

1306038 [2013] RRTA 739 (5 November 2013)

DECISION RECORD

RRT CASE NUMBER: 1306038

DIAC REFERENCE(S): CLF2012/225206

COUNTRY OF REFERENCE: Egypt

TRIBUNAL MEMBER: R Mathlin

DATE: 5 November 2013

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.

Any references appearing in square brackets indicate that information has been omitted from this decision pursuant to section 431(2) of the *Migration Act 1958* and replaced with generic information which does not allow the identification of an applicant, or their relative or other dependant.

STATEMENT OF DECISION AND REASONS

BACKGROUND

1. This is an application for review of a decision made by a delegate of the Minister for Immigration 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 Egypt, applied to the Department of Immigration for the visa [in] November 2012 and the delegate refused to grant the visa [in] March 2013.
3. The applicant claims that he will face persecution in Egypt because he is a homosexual.

RELEVANT LAW

4. The criteria for a protection visa are set out in s.36 of the *Act* and Schedule 2 to the *Migration Regulations 1994* (the *Regulations*). An applicant for the visa must meet one of the alternative criteria in s.36(2)(a), (aa), (b) or (c). As I have decided that the applicant meets the criteria in s.36(2)(a), it is not necessary to set out the others.
5. Section 36(2)(a) provides that a criterion for a protection visa is that the applicant is a non-citizen in Australia in respect of 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). Australia has protection obligations in respect of a person who meets the definition in Article 1A(2), 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.
6. 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.
7. In accordance with Ministerial Direction No.56, made under s.499 of the Act, the Tribunal is required to take account of policy guidelines prepared by the Department of Immigration – *PAM3 Refugee and humanitarian - Complementary Protection Guidelines* and *PAM3 Refugee and humanitarian - Refugee Law Guidelines* – and any country information assessment prepared by the Department of Foreign Affairs and Trade expressly for protection status determination purposes, to the extent that they are relevant to the decision under consideration.

CLAIMS AND EVIDENCE

8. The applicant's claims are set out in his protection visa application, at an interview with the delegate held [in] March 2013 (the protection interview) and at the Tribunal hearing held [in] October 2013.

9. In his protection visa application the applicant stated that he is a single Muslim male born in [year deleted]. He arrived in Australia in October 2012, holding a temporary business visa.
10. He provided one address in Egypt where he said he had resided from his birth until his departure. He submitted a copy of his Egyptian passport with the protection visa application, and presented the original document at the Tribunal hearing.
11. In his protection visa application it was stated that the applicant holds a [qualification] conferred in 2006 by a university in Egypt that he attended in [years deleted]. It was stated that he attended a different university from [years deleted] and he explained at the hearing that he in fact obtained his [qualification] from that university in [year deleted].
12. He stated that he worked in the family business from September 2009 until October 2012. Asked by the delegate and at the Tribunal hearing to comment on information indicating that he had travelled to Australia on a temporary business visa issued on the basis that he was a [professional] attending a conference in Australia, he stated that the agent who arranged for his travel to Australia had made all the arrangements and the applicant had neither seen nor signed the visa application.
13. In the protection visa application the applicant stated that he felt different from other boys from [age deleted]. When he was [age deleted] he had physical contact with another boy at a camp. This made the other students suspicious. The applicant became scared and depressed and was not sexually active until his first year at university. People found out that he was gay and he left that university after one year.
14. At the hearing he stated that his partner at university was an older student who was well known as a homosexual. When he and the applicant were frequently seen together the other students made adverse comments, including calling the applicant a bitch and a slut and suggesting that he have an operation to become a woman. He said that his partner was not bothered by such remarks, but he was. The relationship ended after [a couple of] months.
15. He was not sexually active again for some time. In the protection visa application it was stated that he looked at internet sites but stopped when the government began monitoring the internet. At the protection interview he stated that it was difficult for him to access the internet because of poor reception and the risk that his [siblings] might discover what he was looking at. When I asked him about this at the hearing, he at first said that he had not looked at internet sites because internet access was very difficult in his village. When asked to explain why this claim had been made in the protection visa application, he indicated that "if" he had accessed the internet he "would have" done so in Cairo or [Town 1], the nearest town, but spoke of the problems doing so in internet cafes where he could be observed, or his browsing history be discovered. When pressed as to whether he had or not accessed gay websites, he finally stated that he had searched gay websites on the internet about twice in [Town 1] in internet cafes. He was unable to explain why he would have engaged in such risky behaviour, given his other evidence about the risk involved and the extremely cautious way in which he claimed to live.
16. The applicant has consistently stated that after leaving university he had many short term casual relationships with men he met in Cairo. At the hearing he explained that he used to visit Cairo about once every [number of] weeks for business, and after his work was finished he would visit areas where it was well known that gay men could meet, including [venue deleted], Tahrir Square, and a particular café that he named. The applicant provided

consistent evidence at the protection interview and at the hearing about the number and nature of these encounters, and of various details of this activity.

17. The applicant stated that he has never been physically harmed but three years ago a gay man in his village was killed. At the hearing he stated that this incident occurred more recently, in 2011 or 2012. He said that the man was well known to be homosexual, and he was strangled in his home. The applicant said that it was possible that he was killed for some other reason, but he is pretty sure it was because he is gay.
18. The applicant claimed that he was questioned twice by police, and indicates that this was one of the reasons for which he decided to leave Egypt. In his protection visa application he claimed that the two incidents occurred in the last twelve months. At the hearing he was very vague about when the incidents occurred. I noted that these must have been very frightening experiences, given the independent evidence about the brutality of the police towards homosexuals and in general, and in these circumstances, and given that he claimed that these incidents led to his decision to leave, I would expect that he would be able to provide more precise evidence about when they happened. Eventually he provided dates for the two incidents, which he said were [in] 2011 [and] 2012. His account of the incidents at the Tribunal hearing was essentially consistent with that given at the protection interview.
19. The applicant claims that if he returns to Egypt he may be persecuted or killed, and he cannot have meaningful long term relationships. Homosexuality is not accepted in Egypt and he fears harm from his family, the authorities and the community.
20. The delegate refused to grant the protection visa because he did not believe the applicant is homosexual. In reaching this conclusion he noted inconsistencies between the information provided by the applicant and his claimed partner, [Mr A], who was also interviewed [in] March 2013, in relation to how long after their first meeting [Mr A] took the applicant to the migration agent. The delegate considered that [Mr A]'s lack of knowledge about the applicant's family indicated that they were not genuinely in a relationship, and he considered that the applicant's lack of knowledge of gay cultural issues in Egypt indicated that he was not gay.
21. At the Tribunal hearing, the applicant stated that he and [Mr A] had broken up. He provided details of the reasons, including that [Mr A] was a heavy user of alcohol and drugs, and that he refused to change his ways for the applicant. Nonetheless, he said that he was sure [Mr A] would provide evidence, and gave me [Mr A]'s phone number which he retrieved from his own phone. However, the number had been disconnected.
22. At the hearing the applicant stated that he accesses gay movies on his own laptop by entering the words "gay sex" into Google. He does not know the names of the websites he is then directed to, but said that they are mostly foreign movies. Other than that, he does not read gay magazines or access other forms of gay media.
23. He said that he does not attend gay venues frequently. He and [Mr A] used to go to [location deleted] about once a fortnight, where they went to [venues deleted], but the applicant is hampered by his lack of English. He hopes to find a permanent partner.
24. He provided detailed evidence about the commencement of his relationship with [Mr A], broadly consistent with that provided to the delegate. He stated that [Mr A] went to his apartment a couple of times, and on one of these occasions his flatmate returned home shortly

after they had sex. The applicant's flatmate, to whom I spoke by telephone, confirmed this in his evidence. The applicant also provided details about their break up. He said that for about six weeks after that he was upset, but then had two casual encounters. The first was with an Australian man he met at [venue deleted]. They returned to the applicant's apartment [to] have sex. The applicant's flatmate confirmed that he had seen the applicant with this man. The second encounter was with a [another] man that he met at work. This did not end well, however, as the man engaged in rough sex and became abusive when the applicant said he did not like this.

25. The applicant brought a witness, [Mr B], to give evidence at the hearing. The applicant said that they first met in about June, when he was at [venue deleted] with [Mr A]. He did not see [Mr B] again until last Friday, when they met by chance in a restaurant. [Mr B] established that the applicant was no longer with [Mr A] and invited him out. They had seen each other last Sunday and when [Mr B] noticed that the applicant seemed stressed, he explained about the Tribunal hearing and [Mr B] offered to be a witness. The applicant hopes that they might become long term partners.
26. [Mr B]'s evidence was completely consistent with the applicant's. Asked why he had offered to give evidence on the applicant's behalf when he had only known him for a short period, he said that he feels really sorry for the applicant. [Mr B] is a [nationality deleted]-Australian and he said that while he has to hide his sexuality from his family, he has no problems with broader society. The applicant, however, had to hide his sexuality from everyone in his country, and is at risk of being killed there because of his sexual orientation. [Mr B] said that the applicant had told him about his early sexual experiences which were very similar to his own. He said that he is sure the applicant is gay because when they first met, [Mr A] was "all over him", kissing him passionately. He said that [Mr A] seemed very strange, and appeared to think that [Mr B] was trying to take the applicant away from him. He said that it would be one thing for a straight person to be at [venue deleted], but a straight person would never hook up with a man in the way the applicant did with [Mr A]. Asked if he knew why the applicant and [Mr A] had broken up, he said that he believes it was because [Mr A] was an alcoholic and drug user.

FINDINGS AND REASONS

27. Having seen his Egyptian passport, I accept that the applicant is a national of Egypt and his claims to refugee status will be assessed against Egypt, as his country of nationality. There is no evidence before me to suggest that he has the right to enter and reside in any other country.
28. While initially I had doubts about the applicant's credibility, I have concluded that his account should be accepted. I find that the applicant is a homosexual and that he has a well-founded fear of persecution in Egypt as a member of a particular social group, homosexuals.
29. I do not agree with the delegate's conclusions, which as noted above were partly based on inconsistencies between the evidence of the applicant and his claimed partner, [Mr A]. The delegate interviewed [Mr A] in English. When I listened to the recording of the interview it was apparent, in my view, that [Mr A]'s English was very poor, and I do not consider it appropriate to rely on perceived inadequacies in that evidence. Further, unlike the delegate I consider that [Mr A] in fact displayed a reasonable knowledge of the applicant's family and background. He stated that the applicant had [siblings] (in fact, he is one of [the siblings]), but given the language problem and the minor nature of this inconsistency, I consider it

insignificant). He knew that one sibling lived in [another country] (which is correct), and stated that another lived in Cairo (in fact, he lives in [another city], but again, given the minor nature of this detail I do not consider this inconsistency to be significant). [Mr A]'s evidence was inconsistent with the applicant's as to when he took him to the migration agent and he proffered two explanations, one that he was not interested enough in the applicant at the time to remember, and the other that he drank too much and could not remember things. Again, I consider that both explanations are reasonable. The applicant provided further evidence at the hearing about [Mr A]'s substance abuse issues, and this was confirmed by the witness.

30. As to the applicant's lack of knowledge of gay magazines, movies, websites, networks or support groups in Egypt, again I disagree with the delegate's conclusion. In my view, such knowledge could be expected of a person who had developed a gay consciousness, but the applicant does not claim to be such a person. On the contrary, he has consistently claimed that he spent much of his life in Egypt trying to deny, and when that was not possible, hide his sexual identity.
31. Although I had concerns about discrepancies in the applicant's claims as presented in his application and at the hearing, I am not satisfied that these are the result of the applicant's untruthfulness rather than mistakes made in the completion of the form. This is because it is evident that a significant error was made in relation to the date when the applicant obtained his [qualification], a matter not directly relevant to his claim and about which there would be no point in lying. This indicates to me that the application was not completed with proper attention to accuracy, and in these circumstances it is difficult to rely on discrepancies as evidence of the applicant's lack of truthfulness, although it is evident that he himself took insufficient care to check that the information contained in the document was correct. In these circumstances, however, while I am concerned about the apparent discrepancies in the dates provided at various times for the murder of the gay man in the neighbouring village and the applicant's contact with the police, I do not consider that these discrepancies mean that the applicant's essential claims can be rejected.
32. Of greater concern is my belief the applicant was not truthful when he claimed in the application that he accessed gay websites on the internet in Egypt. When asked about his at the hearing, he at first denied having done so with some surprise, indicating that he was unaware that this claim had been made. His subsequent evidence about the issue was vague, inconsistent, illogical, and appeared to have been made up. It may be that the claim was made on the advice of his adviser and the applicant felt obliged to maintain it. Even so, I do not consider that this is a sufficient basis on which to find that the applicant's entire account is untruthful, particularly having regard to the overall degree of consistency in relation to major claims, and to the corroborative evidence provided by [Mr B] and the applicant's housemate.
33. I accept that the applicant is homosexual, that he engaged in homosexual relationships with men in Egypt while in his first year at university, and during the three years prior to his departure. I also accept that he has engaged in same sex relationships in Australia, that he will continue to do so and that he hopes to establish a long term relationship. I accept that if he returns to Egypt he would wish to, and would engage in same sex relationships.
34. There is abundant evidence before the Tribunal which indicates that homosexual men face significant abuses in Egypt¹. I find, on the basis of the country information, that gay men are

¹ Human Rights Watch 2004, *In a Time of Torture: The Assault on Justice in Egypt's Crackdown on Homosexual Conduct*; Lipson, J. 2007, 'Human Rights in Egypt: The Gap between Policy and Practice', Swords

targeted by the authorities and mistreated throughout Egypt because homosexuality is unacceptable to the majority of Egyptians on religious and cultural grounds. While there is a gay community in Egypt which includes activists and advocacy groups this does not, in my view, indicate any significant degree of acceptance of a homosexual lifestyle for Egyptian men, or indicate that they can socialise or conduct relationships openly and safely without facing a real chance of harm. Both the applicant's evidence and the country information indicate that any public manifestation of homosexuality is extremely dangerous.

35. I accept that the applicant participated in a number of homosexual relationships in Egypt, both casual and long term, which had to be conducted with caution and in fear. While the applicant has been able to exist in Egypt without experiencing significant harm from private individuals or the authorities because of his sexuality, I find that he has been able to do so only by conducting himself with discretion. I find that he has lived in an oppressive atmosphere where he was afraid that his sexuality would be discovered with extremely adverse consequences. I find that if the applicant were to return to Egypt, he would need to continue to modify his behaviour in order to conceal or suppress his sexual orientation so as to avoid harm. I find that such a restriction on his capacity to express his sexuality would be a form of persecution in itself; moreover, I find that even if a person were to act with extreme discretion there remains a real risk that he would be suspected of being or identified as a homosexual, and subjected to serious harm amounting to persecution.
36. Based on the country information I find that the harm to which homosexual men are subjected by the authorities in Egypt, including imprisonment and torture, is sufficiently serious to constitute persecution for Convention purposes. I am satisfied that there is a real chance that a person seeking to lead a homosexual lifestyle in Egypt would be subjected to such mistreatment. Because the likely perpetrators of the harm faced by the applicant are the state authorities, I am satisfied that the applicant would not be able to avoid the persecution he faces by relocating within Egypt, as the situation is likely to be similar everywhere. Nor would he be able to seek protection from the state authorities in the event that he suffered private harm at the hands of non-state actors. I find that the targeting of homosexuals by the authorities and the government in Egypt will continue for the reasonably foreseeable future.

& Ploughshares, Fall Issue, pp.19-20

<http://www1.sis.american.edu/students/sword/Human%20Rights%20in%20Egypt.pdf> – Accessed 26 August 2010; Amnesty International 2010, *Annual Report 2009*, p.132; Human Rights Watch 2009, *Together, Apart: Organizing around Sexual Orientation and Gender Identity Worldwide*, May, p15; Crary, D. 2011, 'Gays in Egypt, Tunisia worry about post-revolt era', *Associated Press*, 21 May; 'Interview by Dan Littauer with "IceQueer", an Egyptian gay blogger' 2011, *Gay Middle East*, 4 February; 'Egypt continues to torture gays' 2004, Rainbow Network, 1 March; 'Egypt's Muslim Brotherhood: "Homophobia is the solution"?' 2011, *Gay Middle East*, 4 May <http://www.gaymiddleeast.com/news/news%20298.htm> – Accessed 30 June 2011; The curious case of Egypt's first gay magazine, Eman el Shenawi, Friday, 24 August 2012, <http://english.alarabiya.net/articles/2012/08/24/233994.html>; Egypt's fading LGBT movement, Michael Luongo, Global Post, 9 March 2012, <http://www.gaystarnews.com/article/egypt-arrests-seven-men-running-alleged-gay-sex-%E2%80%98debauchery%E2%80%99-party-network011112>; Egypt arrests seven men for running alleged gay sex 'debauchery' party network, By Dan Littauer, 1 November 2012, www.gaystarnews.com/topics/Egypt, accessed 3 January 2012.

37. It is well-recognised that homosexuals can constitute a particular social group for the purposes of the Convention². Based on the country information set out above I find that homosexuals in Egypt are identifiable by the common characteristic of their sexual orientation, which characteristic is not a shared fear of persecution, and which sets them apart from society at large. It is the reason for the discrimination and other forms of mistreatment to which they are subjected. I therefore find that homosexuals in Egypt constitute a particular social group, and that the essential and significant reason for which the applicant faces persecution in Egypt is his membership of that particular social group. He therefore satisfies the requirements of s.91R(1)(a). As discussed above, I find that there is a real chance that the applicant will be subjected to serious harm involving systematic and discriminatory conduct, which is persecution. He therefore satisfies s.91R(1)(b) and (c).
38. I am satisfied that the applicant is a person in respect of whom Australia has protection obligations under the Refugees Convention. Therefore the applicant satisfies the criterion set out in s.36(2)(a).

DECISION

39. The Tribunal remits the matter for reconsideration with the direction that the applicant satisfies s.36(2)(a) of the Migration Act.

R Mathlin
Member

²See, for example, *Appellant S395/2002 v MIMA* and *Appellant S396/2002 v MIMA* (2003) 216 CLR 473 at [55] per McHugh and Kirby JJ, [65] per Gummow and Hayne JJ.