

1414394 (Refugee) [2016] AATA 3013 (6 January 2016)

### DECISION RECORD

<b>DIVISION:</b>	Migration & Refugee Division
<b>CASE NUMBER:</b>	1414394
<b>COUNTRY OF REFERENCE:</b>	India
<b>MEMBER:</b>	Amanda Paxton
<b>DATE:</b>	6 January 2016
<b>PLACE OF DECISION:</b>	Melbourne
<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.

Statement made on 06 January 2016 at 10:56am

Any references appearing in square brackets indicate that information has been omitted from this decision pursuant to section 431 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

### APPLICATION FOR REVIEW

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 visa under s.65 of the *Migration Act 1958* (the Act).
2. The applicant who claims to be a citizen of India, applied for the visa [in] July 2013 and the delegate refused to grant the visa [in] August 2014.
3. The applicant appeared before the Tribunal on 15 December 2015 to give evidence and present arguments. The Tribunal also received oral evidence from the applicant's partner and the applicant's partner's mother. At the applicant's request, his partner attended for much of the hearing as a support person.
4. The hearing was conducted in English.
5. The applicant was represented in relation to the review by his registered migration agent. The representative attended the hearing. The applicant provided a copy of the delegate's decision to the Tribunal.

### RELEVANT LAW

6. 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). That is, the applicant is either a person in respect of whom Australia has protection obligations under the 'refugee' criterion, or on other 'complementary protection' grounds, or is a member of the same family unit as such a person and that person holds a protection visa of the same class.

### Refugee criterion

7. Section 36(2)(a) provides that a criterion for a protection visa is that the applicant for the visa 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).
8. Australia is a party to the Refugees Convention and generally speaking, has protection obligations in respect of people who are refugees as defined in Article 1 of the Convention. Article 1A(2) relevantly defines a refugee as any person who:
9. 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. 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.
11. There are four key elements to the Convention definition. First, an applicant must be outside his or her country.

12. 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)). Examples of 'serious harm' are set out in 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.
13. 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.
14. 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.
15. 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 being persecuted for a Convention stipulated reason. 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.
16. 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. The expression 'the protection of that country' in the second limb of Article 1A(2) is concerned with external or diplomatic protection extended to citizens abroad. Internal protection is nevertheless relevant to the first limb of the definition, in particular to whether a fear is well-founded and whether the conduct giving rise to the fear is persecution.
17. Whether an applicant is a person in respect of 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.

#### *Particular social group*

18. 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". ...

19. 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 for reasons of the person's membership of the particular social group.

#### *Relocation*

20. The focus of the Convention definition is not upon the protection that the country of nationality might be able to provide in some particular region, but upon a more general notion of protection by that country: *Randhawa v MILGEA* (1994) 52 FCR 437 per Black CJ at 440-1. Depending upon the circumstances of the particular case, it may be reasonable for a person to relocate in the country of nationality or former habitual residence to a region where, objectively, there is no appreciable risk of the occurrence of the feared persecution. Thus, a person will be excluded from refugee status if under all the circumstances it would be reasonable, in the sense of 'practicable', to expect him or her to seek refuge in another part of the same country. What is 'reasonable' in this sense must depend upon the particular circumstances of the applicant and the impact upon that person of relocation within his or her country. However, whether relocation is reasonable is not to be judged by considering whether the quality of life in the place of relocation meets the basic norms of civil, political and socio-economic rights. The Convention is concerned with persecution in the defined sense, and not with living conditions in a broader sense: *SZATV v MIAC* (2007) 233 CLR 18 and *SZFDV v MIAC* (2007) 233 CLR 51, per Gummow, Hayne & Crennan JJ, Callinan J agreeing.

#### *State Protection*

21. Harm from non-state agents may amount to persecution for a Convention reason if the motivation of the non-State actors is Convention-related, and the State is unable to provide adequate protection against the harm. Where the State is complicit in the sense that it encourages, condones or tolerates the harm, the attitude of the State is consistent with the possibility that there is persecution: *MIMA v Respondents S152/2003* (2004) 222 CLR 1, per Gleeson CJ, Hayne and Heydon JJ, at [23]. Where the State is willing but not able to provide protection, the fact that the authorities, including the police, and the courts, may not be able to provide an assurance of safety, so as to remove any reasonable basis for fear, does not justify an unwillingness to seek their protection: *MIMA v Respondents S152/2003* (2004) 222 CLR 1, per Gleeson CJ, Hayne and Heydon JJ, at [28]. In such cases, a person will not be a victim of persecution, unless it is concluded that the government would not or could not provide citizens in the position of the person with the level of protection which they were entitled to expect according to international standards: *MIMA v Respondents S152/2003* (2004) 222 CLR 1, per Gleeson CJ, Hayne and Heydon JJ, at [29]. Harm from non-State actors which is not motivated by a Convention reason may also amount to persecution for a Convention reason if the protection of the State is withheld or denied for a Convention reason.

#### **Complementary protection criterion**

22. If a person is found not to meet the refugee criterion in s.36(2)(a), he or she may nevertheless meet the criteria for the grant of a protection visa if he or she is a non-citizen in Australia in respect of whom the Minister is satisfied Australia has protection obligations because the Minister has substantial grounds for believing that, as a necessary and foreseeable consequence of the applicant being removed from Australia to a receiving

country, there is a real risk that he or she will suffer significant harm: s.36(2)(aa) ('the complementary protection criterion').

23. 'Significant harm' for these purposes is exhaustively defined in s.36(2A): s.5(1). A person will suffer significant harm if he or she will be arbitrarily deprived of their life; or the death penalty will be carried out on the person; or the person will be subjected to torture; or to cruel or inhuman treatment or punishment; or to degrading treatment or punishment. 'Cruel or inhuman treatment or punishment', 'degrading treatment or punishment', and 'torture', are further defined in s.5(1) of the Act.
24. There are certain circumstances in which there is taken not to be a real risk that an applicant will suffer significant harm in a country. These arise where it would be reasonable for the applicant to relocate to an area of the country where there would not be a real risk that the applicant will suffer significant harm; where the applicant could obtain, from an authority of the country, protection such that there would not be a real risk that the applicant will suffer significant harm; or where the real risk is one faced by the population of the country generally and is not faced by the applicant personally: s.36(2B) of the Act.

#### *Relocation*

25. Under s.36(2B)(a) of the Act, there is taken not to be a real risk that an applicant will suffer significant harm in a country if the tribunal is satisfied that it would be reasonable for the applicant to relocate to an area of the country where there would not be a real risk that the applicant will suffer significant harm. That relocation must be 'reasonable' is also a requirement when considering the definition of 'refugee' and the tribunal draws guidance from the judgments of the High Court in *SZATV v MIAC* and *SZFDV v MIAC* which held that whether relocation is reasonable, in the sense of 'practicable', must depend upon the particular circumstances of the applicant and the impact upon that person of relocation within his or her country: *SZATV v MIAC* (2007) 233 CLR 18 and *SZFDV v MIAC* (2007) 233 CLR 51, per Gummow, Hayne & Crennan JJ, Callinan J agreeing.

#### *State Protection*

26. Under s.36(2B)(b) of the Act there is taken not to be a real risk that an applicant will suffer significant harm in a country if the tribunal is satisfied that the applicant could obtain, from an authority of the country, protection such that there would not be a real risk that the applicant will suffer significant harm. That is, the level of protection must be such to reduce the risk of the applicant being significantly harmed to something less than a 'real risk': *MIAC v MZYLL* [2012] FCAFC 147.

#### **Section 499 Ministerial Direction**

27. In accordance with Ministerial Direction No.56, made under s.499 of the Act, the Tribunal has taken into account 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.

## SUMMARY OF CLAIMS AND EVIDENCE

### Protection visa application

28. In his application for a protection visa the applicant stated that he fears persecution from his family and the state because he is a homosexual man in India. His claims can be summarised as follows.
- The applicant was born in Punjab, India, in [year] and lived [in] Punjab State until coming to Australia in 2009.
  - He studied in Australia, achieving a [qualification] in 2010, and a [qualification] in 2012. He currently works as [occupation] at [employer]. The applicant speaks, reads and writes English, Punjabi and Hindi.
  - The applicant is homosexual and his family will seriously harm him if they find out he is gay.
  - The applicant's parents beat and abused him over a prolonged period of time due to the shame they feel towards the applicant for his effeminate behaviour and due, on a couple of occasions, to his sexual relationships with men.
  - The applicant's family will force him to marry.
  - Homosexual behaviour is illegal in India and the applicant will not be protected from abuse from his parents or the wider community.
  - The applicant will face violence and discrimination from the community and may face legal penalties if his sexuality is known.
  - The applicant has been in a relationship with his current partner since 2013;
29. The applicant submitted documents to the Department, including a copy of the relevant pages of his passport, and Indian and Australian academic records, photographs of the applicant together with his partner on various occasions, and media articles from the internet concerning treatment of the homosexual men in India.

### Departmental interview and decision

30. The applicant was interviewed by the delegate [in] April 2014 and the Tribunal has listened to a recording. The main points are summarised below.
- The applicant's sexual experiences, development and encounters have been of a homosexual nature since the age of [age].
  - The applicant's parents, both his mother and father, have beaten him severely and abused him throughout his youth because of his 'girly' behaviour.
  - He has been teased and alienated at school. He has spent his youth trying to keep a low profile because he has been scared to go out.
  - The applicant explained his father lived for a long period between two households and ultimately lost his family business to his [children] from his first marriage. The family has been supported financially by an old family friend who provided the funds for the

applicant to come to Australia to study. In return for financial support, his sister is required to [details deleted].

- The applicant is being pressured to return to India to enter an arranged marriage to bring dowry to the family to provide financial support.
  - The applicant's family are ashamed of him because of his effeminate behaviour and if they were aware that he was homosexual they would harm him, possibly kill him.
  - In the first two years in Australia, the applicant studied [courses] and he did not go out much. He started going to a gay bar about one and a half years after his arrival in Australia and had a range of casual homosexual encounters and the applicant had a relationship with another man before he met his current partner. The applicant has been living in a long term relationship with his partner since 2013.
  - The applicant did not make a protection visa application earlier because he tried to do other study to get permanent residence but that pathway closed up. He was not able to get a visa with his skills and was not able to apply for a visa on the basis of his de facto relationship because, at that time, he had not been in the relationship for longer than 12 months.
  - Homosexual activity is illegal in India and the applicant fears harassment, violence and discrimination from the community.
  - The applicant's advisor submitted that the applicant, who, outside of Australia, has only lived in the Punjab, is not resourceful enough to survive in India without support.
31. The delegate thoroughly but sensitively explored his experiences at home, with his parents and at school, and accepted that the applicant was homosexual.
32. The delegate found that the applicant faces a real chance of serious harm amounting to persecution from his parents because he is homosexual.
33. Noting that the applicant made claims of persecution against non-state agents, the delegate considered the adequacy of protection afforded by the State. Having regard to country information, the delegate found that given the culture of police corruption and inefficiency, discrimination towards LGBT from police and the prevalence of honour killings in Punjab, she was not satisfied that the applicant would be able to obtain effective protection from the authorities in [Punjab]. The delegate therefore found that the applicant had a well-founded fear of persecution in Punjab for reasons of his homosexuality.
34. The delegate also comprehensively considered country information, noting that a landmark 2009 decision by the Delhi High Court struck down Section 377 of the Indian penal code (IPC), which criminalised homosexual behaviour. However, a panel of the Supreme Court reversed that ruling in December 2013, finding that an act of Parliament would be required to change the code.<sup>1</sup>
35. The delegate also noted that widespread discrimination against lesbian, gay, bisexual, and transgender (LGBT) people continues in India, including violence and harassment in some cases<sup>2</sup>. LGBT groups reported that they faced widespread discrimination and violence

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<sup>1</sup> CX321020: Freedom in the World 2014 – India, Freedom House, 19 May, 2014

<sup>2</sup> CX321020: Freedom in the World 2014 – India, Freedom House, 19 May, 2014

throughout society, particularly in rural areas<sup>3</sup>. It is also reported that honour killings for same-sex relationships have occurred in India, more commonly occurring in Northern regions on India including Punjab.<sup>4</sup>

36. The delegate considered whether there was a real chance that the applicant may be persecuted in an urban area of India for the Convention reason of membership of a particular social group of *Homosexual men in India*. The delegate considered that prosecutions for consensual sexual acts between males, are, and have always been, extremely rare,<sup>5</sup> and considered that the evidence supports that the likelihood of the applicant being persecuted for the crime is highly unlikely. The delegate also noted country information that LGBT groups were active in urban areas, and that urban areas have a relatively progressive culture. The delegate considered that violence, harassment and extortion of same sex oriented males still occur throughout India but found based on available country information, it comes nowhere near establishing that the scale and frequency of police violence against, or extortion and blackmail of, same-sex oriented males is so prevalent as to constitute a real chance that the applicant may face a real chance of being persecuted for his membership of a particular social group of *Homosexual men in India* in an urban city such as Delhi or Mumbai.
37. The delegate considered that the applicant has no adverse history with Indian authorities and would not attract the adverse interest of the authorities. The delegate noted the vastness of the Indian population and that there are no legal restrictions preventing relocation to most parts of the country, including urban cities. The delegate found there is not a real chance that the applicant would be persecuted for his sexuality.
38. The delegate considered whether it is reasonable, in the sense of practicable for the applicant to relocate within India. The delegate considered the applicant's ability to establish himself and support himself in a new city and considered that although the applicant is shy, he has various qualifications, a [qualification in course] and a [qualification in course] in 2010 and 2012 respectively in Australia. He is fluent in English, Punjabi and Hindi, able to travel and settle in Australia, obtain employment and establish social networks within the Australian culture and among the gay community. The delegate considered that the applicant, with the assistance of LGBT groups in India, would have access to employment and services and the ability to subsist.
39. The delegate found that the applicant would be able to relocate to an urban area such as Delhi or Mumbai where there is not a real chance of being persecuted for his homosexuality, and where it would be reasonable, in the sense of practicable to relocate and reside in such an area.
40. On this basis, the delegate was satisfied that the applicant is not at risk of persecution due to his membership of a Particular Social Group of *Homosexual Men in India*, and that he does not have a profile which may place him at risk or persecution now or in the reasonably foreseeable future.

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<sup>3</sup> United States Department of State, 2013 *Country Reports on Human Rights Practices – India 27 February 2014*

<sup>4</sup> CX309546: Honour crimes, including their prevalence in both rural and urban areas; government protection and services offered to victims of honour crimes, 2009 – 2013, Canada: Immigration and Refugee Board of Canada (IRB), 9 May, 2013

<sup>5</sup> CX321592; *The Indian in the Closet*, Foreign Affairs, March/April 2014



#### 41. Pre-hearing submissions

##### *Statutory Declaration*

42. In his extensive Statutory Declaration<sup>6</sup>, the applicant claims, in summary, that:

- He was severely beaten by both his parents, and ostracised, intimidated and harassment from peers as he was growing up in the Punjab for his effeminate ways and on occasion for homosexual behaviour. He led a life of anxiety, hiding and fear in a family and community which regards homosexuality as taboo.
- The applicant fears his parents will force him into marriage to receive dowry and assist the family who are in a desperate financial position, or that they may murder him in an act of honour.
- The applicant fears that he will be forced to pretend to being heterosexual, which may lead to him taking his own life.
- The applicant does not have confidence that he will be protected from violence from his family by police because community attitudes are adverse to homosexuality and it is illegal in India.
- Indian law regards homosexual acts as illegal and the applicant fears harassment and physical violence from the community which has negative attitudes to homosexuals. He states that accounts of attacks and harassment of gay people are frequent. The fact that homosexuality is illegal allows people to harm and abuse gay people.
- In some states such as Goa, homosexuality is treated as a disease to be cured in centres. While this is a less violent approach to homosexuality it is discriminating and isolating, and the applicant is fearful of this kind of treatment.
- The applicant states he would have no idea how to survive in a large city in India. Having no family or other support relocation would have significant negative health and well-being implications for the applicant.
- The applicant has now lived for six years as an openly gay man and knows that he is not sick or needing to be cured. He fears harassment and alienation if he tried to live as a gay person in India.
- In Australia, the applicant has the love and support of his partner and partner's family, and he is slowly recovering from many bad experiences. He is working with a counsellor to overcome fears, depression and anxiety.

##### *Submission*

43. In a submission to the Tribunal<sup>7</sup>, the applicant's advisor states that relocation in another part of India is not reasonable for the applicant who, now aged [age], has not lived anywhere else in India but his home town in Punjab. He has lived in Australia since his arrival in June 2009. He has been in a relationship with his partner since January 2013.
44. It is submitted that relocation is not reasonable as he has no family or other support networks outside of Punjab and it is harm from his family which he most fears. He has no

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<sup>6</sup> AAT, ff. 68 -70

<sup>7</sup> AAT, ff. 74 -77

employment for academic skills that are of any use in India and has no financial means to support himself. It is submitted that the applicant's working experience has been confined to [employer] and his education has been rudimentary. This applies to the whole of India.

45. It is submitted that the applicant will not be able to access protection from the authorities because homosexuality is illegal throughout India. In India he would be forced to stifle any expression of his sexuality.
46. It is submitted that because of fear of violence from police combined with his real fear of violence from his family, the applicant would be required to modify his behaviour in ways which would conflict with the applicant's homosexuality.
47. The applicant's personality is such as to make it difficult to adjust to living in a city or region beyond his own home town. He is shy and not outgoing.
48. It is submitted that while the applicant moved to Melbourne, this was not challenging because of the tolerant attitude and acceptance of homosexual men, greater employment prospects and generally less rigid cultural expectations regarding sexuality in Australia.

#### *Partner's statement*

49. In a statement to the Tribunal dated 14 December 2015<sup>8</sup>, the applicant's partner of almost 3 years, attests to their committed and loving relationship. He outlines the decline in the applicant's mental state, his depression and anxiety, and increasing use of alcohol. He indicates that he has noticed improvement in the applicant's mental health due to the assistance of a psychologist, and he expresses his worry for the applicant's future, commenting on his vulnerability and the dangerous situation he will be in, without his partner or his family to support him, in India.

#### *Partner's mother's statement*

50. In her statement of dated 14 December 2015, the applicant partner's mother<sup>9</sup> states that she was introduced to the applicant as her son's partner in 2013. They have welcomed the applicant into their family and have grown to love him and value his contribution to the family, and confirming that her son and the applicant have a loving and supportive relationship and are very committed to each other. She expresses her concern about the applicant and whether he could cope if this was taken away from him.

#### *Psychologist Report*

51. A Psychologist Report<sup>10</sup>, dated [in] November 2015, concerning the applicant, indicates:
  - The applicant was hospitalised at [a] Hospital (Psychiatric Unit) for about 6 days due to the applicant's unexplainable and significant weight loss, and presentation with symptoms of anxiety and depression. The applicant was reported as having attended for psychological treatment on seven occasions.
  - The applicant reported to the psychologist that he has experienced significant psychological and physiological distress within this family and his community in India, and associated trauma. He reports being fearful of returning as he be rejected by his family and persecuted by an intolerant Indian community.

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<sup>8</sup> AAT, ff. 78

<sup>9</sup> AAT f. 79

<sup>10</sup> AAT, ff.54 -55

- The psychological assessment places the applicant in the extremely severe range of depression, anxiety and stress. He is experiencing poor concentration, hyper vigilance, and difficulties with sleep due to nightmares. He is distressed and fearful when talking about return to India.
- The psychologists indicated that he assesses the applicant to be credible, a private and cautious person, and states that "The applicant's coping skills and behaviours appear to be often naïve and lack insight."
- The psychologist has diagnosed the applicant as meeting criteria for Acute Stress Disorder and with also having symptoms and behaviours consistent with meeting most diagnostic criteria for Post Traumatic Stress Disorder, according to the Diagnostic and Statistical manual of Mental Disorders.

52. Also provided to the Tribunal before the hearing were various media reports from the Internet concerning the situation of LGBT people in India.<sup>11</sup>

### **Tribunal hearing**

53. At the hearing, the Tribunal explored the applicant's history as a homosexual man and his experiences at the hands of his family as a youth growing up in the Punjab. The applicant's evidence was consistent with the claims made above.
54. The applicant spoke of his beatings with objects, particularly from his mother, but also his father which have resulted in ongoing injury and trauma. He also spoke of his anxiety and the impact of his sexuality on his development as a cautious, fearful man.
55. The applicant described his family's financial situation which resulted from his father's loss of his business to his [children] from his first marriage. His parents want him to return and marry to attract a dowry to help them financially. The applicant previously maintained relationships with his sisters but speaks with them infrequently now because they put pressure on him to return to marry. His sisters are not able to marry because the family do not have the finances for their own dowries. His sisters have advised him that his parents are looking for a girl for him to marry. The applicant sends money to the family when he can. His sisters are suspicious about his sexuality because they saw a photo of him with his partner and he is fearful that his parents will realise he is gay.
56. The applicant fears that entering an arranged marriage will expose him to more danger because he will not be able to meet the requirements of marriage.
57. The Tribunal discussed the country information below with the applicant regarding general attitudes towards homosexuals in India with different opinions in rural and urban areas.
58. The applicant stated that he feels overwhelmed at the prospect of trying to survive outside his home area in India and in a big city. He fears that because homosexuality is illegal in India this opens the door to mistreatment. He fears he will not be able to establish himself with no support because he is not educated or skilled in a place where he will not be accepted. The applicant understands that there are organisations to support LGBT people to access employment and services but believes he does not have the personal capacity to use them.
59. The applicant claimed he has been able to cope in Australia because it is an accepting society where he has not had to live in fear about revealing his sexuality. He has also had

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<sup>11</sup> AAT, ff. 42 – 53, ff. 56 - 67

the support of his relationship and his partner's family and accepting friends. He is fearful of life in India as a gay man.

60. The applicant described an ongoing struggle with depression and anxiety for many years, suffering sleeplessness, lethargy, nightmares, and feelings of fear. He described the benefit he derives from his sessions with a psychologist, which commenced in 2015.

#### **Witness 1**

61. At the hearing, the applicant's partner attested to his on-going homosexual relationship with the applicant since 2013 when they started living together in a flat in [suburb]. He described their shared life together, including social and family activities.
62. He described what he knew of the applicant's upbringing in Punjab, including ostracism and violence. The applicant bears the scars from being hit and bashed with objects by family members because of his 'girly' behaviour.
63. The applicant's partner expressed concern that the applicant is very vulnerable, and he held fears for his mental health after many years of trauma, and described the impact of the applicant's anxiety and depression. The applicant's partner had strongly encouraged the applicant to seek professional support and he has observed improvement in the applicant's mental health. He described the applicant as a reserved, shy and not outspoken person, the result of not being socially accepted over many years.

#### **Witness 2**

64. At the hearing, the applicant's partner's mother attested to the applicant and her son sharing a flat together and being in a supportive, loving relationship since 2013.
65. She expressed concern that the applicant is young, vulnerable, cautious and shy, and will not be able to sustain himself alone in India.

#### **Country information**

66. In July 2015 the Department of Foreign Affairs and Trade (DFAT) reported that:

Section 377 of the Indian Penal Code makes it a crime to conduct 'carnal intercourse against the order of nature', punishable by imprisonment for life, or for up to ten years with a fine. This section has been the subject of numerous court cases in recent years, most recently by the Supreme Court in December 2013, which reinstated the offence. Since the 2013 Supreme Court ruling, a number of arrests have occurred under Section 377. India's LGBTI community has argued that even if legal punishments are not upheld by the judiciary, the existence of Section 377 can be used as a means of harassment.<sup>12</sup>

67. In August 2015, DFAT advised:

In 2009, in the landmark *Naz Foundation* case, the Delhi High Court 'struck down the provision insofar as it criminalised consensual adults from having homosexual intercourse. The effect of the decision was that though homosexual intercourse was no longer illegal, Section 377 would remain in the statute books and could be used to prosecute other "unnatural sex" acts'. An appeal against *Naz* was brought by 'groups and individuals including Suresh Kumar Koushal whose interest in the litigation was his "moral responsibility and duty in protecting cultural values of Indian society"'. After hearing the case at length, the Supreme Court overruled the judgment of the Delhi High Court and upheld the

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<sup>12</sup> Department of Foreign Affairs and Trade 2015, *DFAT Country Information Report – India*, 15 July, p.16

constitutionality of Section 377'.<sup>13</sup> In its December 2013 decision, the Supreme Court said that only parliament could change Section 377 of the penal code,<sup>14</sup> and 'the Government could take legislative steps to repeal the law'.<sup>15</sup>

68. In April 2015 an article written by a lawyer with the Alternative Law Forum in Bengaluru, India, indicates that while the Supreme Court of India had reaffirmed 'the constitutionality of Section 377, which criminalises certain sexual acts', the judgment of the apex court 'states that the section only criminalises certain sexual acts and not particular people, identities or orientations. Thus, no one can be charged under Section 377 for being gay'.<sup>16</sup> R S Akila, in the March 2014 article in *The Hindu*, also comments that:

The Supreme Court reasoned that LGBTQ individuals constituted a "miniscule fraction" of the population and that Section 377 is not used frequently as there have been less than 200 reported judgments in 150 years of the law's existence. The argument that the provision is vague and arbitrary, potentially rendering criminal most non-procreative sexual acts, was also not entertained. Gay rights activists' plea that Section 377 criminalises a group of people and deprives them of equal citizenship was also rejected by a Court that held on to a textual reading that the law only criminalises certain acts but not people or identity.<sup>17</sup>

69. Following the Supreme Court decision, petitions seeking review of the decision were filed, but were dismissed in early 2014.<sup>18</sup> In April 2014, 'the Supreme Court agreed to hear a curative petition challenging the December ruling'.<sup>19</sup> According to an April 2014 advice from the Department of Foreign Affairs and Trade (DFAT), on 23 April 2014, India's Supreme Court 'agreed to hear arguments in support of a curative petition proposed by the NAZ Foundation (the lead NGO [non-governmental organisation] in the consortium that initiated the legal challenge to the criminalisation of homosexuality)' in relation to 'the Court's December 2013 judgment which re-criminalised homosexuality'. If the Supreme Court 'rules

<sup>13</sup> Akila, R S 2014, 'Section 377: The way forward', *The Hindu*, 1 March

<<http://www.thehindu.com/features/magazine/section-377-the-way-forward/article5740242.ece>>  
Accessed 5 June 2015 <CX1B9ECAB10873>

<sup>14</sup> Bhalla, N 2014, 'Persecution of India's sexual minorities surges after court ruling – activists', *Thomson Reuters Foundation*, 11 December <<http://www.trust.org/item/20141211172551-r55hv/>>  
<CX1B9ECAB9750>

<sup>15</sup> Amnesty International 2013, *India: Dismaying top court ruling re-criminalizes homosexuality*, 11 December <<http://www.amnesty.org/en/news/india-dismaying-top-court-ruling-re-criminalizes-homosexuality-2013-12-11>> Accessed 12 December 2013 <CX316487>

<sup>16</sup> Ranganathan, G 2015, 'Forced into marriage by social pressures', *The Hindu*, 30 April <<http://www.thehindu.com/todays-paper/tp-opinion/forced-into-marriage-by-social-p pressures/article7155889.ece>> <CXBD6A0DE6755>

<sup>17</sup> Akila, R S 2014, 'Section 377: The way forward', *The Hindu*, 1 March <<http://www.thehindu.com/features/magazine/section-377-the-way-forward/article5740242.ece>>  
Accessed 5 June 2015 <CX1B9ECAB10873>

<sup>18</sup> Akila, R S 2014, 'Section 377: The way forward', *The Hindu*, 1 March <<http://www.thehindu.com/features/magazine/section-377-the-way-forward/article5740242.ece>>  
Accessed 5 June 2015 <CX1B9ECAB10873>; Asokan, S 2014, 'India's Gay Sex Ban Upheld By Supreme Court', *The Huffington Post*, source: *Reuters*, 28 January <[http://www.huffingtonpost.com/2014/01/28/india-gay-ban-upheld-\\_n\\_4679413.html](http://www.huffingtonpost.com/2014/01/28/india-gay-ban-upheld-_n_4679413.html)>  
<CX1B9ECAB11220>; Chandrachud, C 2014, 'Limiting the impact of Section 377', *The Hindu*, 12 December <<http://www.thehindu.com/todays-paper/tp-opinion/limiting-the-impact-of-section-377/article6684447.ece>> Accessed 5 June 2015 <CX1B9ECAB10874>; US Department of State 2015, *Country Report on Human Rights Practices for 2014 – India*, 25 June, Section 6 <<http://www.state.gov/j/drl/rls/hrrpt/humanrightsreport/index.htm?year=2014&dliid=236638>>  
<OG2B06FAF86>

<sup>19</sup> US Department of State 2015, *Country Report on Human Rights Practices for 2014 – India*, 25 June, Section 6 <<http://www.state.gov/j/drl/rls/hrrpt/humanrightsreport/index.htm?year=2014&dliid=236638>>  
<OG2B06FAF86>

in favour of the curative petition it could direct a fresh bench of the Supreme Court to reconsider the legal merits of this case'. DFAT contacts have, however, 'advised that curative petitions are rarely awarded by the Court and only in cases of extreme bias or violation of the principles of natural justice. The curative petition is, therefore, an action of last resort'.<sup>20</sup> There was little further progress in 2014,<sup>21</sup> and in April 2015, *The Indian Express* reported that a curative petition challenging 'the constitutionality of Section 377' was still 'pending in the Supreme Court'.<sup>22</sup>

70. According to a December 2014 article in *The Hindu*, two subsequent court judgments in India indicated that courts could be narrowing the impact of the December 2013 Supreme Court decision through subsequent decisions.<sup>23</sup> The 2015 ILGA publication on laws regarding same-sex relationships, however, states that:

In 2009, Section 377 of the Indian Penal Code was given a more limited interpretation by the Delhi High Court, lifting the ban on same-sex sexual activity among consenting adult men in private. However, on 11 December 2013, in *Koushal v Naz Foundation*, a two-judge bench of the Supreme Court of India upheld Section 377 as constitutional. Therefore, private consensual sexual activity between two men is still a crime in India.<sup>24</sup>

71. An October 2014 paper by Dr. M V Lee Badgett, a professor of economics at the University of Massachusetts Amherst, Williams Institute Distinguished Scholar, and World Bank consultant, writing on the economic cost of the exclusion of LGBT people in India, notes that:

On one hand, LGBT people enjoy some freedom of association in India, and space exists in civil society for participation by LGBT people: LGBT organizations can form and operate, public demonstrations on LGBT issues take place, and LGBT cultural life exists publicly. On the other hand, Section 377 of the Indian Penal Code criminalizes sexual activities between adults of the same sex, and to date, the Indian Parliament has not passed any direct legal protections against discrimination against LGBT people, such as laws that prohibit discrimination based on sexual orientation or gender identity in social and economic spheres. Similarly, no legal recognition of same-sex relationships exists.<sup>25</sup>

### State Protection

<sup>20</sup> Department of Foreign Affairs and Trade 2014, *India human rights - Supreme Court recognises transgender rights*, 24 April <CX320298>

<sup>21</sup> Freedom House 2015, *Freedom in the World 2015 - India*, 27 February <<https://freedomhouse.org/report/freedom-world/2015/india>> <CXBD6A0DE2586>; US Department of State 2015, *Country Report on Human Rights Practices for 2014 - India*, 25 June, Section 6 <<http://www.state.gov/j/drl/rls/hrrpt/humanrightsreport/index.htm?year=2014&dliid=236638>> <OG2B06FAF86>

<sup>22</sup> Padmanabhan, A 2015, 'And what about Section 377?', *The Indian Express*, 1 April <<http://indianexpress.com/article/opinion/columns/and-what-about-section-377/>> Accessed 10 June 2015 <CXBD6A0DE7920>

<sup>23</sup> Chandrachud, C 2014, 'Limiting the impact of Section 377', *The Hindu*, 12 December <<http://www.thehindu.com/todays-paper/tp-opinion/limiting-the-impact-of-section-377/article6684447.ece>> Accessed 5 June 2015 <CX1B9ECAB10874>

<sup>24</sup> Carroll, A & Itaborahy, L P 2015, *State-Sponsored Homophobia 2015 - A World Survey of Laws: criminalisation, protection and recognition of same-sex love*, International Lesbian, Gay, Bisexual, Trans and Intersex Association (ILGA), May, p.72 <[http://old.ilga.org/Statehomophobia/ILGA\\_State\\_Sponsored\\_Homophobia\\_2015.pdf](http://old.ilga.org/Statehomophobia/ILGA_State_Sponsored_Homophobia_2015.pdf)> <CISEC96CF1945>

<sup>25</sup> Lee Badgett, M V 2014, *The Economic Cost of Stigma and the Exclusion of LGBT People: A Case Study of India*, October, World Bank, p.10 <[http://www-wds.worldbank.org/external/default/WDSContentServer/WDSP/IB/2015/02/03/000477144\\_20150203155141/Rendered/PDF/940400WP0B0x380usion0of0LGBT0People.pdf](http://www-wds.worldbank.org/external/default/WDSContentServer/WDSP/IB/2015/02/03/000477144_20150203155141/Rendered/PDF/940400WP0B0x380usion0of0LGBT0People.pdf)> Accessed 5 June 2015 <CISA447F082817>

72. A wide range of sources indicate that many within the Indian security forces – including the police and the military – are poorly trained, corrupt, ineffective, and at times responsible for human rights abuses. According to the US Department of State (US DOS), during 2013 “[t]he most significant human rights problems were police and security force abuses, including extrajudicial killings, torture, and rape; widespread corruption at all levels of government, leading to denial of justice; and separatist, insurgent, and societal violence.”<sup>26</sup> In its 2013 *World Report*, Human Rights Watch noted that:

Government initiatives, including police reform...languish due to poor implementation. Many women, children, Dalits (so called untouchables), tribal communities, religious minorities, people with disabilities, and sexual and gender minorities remain marginalized and continue to suffer discrimination because of government failure to train public officials in stopping discriminatory behaviour.<sup>27</sup>

73. Human Rights Watch has alleged in the past that “[p]olice routinely fail to investigate apparent “honor” killings”.<sup>28</sup> A 2011 source stated that Punjab police had been unable to find a solution to an apparent ‘surge’ in the number of honour killings.<sup>29</sup>

74. In respect of police protection to LGBT people, in July 2014, the United Kingdom Home Office, Country Information and Guidance, *India: Sexual orientation and gender identity* reported:

1.3.7 Police conduct towards LGBT people varies from one Indian state to another. In several states the police have received relevant additional education and sensitivity training in LGBT issues.

1.3.8 Whilst there have been some reports of police not providing effective protection in individual cases, there are avenues of redress in such circumstances. The objective country information shows no evidence that, in most cases, the police would fail to properly investigate an incident of violence, or other serious crime, on the basis that the victim happened to be a lesbian, a gay man, bisexual or transgender. There is also no reason to believe that the courts would be unduly lenient towards the perpetrators in such circumstances.

1.3.9 Victims of police misconduct who do not wish to complain to the police have recourse to NGOs who will act on their behalf; or to an independent police complaints authority (in most states); or directly to the courts.<sup>30</sup>

### *Relocation*

75. In relation to relocation, Home Office advice stated that:

1.3.13 India is a vast country with a population of 1.2 billion. It comprises 35 states and “union territories”. There are seven cities which have populations of over 5 million and over 600,000 towns and villages. There are no legal restrictions preventing relocation to most parts of the country, including to the major cities....

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<sup>26</sup> US Department of State 2014, *Country Reports on Human Rights Practices 2013 – India*, 27 February, Executive Summary <<http://www.state.gov/j/drl/rls/hrrpt/humanrightsreport/index.htm#wrapper>> Accessed 21 October 2014 <OG1F18C9077>

<sup>27</sup> Human Rights Watch 2013, *World Report 2013 – India*, 31 January, <<http://www.hrw.org/world-report/2013/country-chapters/india>> Accessed 8 February 2013 <CIS36DE0BB1611>

<sup>28</sup> Human Rights Watch 2010, *India: Prosecute Rampant ‘Honor’ Killings*, 18 July <<http://www.hrw.org/en/news/2010/07/16/india-prosecute-rampant-honor-killings>> Accessed 26 August 2010 <Attachment>

<sup>29</sup> ‘Spate of honour killings shakes up Punjab’ 2011, *Indo-Asian News Service*, 14 July <Attachment>

<sup>30</sup> UK Home Office, Country of origin information and guidance report: India, Sexual orientation and gender identity, 18 July 2014.

1.3.17 India has a large, robust and accessible LGBTI activist and support network, mainly to be found in the large cities. Evidence accepted in MD was that, following relocation, gay people could often rely on NGOs or support groups to provide emotional and material support; this may include assistance in establishing contacts and obtaining employment and accommodation.<sup>31</sup>

2.2.6 According to a report of July 2012, prepared on behalf of the World Bank by Amaltas Consulting (Delhi) and Humsafar Trust, a Mumbai-based LGBT advocacy NGO:

“Countless episodes of gay men entrapped in public spaces and parks by police and threatened with arrest and prosecution under Section 377 have been reported. It is common for police to misuse their privilege with impunity against alternate sexuality since intolerance is built into the social structure. Moral policing replaces the policing that is protective of human rights, laid down by the law of the land.

Community activities such as simple get-togethers are met with suspicion and complaints of public nuisance. There are various incidents where gay parties have been raided by the police on the pretext of drugs and sex.”<sup>32</sup>

76. With respect to cultural attitudes to LGBT people the UK Home Office reported in July 2014 that :

2.3.2 The World Bank report of July 2012 observed:

Often the stigmatizing attitudes and discriminatory actions towards homosexuals or persons with alternative sexuality are hostile, and justified on the pretext of them being anti-religious, anti-social or just anti-tradition. Sexuality is sometimes viewed even in liberal and radical circles as a frivolous, bourgeois issue. In such a context, homosexuality is seen implicitly as something deviant and unnatural that is at best defended as an individual freedom but not a matter of priority for the human rights movement. Generally, issues of poverty, class and caste oppression are seen as more important than that of gender and sexuality – especially gender and sexual minorities – and the links and interdependencies are often not recognized.

Even in the southern states where the LGBT mobilization has been quite strong, there have been instances where people from the LGBT communities have not been allowed to enter hotels, restaurants or clubs.”<sup>33</sup>

#### *Health Services*

77. In relation to health services, the UK Home Office reported :

2.4.1 According to the World Bank report of July 2012,

[Focus group interviews] show very clearly that the LGBT community prefers to stay away from the mainstream health services. The reason for staying away is the stigmatization faced by the LGBT community in the hands of the health service providers. The stigmatization doubled for MSM and transgenders. Other than stigmatization the community also feels that service providers specially the doctors are not oriented about the health issues faced by the community.

#### *Accommodation*

78. Commenting about accommodation issues for LGBT people in India, the UK Home Office states:

<sup>31</sup> UK Home Office, Country of origin information and guidance report: India, Sexual orientation and gender identity, 18 July 2014.

<sup>32</sup> UK Home Office, Country of origin information and guidance report: India, Sexual orientation and gender identity, 18 July 2014.

<sup>33</sup> UK Home Office, Country of origin information and guidance report: India, Sexual orientation and gender identity, 18 July 2014.



2.4.3 There have been reports of homophobic landlords refusing to rent accommodation to LGBT tenants and there is no law in India effectively preventing such discrimination. However, the Upper Tribunal found in MD India that - the evidence does not disclose that this problem is endemic or anywhere approaching it.

### *Employment*

79. Commenting about employment issues for LGBT people in India, the UK Home Office states:

2.4.4 The US State Department 2013 Human Rights Report stated that advocacy organizations, such as the Mission for Indian Gay and Lesbian Empowerment (MINGLE), have documented workplace discrimination against LGBT persons, including slurs by colleagues and supervisors as well as unjustified dismissals.

2.4.5 It was observed in The World Bank report of 2012 that workplace policies are locally defined and many organizations, big or small, are not necessarily inclusive, sensitized or protective towards LGBT persons.

2.4.6 A survey by the Labour Bureau in 2010 showed that only 17 per cent of the Indian workforce is in formal, salaried employment; more than 70 per cent of all working people are self-employed as casual workers.<sup>34</sup>

80. However advice indicates that there are changes in attitude to LGBT people:

2.3.3 The Naz Foundation (India) Trust, a leading LGBT advocacy organisation and the principal respondent in the Indian Supreme Court case regarding Article 377 IPC, advised the British High Commission (Delhi) in September 2013: "...we do see a lot more openness in relationships especially in urban areas. Many couples are living together..."

81. In conclusion, the UK Home Office in July 2014 noted that:

While LGBT persons (or those perceived to be) may suffer ill treatment, extortion, harassment and discrimination from the police and the general populace, the prevalence of such incidents is generally not such, even when taken cumulatively, as to give rise to a real risk of an LGBT person suffering treatment which would reach the threshold required for protection under either the Refugee Convention, the EU Qualification Directive, or the European Convention on Human Rights.<sup>35</sup>

## **CONSIDERATION OF CLAIMS AND EVIDENCE**

### **Findings and reasons**

#### **Country of reference**

82. The applicant submitted his Indian passport. On the basis of this document and the applicant's oral evidence the Tribunal is satisfied that applicant is a citizen of India. The Tribunal assesses the applicant's claims against India as his country of nationality and receiving country.

#### **Credibility**

83. The Tribunal found the applicant to be spontaneous, detailed, consistent, unaffected and genuine in his presentation of his claims and on this basis, the Tribunal found the applicant

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<sup>34</sup> UK Home Office, Country of origin information and guidance report: India, Sexual orientation and gender identity, 18 July 2014.

<sup>35</sup> UK Home Office, Country of origin information and guidance report: India, Sexual orientation and gender identity, 18 July 2014.

to be a credible witness. The applicant required a couple of breaks because he became anxious and short of breath and at his request, his partner was asked to attend to provide the applicant with support. The Tribunal was satisfied that the applicant was able to fully put forward his claims for a protection visa.

84. The Tribunal similarly found the applicant's witnesses, the applicant's partner and his partner's mother, to be sincere, genuine and open and found both to be highly credible witnesses.

### **Consideration of claims**

85. The Tribunal confirmed with the applicant that he claimed that he would face a real chance of serious harm for the Convention ground of membership of a particular social group, being a homosexual in India. It is well-established that the homosexual members of a particular society may form a "particular social group" for the purposes of the Convention.<sup>36</sup> The Tribunal accepts on the basis of the evidence before it that they are a "particular social group" in India. They are identifiable by a characteristic or attribute common to all members of the group, which is their sexual orientation, and that characteristic or attribute is not their shared fear of persecution.

86. On the evidence provided to it, which included the credible evidence of the applicant, his partner and his partner's mother, a report from the applicant's treating psychologist, and the country information cited above, the Tribunal finds that:

- The applicant is homosexual and has always identified in this way;
- The applicant has suffered severe abuse at the hands of his parents because of his feminine and homosexual behaviour;
- The applicant has been isolated and bullied by his peers in the community because of his feminine and homosexual behaviour;
- The applicant's parents have fallen into financial difficulties. They are relying on the dowry the applicant will attract from marriage to assist them overcome their financial difficulties and they will force the applicant into marriage for this reason.
- The applicant's parents have made an arrangement with an older man in the community [for] money;
- The applicant's family will harm him, possibly kill him, in the event that they become aware of his sexuality or if he tries to live as an openly homosexual man;
- The applicant has been living since his arrival in Australia in 2009 as an openly gay man since his arrival in Australia, albeit in a reserved manner.
- The applicant has been living in a long-term relationship with his partner for almost three years.

87. The Tribunal has considered the nature of the harm feared by the applicant and finds that this amounts to serious harm for the purposes of s.91R(1) of the Act. The independent country information set out above indicates that the applicant may not receive effective protection from harm at the hands of his family from police in his home area of Punjab because of the high level of corruption, inefficiency and in some cases collusion and

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<sup>36</sup> *Applicant A* (1997) 190 CLR 225, McHugh J at 265.

sympathy to uphold traditional Sikh values with violence. Considering this information and the applicant's homosexuality which is counter to traditional Sikh values, the Tribunal finds that the applicant would not be able to access a level of state protection in Punjab in accordance with the principles of *MIMA v Respondents S152/2003*. The Tribunal finds that the applicant could not obtain protection from the authorities in Punjab for a Convention-related reason of membership of a particular social group being a *Homosexual man in India*. The Tribunal finds that the applicant faces the real chance of serious harm at the hands of his family in the reasonably foreseeable future in his home area of Punjab on account of his membership of a particular social group, being a *Homosexual man in India*.

### Relocation

88. Having found that the applicant faces a real chance of serious harm in his home area of the Punjab, the Tribunal considered whether the applicant could relocate to other areas of India, such as the urban areas of Mumbai or Delhi, where there is no appreciable risk of the occurrence of the feared harm.
89. In assessing whether the applicant faces a real chance of serious harm on the grounds that he is a *Homosexual man in India*, the Tribunal considered the independent country information above and noted that while Section 377 of the Indian Penal Code criminalises homosexual acts, this act has been rarely used and there are few reports of cases where the police have not provided effective protection.
90. The Tribunal acknowledges that LGBT persons may suffer ill treatment, extortion, harassment and discrimination from the police and the general populace, as discussed in the above country information. However, the Tribunal also notes that the country information indicates that there are signs of increasing tolerance of homosexuality in India, and that while negative attitudes towards homosexuality persist throughout India particularly in rural areas of India such as the Punjab, the Tribunal is satisfied that the prevalence of such incidents is generally not such that there is a real chance the applicant faces serious harm from the state or community on the ground that he is a *Homosexual man in India* in an urban city such as Mumbai or Delhi.

### Reasonableness

91. Having found that the applicant does not have a real chance of serious harm from the state or community in an urban area of India such as Mumbai or Delhi, the Tribunal considered whether it would be reasonable, in the sense of practicable, for the applicant to relocate to another part of India where there is no appreciable risk of the occurrence of the feared persecution.
92. In this consideration, the Tribunal considered the applicant's particular circumstances and the impact upon him of relocation within India.
93. The Tribunal considered the applicant's claim, and the submission of his representative, that he has no skills to obtain employment. In this consideration, the Tribunal notes that the applicant has Australian qualifications in [occupation] and [occupation], considerable work experience as a [occupation] with [employer] and that he is proficient in three languages. Given these attributes, the Tribunal does not accept that the applicant does not have any resources or skills for employment.
94. The Tribunal also considered the applicant's representative's submission that the applicant has lived only in the Punjab in India and does not have the experience to adjust to a new environment, and does not know anyone outside the Punjab from whom to draw support. In this regard, the Tribunal notes that the applicant has demonstrated ability to adapt to life

in Australia, suggesting that he would have the ability to adjust to life in parts of India outside the Punjab. He has also demonstrated the ability to adapt to new circumstances by joining another community, from which he has drawn support, partner, take part in a family life, and make friends and relationships.

95. Notwithstanding these considerations, in the Tribunal's view, it would not be reasonable in the sense of practicable for the applicant to seek refuge in another part of India. This is because he is particularly vulnerable by reason of his psychological condition. The applicant is [age], and as such he is an adult, however, he presented to the Tribunal as young, highly vulnerable, shy and cautious, perhaps a consequence of early abuse and trauma.
96. In this assessment, the Tribunal has had regard to, and accepts, the assessment of the applicant's Psychologist above that the applicant's coping skills and behaviours appear to be often naïve and lacked insight. The Tribunal also accepts the Psychological assessment which places the applicant in the extremely severe range of depression, anxiety and stress. The Tribunal accepts the Psychologist's diagnosis that the applicant meets criteria for Acute Stress Disorder and displays symptoms consistent with diagnostic criteria for Post Traumatic Stress Disorder.
97. Considering these factors, the Tribunal considers that the applicant's ability to live in Australia has largely been because of the considerable support he has obtained through his partner and his partner's family and because he has been able to live as an openly gay man. The Tribunal accepts that without support he would experience considerable difficulties in all facets of his life.
98. The applicant's representative submitted that the applicant's return to India would require him to modify his behaviour in ways which would conflict with his homosexuality. The Tribunal accepts that the applicant's psychological vulnerability puts him in a position where he would be poorly equipped to manage his fear of violence from police and the community. The Tribunal considers that the applicant's psychological vulnerability means that he will be unable to cope with possible negative community views, harassment or discrimination and he will be unable to put himself forward to take advantage of the support LGBT organisations may be able to offer him to overcome any discrimination in access to health care, accommodation or employment.
99. The applicant's representative submitted that the applicant's return to India would have significantly negative health and wellbeing implications for the applicant and that he will not be able to cope with the challenges that would present. In the Tribunal's view, what can be said at least is that a deterioration in the applicant's already precarious psychological condition would have a significant negative impact on his ability to establish himself, subsist and access relevant services.
100. Considering the factors above, the Tribunal concludes that relocation to another state in India to avoid the real chance of serious harm that the applicant faces in his home area of Punjab because of his membership of a particular social group, *Homosexual men in India*, is not reasonable.
101. Accordingly, the Tribunal finds that the applicant has a well-founded fear of persecution in India.
102. For the reasons given above, the Tribunal is 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**

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

Amanda Paxton  
Member