

**0905785 [2010] RRTA 150 (7 March 2010)**

**DECISION RECORD**

<b>RRT CASE NUMBER:</b>	0905785
<b>DIAC REFERENCE(S):</b>	CLF2009/47084
<b>COUNTRY OF REFERENCE:</b>	India
<b>TRIBUNAL MEMBER:</b>	Sue Crosdale
<b>DATE:</b>	7 March 2010
<b>PLACE OF DECISION:</b>	Sydney
<b>DECISION:</b>	The Tribunal remits the matter for reconsideration with the direction that the applicant satisfies s.36(2)(a) of the Migration Act, being a person to whom Australia has protection obligations under the Refugees Convention.

## **STATEMENT OF DECISION AND REASONS**

### **APPLICATION FOR REVIEW**

1. This is an application for review of a decision made by a delegate of the Minister for Immigration and Citizenship to refuse to grant the applicant a Protection (Class XA) visa under s.65 of the *Migration Act 1958* (the Act).
2. The applicant, who claims to be a citizen of India, arrived in Australia [in] February 2009 and applied to the Department of Immigration and Citizenship for a Protection (Class XA) visa [in] April 2009. The delegate decided to refuse to grant the visa [in] July 2009 and notified the applicant of the decision and his review rights by letter dated [in] July 2009.
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] July 2009 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 CLF2009/47084 relating to the applicant. The Tribunal also has had regard to the material referred to in the delegate's decision, and other material available to it from a range of sources.
20. The applicant appeared before the Tribunal [in] September 2009 to give evidence and present arguments. The Tribunal hearing was conducted with the assistance of an interpreter in the Hindi and English languages.
21. The applicant was represented by his registered migration agent. The applicant's representative did not attend the hearing.

### **Protection Visa Application**

22. According to the applicant's protection visa application he is a citizen of India. He said he was born in [Town 1] in [year deleted: s.431(2)]. He said she had undertaken thirteen years of schooling. The applicant said he had lived in New Dehli from January 2009 to January 2009. He said he worked as an embroiderer at [Company 1] and [in] New Dehli from June 1997 until December 2002, from July 2003 to February 2004 he was unemployed and from November 2007 until January 2009 he was self-employed.
23. The applicant said he entered Australia on an Indian passport [in] February 2009.
24. The applicant set out his refugee claims in his protection visa application and his statutory declaration provided with his protection visa application and they may be summarised as follows :
  - He said he was an Indian citizen by birth and was born in [year deleted: s.431(2)] in New Delhi in a Muslim family.
  - He said his family was very conservative and performed religious rituals very strictly. He said his family consists of his parents, one brother and one sister.
  - He said he was a garment designer and embroiderer by profession and had been employed by [Company 1] and Embroiderer, [Company 2] and [Company 3] and later he started his own business.
  - The applicant said that during his employment with [Company 2] and [Company 3], [Mr A], an employee of this organisation was responsible for providing his training and also supervised his work.
  - During the course of his employment he said that [Mr A] helped him and shared his problems with him. The applicant said they became close and one day [Mr A]

proposed to be his friend and the applicant said he did not refuse his proposal. The applicant said their relationship turned into loving each other.

- The applicant said their relationship started in August 2006 and as time went on their relationship became a homosexual relationship and it was not known to anyone.
- The applicant said that although they were living separately they would spend some time every day after work together.
- The applicant said he decided to start his own business in November 2007 after [Company 2] and [Company 3] moved to [Town 2] and [Mr A] joined him in his factory. The applicant said they happily continued their relationship
- The applicant said in June 2008 they decided to live together and lived in the factory premises from the end June 2008. He said he informed his family that he stayed in the factory to cope with his extra work
- He said one of his employees came to know about their homosexual relationship and he mentioned it within the community and as a result the local people and his family members came to know about their relationship.
- He said his father felt offended and a homosexual relationship was not accepted in Indian society, his religion and the legal system. He said his father found their relationship disgraceful and said it was impacting on the respect of his family in society. The applicant said his father was questioned by religious and social leaders.
- The applicant said his father advised him to cut off all relationship with [Mr A] and get married. The applicant said he refused his father's proposal as it was beyond his thinking to start marital life with a woman. He said he and [Mr A] had decided to live together and maintain their relationship for the rest of their lives. The applicant said they warned [Mr A] to leave him and to leave the area.
- The applicant said on 9 July 2008 his father and brother came to his factory with a few other people and physically assaulted [Mr A], closed his factory premises and forcibly took him home. He said they beat him mercilessly and his mother tried to protect him from their atrocities. The applicant said his mother was hurt and he was severely injured and his father took him to the local doctor for treatment
- The applicant said it was difficult for him to come out of his home and everyone was teasing him about his relationship. He said he was branded as gay and was singled out in the society. He said he was disowned by his family members and the members of the community and was hated by the community people. The applicant said the religious leaders were also acting against him.
- He said it became difficult for him to lead my life with dignity and he became a victim of harassment, discrimination and persecution.
- He said he became very frustrated, suffered from mental issues, no-one supported him and [Mr A] had disappeared in fear of his family members.

- He said he had no option but to discontinue his business and he sold his business in the middle [of] 2008.
- The applicant said he experienced persecution including physical violence because of his relationship with a person of the same sex prior to departing India.
- He said it was not possible for him to live in his area as a homosexual relationship was not accepted anywhere in India and the authority would not protect him as his relationship was not accepted by Indian common law. The applicant said homosexuals were always discriminated, harassed and deprived of their rights as a citizen of India.
- The applicant said he decided to leave India and he contacted one of his friends, [Mr B], who had been working in a travel agency, and told him of his grievances and his intention to leave India for the safety of his life, to continue his relationship and to lead his life with dignity and freedom.
- The applicant said in September 2008 [Mr B] organised visas for him to travel to Singapore and Malaysia and he refused to go to these countries and requested he arrange a visa for him where he should be able to manage his life safely and continue his relationship without any hindrance.
- He said [Mr B] was successful to arrange an Australian visa for him. He said his visa was granted [in] February 2009 and he left India on 26 February 2009. He said he arrived in Australia [the following day]
- He said he has suffered from a “great shock” as a result of his separation from [Mr A] and he was genuinely fearful to return to India for the safety of his life and he had no future in India. He said he would be persecuted if he returned to India.

### **Department Interview**

25. At the interview the applicant said he did not want to return to India as he feared being harmed because he was homosexual. The delegate put to the applicant that he made no mention in his application for a visitor visa that he wanted to come to Australia because he was a homosexual who feared persecution in India. The applicant said he paid an intermediary to obtain a visa for Australia and he did not know anything about this visa application although he admitted that he signed the visitor visa application form and he was involved in the provision of bank records that were submitted in support of his application for a visitor visa.
26. The delegate noted that the applicant in his application for a visitor visa said he had been working as a Manager for [Company 4] for more than 2 years and this information was inconsistent with his claims in his protection visa application that he was self employed in the clothing industry and he was forced to sell his business [in] 2008 after his homosexuality became known to family members and other people in his local community. The applicant said he did not work as a Manager for [Company 4] and he knew nothing about the employment records submitted in support of his application for a visitor visa.
27. The delegate put to the applicant that he had submitted banking records in support of his application for a visitor visa and these records appeared to be inconsistent with claims he

made in support of his application for a protection visa that he was not working and he had no source of income after selling his business [in] 2008. The applicant said he had never seen these banking records but the intermediary who helped him apply for a visitor visa informed him to open an account so that banking transactions could be recorded.

### **Delegate's Decision**

28. The delegate found that there were significant inconsistencies in the information provided in the applicant's visitor visa application and his protection visa application and he was not satisfied that the applicant had adequately accounted for these inconsistencies. The delegate found that the applicant's claim in his protection visa application that he was not working and he had no source of income from [mid] 2008 onwards was contradicted by information provided in his visitor visa application which said that the applicant worked as a Manager for [Company 4] prior to the date he applied for a visitor visa.
29. The delegate said that the applicant, in his protection visa application, said he was mercilessly beaten by members of his family when they discovered he was homosexual and this did not sit comfortably with statements made by the applicant at the Departmental interview that his family helped him come to Australia.
30. The delegate was also not satisfied that the applicant was seriously harmed in India because he was homosexual and that the applicant genuinely feared being persecuted for being homosexual if he returned to India. Accordingly, the delegate was not satisfied that the applicant had a well-founded fear of being persecuted within the reasonably foreseeable future if he returned to India and was not satisfied that the applicant was a person in respect of whom Australia had protection obligations.

### **Tribunal Hearing**

31. Following the Tribunal's explanation of the definition of a refugee, the applicant said he was a victim and he fell within the definition of a Refugee.
32. The applicant said he obtained his passport in 2005. He said [Mr B] arranged for him to obtain a visitor visa in Dehli [in] February 2009. The applicant said he had not travelled outside of India other than to travel to Australia. The applicant said he informed his agent that he could send him to any country where people would accept "people like him". The applicant said the agent advised him to go to Singapore and Malaysia but he obtained information that "people like him" were not accepted in Singapore and Malaysia so he decided not to travel to these places.
33. The Tribunal asked the applicant when he applied for his protection visa. The applicant said he applied for his protection visa a week before his visitor visa expired. The Tribunal asked the applicant why he travelled to Australia. The applicant said he came to Australia with the intention to stay and settle because he was aware that "people like him" would be accepted and could stay in Australia. He said it was not until after he arrived in Australia that he became aware he would need to apply for a protection visa.
34. The Tribunal asked the applicant who assisted him in completing his protection visa application. The applicant said some of his roommates gave him a name, [Mr C]. The Tribunal asked the applicant how his story was recorded. The applicant said he told [Mr C] and [Mr C] wrote it down. He said [Mr C] read the application back to him. The Tribunal noted that he had attached a Statutory Declaration to his application and asked the applicant

whether it was read back to him as well. The applicant said it was not read back to him and [Mr C] only asked him to sign it. The applicant said [Mr C] told him one or two sentences and he said it was his story. The Tribunal asked the applicant whether everything in his application and Statutory Declaration was true in every respect. The applicant said it was. The Tribunal asked the applicant whether there was anything he wished to add to his application. The applicant said there was nothing he wished to add.

35. The Tribunal asked the applicant about his present claims for refugee status. The applicant said his situation was not accepted in India. The Tribunal asked the applicant about this "situation". After a pause, the applicant said he had had a homosexual relationship. The Tribunal asked the applicant what he thought would happen to him because he had been involved in a homosexual relationship. The applicant said "people like him" were not accepted in Indian society and they were not respected. The Tribunal asked what he thought would happen to him if he returned to India. The applicant said he was attacked and he believed it would happen again. The Tribunal asked the applicant who would do that to him. The applicant said Indian society and the Indian people. He said the thinking of people was not good. The Tribunal asked the applicant whether there was any other reason he feared persecution. The applicant said there was no other reason.
36. The applicant said he was born in New Delhi. He said he completed schooling to Year 12. The Tribunal asked the applicant whether he had done any other study. He said he had completed a computer course and he did that when he was in Year 12. The applicant said he studied software and office in his computer studies. The Tribunal asked the applicant whether he had undertaken any other computer studies. The applicant said he did a computer course that was related to his work and it was a computer design course. He said he did that in 2003. The applicant confirmed it was the Garment Pattern Designer Cutting course. The applicant said he completed another course and that was in pattern making. He said he also did that in 2003.
37. The Tribunal noted that in his application for a protection visa he said he did hand embroidery and pattern design. The applicant said that was not a course but in fact it was his work. The Tribunal noted that his response to Question 38 where he was asked to give details of University, trade or similar qualifications he had obtained, he identified the Garment Pattern Designer course in 2003. The applicant said that the garment making was not a course, it was his work. The applicant said he did not know why the hand embroidery and design in 1998 was included because it was not a course, it was his work. The Tribunal noted that his application stated he did embroidery work but the difficulty the Tribunal had was not only did the applicant say he worked in embroidery, his application also said that he had completed an embroidery course. The applicant said he did not know why and he did not study that. He said he did computer studies and pattern design. He said that was some sort of training in his work. The Tribunal noted that it would need to consider that explanation because it does go to his credibility. The applicant said he did not provide that type of information and said that he was doing work and that was one type of workshop in a factory and that was part of his work.
38. The Tribunal asked the applicant where he was living prior to coming to Australia. The applicant said New Delhi. He said he lived with his family and prior to coming to Australia he had established a factory and he used to live there. The Tribunal asked the applicant who else was living in the house. He said his brother, two sisters and his parents lived at the house.



39. The Tribunal asked the applicant when he commenced working. The applicant said he started work after finishing his studies in 1997. He said he commenced work at [Company 1] in New Delhi. The applicant said he made designs and did some hand embroidery. The applicant said he had no experience when he commenced work in 1997 and he was given on-the-job training. He said he remained with this employer until the end of 2002. The applicant said he was not earning sufficient so he decided in 2003 to undertake the Garment Pattern Designer course. The applicant said he obtained a job in 2004 in [Company 2], New Delhi and he was the assistant of the pattern master. He said he stayed with this employer until 2007.
40. The applicant said next he commenced his own hand embroidery work. The Tribunal asked the applicant why he decided to leave his previous work and commence his own business. The applicant said the tailor moved his business and it was too far for him. The applicant said he started his own business and [Mr A] worked for him. He said initially he had only two employees. The applicant said gradually he expanded the business and he bought some machines. He said [Mr A] handled the machines. He said he had 10-12 machines. He said the premises were rented. The applicant said he knew the owner and it was close to his house.
41. The Tribunal asked the applicant how long he had had his own business. The applicant said it was [in] 2008. The applicant said when the people came to know about him he had to sell his business and he was moved here and there and working casually. The applicant said whenever people came to know about his situation he was picked out. He said he was working in some other smaller factories and he worked in 2-3 factories.
42. The Tribunal asked the applicant whether he had difficulty obtaining work at any of the factories. The applicant said there was no problem in searching for work but when they came to know it was very difficult to remain there. The applicant said he did a little bit of work up until 2009. The Tribunal asked the applicant what he did after January 2009 until he travelled to Australia. The applicant said he did not work anywhere as he was trying to search out some options to leave. The applicant said it was very difficult to stay at home. The Tribunal asked why it was difficult to stay at home. The applicant said his neighbours and the other people of society were harassing his parents.
43. The Tribunal asked the applicant whether his parents had any objections to him living at home. The applicant said they did not do anything directly but indirectly he came to know they wanted him to leave all his bad habits but it was not possible for him because he was addicted.
44. The Tribunal asked the applicant who made the decision for him to leave India. He said it was his own decision. He said the situation was getting worse day by day and he decided to leave India and he said his family members were happy with that decision. The applicant said he could not say happy and he could at least say they were comfortable that he was leaving the place.
45. The Tribunal asked the applicant why he stated in his visitor visa application that he was employed by [Company 4] as an IT Manager for two and a half years prior to him applying for his visitor visa. The applicant said he had not provided any information regarding that to his agent. He said he gave his passport to his agent and he was asked to sign some cheques and he did that and he did not do anything else. The Tribunal asked the applicant about the cheques. The applicant said the cheques were about operating a bank account and he had to

make some transactions. The applicant said account was managed by his agent and his agent opened the account and the agent obtained his signature. He said the agent managed this account and took his signature on some cheques.

46. The Tribunal asked the applicant about his employment as an IT Manager. He said he did not know anything about it. The Tribunal asked the applicant whether he signed his application for a visitor visa. The applicant said he signed the application. The Tribunal said it would need to consider the inconsistencies in relation to his employment it went to his credibility.
47. The Tribunal asked the applicant when he last contacted India. He said he called his brother about 2-3 months ago. The Tribunal asked the applicant what he and his brother discussed. He said he asked his brother that if he did not get a visa to stay in Australia would his family accept him if he returned to India. The applicant said his brother said there was no relationship with his family and they asked him to stay in Australia. The applicant said his brother demanded money as his brother said they had given him money.
48. The Tribunal noted the applicant said he feared persecution because he had a homosexual relationship and asked the applicant when he realised he had a sexual preference for men. The applicant said it was not like that and he had a habit. The applicant said he used to work at the tailor's and his pattern master was his good friend. He said they had a good relationship. He said the pattern master was his good friend and that relationship turned into another relationship.
49. The Tribunal asked the applicant when his sexual relationship started. The applicant said it was in 2006. The applicant said he and [Mr A] were friends and they had a habit and they started living together in his factory. The Tribunal asked when their relationship commenced in 2006. The applicant said maybe it was in June or July.
50. The Tribunal asked the applicant about this relationship. The Tribunal noted that the applicant said [Mr A] was his supervisor and the Tribunal asked the applicant how their relationship developed. The applicant said they worked together all day in the factory and in the evening he would go to [Mr A]'s home. The Tribunal asked the applicant whether he would go to [Mr A]'s home every day after work. The applicant said most days. The Tribunal asked the applicant what they would do. There was a long pause. The Tribunal asked the applicant how long he stayed at [Mr A]'s home. He said he stayed one or two hours. The Tribunal asked the applicant what he did during that time. The applicant said they would pass time with each other and sometimes they had sex. The Tribunal asked the applicant whether they went out together. He said they did go out together. The Tribunal asked where they would go. He said they went to a lot of places in Delhi. He said they went to some parks and some other places. The Tribunal asked about these places. The applicant said there were some forts. The applicant said when people came to know, particularly his father and his brother, they came to his factory and beat [Mr A] and told the applicant to close his factory. The Tribunal asked when that happened. The applicant said about July 2008.
51. The Tribunal asked the applicant when he and [Mr A] decided to live together. The applicant said they started to live together after he had started his factory. He said they began working together and after some time they decided to live together. He said they worked together for 6-7 months and then they decided to stay at the factory.

52. The Tribunal asked the applicant when he started the factory. He said when [Company 2] moved at the end of 2007 and they began to live at the factory end June 2008. The Tribunal asked the applicant what happened then. The applicant said it was very difficult for them to live together. He said some of his employees came to know about their relationship and started telling other people. The Tribunal asked how they came to know about the relationship. The applicant said they had seen them. The applicant said it was their fault. He said they had a lot of work, they used to work overnight and the boys were working at night in the factory. The applicant said the boys came to know and began to tell other people. The applicant said his family members came to know. He said his neighbours and other people in society came to know. He said his family wanted him to stop everything. The Tribunal asked the applicant what he did when his family warned him. The applicant said initially he did not say anything but it was very difficult for him to leave his habit.
53. The applicant said his father instructed him to close the factory and he did. He said his father kicked out [Mr A] when he came to know. The Tribunal asked the applicant when [Mr A] was assaulted. The applicant said it was when he was caught and when his father told him to close the factory. The Tribunal asked the applicant how his father could tell him to close the factory. The applicant said he was very angry about the situation and some community people and neighbours wanted the factory closed. The applicant said people opposed the factory because of his relationship with [Mr A] and believed that by closing the factory everything would stop. The Tribunal asked why he could not continue the factory. The applicant said it was not possible to continue because people were very strongly opposed to the factory.
54. The applicant said he was attacked by his family members and community people. The Tribunal asked which of his family members attacked him. The applicant said his father and brother did not beat him, they just wanted him to stop everything and other people were there and badly assaulted him. He said his mother tried to save him. The applicant said his neighbours and family members beat him. The Tribunal asked whether this included his father and his brother and the applicant said it did. The Tribunal noted he had said his mother tried to help him and asked whether anything happened to his mother. The applicant said his mother obtained an injury. The Tribunal asked the applicant whether anyone required treatment for their injuries. The applicant said he had to visit his local doctor. He said his head was bleeding and his father took him to the doctor.
55. The Tribunal asked the applicant what happened after that. The applicant said he stayed at home and it was difficult to go out because of people. The Tribunal asked why that was the situation. He said he was so scared by these people and he was attacked and beaten by them. He said they broke the glass windows at his home. The Tribunal asked the applicant how his parents and other family members felt about him. The applicant said they were disturbed and were hoping that something would happen and he would leave these bad habits. The applicant said he was addicted and could not leave and stop these things. The applicant said he was told to leave the home. The applicant said he came to Australia. The Tribunal asked the applicant whether he was disowned by his family. The applicant said his family told him to leave the place. The Tribunal asked the applicant whether he stayed with his family from July 2008 until he left to come to Australia. The applicant said he did. The applicant said he used to hide himself from people so that his people could not see him.
56. The Tribunal asked the applicant whether he was seeing anyone else or whether he had been involved with anyone else of the same sex. The applicant said he had not. The applicant said it was a habit. The Tribunal noted the applicant said it was a habit and he was addicted with

people of the same sex and he had not had a relationship with someone of the same sex since July 2008 and asked whether that was correct. He said that was true. The Tribunal asked why that was the situation. He said there were some other options. The Tribunal asked the applicant about these other options. The applicant said he could not answer this question. There was a period of silence. The applicant asked the Tribunal not to ask this question.

57. The Tribunal asked the applicant whether he socialised with homosexuals after July 2008. The applicant said he did in Australia. The Tribunal noted that the applicant said he had an addiction and a habit for someone of the same sex and asked what he did and what activities he was involved in when he was in India. The applicant said he was too scared of people and it was difficult to go to any place. The applicant said he used other means to obtain enjoyment. The Tribunal asked the applicant about that. The applicant said he did not wish to talk about that.
58. The Tribunal asked the applicant whether he knew any other homosexuals in India. The applicant said no. The Tribunal asked the applicant whether he sought the company of homosexuals. The applicant said no. The Tribunal asked the applicant why he did not seek the company of homosexuals. The applicant said he was scared of people and it was difficult to go to any place. He said he was enjoying it by other means. The Tribunal again asked the applicant whether he wanted to talk about his gaining enjoyment by other means. The applicant said he did not. The applicant said society was so reluctant about homosexuality and people behaved very badly with him. He said there was no chance to ask anyone about it.
59. The Tribunal asked the applicant whether he had access to the internet in India. The applicant said he did not. The Tribunal asked the applicant whether he knew of any health risks associated with homosexuality. The applicant said he did not have enough knowledge about it. He said he just was addicted and he did not know anything else. The Tribunal asked the applicant whether he had heard of HIV or AIDS. The applicant said he was aware of safe sex. The Tribunal asked the applicant what that meant to him. He said some things are there that can be used to help with safe sex, like condoms. The applicant said he used condoms.
60. The Tribunal asked the applicant whether he was involved in any activities that involved homosexuals. The applicant said no. The Tribunal asked the applicant whether he had been involved in any marches or any other activities. The applicant said he had not seen anything in India. The Tribunal asked the applicant about the discrimination he suffered in India. The applicant said people would abuse him, they would not talk to him properly and they used to make comments about him. He said it was very difficult for him to live there. The Tribunal put to the applicant that it would need to assess whether he would suffer persecution as a homosexual if he was to return to India now or in the reasonably foreseeable future. The Tribunal noted that he had said that people abused him and did not talk to him properly but it said it was having difficulty accepting that such discrimination would amount to serious harm that it would be considered persecution. The applicant said it was very difficult for a person to stay and live somewhere and there was no respect for him. The applicant said people always made comments about him and no-one could stay in such an environment. The applicant said the harassment was not by one or two persons but it was the whole society and the whole country did not accept his situation.
61. The Tribunal asked the applicant whether he had heard about any of the recent developments that have occurred in New Delhi following the High Court decision. The applicant said after

coming here he had heard about it. The applicant said he had heard about it and there was a change to some law. The applicant said if there was any change and he was accepted by the society with respect, he would be happy to return. The applicant said it was the main question of society and society would not accept a homosexual relationship because their mind was set.

62. The Tribunal noted the Executive Director and founder of the Naz Foundation said in the *New York Times* that since Section 377 changed there has been some acceptance of the High Court of Delhi's decision. The applicant said society would never accept homosexuality and he had to live in the society. The applicant said he had not seen homosexual couples moving about openly in India. He said the acceptance of people was impossible.
63. The Tribunal identified a report from the *Thaindian News*, dated 28 June 2009 which provided details of the second Pride Gay March that was held in Delhi. The Tribunal noted that it took place on 27 July and 600 or 700 people attended. The Tribunal said it was reported that that some people kept their faces behind masks but other people flaunted themselves. One of the participants said it felt so good to be able to walk the streets freely without having people looking down on them. The applicant said he did not know anything about it and had not heard about it. The applicant said he suffered very badly and it was very difficult for him.
64. The Tribunal accepted that there was some discrimination against homosexuals in India but what it needed to consider was whether the discrimination was such that it would result in persecution because of his membership of a particular social group. The Tribunal said it had referred to some country information that would suggest that if there was some discrimination it would not be such as to amount to persecution. The Tribunal said that it might accept that there was some discrimination in India but it needed to assess whether the discrimination was such as to amount to persecution because of his membership of a particular social group. The Tribunal said it might prefer to accept the independent country information that would suggest that if there was some discrimination it would not amount to persecution if he was to return to India now or in the reasonably foreseeable future.
65. The Tribunal noted that the applicant said a homosexual relationship was against his religion and asked how he reconciled that. The applicant said that was true. He said that was an important reason why he would be attacked.
66. The Tribunal asked the applicant about his activities in Australia and said that if the Tribunal found that the applicant had engaged in conduct in Australia to strengthen his claim to be a refugee it must disregard that conduct. The Tribunal asked the applicant whether he had been involved in any homosexual relationships or other activities since he had been in Australia. The applicant said he met some people. He said sometimes he met people at a train station and he would just have a chat and nothing else. The Tribunal asked the applicant whether he had been involved in any homosexual relationships after his relationship with [Mr A]. He said he had not had any relationship with any other man since [Mr A]. The Tribunal asked the applicant why that was the case. The applicant said after that incident he was so scared and mentally upset he did not take any interest in anything. He said he was not happy because of what had happened to him in India. The applicant said he was still scared because if he was not accepted to Australia and he had to return to India his life would be finished. The Tribunal noted the applicant had said he was addicted and had a habit regarding his homosexuality and asked why he had not been involved in any relationship in Australia. The applicant said, as he had said earlier, there were some other options. The Tribunal asked the

applicant whether he was going to mention these other options. After a pause the Tribunal again asked the applicant whether he wished to say anything about these options. The applicant said no, please do not ask me.

67. The Tribunal asked the applicant whether he knew any gay people in Australia. The applicant said some people had informed him about gay clubs in Sydney. The Tribunal asked the applicant whether he was aware of any gay and lesbian groups or organisations in Australia. The applicant said he was aware of a Christian church that belonged to gay people. The Tribunal asked the applicant whether there was any other reason he had not involved himself in activities with other gay people. The applicant said he was still scared and he did not know what would happen to him. He said if he was sent back to India that would be very difficult for him.

## **Background**

68. The USDOS human rights report provided the following information on the situation of homosexuals in India generally:

The law punishes acts of sodomy and bestiality; however, the law was often used to target, harass, and punish lesbian, gay, bisexual, and transgender persons. Gays and lesbians faced discrimination in all areas of society, including family, work, and education. Activists reported that in most cases, homosexuals who did not hide their orientation were fired from their jobs. Homosexuals also faced physical attacks, rape, and blackmail. Police committed crimes against homosexuals and used the threat of arrest to coerce victims into not reporting the incidents (US Department of State 2009, *Country Reports on Human Rights Practices for 2008 – India*, 25 February, Section 5)

69. A report from the *New York Times*, dated 3 July 2009, states that “New Delhi’s highest court decriminalised homosexuality” in its decision of 2 July 2009, but that this ruling only applied to the National Capital Territory of Delhi. The report quoted “lawyers and advocates” who claimed that “it is likely to force India’s government either to appeal the decision to the Supreme Court, or change the law nationwide”. The report also noted that “India’s society is generally unwelcoming of homosexuality except in the most cosmopolitan circles”, and that “the decision was condemned from many corners in India”; the report concluded that “some say the next step is a change in the way that society views gay people”

([http://www.nytimes.com/2009/07/03/world/asia/03india.html?\\_r=2](http://www.nytimes.com/2009/07/03/world/asia/03india.html?_r=2) – Accessed 28 August 2009)

70. The International Gay and Lesbian Human Rights Commission (IGLHRC) website noted on 27 July 2009 that if the Supreme Court had decided to issue an interim stay on the Delhi High Court judgment, it would have “suspended the new interpretation of 377 until the Supreme Court decided the case on appeal or the central government changed the law”. This report also provided background information on the Delhi High Court case filed by the Naz Foundation in 2001, which led to the July 2009 decision, and cites some of the “benefits from the recent decision to decriminalise homosexuality”. The IGLHRC report cautions that “there is some worry of negative repercussions since a favourable judgment will not end homophobia and its devastating effects on the lives of LGBT people in India”, and “that the disappearance of Section 377 will not make a significant difference in the daily lives of vernacular (non-English speaking) youth, economically disempowered people, or non-heteronormative women”:

At the same time, there is some worry of negative repercussions since a favourable judgment will not end homophobia and its devastating effects on the lives of LGBT people in India.

One concern is the possibility of organised and social backlash against LGBT people as their issues and identities are made more public and prominent in mainstream media and could potentially increase family and community surveillance and violence. Some activists say there is an even greater urgency now for safe houses, particularly for young lesbians, bisexual women, and non-gender conforming men and women. There is also some criticism that the disappearance of Section 377 will not make a significant difference in the daily lives of vernacular (non-English speaking) youth, economically disempowered people, or non-heteronormative women facing forced marriages, forced confinement by the family, and forced separation from same sex partners because these issues are grounded in denial of autonomy and dignity for non-conforming sexuality, gender identity or expression.

Despite these concerns, the overwhelming feeling among most activists is that the positive verdict in Delhi has tremendous symbolic value and could lead to more public debate, more challenges to other repressive morality laws, and increased support for social change in India ('India: Section 377 and Naz Foundation (India) Trust v. Government of NCT Delhi' 2009, International Gay and Lesbian Human Rights Commission website, 27 July <http://www.iglhrc.org/cgi-bin/iowa/article/takeaction/resourcecenter/930.html> – Accessed 28 August 2009)

71. On 3 July 2009, *Inter Press Service* reported on the reactions of Muslim, Catholic and Hindu leaders to the Delhi High Court ruling:

As soon as the Delhi HC ruling was in the public domain, sections of Muslim religious leadership, Catholic Church and Hindu conservatives came out strongly against the decision.

Rev. Babu Joseph, a spokesman for the Catholic Bishops Conference of India said the decision was “disappointing” but clarified that though homosexuals should not be treated as criminals, “we cannot afford to endorse homosexual behaviour as normal and socially acceptable.”

Even before the verdict came out, Jamiat-e-Ulema-e-Hind’s Maulana Mehmud Madani stated that “Homosexuality is Haram (prohibited) and an immoral act. It is unnatural. It is a punishable offence in Shariat. It is against the age old traditions and culture of India and of Islam.”

Some Hindu religious leaders also condemned it calling it “against Indian culture” (Biswas, R. 2009, ‘India’s Historic Gay Ruling’, *Inter Press Service*, 3 July <http://ipsnews.net/news.asp?idnews=47518> – Accessed 28 August 2009 ).

72. A 8 July 2009 article in *The Times of India*, sourced from the *Press Trust of India (PTI)*, reported that president of “The All-India Muslim Personal Law Board (AIMPLB)...said the court decision should be ‘condemned’ as it was “irreligious and unnatural”, and “will poison the Indian society”. He further claimed that “homosexuality was never accepted in the human history as it was ‘thought of as an extremely evil and criminal act’”:

The All-India Muslim Personal Law Board (AIMPLB) on Wednesday termed the Delhi High Court’s verdict decriminalising homosexual acts among consenting adults as “illegal, irreligious and unnatural” for the society.

AIMPLB president Maulana Rabe Hasani Nadvi said that the court’s decision was in favour of only a very small gay community.

Nadvi said the court decision should be “condemned” as it was “irreligious and unnatural” and added “we would not allow the western culture to be imposed upon the innocent Indian society.”

...“If legalised, these acts, which are contrary to religion, nature, morality and habits, will poison the Indian society,” he said.

Maulana claimed homosexuality was never accepted in the human history as it was “thought of as an extremely evil and criminal act” (‘Legalising homosexual acts is illegal and unnatural: Muslim law board’ 2009, *The Times of India*, (source: PTI), 8 July <http://timesofindia.indiatimes.com/NEWS/India/Legalising-homosexual-acts-is-illegal-and-unnatural-Muslim-law-board/articleshow/4753463.cms> – Accessed 31 August 2009)

73. *The Times of India*, a blog posting from 2 July 2009, suggests that, in the wake of the Delhi High Court decision, “the pressing issue that we now face, really, is how much of a change in attitude society – the heterosexual majority – will show towards a minority that has been persecuted by all sections, all classes, all religions, castes, faiths and political persuasions”. The article continues, claiming that: “More than the law, it is society has to give freedom to homosexuals”, and “that will take quite some time in coming”:

But the pressing issue that we now face, really, is how much of a change in attitude society – the heterosexual majority – will show towards a minority that has been persecuted by all sections, all classes, all religions, castes, faiths and political persuasions.

For, one may not anymore have to live under the fear of being dragged to a police station, to be beaten, abused and humiliated by cops, or face certain punishment if prosecuted, but one will still have to agonise about what the parents, siblings, neighbourhood aunties and uncles, friends and peers would say if someone decided to ‘come out’. The real freedom would eventually rest there – an acceptance by society. Because in all cultures, there is a law of the land and there is a more private, more insidious law of the people. It is this that shackles and fetters all those who are perceived to be different, followers not of the norm but aberration.

In India, as in so many Asian countries which are far behind Western nations in their approval and acceptance of homosexuality, parents marry off their sons and daughters to people of the opposite sex knowing fully well that their children won’t be happy, acutely aware that they will remain suffocated and trapped in an institution that will kill them a little every day.

Countless families continue to “treat” homosexuality, if not as a disease of the body than of the mind. They will take them to doctors, vairs, magicians, Bangali Babas, gurus, priests, maulvis and exorcists in the hope that the devil of homosexuality will either be medicated out or beaten away. If “treatment” fails, they try emotional blackmail. When that fails they try to hide it from the public eye. If that too fails they strike a deal that says their gay children can do what they want privately but publicly they should be seen as “normal” and married. When all else fails, there is the punishment of excommunication and banishment. Few, very few, will be at peace, confident and bold enough to give this real freedom to gay family members. Only a minuscule lot will be able to tell society that their children, kin, friends are gay and that they are okay with it.

More than the law, it is society has to give freedom to homosexuals. This is what we have to strive for from here on. And though that will take quite some time in coming, there is a new dawn waiting at the horizon for gays (Soondas, A. 2009, ‘Law has freed gays, now society has to’, *The Times of India*, 2 July <http://blogs.timesofindia.indiatimes.com/onefortheroad/entry/law-has-freed-gays-now> – Accessed 31 August 2009).

74. A report from *Thaindian News*, dated 28 June 2009, provides detail on the second gay pride march to be held in Delhi, which took place on 27 June, and “saw 600-700 people participate”. The also notes that:



Some hid their faces behind rainbow coloured masks but others flaunted their sexuality unabashedly. The second edition of Delhi's gay pride march was a riot of colours, and had the marchers dancing and shouting slogans in unison.

...Holding a massive rainbow coloured flag – symbolising the lesbian, gay, bisexual, transgender (LGBT) community – Ranjini, a transgender, said: “It feels so good to be able to walk the streets freely, without having people looking down upon me with a weird look. Yes, I am queer and I am proud of it.”

...The march, which saw 600-700 people participate, culminated at Jantar Mantar.

Similar pride marches took place in other metros as well ('Riot of colours at Delhi's second gay pride march' 2009, *Thaindian News*, 28 June

[http://www.thaindian.com/newsportal/health/riot-of-colours-at-delhis-second-gay-pride-march\\_100210676.html](http://www.thaindian.com/newsportal/health/riot-of-colours-at-delhis-second-gay-pride-march_100210676.html) – Accessed 31 August 2009)

## FINDINGS AND REASONS

75. The Tribunal has sighted the applicant's passport and accepts on the basis of this and his oral evidence that he is a national of India and no other country. The Tribunal also finds he is outside of his country of nationality. There is no evidence before the Tribunal to suggest that he has a legally enforceable right to enter and reside in any country other than his country of nationality.
76. The applicant fears persecution on the basis that he is homosexual and he will be persecuted both in Dehli and in other areas of India, if he were to return to India in the reasonably foreseeable future. He claims that because he is homosexual he has been beaten and has become a victim of harassment, discrimination and persecution. The applicant claims he will not be protected by the authorities in India.
77. The applicant's claims are based on the Convention ground of membership of a particular social group, namely homosexual men in India. Essentially, he claims to be homosexual and as a consequence he was harassed, abused, threatened and assaulted. The applicant fears further attacks and fears he will not be able to live a normal life as a homosexual in India.
78. In considering the relevant and material facts in this matter the Tribunal has assessed the credibility of the applicant. When assessing credibility, the Tribunal is mindful that it must be sensitive to the difficulties often faced by refugee applicants and should give the benefit of the doubt to those who are generally credible but unable to substantiate all of their claims. The Tribunal has not placed great emphasis on minor inconsistencies of fact which the Tribunal accepts can occur for a variety of reasons unconnected with the credibility of an applicant.
79. The Tribunal accepts that, as Beaumont J observed in *Randhawa v Minister for Immigration, Local Government and Ethnic Affairs* (1994) 52 FCR 437 at 451, 'in the proof of refugeehood, a liberal attitude on the part of the decision-maker is called for' However this should not lead to 'an uncritical acceptance of any and all allegations made by suppliants'. As the Full Court of the Federal Court (von Doussa, Moore and Sackville JJ) observed in *Chand v Minister for Immigration and Ethnic Affairs* (unreported, 7 November 1997):

'Where there is conflicting evidence from different sources, questions of credit of witnesses may have to be resolved. The RRT is also entitled to attribute greater weight to one piece of evidence as against another, and to act

on its opinion that one version of the facts is more probable than another’  
(citing *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* (1996)  
185 CLR 259 at 281-282)

80. The Tribunal found the applicant to be a truthful and credible witness. The applicant gave evidence which was consistent with the material he had submitted to the Department. His evidence at the hearing was also internally consistent. He made no new claims. The Tribunal has considered the concerns raised by the delegate regarding the inconsistencies between the applicant’s visitor visa application and protection visa application regarding the applicant’s homosexuality and employment and accepts the applicants explanation for the inconsistencies. The Tribunal accepts that the applicant provided his agent his passport, the agent completed the application form and the applicant only signed the visitor visa application and a number of cheques which he was told was necessary for him to obtain the visa. The Tribunal accepts the applicant’s claim that he is a member of a particular social group of homosexual men in India and he would suffer persecution if he returned to India for the reasons outlined below.
81. The Tribunal accepts that the applicant was a garment designer and embroiderer and was employed by [Company 2] and [Company 3] , [Mr A] was an employee of [Company 2] and [Company 3] and was responsible for providing the applicant’s training and also supervised his work and the applicant had a homosexual relationship which commenced in August 2006 with [Mr A] The Tribunal accepts that the applicant commenced his own business in November 2007, [Mr A] worked in the new business, their homosexual relationship continued and in June 2008 they decided to live together in the factory The Tribunal accepts that one of the employees came to know about their homosexual relationship, the employee mentioned it within the community and as a result local people and the applicant’s family members came to know about their relationship. The Tribunal accepts that the applicant’s family were Muslim, very conservative and performed religious rituals very strictly and they found the applicant’s homosexual relationship disgraceful, the homosexual relationship was impacting on the respect of his family in society and the applicant’s father was questioned by religious and social leaders. The Tribunal accepts that the applicant’s father advised the applicant to cut off his relationship with [Mr A] and get married, the applicant refused his father’s proposal, [in] July 2008 his father and brother came to his factory with a few other people and assaulted [Mr A] and forcibly took him home. The Tribunal accepts that the applicant was beaten and his mother tried to protect him and he closed his factory premises. The Tribunal accepts that it would have been difficult for him to come out of his home, he was disowned by his family members and the members of the community, he was hated by the community people and the religious leaders acted against him. The Tribunal accepts that it became difficult for the applicant to lead his life with dignity and he became a victim of harassment, discrimination and persecution and the applicant suffered from mental issues as no-one supported him and [Mr A] had disappeared in fear of his family members.
82. The meaning of the expression ‘for reasons of ... membership of a particular social group’ was considered by the High Court in *Applicant A’s* case and also in *Applicant S*. 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". ...

83. Whether a supposed group is a 'particular social group' in a society will depend upon all of the evidence including relevant information regarding legal, social, cultural and religious norms in the country. However it is not sufficient that a person be a member of a particular social group and also have a well-founded fear of persecution. The persecution must be feared for reasons of the person's membership of the particular social group.
84. The Tribunal is satisfied that the applicant is a member of a particular social group for Convention purposes, in that, as in any society, homosexuals in India share a common characteristic, their sexual preference, which distinguishes them from society at large. The independent evidence indicates homosexuals are recognised as such, that is, they are a "cognisable group" in Indian society. The identifiable characteristic of this social group is not the shared fear of persecution.
85. Having determined that homosexuals are a particular social group in India, and that the applicant is a homosexual the Tribunal then considered whether the applicant would suffer harm because of his membership of this particular social group.
86. The applicant claims to fear persecution for the reason of his homosexuality. Having regard to the evidence of the applicant, the Tribunal is satisfied that he is a homosexual as he claims having realised his sexual orientation from the time of his relationship with [Mr A] in August 2006. Accordingly, the Tribunal finds that the applicant is member of a particular social group and that he fears persecution in India for reason of his membership of that group. The Tribunal accepts that if the applicant returns to India now or in the reasonably foreseeable future he will wish to continue living his life as a homosexual man.
87. The independent evidence as set out above indicates that the harassment and repression of homosexual men continues. The High Court decision in *Appellant S395/2002 v MIMA ; Appellant S396/2002 v MIMA ( Appellant S395/2002 )*, ([2003] HCA 71 (High Court of Australia, Gleeson CJ, McHugh, Gummow, Kirby, Hayne, Callinan, & Heydon JJ, 9 December 2003), reinforces existing principles relating to the assessment of claims involving the expression and suppression of opinions, beliefs and identity. The majority judgments make it clear that the Tribunal has no jurisdiction or power to require an applicant for protection to take steps to avoid persecution. Thus, it would be wrong to reject his claim based on homosexuality on the basis that he could reasonably avoid persecution by being discreet.
88. The Tribunal accepts that the Indian High Court ruling in July 2009 to declare invalid section 377 of the Indian Penal Code as being unconstitutional, and in effect decriminalising homosexual acts, is unlikely to have any immediate impact either now or in the reasonably foreseeable future as to how Indians generally, and Muslims, regard homosexuality. Having regard to the applicant's evidence and the independent information about the attitude of Muslims to homosexuals, the Tribunal is satisfied that prejudice against homosexuals is entrenched within the Muslim community and the local community generally and that the High Court ruling is unlikely to make any identifiable change to such an attitude either now or in the reasonably foreseeable future.

89. The Tribunal accepts that the applicant departed India for the reasons he has provided. The Tribunal accepts that the applicant was persecuted because of homosexuality. The Tribunal is satisfied that the applicant has been harmed in the past because of his homosexuality.
90. Having regard to the independent information, the Tribunal is satisfied that relocation within another part of India is not a safe option for the applicant. The Tribunal accepts that that there is no part of India to which the applicant could reasonably be expected to relocate where he would be safe from the persecution which he fears. The Tribunal accepts that that the public authorities in India would not provide the applicant with protection against the harm he fears. The Tribunal finds that the applicant is unwilling or unable, owing to his fear of persecution, to avail himself of the protection of the government of India. The Tribunal is satisfied that his homosexuality is likely to bring him to the attention of persons or agents of the state in India or other persons or groups opposed to homosexuality in India. The Tribunal is not satisfied that the applicant could avoid the persecution that he fears by internally relocating in India.
91. Section 91R(3) requires a decision-maker to disregard any conduct engaged in by the person in Australia unless the decision-maker is satisfied that the conduct was otherwise than for the purpose of strengthening the person's claim to be a refugee. The Tribunal accepts that since the applicant has been in Australia he has not had a homosexual relationship, he has met a number of men at a train station but he would only chat and he was aware of the location of a number of gay clubs and a Christian church that was attended by gay people. The applicant said after that incident with [Mr A] he was still scared and, because if he was not accepted to Australia and he had to return to India, his life would be finished. The Tribunal is satisfied that the applicant's conduct was otherwise than for the purpose of strengthening his claim to be a refugee. The Tribunal finds that section 91R(3) of the Act is not enlivened in relation to such conduct. The Tribunal accepts the applicant's explanations as to why he has not chosen to pursue any sexual relationships or become involved in the gay community
92. After considering the independent country information, the Tribunal is satisfied that if the applicant is returned to India he could face the real chance of serious harm due to his homosexuality. The Tribunal is satisfied that the harm involves harassment, discrimination, physical harm and inaction by the authorities. The Tribunal is satisfied that the applicant would not be able to have any public acknowledgement of his homosexuality or any homosexual relationship without exposing himself to real harm and persecution.
93. The Tribunal accepts that if the applicant returns to India now or in the reasonably foreseeable future he will wish to continue living his life as a homosexual man. As referred to above, the Tribunal accepts that if the applicant were to return to India now or in the reasonably foreseeable future there is a real chance that he would be attacked by groups who are opposed to homosexuals and he would not be protected by the Indian authorities. The Tribunal considers that the persecution which the applicant fears clearly involves "serious harm" as required by s. 91R(1)(b) of the of the Act in that it involves a threat to his life or liberty or significant physical harassment or ill-treatment. The Tribunal considers that the applicant's membership of a particular social group, homosexual men in India, is the essential and significant reason for the persecution which he fears, as required by s. 91R(1)(a). The Tribunal further considers that the persecution which the applicant fears involves systematic and discriminatory conduct, as required by s. 91R(1)(c), in that it is deliberate or intentional and involves his selective harassment for a convention reason, namely membership of a particular social group.

94. For reasons given above, the Tribunal finds that the applicant has a well-founded fear of being persecuted for reasons of his membership of a particular social group if he returns to India now or in the reasonably foreseeable future. The Tribunal finds that the applicant is unwilling, owing to his fear of persecution, to avail himself of the protection of the Indian Government and that he is not excluded from Australia's protection by subsection 36(3) of the Act. Accordingly, the Tribunal is satisfied that the applicant is a person to whom Australia has protection obligations under the Refugees Convention as amended by the Refugees Protocol.

### **CONCLUSIONS**

95. 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**

96. 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. PRMHSE