

071070452 [2007] RRTA 32 (16 February 2007)

DECISION RECORD

RRT CASE NUMBER: 071070452

DIMA REFERENCE(S): A94/004631

COUNTRY OF REFERENCE: Malaysia

TRIBUNAL MEMBER: Ron Witton

DATE DECISION SIGNED: 16 February 2007

PLACE OF DECISION: Sydney

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

This is an application for review of a decision made by a delegate of the Minister for Immigration and Multicultural Affairs to refuse to grant the applicant a Protection (Class XA) visa under s.65 of the *Migration Act 1958* (the Act).

The applicant, who is a citizen of Malaysia, arrived in Australia and applied to the Department of Immigration and Multicultural Affairs for a Protection (Class XA) visa. The delegate decided to refuse to grant the visa and notified the applicant of the decision and his review rights.

The applicant sought review of the delegate's decision.

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.

RELEVANT LAW

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.

Section 36(2) of the Act, as in force before 1 October 2001, provided that a criterion for a Protection (Class XA) visa is that the applicant for the visa is a non-citizen in Australia to whom Australia has protection obligations under 1951 Convention Relating to the Status of Refugees as amended by the 1967 Protocol relating to the Status of Refugees (together, the Convention). Further criteria for the grant of a Protection (Class XA) visa are set out in Parts 785 and 866 of Schedule 2 to the Migration Regulations 1994.

Definition of 'refugee'

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.

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.

Sections 91R and 91S of the Act qualify some aspects of Article 1A(2) for the purposes of the application of the Act and the regulations to a particular person. These provisions were inserted on 1 October 2001 and apply to all protection visa applications not finalised before that date.

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

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.

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.

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.

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.

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.

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

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 applicant appeared before the Tribunal to give evidence and present arguments. The Tribunal also received oral evidence from a number of witnesses.

The applicant was represented in relation to the review by his registered migration agent.

The applicant's claims were as follows:

The Applicant is ethnic Chinese, Christian and *[age deleted]*. He claims that he lived in a small village some *[distance]* from the capital, Kuala Lumpur. He claims that neither he nor anyone he knew recognised that he was homosexual when he was living in Malaysia. At the same time he claims he was only ever interested in men and that no-one ever dared to talk about such things in Malaysia. He indicated that this was because of the social stigma attached to the notion of homosexuality, not only in ethnic Chinese society but also in Malaysian society at large.

It appears from his claims that the Applicant might not have been totally aware of the full reality of his situation but that he knew the potential implications. He claims that he discovered his sexuality after he arrived in Australia. He claims that he mixes socially with homosexual friends but is not in any intimate relationship at this time. He claims that he has not discussed his sexuality with non-homosexual colleagues or with his family members either here or in Malaysia for fear of ostracism.

He fears, however, that if he had to return to Malaysia, his sexuality would inevitably become known and that in what he sees as the inevitable event that it were, he would not only be ostracised by his family but also in danger of attracting penalties under section 377 of the Malaysian criminal code.

Prior to the hearing, the applicant's representative submitted a statement by the review applicant in which he describes how he became aware of his sexuality while in Australia and his involvement in a number of gay organisations. Also submitted was a petition testifying to his homosexuality by members of a number of gay-related associations. At the hearing there was also submitted a letter in support of his application by a minister of a church.

At the hearing the applicant spoke about the fact that he was a practising homosexual and this fact was attested to by his witnesses whose backgrounds, including some of them being officeholders of gay-related organisations, are detailed on a document submitted by the applicant's adviser.

Independent Evidence

The situation at present in Malaysia for homosexuals

Homosexuality continues to be unacceptable as well as illegal in Malaysia. The latest US Department of State report on human rights (2005) states “laws against sodomy and ‘carnal intercourse against the order of nature’ exist and were enforced. Religious and cultural taboos against homosexuality were widespread” (US Department of State 2006, *Country Reports on Human Rights Practices for 2005 – Malaysia*, March, Section 5).

The available information suggests that Malaysia is undergoing a move towards increased Islamic conservatism, and that this is affecting both Muslim and non-Muslim Malaysians. Homosexuality continues to be vilified by politicians and in the media. There are a few gay and lesbian support organisations, as well as gay-friendly venues (mainly in Kuala Lumpur), but these tend to be discreet, and maintain a low profile. Recent police raids have occurred against gay-patronised establishments. The stigma surrounding HIV/AIDS has also affected attitudes towards homosexuals. According to the UNAIDS Country Report on Malaysia for 2006:

The conservative climate in this country is upheld by religious beliefs which subsume strong views on issues pertinent to HIV/AIDS, such as homosexual practices, premarital sex, multiple partners, commercial sex, drug use, and condom use. **The non-acceptance of diverse sexualities is intransigent** [researcher emphasis added] (UNAIDS 2005, *Country Report – Malaysia (2006)*, December, p. 25 http://data.unaids.org/pub/Report/2006/2006_country_progress_report_malaysia_en.pdf – Accessed 1 February 2007).

For information on Malaysia’s increasing conservatism, see also: ‘A difficult balance to strike; Islam Hadhari, Malaysian PM’s moderate vision, may be backfiring’ 2006, *Today*, 24 June).

Law

According to Amnesty International, homosexuality remains illegal in Malaysia for men (the status for women is unclear), and homosexuals may be imprisoned for up to 20 years (Amnesty International 2006, *Sexual Minorities and the Law: A World Survey*, updated July 2006 http://www.ai-lgbt.org/status_worldwide.htm – Accessed 1 February 2007).

A chapter on Malaysia in *Women of the World: East and Southeast Asia* states that:

There are no constitutional guarantees against discrimination on the ground of sexual orientation. Homosexual acts are punishable offences under civil, criminal, and Islamic laws. The penal code criminalizes “unnatural offences,” which are interpreted to include homosexuality. A relevant provision of the code was invoked for the first time against a former deputy prime minister in a case involving alleged homosexual activity between two consenting adults. Transsexuals are often arrested and charged under the Minor Offences Act 1955 for “indecent behavior.” Under the tenets of Islam, homosexuality is considered morally worse than adultery because it is against nature and the divine objective of creation and reproduction. *Liwat* (sexual relations between male persons) and *musahaqah* (sexual relations between female persons) are punishable offences under the Syariah Criminal Offences (Federal Territories) Act 1997 (‘Malaysia’, *Women of the World: Laws and Policies Affecting Their Reproductive Lives, East and Southeast Asia* 2005, The Center for Reproductive Rights & Asian-Pacific Resource and Research Centre for Women (ARROW), p. 100 <http://www.crlp.org/pdf/Malaysia.pdf> – Accessed 1 February 2007).

While homosexuality is not specifically mentioned in the Malaysian Penal Code, 'unnatural offences', involving any gender, deemed to be 'against the order of nature' are punishable by up to 20 years imprisonment and whipping. Under Section 377 of the Penal Code:

377A. Carnal intercourse against the order of nature.

Any person who has sexual connection with another person by the introduction of the penis into the anus or mouth of the other person is said to commit carnal intercourse against the order of nature.

377B. Punishment for committing carnal intercourse against the order of nature.

Whoever voluntarily commits carnal intercourse against the order of nature shall be punished with imprisonment for a term which may extend to twenty years, and shall also be liable to whipping.

377D. Outrages on decency.

Any person who, in public or private, commits, or abets the commission of, or procures or attempts to procure the commission by any person of, any act of gross indecency with another person, shall be punished with imprisonment for a term which may extend to two years (*Malaysian Penal Code (Act No. 574) August 1997, Chapter XVI, UNHCR website (undated) <http://www.unhcr.org/cgi-bin/texis/vtx/rsd/rsddocview.html?tbl=RSDLEGAL&id=3ae6b5cf0&count=16> – Accessed 30 January 2007*)

According to a 2004 report on sexual minorities in Malaysia by the Immigration and Refugee Board of Canada, in addition to corporal punishment and imprisonment, punishments for homosexual acts include the death penalty (Immigration and Refugee Board of Canada 2004, *MYS42857.E – Malaysia: The situation of sexual minorities (January 2002 – August 2004)*, 13 August).

A paper presented at the Sexuality and Human Rights in Muslim Societies in South/Southeast Asia Conference (2004) outlines the two sets of laws in Malaysia, and the effects of Islamic morality laws on both Muslim and non-Muslim Malaysians:

There are two sets of laws in Malaysia: the civil system, which applies to all persons residing in Malaysia; and the state-administered Islamic or Shariah laws which are ostensibly only applicable to Muslims. The Federal Constitution delineates that "matters of Islam" will be handled under the Shariah laws. However, what has been happening in effect is a quiet "redefinition" of what is considered "matters related to Islam." The scope of Shariah laws in the country has slowly widened, from personal status laws on marriage, divorce, custody, and maintenance to matters related to the individual's piety, practices, and preferences (such as fasting, Friday prayers, sexual orientation, and consumption of alcohol).

The PAS state governments have also used this provision to enact their own versions of hudud laws [Islamic laws stating the limits ordained by Allah and including the deterrent punishments for serious crimes] in two states, over and above the existing Syariah Criminal Offences Enactments (SCOE) and a civil system already enforced throughout the country. All three sets of laws contain numerous provisions that,

blatantly and tacitly, disproportionately discriminate against and violate the rights of women and the lesbian, gay, bisexual, and transgender (LGBT) community.

The Shariah laws have also found their way into municipal laws, subsidiary legislation, regulations, and policy directives that affect both Muslims and Malaysians of other faiths (Kasim, Z. M. 2004, 'Sexuality under Attack: The Political Discourse on Sexuality in Malaysia', *Queering: Social Movements and Feminist Theories, Women In Action (WIA)*, No. 1, 2006, 14 September. Cited on Isis International - Manila website http://www.isiswomen.org/index.php?option=com_content&task=view&id=262&Itemid=156 – Accessed 1 February 2007).

Police/Law enforcement

According to a paper prepared for the Asia-Europe Foundation (ASEF) 2005 dialogue on 'Policies and Perceptions of Sexual Minority Groups in Asia & Europe', the laws against homosexuals "were hardly enforced till recently with the upsurge in Islamic hardliners. In 1998 the former Deputy Prime Minister Dr Anwar Ibrahim was charged with four counts of sodomy. The charges were recently dropped. Following these charges an Anti- Homosexual Voluntary movement was initiated." Kasim states that "[t]he growing conservatism in the country has also given rise to self-appointed 'vigilante' Islamist groups or individuals in the universities, the workplace, and also in public spaces, who have taken it upon themselves to harass and police other individuals and groups" (Asia-Europe Foundation (ASEF) 2005, Country Studies document prepared for 'Policies and Perceptions of Sexual Minority Groups in Asia & Europe', *Cultures & Civilizations Dialogue: Talks on the Hill*, 6-8 March <http://www.civdialogue.asef.org/documents/COUNTRYSTUDIESFinal.pdf> – Accessed 2 February 2007; Kasim, Z. M. 2004, 'Sexuality under Attack: The Political Discourse on Sexuality in Malaysia', *Queering: Social Movements and Feminist Theories, Women In Action (WIA)*, No. 1, 2006, 14 September. Cited on Isis International – Manila website http://www.isiswomen.org/index.php?option=com_content&task=view&id=262&Itemid=156 – Accessed 1 February 2007).

A *BBC* article in 2005 reports on the practise in some State Islamic departments of launching raids to catch Muslims alleged to be committing 'immoral acts', and planned moves by the Malaysian government to curb such moral policing. (see Kent, J. 2005, 'Malaysia to curb 'Moral Policing'', *BBC News*, 26 March. Cited at Sodomy Laws website <http://www.sodomylaws.org/world/malaysia/mynews073.htm> – Accessed 1 February 2007; for more information on the raid on the Kuala Lumpur nightclub, see: Noor, F. 2005, 'A Wake Up Call', The International Lesbian and Gay Association (ILGA) website, 31 January http://www.ilga.org/news_results.asp?LanguageID=1&FileCategory=1&ZoneID=3&FileID=478 – Accessed 1 February 2007).

While Shariah laws ostensibly only cover Muslims, the investigation and enforcement of these laws by 'vice-prevention squads' have affected all Malaysian citizens. A June 2006 report published in Singapore's *Today* has highlighted the view, expressed by a number of commentators and human rights groups, that Malaysia is presently undergoing a process of "Islamisation" which increasingly impinges on ethnic Chinese, and other non-Malay/Muslim Malaysians; noting that "[a] young Chinese couple caught kissing in public were [recently] made to stand trial on charges of indecency" and that "[n]ew rules compel non-Muslim policewomen to wear headscarves in parades." The report states that these cases "signal an

incursion of conservative Muslim values into public life” (‘A difficult balance to strike; Islam Hadhari, Malaysian PM’s moderate vision, may be backfiring’ 2006, *Today*, 24 June).

The precedence given to Islamic law, or Shariah, is also affecting the private lives of non-Muslims in Malaysia. Although the previously mentioned *BBC* article from 2005 reported that the Malaysian government had moved to “curb so-called moral policing following complaints about state snooping into citizens’ private lives”, such incidents are still occurring. In October 2006 *The Star* reported that an American couple were raided by religious enforcement officers, accusing them of committing *khalwat* (close proximity). The article states that:

On Oct 12, Barnhart, 62, and his wife Carole, 61, were in their rented condominium in Kuala Lumpur when enforcement officers continuously knocked on their door at 2am, accusing them of committing *khalwat* (close proximity).

He said the officers demanded to see his marriage certificate, although he had told them that they were Christians and should not be subjected to Islamic law (Habibu, S. 2006, ‘Couple in khalwat raid may drop second home plan’, *The Star*, 28 October <http://thestar.com.my/news/story.asp?file=/2006/10/28/nation/15839442&sec=nation> – Accessed 1 February 2007).

Homosexual activity is a specific target of this moral policing. Raids and crackdowns by police and inspectors on venues catering to gay customers continue to occur periodically. A gay website discussing travel in Malaysia warns its readers to “be careful when cruising due to police activity.” In February 2006, *The Star* reported that thirty-four men “were arrested when police raided three illegal massage parlours which doubled up as ‘exclusive’ homosexual clubs. The men, aged between 20 and 50 years old, were caught in the act while in the shower or in bed.” In April 2006, a *PRWeb* press release reported that “Kuala Lumpur police are trying to crack down on businesses that cater to gay customers by fining owners for petty license violations, bringing criticism from local AIDS/HIV educators.” A *Utopia News* article dated 22 February 2006 stated that “business licensing board inspectors have forced gyms, spas and massage businesses to remove condoms provided by Malaysia’s main MSM (men who have sex with men) AIDS/HIV outreach organization, the PT Foundation, jeopardizing health and well-being during a time when HIV infection rates have risen dramatically among young gay men in neighboring Singapore and Thailand” (‘Gay Malaysia’ (undated), Gay Thailand and Gay Asia Online <http://dragoncastle.net/malaysia.shtml> – Accessed 2 February 2007; ‘Rent boys and clients held in raids across KL’ 2006, *The Star*, 15 February <http://www.thestar.com.my/news/story.asp?file=/2006/2/15/nation/13398161&sec=nation> – Accessed 1 February 2007; ‘World’s First Guide to Gay and Lesbian Life in Singapore, Malaysia and Indonesia’ 2006, *PRWeb*, 22 April <http://www.prweb.com/releases/2006/4/inktom375494.php> – Accessed 1 February 2007; ‘Malay Press Reports Fuel Police Crack Down on Gay Clubs’ 2006, *Gay Asia News*, 22 February, Utopia – Asia website http://www.utopia-asia.com/unews/article_2006_02_22_223148.htm – Accessed 1 February).

The PT Foundation held information sessions about legal rights in the face of this increasing harassment by police. A statement on the PT Foundation website says:

The recent rounds of police raids at various gay patronised venues have precipitated a sense of unease and panic, doom and gloom within the gay community. Codenamed “Operation Duck-flus”, this harassment by the authorities is a challenge to the colourful gay lifestyle in KL which has increasingly come to be accepted as the norm.

Irrespective of what you think of the harassment, one thing is clear: if this continues, there will be severe repercussions – on personal sense of freedom, on businesses, on our AIDS/ HIV prevention work, and more damagingly, on the good name of gay people given the intense media fuel pouring. We are reliably informed that this is an ongoing operation which may yet continue for many more weeks to come ('S for Survival – learn your legal rights in the face of harassment' 2006, PT Foundation website, March <http://www.ptfmalaysia.org/SunSession/2006March05.htm> – Accessed 1 February 2007).

Media

The 2004/2005 *Spartacus International Gay Guide* states that “[h]omosexuality is a taboo in the media or is portrayed in a negative light together with criminal activities.” The previously mentioned statement on the PT Foundation website claims that attitudes towards homosexuals were being influenced by the “intense media fuel pouring” accompanying the police crackdowns on gay venues (Gmünder, Bruno 2004, ‘Malaysia’, *Spartacus International Gay Guide*, 33rd Ed, Bruno Gmünder Verlag GMBH, Berlin, p. 682; ‘S for Survival – learn your legal rights in the face of harassment’ 2006, PT Foundation website, March <http://www.ptfmalaysia.org/SunSession/2006March05.htm> – Accessed 1 February 2007).

An article in February 2006 from *Utopia News* claims that the media chose to sensationalise the police raids, despite little evidence of any wrong doing. The article states that:

Human rights in Malaysia took another downturn today as the English-language newspaper, The Malay Mail, used their front page to equate homosexuals with prostitutes. Referring to recent high profile police raids on Kuala Lumpur discos, spas and saunas popular with gay men, the paper used local slang to slur the country’s gay citizens: “Round-up of the Day! Chicks [female prostitutes], Ducks [male prostitutes] and Gays.”

In a full page exposé, the paper chose to display pictures of patrons shot by police inside a private men’s club, unprecedented behavior from the local media.

An article which appeared last week in the Malay press, luridly detailing suggestive activities inside a popular local men’s spa, seems to have been the trigger for the police actions against a number of clubs, saunas, and massage businesses.

Subsequent one-sided articles have appeared in the press from a Muslim group asking for harsher penalties against homosexual activities ('Malay Press Reports Fuel Police Crack Down on Gay Clubs' 2006, *Gay Asia News*, 22 February, Utopia – Asia website http://www.utopia-asia.com/unews/article_2006_02_22_223148.htm – Accessed 1 February).

According to the Malaysian human rights group, *Suara Rakyat Malaysia* (SUARAM), the government’s restrictive laws have brought about a “high level of self-censorship among local media” and the “media remains the main target of the government in its efforts to control freedom of expression.” In June 2005, Prime Minister Abdullah Ahmad Badawi threatened to take action against print media publishers for carrying articles, question-and answer columns and advertisements focusing on sex. In 2006, the Malaysian film distributor UPI chose not to apply to the state-run Film Censorship board for approval to show the Academy Award-winning movie, *Brokeback Mountain*, which is about a gay relationship. An

article dated 17 January 2006 states that, “Golden Globe fave, *Brokeback Mountain*, has been censored by the Malay film board. Actually, UPI, the film’s distributor, has decided to self-censor itself, not even bothering to seek the strict board’s approval. I guess they know what the answer will be already.” The publicity manager told the Associated Press that “*Brokeback Mountain* is definitely not going to make it here because its themes wouldn’t be right for our local audiences” (Suaram 2005, *Malaysia: Civil And Political Rights Report*, <http://www.suaram.net/2005-hr-exec-summ-eng.pdf> – Accessed 11 September 2006; ‘Malaysia Says No To Brokeback Mountain’ 2006, Queerty website, 17 January <http://www.queerty.com/queer/movies/malaysia-says-no-to-brokeback-mountain-20060117.php> – Accessed 1 February 2007).

HIV/AIDS

The social stigma surrounding HIV in Malaysia has also increased intolerance towards, and misunderstanding about, homosexuality. A letter dated 20 January 2007 on the gay website, Utopia-Asia, describes a recent episode of a Malaysia/Singapore TV series in which a young man’s family advises him against homosexuality because he “will get AIDS”. The UNAIDS Country Report on Malaysia for 2006 states that the association of HIV/AIDS with drug addicts, sex workers, and homosexuals reinforces the perception that HIV infection is related to ‘immoral behaviour’ and is self-inflicted. Although “heterosexual transmission dominates HIV infections in Malaysia, rather than infections via other sexual routes, namely, men having sex with men... **HIV infection is... associated with what is perceived to be sexually deviant behaviour, particularly in a conservative culture. The high level of stigma that ensues leads to inaction**” [researcher emphasis added] (‘Utopia Update’, 20 January 2007, Utopia-Asia website <http://www.utopia-asia.com/tipsmala.htm> – Accessed 1 February 1, 2007 ; UNAIDS 2005, *Country Report – Malaysia (2006)*, December, p. 24 http://data.unaids.org/pub/Report/2006/2006_country_progress_report_malaysia_en.pdf – Accessed 1 February 2007).

The PT Foundation is a non-government organisation that deals with gay and lesbian issues in Malaysia. The website states:

PT Foundation (previously known as Pink Triangle) is a voluntary non-profit making organization providing HIV/AIDS and sexuality education, prevention, care and support program for marginalized communities. We work with six communities that are difficult to reach due to societal discrimination – drug users, sex workers, transsexuals, homosexual men and women, and people living with HIV/AIDS (‘About Us’ (undated), PT Foundation website http://www.ptfmalaysia.org/about_us.htm – Accessed 2 February 2007).

PT programs are limited to Kuala Lumpur and, since HIV/AIDS has become a major concern in the nation, its tasks have become very much focused on HIV/AIDS related issues. It has been recognised by the government as one of the most active organisations to fight the disease. According to Dr Baba, the organisation has been reluctant to take too active a role in gay and lesbian issues for fear of political and social repercussions, but by focusing on HIV/AIDS issues PT members feel that they can still render social services indirectly to its members without being too visible about it (Ismail, Baba 2001, ‘Gay and Lesbian Couples in Malaysia’, *Gay and Lesbian Asia: Culture, Identity*, Harrington Park Press, New York, pp. 147 & 159-160; for more information on the PT Foundation, see: RRT Country Research 2004, *Research Response MYS17043*, 20 October).

Social

Increasing Islamic conservatism in Malaysia is juxtaposed by increased exposure to other value systems and lifestyles through electronic communication forms such as the internet. According to an article on homosexuals in Muslim contexts, “[i]n countries where being outed as a non-heterosexual is dangerous, people are reaching out to other LGBTIs via the Internet. While often a tool of the privileged, it does nevertheless provide a channel for exchange and solidarity.” The PT Foundation website contains a list of Malaysian gay community websites. Utopia-Asia also has community links and listings of venues, etc. by state and city. Although there are links to a couple of support groups on these sites, there was little evidence of local gay Malaysian activist or lobbying groups (Helie, A. 2006, ‘Threats and Survival: The Religious Right and LGBT Strategies in Muslim Contexts’ Queering: Social Movements and Feminist Theories, *Women In Action (WIA)*, No. 1, 2006, 14 September. Cited on Isis International – Manila website http://www.isiswomen.org/index.php?option=com_content&task=view&id=272&Itemid=135 – Accessed 2 February 2007; for community and social links see: ‘Links for MSM’ (undated), PT Foundation website http://www.ptfmalaysia.org/msm_links.htm – Accessed 2 February 2007; and ‘Travel & Resources: Malaysia’ (undated), Utopia-Asia website <http://www.utopia-asia.com/tipsmala.htm> – Accessed 2 February 2007).

Despite Malaysia’s state sanctioned homophobia, the internet allows for an underground local gay community, and Malaysia is described by some gay travel guides as having a ‘vibrant gay scene’, albeit with cautions for discretion when visiting. It must be noted that these guides are written for foreign travellers who have a degree of immunity to the local laws. A Malaysian travel advisory on the Utopia-Asia website states that:

Gay life in Malaysia, as in other Asian countries, is blossoming despite conservative religion-based discrimination and outdated colonial-era laws. Former Deputy Prime Minister, Anwar Ibrahim, was famously removed from office by a trumped-up sodomy conviction that was reversed by Malaysia’s high court in 2004. Muslims, both local and visitors, are also subject to religious law which may (though rarely does) punish gay or lesbian sexual activity with flogging and male transvestism with imprisonment. Even though religious law does not apply to non-Muslims, Islam is the state religion under Malaysia’s constitution and thus **homosexual citizens face official discrimination**. Police may arrest any person (Muslim or not) for sex in a public place (i.e. cruise spots), so visitors are well-advised to respect Malaysian law and customs while they are guests in the country. Having said that, **police generally have not detained foreigners during raids on local gay businesses, focusing instead on ethnic Malay customers**, almost 100% of whom are considered Muslim at birth by law [researcher emphasis added] (‘Travel & Resources: Malaysia’ (undated), Utopia-Asia website <http://www.utopia-asia.com/tipsmala.htm> – Accessed 2 February 2007).

The inconsistency in descriptions of a ‘blossoming’ Malaysian gay scene in the same paragraph as cautions about ongoing raids on local gay businesses by police, highlights the Malaysian authorities’ efforts to appear to be taking a strong stand against homosexuality whilst still carrying out “pro-western economic policies”. According to a briefing paper on ‘Policies and Perceptions of Sexual Minority Groups in Asia & Europe’, in terms of economics, attitudes towards homosexuals may differ from the law, and “the ‘Pink Dollar’ may sway many authorities, which still officially oppose homosexuality, to turn a blind eye. Although these countries may make it illegal to be homosexual they accept the economics of

homosexuality.” As the previously quoted Utopia Asia guide states, foreigners are not generally detained, with police focussing on Malaysian customers (Carr, Adam 2003, ‘A Twofaced Society’, Gay Australia website, 14 March; Asia-Europe Foundation (ASEF) 2005, ‘Policies and Perceptions of Sexual Minority Groups in Asia & Europe’, briefing paper for *Cultures & Civilizations Dialogue: Talks on the Hill*, 6-8 March, Section 2.3.4 <http://www.asef.org/go/subsite/ccd/documents/briefingpaperfinal.pdf> – Accessed 2 February 2007).

Politics

According to the previously mentioned research paper, ‘Policies and Perceptions of Sexual Minority Groups in Asia & Europe’, the movement in Asia for legal and social tolerance of homosexuality has not gained ground in part because the concept of homosexual identity is alien to many countries. The paper states that many Asian countries “consider themselves as traditional and relatively conservative cultures where homosexuality is conceived as something against the tradition and something imported from/specific to the western countries. And finally, the laws followed the Islamic law or Victorian laws, both against homosexual practices.” Kasim states that “Sexuality in Malaysia, as with most other discourses in the country, is mired within a political system that teeters on ethnic and religious faultlines. In this push for greater Islamisation, both state and non-state actors are wittingly and unwittingly calling for the implementation of rules, laws, and policies that are deeply influenced or inspired by the ideology of Islamic conservatism.” Anissa Helie states that homosexuality in conservative Muslim contexts is portrayed as a “Western depravation” and the concept of homosexual rights is viewed as a product of a foreign ideology. Activists are thus labelled as a threat to social order as well as traitors to their nation, community, or faith (Asia-Europe Foundation (ASEF) 2005, briefing paper for ‘Policies and Perceptions of Sexual Minority Groups in Asia & Europe’, *Cultures & Civilizations Dialogue: Talks on the Hill*, 6-8 March, Section 2.3.4 <http://www.asef.org/go/subsite/ccd/documents/briefingpaperfinal.pdf> – Accessed 2 February 2007; Kasim, Z. M. 2004, ‘Sexuality under Attack: The Political Discourse on Sexuality in Malaysia’, *Queering: Social Movements and Feminist Theories*, *Women In Action (WIA)*, No. 1, 2006, 14 September. Cited on Isis International – Manila website http://www.isiswomen.org/index.php?option=com_content&task=view&id=262&Itemid=156 – Accessed 1 February 2007; Helie, A. 2006, ‘Threats and Survival: The Religious Right and LGBT Strategies in Muslim Contexts’ *Queering: Social Movements and Feminist Theories*, *Women In Action (WIA)*, No. 1, 2006, 14 September. Cited on Isis International – Manila website http://www.isiswomen.org/index.php?option=com_content&task=view&id=272&Itemid=135 – Accessed 2 February 2007).

The prevalence of homophobia within Malaysian society, as well as the laws punishing homosexual activity, were major factors in Mahathir Mohamed’s successful ousting and imprisonment of his political rival, Anwar Ibrahim. In this infamous case, the penal code was invoked against a high profile politician in a case involving alleged homosexual activity between two consenting adults. In 2000 Anwar Ibrahim was sentenced to 9 years in prison for sodomy. According to Zaitun Mohamed Kasim:

Same-sex sexual relations, particularly between men, is often demonised as “un-Islamic,” “unnatural,” “disgusting,” and, according to the head of Education and Research at Malaysia’s Islamic Affairs Department, when interviewed, “a crime worse than murder” (Ramakrishnan, 2000).

It is this “ick factor” that ex-Prime Minister (PM) of Malaysia Mahathir Mohamed, had hoped to ride on when charges of sodomy were brought against his Deputy PM (DPM) Anwar Ibrahim (Kasim, Z. M. 2004, ‘Sexuality under Attack: The Political Discourse on Sexuality in Malaysia’, *Queering: Social Movements and Feminist Theories, Women In Action (WIA)*, No. 1, 2006, 14 September. Cited on Isis International – Manila website http://www.isiswomen.org/index.php?option=com_content&task=view&id=262&Itemid=156 – Accessed 1 February 2007)

In 2004 the sodomy conviction was overturned and Ibrahim was freed. Despite this, Mahathir Mohamed has continued to highlight the ‘immorality’ of Ibrahim’s (alleged) homosexuality as justification for ousting him. An article dated 9 September 2005 in *Agence France-Presse* quotes Mahathir as saying:

“In our society, sodomy is not acceptable. Of course, among some media people even, they are gay. They don’t like my taking action against a person for the kind of things that they indulge in. So I became a bad guy because of that,” he told reporters. “But I cannot have a person who is like that in my cabinet who may succeed and become the prime minister. Imagine having a gay prime minister. Nobody would be safe” (‘Mahathir sacked Anwar to prevent Malaysia having ‘gay’ PM’ 2005, *Agence France-Presse*, 9 September <http://www.globalgayz.com/malaysia-news.html#article15> – Accessed 2 February 2007).

In April 2006 Mahathir said that it was his moral duty to accuse the former deputy prime minister, as Ibrahim’s alleged sexual orientation made him unfit for office, and “it was unacceptable to have a homosexual in his cabinet.” In January 2007, *Associated Press* quoted a statement of Mahathir’s as saying: “I strongly believe we cannot have a prime minister who is homosexual...Malaysia is officially an Islamic country” (‘Former Malaysia PM: It was “moral duty” to accuse heir apparent of being gay’ 2006, *The Advocate*, 15 April http://www.advocate.com/news_detail_ektid29653.asp – Accessed 2 February 2007; Kanaraju, S. 2007, ‘Mahathir says gays should not rule mostly Muslim Malaysia’, *Associated Press (AP)*, 6 January).

A 2005 report on sexual minorities in Malaysia by the Immigration and Refugee Board of Canada states:

In response to the British Navy’s agreement to promote the rights of homosexuals, Royal Malaysian Navy Chief Mohd Anwar Mohd Nor allegedly stated in February 2005 that homosexuals would not be admitted into the Malaysian Navy (Today 25 Feb. 2005; AP 24 Feb. 2005; New Straits Times 24 Feb. 2005). He further indicated that he was opposed to “such unnatural sex acts” and needed to “protect the image of the navy” (Today 25 Feb. 2005; New Straits Times 24 Feb. 2005). A day later, the navy chief’s words were echoed by the deputy defense minister, who said gays and lesbians would never be allowed to join the military because their behaviour is “against Islam and also against the laws of [Malaysia]” (AP 24 Feb. 2005) (Immigration and Refugee Board of Canada 2005, *MYS100434.E – Malaysia: Treatment of sexual minorities (August 2004 – August 2005)*, 30 August).

UN Resolution

Malaysia played an instrumental role in obstructing the voting on a 2003 UN resolution to ban discrimination on the basis of sexual orientation. The resolution was deferred twice and

in 2005 the motion was not reintroduced, with lack of support in the Commission being cited as the reason. According to Professor Douglas Sanders, both the German delegation and the NGO Human Rights Watch believed that there were probably enough votes to pass the resolution if the obstructive tactics of opposing states [including Malaysia] could be overcome (Sanders, D. 2005, 'Human Rights and Sexual Orientation in International Law', 11 May, The International Lesbian and Gay Association (ILGA) website http://ilga.org/news_results.asp?LanguageID=1&FileCategory=44&ZoneID=7&FileID=577 – Accessed 2 February 2007; for more information see: Asia-Europe Foundation 2005, briefing paper for 'Policies and Perceptions of Sexual Minority Groups in Asia & Europe', *Cultures & Civilizations Dialogue: Talks on the Hill*, 6-8 March, Section 2.3.3 <http://www.asef.org/go/subsite/ccd/documents/briefingpaperfinal.pdf> – Accessed 2 February 2007).

FINDINGS AND REASONS

The applicant is seeking a review of the Department's decision to refuse his application for a protection visa on the Convention ground of his fear of being persecuted for reason of his membership of a particular social group, namely homosexuals in Malaysia.

The Tribunal found the applicant and his witnesses to have been credible and accepts their evidence. The Tribunal finds on the basis of this oral evidence, and the written statements also submitted, that the applicant is a homosexual. The Tribunal accepts his evidence that he fears that he will be harmed for reason of his homosexuality by either the authorities who might prosecute him or by homophobic elements in Malaysian society and that in such a case he could not expect protection from the authorities should he return to Malaysia.

The Tribunal accepts that being gay or homosexual in Malaysia makes the applicant a member of a particular social group under the Convention. Homosexual members of a particular society may form a 'particular social group' for the purposes of the Refugees Convention if they are perceived in that society to have characteristics or attributes that unite them as a group and distinguish them from society as a whole (see *Applicant A*, referred to above, per McHugh J at 265). Homosexuals have been consistently accepted by the Tribunal as constituting a particular social group. Independent evidence available to the Tribunal, as set out above, indicates that there is an identifiable homosexual community in Malaysia which forms a cognisable social group within that country. In particular, the societal prejudice against homosexuals in Malaysia indicates that not only do they share a certain characteristic - their sexual orientation - but this element makes them a cognisable group within Malaysian society. Moreover, the independent evidence indicates that it is generally accepted and that the Malaysian criminal code contains provisions that recognise and criminalise homosexual conduct.

The Tribunal has considered the independent evidence cited above. For men who are homosexual in their sexual orientation, there would appear to be very little public acceptance or support, and they are forced to live in a situation of extreme vulnerability. Further, the Tribunal accepts the independent evidence cited above that there have been selective, and indeed relatively recent, prosecutions of homosexuals and this leaves homosexual Malaysians in a situation of extreme vulnerability. The Tribunal accepts that members of the Malaysian police would evidence prevailing feelings of hostility towards homosexuals and that being so, the Tribunal finds that homosexuals, such as the applicant, could not expect that they could turn to the police for protection in the face of community hostility and threats.

The Tribunal is satisfied the applicant could not safely relocate within Malaysia and that the situation of real chance of serious harm for gay men in Malaysia pertains to the whole country.

In the light of the above evidence and findings, the Tribunal finds that the applicant would face a real chance of serious harm in Malaysia because of his homosexuality.

In the light of the evidence before it, the Tribunal finds that the applicant has a well-founded fear of persecution for a Convention based reason.

CONCLUSIONS

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) for a protection visa.

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.

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

Sealing Officer's I.D. prrt44