08/07/homosexuality-cannot-be-legalised-in-bangladesh-justice-rabbani/>

48. Mr Shivananda Khan, chief executive, the Naz project, London U.K. advised the Department in January 1996 that in India and Bangladesh the apparent tolerance [of male to male sex] is based upon denial, invisibility and to a large extent ignorance. To openly admit homosexuality is to bring shame to country, community and family. Pakistan and Bangladesh culture cannot afford to openly admit homosexuality, since Islam is very specific about it. The Muslim law, the Sharia specifically states a death sentence. All these countries have extremely strong social, cultural and religious pressure for marriage. There is a social compulsion for marriage. Homosexuals are seen as deviant, sick, and to some extent within Muslim cultures, evil. There is a distinct difference between homosexual behaviour and homosexual identity. A man must get married. If he doesn't then there is something wrong with him, he shames his family and community, he is sick. The issue here then is not so much the sexual behaviour, but marriage and children. Sexual behaviour must be kept invisible. To make it visible is to bring shame. In Pakistan, there is a risk of the Sha'ria being imposed, in which case stoning is the punishment. This tends to be in rural areas though. Mr Shivananda Khan noted that a man can get away with male to male sex as long as it is hidden, as long as he gets married. But to develop a gay identity, to openly admit to being a homosexual shames the whole community.

FINDINGS AND REASONS

49. The applicant arrived in Australia on a photo substituted Bangladeshi passport in a different name. The applicant subsequently provided to the Department a Bangladeshi National Identity Card, a Family Certificate, a Birth Certificate, a Marriage Certificate and a photo copy of a Bangladeshi passport. Based on this evidence the Tribunal accepts that he is a national of Bangladesh.
50. The applicant claimed that he feared persecution in Bangladesh because:
 - his longstanding homosexual relationship had been discovered and the local Mullahs had issued a fatwa calling for his death by stoning.
 - he was involved in politics and was a member of the BNP.
51. In relation to the applicant's claims regarding his relationship with [Mr A], he made this claim at the first opportunity when initially questioned at the airport and has continued to provide a consistent and coherent account of this relationship. It was unfortunate that the Tribunal was not able to speak with [Mr A]. The applicant's brother and wife were compelling witnesses who gave evidence that was consistent with the applicant's account.
52. The country information quoted above indicates that homosexual relationships are kept secret. The applicant claimed that the local Mullahs had issued a fatwa against him calling for his stoning. The applicant was not claiming that he had been charged under the criminal code rather that the Mullahs in the local area were applying their version of Sharia law. This claim is consistent with the country information. The US Department of State 2010, *Country Reports on Human Rights Practices for 2009-Bangladesh* quoted above also notes that there is a problem in Bangladesh with vigilante killing and action is rarely taken against those responsible. The applicant's wife had indicated that even if the applicant was not killed he would be subjected to other harsh treatment and his brother spoke of the shame on the family. This evidence is consistent with the country information quoted above.
53. The applicant also claimed that his political opponents would use the discovery of his relationship against him and that this meant that it could become even more widely known. The applicant was knowledgeable regarding politics in Bangladesh and the Tribunal accepts that he was a member of the BNP and organising secretary in his local area. The Tribunal notes that the *Country Reports on Human Rights Practices for 2009* confirms that political violence is endemic in Bangladesh and that the incumbent party has been responsible to political attacks on BNP members. The Tribunal accepts that the applicant's political opponents would use the discovery of his homosexual relationship against him and this would lead to it being more widely known.
54. The applicant did not use his own passport to leave Bangladesh immediately after the relationship was discovered. The applicant explained that he felt relatively safe in the short term at his sister's home in Dhaka. He needed to escape to somewhere where homosexuality was accepted. This he was unlikely to be able to do quickly travelling on his own Bangladeshi passport. The Tribunal's research indicates that there are very few countries that a holder of a Bangladeshi passport can visit without a visa. They cannot visit India, Pakistan, Indonesia, Kyrgyzstan, or the Philippines without a visa. A holder of a Bangladeshi passport can visit Trinidad and Tobago without a visa but the law there criminalises homosexual behaviour (see www.timaticweb.com, www.unbconnect.com/component/news/task-show/id-

17131 The Henley Visa Restrictions Index- Global ranking 2008, the US Department of State 2010, *Country Reports on Human Rights Practices for 2009-Trinidad and Tobago*, 11 March). The Tribunal does not consider that the fact the applicant did not leave immediately on his own passport indicates that he did not have a subjective fear of persecution.

55. There are some matters that cause the Tribunal some concern. The applicant has provided photographs of him and [Mr A] and a photograph him, [Mr A] and his wife. The most cursory examination makes it clear that it is the same photograph and that in one photograph his wife's image has been digitally removed. It is odd that someone went to the trouble to alter this image and then submitted both photographs to the Department. As the applicant has claimed that [Mr A] was often at his home, a photograph including the applicant's wife does not in any way contradict his claims and there seems little reason to remove her from the photograph. The applicant was adamant that the photograph had not been doctored. The Tribunal finds that he was not being truthful when he gave this evidence. However the untruthfulness related to a minor issue and is not sufficiently grave for it to impact on his general credibility.
56. The Tribunal finds that the applicant has been involved in a long term homosexual relationship which has been discovered by his family and local community. The Tribunal accepts that the local Mullahs have issued a fatwa calling for his death by stoning and the Tribunal is satisfied that the applicant is at risk of at least serious harm and possibly death if he returned to his home village due to his homosexual relationship. The Tribunal finds that the harm the applicant's fears is serious harm and therefore persecution within the meaning of the Convention. The Tribunal accepts that there a real chance the applicant would be persecuted in the reasonably foreseeable future and that this real chance of persecution is heightened by his involvement in politics.
57. The Tribunal must consider whether the harm the applicant fears is for reasons of a Convention ground, in particular for reasons of his memberships of a particular social group. The homosexual members of a particular society may form a 'particular social group' for the purposes of the Convention: see *Applicant A*, referred to above, per McHugh J at 265. In *Applicant S v Minister for Immigration and Multicultural Affairs* (supra) at [36] Gleeson CJ, Gummow and Kirby JJ gave the following summary of principles for the determination of whether a group falls within the definition of a 'particular social group':

'First, the group must be identifiable by a characteristic or attribute common to all members of the group. Secondly, the characteristic or attribute common to all members of the group cannot be the shared fear of persecution. Thirdly, the possession of that characteristic or attribute must distinguish the group from society at large. Borrowing the language of Dawson J in *Applicant A*, a group that fulfils the first two propositions, but not the third, is merely a "social group" and not a "particular social group".'
58. Clearly homosexuals in Bangladesh are identifiable by a characteristic or attribute common to all members of the group, namely their sexual orientation. Equally clearly, this characteristic or attribute distinguishes the group from society at large in Bangladesh, as evidenced by the societal prejudice against homosexuality. Even those members of the group who have the resources to be able to conduct a relationship in private would not be able to acknowledge this relationship publicly (Dr Gary Dowsett, 'Men Who Have Sex With Men in Bangladesh', 28 February 2003). The Tribunal finds that homosexuals form a particular social group in Bangladesh for the purposes of the Convention. The Tribunal finds that the harm the applicant fears is for reasons of his membership of this particular social group.

59. The Tribunal has indicated that he was at risk in his local area and that he felt relatively safe at least in the short term in Dhaka where he was not known. The Tribunal has considered whether it would be reasonable for the applicant relocate to avoid the risk of harm. The Tribunal accepts that the applicant would wish to continue to be engaged in politics and that his local political opponents are aware of the relationship which could result in it becoming more widely known.
60. The applicant indicated to the Tribunal that he did not intend to continue his relationship with [Mr A]. The applicant had not considered his sexual orientation and this is consistent with the country information regarding identification as gay person in Bangladesh. The Tribunal regards, based on the applicant's past relationship, that it is not a far fetched or remote possibility that he would engage in homosexual activities in the future and that this activities could be discovered.
61. Based on the country information the Tribunal accepts that homosexuals are at risk of harm throughout Bangladesh. The Tribunal finds that it would not be reasonable for the applicant to relocate as he is at risk of harm throughout Bangladesh.
62. The Tribunal finds that that the applicant does have a well-founded fear that he will be persecuted in the reasonably foreseeable future for reasons of his membership of the particular social group of homosexuals in Bangladesh and that he is a refugee within the meaning of the Convention.

CONCLUSIONS

63. The Tribunal is satisfied that the applicant is a person to whom Australia has protection obligations under the Refugees Convention. Therefore the applicant satisfies the criterion set out in s.36(2)(a) for a protection visa.

DECISION

64. The Tribunal remits the matter for reconsideration with the direction that the applicant satisfies s.36(2)(a) of the Migration Act, being a person to whom Australia has protection obligations under the Refugees Convention.