

**1000978 [2010] RRTA 493 (18 June 2010)**

**DECISION RECORD**

<b>RRT CASE NUMBER:</b>	1000978
<b>DIAC REFERENCE(S):</b>	CLF2009/142200
<b>COUNTRY OF REFERENCE:</b>	Malaysia
<b>TRIBUNAL MEMBER:</b>	George Haddad
<b>DATE:</b>	18 June 2010
<b>PLACE OF DECISION:</b>	Melbourne
<b>DECISION:</b>	The Tribunal affirms the decision not to grant the applicant a Protection (Class XA) visa.

## **STATEMENT OF DECISION AND REASONS**

### **APPLICATION FOR REVIEW**

1. This is an application for review of a decision made by a delegate of the Minister for Immigration and Citizenship to refuse to grant the applicant a Protection (Class XA) visa under s.65 of the *Migration Act 1958* (the Act).
2. The applicant, who claims to be a citizen of Malaysia, arrived in Australia [in] June 2008 and applied to the Department of Immigration and Citizenship for a Protection (Class XA) visa [in] October 2009. The delegate decided to refuse to grant the visa [in] January 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] February 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.

The protection visa application

20. In support of his protection visa application, the applicant submitted a written statement of claims in which he stated:
  - He is a Malaysian national of Chinese ethnicity, born in [City 1] on [date of birth deleted: s.431(2)].
  - He was formally married but divorced since April 2008.
  - He was a very successful businessman trading in building products and employed more than ten staff.
  - In February 2005, he met a fellow businessman ([Mr A]) and developed a secret gay relationship. The relationship was not known to anyone in his country as such relationships are a major scandal in his country especially if it involves reputable businessmen and well known professionals.
  - Prior to his relationship with '[Mr A]' he used to have sex with male prostitutes which is also illegal in Malaysia.
  - His wife discovered his relationship with [Mr A] and immediately left the family home and informed her family of the relationship. His wife's family threatened to inform the police of his gay relationship.
  - He was never happy in his marriage which was arranged by his father and only married because of community expectations. The marriage was to him a social convenience.
  - He always desired to live with his gay partner '[Mr A]' but because of community attitudes and the authorities' opposition to homosexuality, it was not possible.
  - He is unable to return to Malaysia as he fears that he would be arrested and imprisoned on charges of sodomy. Even if his wife's family did not carry out their threat to inform the police, he could not return and maintain a homosexual relationship without the risk of being detained or harmed.

The review application

21. The applicant appeared before the Tribunal [in] April 2010 to give evidence and present arguments.
22. The applicant was represented in relation to the review by his registered migration agent. The migration agent attended the hearing by telephone from Sydney.
23. At the commencement of the hearing the applicant's migration agent, [Mr B], made an oral submission about homosexuality being unaccepted in a majority Moslem country such as the applicant's home country. He also commented on the primary decision.
24. The applicant stated his full name and date of birth and presented his Malaysian passport to confirm his identity. He gave oral evidence which may be summarised as follows:

His last residential address in Malaysia was:

[Address deleted: s.431(2)]

He sold the above property to a friend shortly before he left Malaysia.

He married [name] in 1997 and has three children born in [years].

He has not previously travelled out of Malaysia except to Singapore.

He was first employed in the family business but in 1999 he started his own construction business. His company, [name], bid for building contracts and provide the [Material A]; the other work is subcontracted to other firms.

He was the sole owner of the business until 2005 when he took in a partner named [Mr A]. [Mr A] became a 40% shareholder. Although the applicant was the principal partner, [Mr A] had equal authority in the operation of the business.

The business assets included the office building estimated at around 100,000 Ringgit and plant and equipment at around the same value. The turnover of the business in 2007 was around 4.5 million Ringgits.

The business employed 8 full-time employees. It paid the applicant a monthly salary of 8000 Ringgits and [Mr A] 5000.

He believes the business ceased to operate under the same name but [Mr A] is operating under a different business name.

He was unable to contact [Mr A who] has changed his phone number.

Since coming to Australia, he has been in contact with his mother, brother and some friends. They know that the applicant left Malaysia because of his homosexuality. They were not aware of it until his wife told them. At first his family were angry and shocked, but now they understand.

Prior to coming to Australia he had no contacts and did not know anyone in Australia.

He believes that his wife has filed for divorce but he is not certain. His wife visited his mother and told her that she and the applicant are no longer together and that she and her children will live their own lives. His mother is not permitted to see the children.

25. The Tribunal asked the applicant at what point in his life he became aware of his homosexuality, how he felt about it and what life he envisaged he might have as a homosexual, whether he had relationships with other men. The applicant said that:

He thinks he first became aware at around the age of [age]. It was just doubts at that time but he preferred male company, and even though in Malaysia men are free to have girlfriends, he did not see female company.

It was not easy to know if other men had similar feelings because homosexuals kept it to themselves as it is illegal in Malaysia. He did not become aware of much information and did not read about it other than the little that was on television news and in newspapers.

He knew it is illegal and if found out, it would be reported. That is why homosexuals kept it a secret.

He met his wife about one year before they married and he had not had any homosexual relationships or experiences before he married.

But his feelings became stronger after the birth of his second child. He felt a little surprised by his own feelings because he was married. But two or three years after that he was no longer able to control his feelings. He set out to look for premises to enjoy the homosexual lifestyle. He did not know how to find such premises, he went to crowded places and at night he went to discos and KTV in the hope of finding someone who felt as he does.

Slowly he gained some insight. He saw groups of men; he joined in a drink and talked. He noticed certain intimate physical contact such as hand on hand, or hand on waist which is unusual among men in Malaysia.

He began to go to men's clubs around 2001 and had his first sexual experience with a man in May or June 2003. He was at a friend's birthday party, the friend was not a homosexual, but the applicant went with a friend he had known for a year and he knew him to be homosexual; that was [Mr A] his business partner. After the birthday party he and [Mr A] went for a late night snack and drank a little too much. They then went to a hotel and had sex.

[Mr A] did not work but his family was wealthy. The applicant needed cash injection in his business, so [Mr A] became his business partner. [Mr A] was also his homosexual partner.

After his first sexual experience, the applicant had a number of encounters or one-night stands with friends of friends he met through the men clubs. He did not tell [Mr A] of these casual encounters and his regular male friends knew that he and [Mr A] were regular partners but one-night stands are very common in Malaysia.

He and [Mr A] had regular contact and usually went to hotels to be together. It became easier to maintain their homosexual relationship once they became business partners as they often went on business trips together.

26. The Tribunal asked the applicant whether once he came to know that there is a number of homosexual men in his society and were able to meet and one-night stands were common, he also came to know more of the gay scene in Malaysia.
27. The applicant said that there are no gay districts or gay clubs. As a group of around 8 male friends, they decided which clubs they would frequent and they usually went to the most famous privately owned KTV clubs as they had private rooms.
28. The applicant named a few of the places he visited with his male friends.
29. The Tribunal asked the applicant whether with the passage of time as an active homosexual he came to know of gay specific places, organisations, events or festivals. He said he did not. He knew that gay men went to Singapore, a district known as “Ji Long” where there are many homosexuals. But he did not go to that area because he was with [Mr A].
30. The Tribunal asked the applicant how his wife came to know of his relationship with [Mr A]. His account may be summarised as follows:

Around the beginning of April 2008, [Mr A] sent him an SMS saying “Let us enjoy a night at a hotel at “M”” which was code for [a hotel] in [City 2]. [Mr A] did not include his name in the message. The applicant’s wife saw the message and must have thought it was sent by a woman.

The applicant booked a room at the hotel in his name and set off to the hotel which was about a two-hour drive away. His wife followed him in a friend’s car. But although it was a long journey on a highway, he did not become aware of her following him.

When he arrived at the hotel around 9.00pm [Mr A] was waiting. He checked in and went to the room. About 20-30 minutes later. His wife knocked on the door of the room and walked into the room. The applicant had only a towel around him. [Mr A] had already showered and was in bed and had no clothes on. His wife saw [Mr A] in bed and asked the applicant: “are you gay?” He did not deny it. He did not know how to respond. She left.

He added that as he drove back home he thought of a number of excuses he would say to his wife.

31. The Tribunal asked the applicant how two men could reserve a room with a double bed in Malaysia given the laws he described and the intolerance of homosexuality in Malaysian society. He said did not ask or suspect anything as they are in business.
32. The Tribunal also expressed some astonishment that the applicant would answer the door so readily given he described the scene of two men together almost naked. He described the layout of the room whereby from the door [Mr A] would not have been seen by someone standing at the door. He added that he was expecting room service and was surprised to see that it was his wife at the door.

33. The Tribunal indicated that it seemed implausible that within 20-30 minutes of checking into the room, he and [Mr A] would be already showered, room service already ordered and ready to deliver; and that room service in hotels usually arrived on a trolley which the staff wheel into the room and set the food onto the table in the room. The Tribunal again asked why he was not concerned that it would have been apparent to the hotel staff that he and [Mr A] were practically naked in the room alone.
34. The applicant replied that staff in hotels are doing a job, they would not care what people did.
35. The applicant said that when he returned home, he discovered that his wife had packed her belongings and left home with the children. A couple hours later, now the time is past midnight, he received a call from his father-in-law. He asked the applicant if he was gay, the applicant said he was unable to deny it. The following morning the applicant received a call from his mother who had heard from his wife. His mother was very upset and the applicant was unable to explain to her.
36. The applicant said that he tried to contact his wife for several days by telephone without success. He could not go to see her at her parents' because they were all angry. His father-in-law called him again and "made bad comments". He told him that he would report the matter to the police. Around one week later, the applicant left his house and went to stay with his brother. At that time his brother had not heard, but two weeks later everyone knew.
37. The applicant said he withdrew cash from the bank and settled the mortgage. He contacted [Mr A] and told him to keep the business running and that he would be leaving Malaysia for a short time.
38. Asked if he confirmed whether his wife's family contacted the police in relation to his alleged homosexuality, the applicant said he did not see for himself but he has heard from others. A friend of his who is a police officer in Malaysia contacted him to say that he had seen his father-in-law making a report but did not know what he was reporting. He asked the applicant if he knew what his father-in-law would have been reporting. The policeman friend only wanted to see if he could help his father-in-law [details deleted: s.431(2)] The Tribunal asked why the policeman would need to ask the applicant what his father-in-law might have been reporting when he might have been able to check given he was a police officer. He said his father-in-law might have reported to a different department from that where his friend was working.
39. The applicant said he had arranged his affairs to depart within around 10 days. He then travelled to Singapore to enquire about flight times and to book a ticket for travel.
40. Asked why he did not check travel options from Malaysia, the applicant said that he did not want to apply for a visa to Australia in Malaysia through the Malaysian government. He wanted to avoid any contact with the Malaysian authorities. He chose to travel to Australia because Australia is close to Malaysia and homosexuality is legal. He enquired with a travel agent whether as a Malaysian passport holder he could apply for a visa to Australia in Singapore. He was advised that he could.



41. The Tribunal asked the applicant if he made a similar enquiry for travel and visa to Australia with a travel agent in Malaysia. He said he did but was advised that the application for a visa to Australia would be made through the Malaysian immigration authorities.
42. The Tribunal indicated to the applicant that it would be highly unlikely that a travel agent in Malaysia would give such advice as Malaysian nationals wishing to visit Australia are eligible to apply for an electronic travel authority. The process is carried out directly by the travel agent through electronic systems with Australia. He replied that he does not know of these arrangements and confirmed that he was concerned to have any contact with the Malaysian immigration authorities for fear of alerting them that he was intending to leave Malaysia.
43. The Tribunal then indicated to the applicant that he had presented his passport to the Tribunal which shows that it was issued [in] April 2008 – after the time he claimed that he suspected he was reported and wished to avoid the Malaysia authorities; and that his passport shows that he travelled to and from Singapore several times in a short period of time following that date. The Tribunal put to the applicant that it seemed inconsistent as this indicates that he made a number of contacts with the Malaysian immigration authorities he had just confirmed he was trying to avoid. The applicant replied that applying for a new passport was simple. He took his expired passport to the immigration authorities and they issued a replacement in two hours, the police have no involvement in issuing passports. In respect of crossing the border to and from Singapore, the applicant said that the immigration authorities at the Malaysian land border only require seeing the outside cover of the passport so his identity was not revealed.
44. The hearing was adjourned until [a date in] April 2010.
45. At the resumption of the hearing the applicant was invited to give an account of his time in Australia since he first arrived [in] June 2008. His oral evidence is summarised as follows:

He joined a tourist group in Singapore and on arrival in Australia; he stayed in the same hotel as the other members of the tour group. He went sightseeing with the tour group. After five or six days the tour group left Australia but the applicant remained. He stayed in a hotel for two to three weeks then began to look for a room to rent. He found a house in [Suburb A] through the newspaper. The house was shared was shared by five or six people including the owner. He stayed two months then went to Sydney for around 10 days.

On his return from Sydney, he took a room at the back of the house in [Suburb B] where 8 persons were sharing. He saw a [Material A] factory as he was going around in [Suburb C]. He went in and said he was looking for work. A man named “[Mr C]” asked him if he was able to [work in this industry]. The applicant told him that he needs to have a work permit and if he was unable to arrange a work permit for him, he would go elsewhere to look for work. [Mr C] told him the work permit would be arranged. The applicant started working for him a couple of days later. He made [products deleted: s.431(2)].

The travel agent in Singapore gave him a piece of paper stating that his visitor visa was valid for stay in Australia until [date] May 2009. He kept

asking [Mr C] about his work permit but it was to no avail. He left that factory in April 2009.

He could not remember the name of the factory but he thinks it was “[name]” He saw the sign bearing the name but did not pay attention. It was close to his house and to [Suburb C] railway station.

After leaving the job with [Mr C], he went to look in the surrounding areas – [Suburbs A, B, C etc.]. It was a difficult time to find work. He was told he should see a lawyer about his visa. Some people he knew told him to contact [Mr B]. He travelled to Sydney and met [Mr B] in October 2009. [Mr B] advised him that he is not able to work as he does not have a work permit. He then told [Mr B] that he is a homosexual. Until then he had not told anyone about his homosexuality as he wanted “a clean start in Australia”.

46. The Tribunal referred the applicant to his earlier statement that he was advised by his travel agent that his visa was to expire [in] May 2009 and asked he steps he took around that time regarding his visa status. He replied that:

He knew that his visa had expired.

He also knew that he could not return to Malaysia.

He wanted to find a job.

Someone told him [Mr B] can help him with a work visa.

47. The Tribunal indicated that it seemed a little unusual that he would travel to Sydney to consult a migration agent about a work permit and asked the applicant why he did not consult a migration agent in his area as there seemed to be many migration agents in [Suburb A] and the surrounding areas who advertise their services in the Chinese language. The applicant replied that:

People told him to contact [Mr B] and he just went, he did not consult.

For a few months he was confused and he could not find work. Until someone suggested that he should consult a migration agent he did not think to see a local migration agent.

He called his brother in Malaysia and had his résumé and a work reference sent to him. [Mr B] told him it is too late to get a work permit as his visa had expired.

He told [Mr B] that he has a personal problem and told him that he is a homosexual at which time [Mr B] advised that he could apply for a protection visa.

48. The Tribunal asked the applicant why he wanted to hide his homosexuality in Australia given he had said he chose to come to Australia because he knew it to be an open society where homosexuality is not illegal. He replied that: put simply, two years ago he made a mistake and lost his family. He felt that homosexuality ruined his life and he did not want to repeat the same mistake. The applicant then uttered: “Oh I shouldn’t have said this, it’s problematic”.

49. The Tribunal remarked that it is interesting he should make the comment about his own evidence as the Tribunal was having some difficulty with the logic and credibility of some of his evidence.
50. The applicant said that he knows that Australia is open about homosexuality but not everyone accepts it. He does not wish to be rejected. Australia is new to him and he wanted to keep his homosexuality a secret.
51. The Tribunal asked the applicant if he has found work. He said he has. He started in a job in [Suburb B] one month ago. Asked the name and address of his employer, the applicant said:

[Name and address deleted: s.431(2)]
52. The Tribunal asked the applicant to describe his social life in Australia. He said that before he applied for work he went to KTV clubs. Then the applicant submitted one business card and a photocopy which was cut to the size of a business card. Both cards referred to "Cruise" clubs. One is located in [Suburb D] and refers to "gay and bi-sexual sauna", the other is located in [Suburb E]. The applicant said that since he acquired a tax file number he has been frequenting these places often.
53. The Tribunal asked the applicant what else he knows of the gay scene in Melbourne. He said he does not know. He wonders around and if he sees a place he goes in. Asked how he came to know the two places for which he submitted information. He said by driving around and seeing them.
54. The Tribunal asked the applicant what persecution he has suffered in the past. He said the events he described have caused him to lose everything. But he was not questioned, arrested or detained by the authorities in his home country. Asked what future harm he believes he would suffer if he were to return to his country, the applicant said that he would be arrested and detained for the rest of his life.
55. The Tribunal asked if he has tried to contact [Mr A] in Malaysia, the applicant said [Mr A] cannot be contacted.
56. Asked if he has a same sex partner in Melbourne, the applicant said "No, no. I am new to Melbourne, my English is not good. I do not have a gay partner".
57. The Tribunal indicated to the applicant that it has significant concern with the credibility of his claims and his evidence in relation to those claims. It may be more convenient to refer to the issue of credibility and the applicant's comments in the Tribunal's findings and reasons below. The Tribunal invited the applicant to comment on the credibility issues put to him. He was granted an adjournment to confer with his migration agent. At the resumption of the hearing, the applicant's migration agent stated that his client wishes to respond in writing.
58. Following the hearing the Tribunal received the following written submission dated [in] May 2010:

RE: [The Applicant]

We refer to above matter are instructed to submit the following in support of our client's claims;

1. We put to the Tribunal to take into consideration the cultural sensitivities which may prohibit discussions about one's own sexual activity or sexual orientation. We are instructed that throughout the oral hearing our client remained extremely uncomfortable when giving evidence about his sexual orientation and this undoubtedly adversely affected his ability to provide details about some aspects of his claims. He found divulging aspects relating to homosexual encounters/relationships extremely challenging as he is not accustomed to talking publicly about this subject. In the Malaysian/Chinese culture one sexual activity or preference is not openly discussed with anyone. Sex remains a deeply private topic and not discussed in public.

2. We conceded that some of our client's explanations about certain aspects of his claims may have come across to the Tribunal as being implausible or inconsistent; however, we submit that this is largely attributed to the cultural sensitivities and inhibitions. Our client was extremely embarrassed and reserved when pressed to provide details about claimed homosexual activity. The calumny effects of such limited and inconsistent oral evidence may leave the Tribunal unsatisfied as to the truthfulness of his claims (homosexual) however; we invite the Tribunal to consider the responses in light of the cultural limitations and moral dilemma that still impact upon him. Moreover, this should not without further consideration (of cultural sensitivities) lead to adverse findings about his overall credibility. Such finding would be similar to a conclusion that the claims of a female Afghani rape victim lacks plausibility simply because of a lack of details about the actual rape or other specifics. In other words cultural sensitivity or appreciation would normally be applied when dealing with a taboo subjects such as rape. In this case the rape victim's unwillingness to provide details of explicit sexual nature should not weigh on her credibility. Similarly, without an appreciation of cultural, our client's credibility cannot be accurately determined.

3. We concede that our client's homosexual lifestyle lacks similar characteristics to that of the lifestyle of a homosexual Australian man. His limited knowledge about the gay scene in both Australia and Malaysia should not be viewed as problematic. Consideration should be given to the fact that our client comes from a society where success is a measure of one's personal reputation and attributes. Accordingly, it would not be plausible for our client to be sexually promiscuous or overtly sexually active. He would be mindful to guard his reputation against sexually derived scandals. This would inevitably result in our client curtailing his homosexual activities by limiting them to occasional discreet visits to male prostitutes or maintaining a covert homosexual relationship.

4. Accordingly, we put to the Tribunal that given the due consideration that is normally given to one's reputation and social standing, our client would have little choice but to conduct his homosexual activity in an extremely covert and limited fashion, thus also limiting his overall knowledge of the homosexual scene in his home country. We also invite the Tribunal to consider our client's claim in light of the fact that he has been and remains a closet gay who is slowly coming to terms with the realities of an open society such as Australia. Adopting an overt gay profile is not yet something that he has come to grips with, despite the acceptance of homosexuals in this country. In terms of his sexual activity in Australia it remains limited to occasional discreet visits to male prostitutes or massage parlours.

5. Our client's reserved personality and shyness will continue to present significant barriers because he is not yet accustomed to the level of acceptance or public dissemination of the issue of homosexuality. Cultural baggage weighs heavily on one's personality and his or her ability to quickly adjust to new environments. We readily concede that it is a difficult exercise for the Tribunal to make findings on an applicant's sexual orientation and that in most cases the applicant's ability to provide plausible accounts or details of the claims remains a compelling basis for the ultimate finding. But equally, when the subjects of one's sexuality are being tested and given the level of sensitivity normally attributed to this subject; unconvincing explanations would not be entirely unexpected. The Tribunal would also need to be conscious of not applying characterisations that underpin our own understanding of sexual, but to consider the claims in light of the applicant's cultural background and its own measures of sexual norms.

6. It is also worth noting that our client does not view homosexuality and homosexual relationships in the same mode as they are viewed in a Western society. He maintains that his understanding of homosexuality is that it is merely an act of physical sexual gratification. He is yet to come to terms with accepting that two male lovers can maintain a relationship that goes beyond mere sexual gratification. With respect to my client, we submit that his understanding of homosexual relationships lacks the level of sophistication that our society has attained. This is because such degree of understanding and appreciation of a homosexual relationship has not been allowed to nurture in a conservative society such as Malaysia.

7. Moreover, even if our client was only interested in merely sexual gratification, we put to the Tribunal that a single homosexual act (such as a single visit to male prostitute) may potentially expose him to serious harm.

Accordingly, we invite the Tribunal to examine the impact of cultural sensitivity and how it can impact on our client's personality, views and overall ability to discuss the topic of homosexuality without reservation or embarrassment (sic).

Yours faithfully

[Mr B]

## **FINDINGS AND REASONS**

59. In order to be a refugee under the Convention, it is necessary for the applicant to be outside his country of nationality and for him to hold a well-founded fear of persecution for reasons of at least one of the five grounds enumerated in the Convention.
60. In both his Protection visa application and his review application the applicant described himself as a national of Malaysia. The applicant arrived on a valid Malaysian passport with a valid visa to enter Australia. On this basis the Tribunal accepts, that he is a citizen of Malaysia and having made no claims against another country and as he is outside his country of nationality, for the purpose of the Convention, the Tribunal will assess his claims against Malaysia.

61. The Tribunal's task in the present case is to consider whether the applicant fears persecution, and if so, whether that fear is well-founded. This task requires examining the claims that he has raised and the evidence that he has submitted, in addition to relevant independent country information.
62. The mere fact that a person claims fear of persecution for a particular reason does not establish either the genuineness of the asserted fear or that it is "well-founded" or that it is for the reason claimed. It remains for the applicant to satisfy the Tribunal that all of the statutory elements are made out: *MIEA v Guo & Anor* (1997) 191 CLR 559 at 596. Although the concept of onus of proof is not appropriate to administrative inquiries and decision-making (*Yao-Jing Li v MIMA* (1997) 74 FCR 275 at 288), the relevant facts of the individual case will have to be supplied by the applicant himself or herself, in as much detail as is necessary to enable the examiner to establish the relevant facts. A decision-maker is not required to make the applicant's case for him or her: *Prasad v MIEA* (1985) 6 FCR 155 at 169-70; *Luu & Anor v Renevier* (1989) 91 ALR 39 at 45. Nor is the Tribunal required to accept uncritically any and all the allegations made by an applicant: *Randhawa v MILGEA* (1994) 52 FCR 437 at 451.
63. The applicant in both his protection visa application and at review claimed that he would suffer persecution if he were to Malaysia because of he is a homosexual. The claim of homosexuality is within the Convention ground of 'membership of a particular social group' It is accepted that homosexuals may constitute a particular social group. Even though no laws in Malaysia expressly outlaw homosexuality in Malaysia, having regard to relevant laws in Malaysia and country information (see for example the US Country Report 2009 (11 March 2010)), the Tribunal accepts that "homosexual men in Malaysia" constitute a particular social group within the meaning of the term in the Convention and pronouncements by Australian Courts, notably the High Court of Australia in *Applicant A and Anor v* (1997) 190 CLR 25 case and also in *Applicant S v MIMIA* [2004] HCA 25. In *Applicant S* Gleeson CJ, Gummow and Kirby JJ gave the following summary of principles for the determination of whether a group falls within the definition of particular social group at [36]:

... 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". ...
64. No submission or arguments have been submitted in relation to any other Convention ground. The ground of 'membership of a particular social group' is therefore the Convention ground; and for the purposes of s.91R, is the essential and significant reason for the persecution claimed by the applicant.
65. The applicant does not claim to have suffered serious harm at the hands of the authorities in the past, in that he did not come to the adverse attention of the authorities in connection with his claim of homosexuality. Although it is noted that he claims to have suffered from having to keep his homosexuality a secret because of the laws and societal intolerance of homosexuality in Malaysia; and as a consequence of

the events he claims led to his fleeing Malaysia, he lost his family and his business, and that it 'ruined his life'.

Future conduct, future harm

66. The question is whether the applicant faces a real chance of persecution amounting to serious harm if he were to return to his home country of Malaysia.
67. The Tribunal indicated to the applicant at different times during the course of the hearing that it was experiencing difficulties with the credibility of his oral evidence relating to his claims and account of events.
68. The Tribunal put to the applicant that it found his oral evidence relating to his business to be vague, evasive, and inconsistent; some aspects appeared difficult to accept as credible. Stating that he believes the business ceased operating but he believes [Mr A] is operating under a different name; not being able to contact [Mr A] simply because he has changed his phone number, the applicant's family went to the business site but the office was empty, more effort was not made to recover his share of what he described as 60% share in a substantial business. While the business does not appear to be immediately relevant to the claims for protection, his apparent unwillingness to be forthcoming about this issue raised doubt about his truthfulness and reliability the Tribunal might place on his evidence generally.
69. The Tribunal put to the applicant that he repeatedly stated that homosexuality is illegal in Malaysia and attracts severe sanctions; and that it is socially unacceptable. Homosexual men do not trust to disclose their homosexuality to anyone or share information about homosexuality unless they have established that it is safe to do so. Then it put to him his account of booking the hotel room with one double bed in [City 2] for two men. His description of answering the door for room service. His first response that the layout of the room was such that from the door [Mr A] would not have been visible. But when it was suggested to him that a hotel goer would know to expect room service staff to wheel in a trolley to place the order onto the table, he did not disagree. He gave a different response that hotel staff do not ask and do not care. The Tribunal said to him that it does not accept as consistent that staff in the hotel would not have similar views as he described others in Malaysian society; and that he would be confident that they would not report the scene as he described.
70. The Tribunal also put to the applicant that it found the whole account he described of the incident at the hotel in [City 2] to be implausible and lacking in credibility. From the account that his wife followed him for a period of some two hours to the hotel, however he did not sense or notice that he was being followed, the unlikelihood that in the 20 – 30 minutes between the time he checked in and when his wife appeared at the room, he and [Mr A] had showered, he had already ordered room service and he expected it to have arrived in that time, to the account of the confrontation and the days that followed, it all lacked credibility.
71. The Tribunal also put to the applicant that it found improbable and lacking in credibility his account of avoiding the Malaysian immigration authorities but he applied for a new passport, crossed the land border with Singapore, both out of and into Malaysia by simply 'flashing' the outer cover of his Malaysian passport.

72. The Tribunal also found implausible that the applicant led a secret homosexual life with a group of men for six to seven years and was unaware of any places, organisations and public events about homosexual life in Malaysia.
73. In his written statement submitted with his visa application, the applicant stated that he had wished to live in a homosexual relationship with [Mr A], the Tribunal found inconsistent that the applicant made no mention of any risk that might have been posed to [Mr A] in his account of the event which exposed him and [Mr A] to possible police attention. He did not indicate that he warned [Mr A] or that [Mr A] took any steps such as the applicant took to avoid any police action. The applicant made no effort to give effect to his statement that he wished to live in a homosexual relationship with [Mr A]. The Tribunal found this to be lacking in credibility.
74. The applicant has told the Tribunal that since arriving in Australia he has not had a homosexual relationship and therefore there is no evidence before the Tribunal that he has a male partner. In fact the applicant stated that he intends to keep secret his homosexuality in Australia as he “wanted a clean start” This is highly inconsistent with his claim that he chose to come to Australia on the basis that it is an open society which accepts or tolerates homosexuality.
75. The Tribunal noted that the questions regarding what the applicant knew about the gay scene in Malaysia were discussed in the first part of the hearing. At the resumption a few days later, the Tribunal asked the applicant about his social life in Australia, very quickly in response to this question, the applicant presented the business cards referring to two gay clubs in Melbourne. He told the Tribunal that he happened upon these places by driving around. The Tribunal put to the applicant that the two places seemed to be well out of the area where he lives. It noted to the applicant that the Tribunal is familiar with the streets where those two places are located. In particular the Tribunal noted to him that it is very familiar with [Suburb E]. It noted to him that [Suburb E] is known for having a large gay scene It put to the applicant that [street deleted: s.431(2)] is a very narrow and short one-way street [details deleted: s.431(2)]. It comprises a few small businesses and some apartment blocks. Its entry from the main thoroughfare is in a very awkward location and unless it is a destination, it is easily missed. It put to the applicant that it is highly improbable that one would ‘happen’ upon a gay club in such a street, especially as it would be much easier to locate others in more accessible locations in [Suburb E]. The Tribunal does not accept the applicant’s evidence that he happened upon these places or that he frequented them. The Tribunal does not accept that the applicant has visited either of these two places. It is the Tribunal’s view that he has submitted the cards to give an impression that he has some knowledge of the gay scene in Melbourne as he might have correctly anticipated a question given he was asked a similar set of questions about Malaysia and had the benefit of a few days adjournment.
76. The Tribunal also put to the applicant significant inconsistencies between his written statement and his oral evidence regarding his sexual experiences with other men. In his written statement the applicant stated that he started having sex with male prostitutes, then in 2005 he began a relationship with [Mr A]. In his oral evidence he said that had his first sexual experience with [Mr A] in 2003.
77. The Tribunal also put to the applicant other and perhaps less significant inconsistencies such as his claim that he did not apply for protection soon after he



arrived in Australia on the basis that he had expected [Mr C] to arrange a visa to enable him to remain in Australia but when he came to the view that [Mr C] was not forthcoming with his promise, he proceeded to pursue other options and was finally advised that he could apply for protection. It pointed out to the applicant that even though he claimed to have worked for [Mr C] for several months he was unable to provide the name of the factory with confidence or its address. By contrast, a job he has held for around one month, when asked, he readily gave the full name of the business and its address. While it seems unrelated to the applicant's claim and less significant among inconsistencies, it added further doubt in the Tribunal's mind in respect of the applicant's truthfulness in his dealing with the Tribunal. It also cast doubt on whether he did have the arrangement he claimed to have with a man called [Mr C] and it undermines the applicant's reason for not applying for protection earlier if indeed he had a well-founded fear.

78. The Tribunal invited the applicant to comment on the inconsistencies and the credibility issues it put to him. He was granted an adjournment to confer with his migration agent. Upon resumption, the applicant's migration agent made an oral submission to the Tribunal stating that his client wishes to respond in writing. The Tribunal indicated that it will accept a response in writing but confirmed with the applicant whether he wished to present any arguments or give oral evidence in response to the credibility issues at the hearing. He confirmed that he wished to make a written submission in response.
79. The Tribunal has taken into account the submission above provided after the hearing and finds that it does not resolve its concerns regarding the credibility issues it put in detail and at length to the applicant. The submission does not respond to a number of inconsistencies which were put to the applicant and which were of concern to the Tribunal. Those inconsistencies remain unresolved. The Tribunal has taken into account the cultural differences and sensitivities in every aspect of its consideration of the applicant's claims and in its examination of his claims and evidence.
80. On the basis of all the evidence before it and the above discussion, the Tribunal does not accept the applicant's claim of having been or of now being a homosexual male, or that he was perceived to be a homosexual male in Malaysia. The Tribunal does not accept the applicant's account of the event at the hotel in [City 2] to have taken place. It does not accept that the applicant's wife discovered him with another man in an apparent situation of a homosexual meeting. The Tribunal does not accept that the applicant has had a homosexual relationship with [Mr A] or that he had sexual relations with him or other men in Malaysia or in Australia. The Tribunal does not accept the applicant's claim that he believes his wife has filed for divorce on the basis of the applicant being a homosexual or that she perceived him to be a homosexual. The Tribunal is of the view that the applicant has fabricated this evidence for the purpose of obtaining a visa to remain in Australia. The Tribunal accepts that the applicant may fear returning to Malaysia, but on the basis of the evidence before it, if he does have such a fear, the Tribunal does not accept that it is for a Convention related reason.
81. In sum, the Tribunal finds that the applicant does not face a real chance of persecution now or in the reasonably foreseeable future because of membership of the particular social group 'homosexuals in Malaysia' if he were to return to Malaysia. Further the Tribunal finds that the applicant does not have a well-founded fear of persecution for any

Convention related reason now or in the reasonably foreseeable future if he were to return to Malaysia.

### **CONCLUSIONS**

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

### **DECISION**

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