

**0804436 [2008] RRTA 359 (15 October 2008)**

**DECISION RECORD**

**RRT CASE NUMBER:** 0804436

**DIAC REFERENCE(S):**

**COUNTRY OF REFERENCE:** Ukraine

**TRIBUNAL MEMBER:** Giles Short

**DATE DECISION SIGNED:** 15 October 2008

**PLACE OF DECISION:** Sydney

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

## STATEMENT OF DECISION AND REASONS

### APPLICATION FOR REVIEW

1. This is a review of a decision made by a delegate of the Minister for Immigration and Citizenship on [date] refusing an application by the applicant for a Protection (Class XA) visa. The applicant was notified of the decision under cover of a letter dated [date] and the application for review was lodged with the Tribunal on [date].
2. The matter is now before the Tribunal.
3. The applicant is a citizen of Ukraine. He arrived in Australia in [month, year] and he applied for a Protection (Class XA) visa on [date].

### RELEVANT LAW

4. In accordance with section 65 of the *Migration Act 1958* (the Act), the Minister may only grant a visa if the Minister is satisfied that the criteria prescribed for that visa by the Act and the Migration Regulations 1994 (the Regulations) have been satisfied. The criteria for the grant of a Protection (Class XA) visa are set out in section 36 of the Act and Part 866 of Schedule 2 to the Regulations. Subsection 36(2) of the Act provides that:  

‘(2) A criterion for a protection visa is that the applicant for the visa is:

  - (a) a non-citizen in Australia to whom the Minister is satisfied Australia has protection obligations under the Refugees Convention as amended by the Refugees Protocol; or
  - (b) a non-citizen in Australia who is the spouse or a dependant of a non-citizen who:
    - (i) is mentioned in paragraph (a); and
    - (ii) holds a protection visa.’
5. Subsection 5(1) of the Act defines the ‘Refugees Convention’ for the purposes of the Act as ‘the Convention relating to the Status of Refugees done at Geneva on 28 July 1951’ and the ‘Refugees Protocol’ as ‘the Protocol relating to the Status of Refugees done at New York on 31 January 1967’. Australia is a party to the Convention and the Protocol and therefore generally speaking has protection obligations to persons defined as refugees for the purposes of those international instruments.
6. Article 1A(2) of the Convention as amended by the Protocol relevantly defines a ‘refugee’ as a 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’
7. The time at which this definition must be satisfied is the date of the decision on the application: *Minister for Immigration and Ethnic Affairs v Singh* (1997) 72 FCR 288.

8. The definition contains four key elements. First, the applicant must be outside his or her country of nationality. Secondly, the applicant must fear ‘persecution’. Subsection 91R(1) of the Act states that, in order to come within the definition in Article 1A(2), the persecution which a person fears must involve ‘serious harm’ to the person and ‘systematic and discriminatory conduct’. Subsection 91R(2) states that ‘serious harm’ includes a reference to any of the following:
  - (a) a threat to the person’s life or liberty;
  - (b) significant physical harassment of the person;
  - (c) significant physical ill-treatment of the person;
  - (d) significant economic hardship that threatens the person’s capacity to subsist;
  - (e) denial of access to basic services, where the denial threatens the person’s capacity to subsist;
  - (f) denial of capacity to earn a livelihood of any kind, where the denial threatens the person’s capacity to subsist.
  
9. In requiring that ‘persecution’ must involve ‘systematic and discriminatory conduct’ subsection 91R(1) reflects observations made by the Australian courts to the effect that the notion of persecution involves selective harassment of a person as an individual or as a member of a group subjected to such harassment (*Chan Yee Kin v Minister for Immigration and Ethnic Affairs* (1989) 169 CLR 379 per Mason CJ at 388, McHugh J at 429). Justice McHugh went on to observe in *Chan*, at 430, that it was not a necessary element of the concept of ‘persecution’ that an individual be the victim of a series of acts:

‘A single act of oppression may suffice. As long as the person is threatened with harm and that harm can be seen as part of a course of systematic conduct directed for a Convention reason against that person as an individual or as a member of a class, he or she is “being persecuted” for the purposes of the Convention.’
  
10. ‘Systematic conduct’ is used in this context not in the sense of methodical or organised conduct but rather in the sense of conduct that is not random but deliberate, premeditated or intentional, such that it can be described as selective harassment which discriminates against the person concerned for a Convention reason: see *Minister for Immigration and Multicultural Affairs v Haji Ibrahim* (2000) 204 CLR 1 at [89] - [100] per McHugh J (dissenting on other grounds). The Australian courts have also observed that, in order to constitute ‘persecution’ for the purposes of the Convention, the threat of harm to a person:

‘need not be the product of any policy of the government of the person’s country of nationality. It may be enough, depending on the circumstances, that the government has failed or is unable to protect the person in question from persecution’ (per McHugh J in *Chan* at 430; see also *Applicant A v Minister for Immigration and Ethnic Affairs* (1997) 190 CLR 225 per Brennan CJ at 233, McHugh J at 258)
  
11. Thirdly, the applicant must fear persecution ‘for reasons of race, religion, nationality, membership of a particular social group or political opinion’ Subsection 91R(1) of the Act provides that Article 1A(2) does not apply in relation to persecution for one or more of the reasons mentioned in that Article unless ‘that reason is the essential and significant reason, or those reasons are the essential and significant reasons, for the persecution’. It should be remembered, however, that, as the Australian courts have observed, persons may be persecuted for attributes they are perceived to have or opinions or beliefs they are perceived to hold, irrespective of whether they actually possess those attributes or hold those opinions

or beliefs: see *Chan* per Mason CJ at 390, Gaudron J at 416, McHugh J at 433; *Minister for Immigration and Ethnic Affairs v Guo* (1997) 191 CLR 559 at 570-571 per Brennan CJ, Dawson, Toohey, Gaudron, McHugh and Gummow JJ.

12. Fourthly, the applicant must have a 'well-founded' fear of persecution for one of the Convention reasons. Dawson J said in *Chan* at 396 that this element contains both a subjective and an objective requirement:

'There must be a state of mind - fear of being persecuted - and a basis - well-founded - for that fear. Whilst there must be fear of being persecuted, it must not all be in the mind; there must be a sufficient foundation for that fear.'
13. A fear will be 'well-founded' if there is a 'real chance' that the person will be persecuted for one of the Convention reasons if he or she returns to his or her country of nationality: *Chan* per Mason CJ at 389, Dawson J at 398, Toohey J at 407, McHugh J at 429. A fear will be 'well-founded' in this sense even though the possibility of the persecution occurring is well below 50 per cent but:

'no fear can be well-founded for the purpose of the Convention unless the evidence indicates a real ground for believing that the applicant for refugee status is at risk of persecution. A fear of persecution is not well-founded if it is merely assumed or if it is mere speculation.' (see *Guo*, referred to above, at 572 per Brennan CJ, Dawson, Toohey, Gaudron, McHugh and Gummow JJ)

## **CLAIMS AND EVIDENCE**

14. The Tribunal has before it the Department's file relating to the applicant including the tape recording of the interview which the primary decision-maker conducted with the applicant on [date] The Tribunal also has before it the Tribunal's files and the tape recordings of the hearings before the Tribunal held on [date], [date] and [date]. The applicant last appeared before the Tribunal on [date] to give evidence and present arguments. The Tribunal was assisted by an interpreter in the Russian language. The applicant was represented by Mr A, a registered migration agent. Mr A did not attend the hearing.

### **The applicant's original application**

15. The applicant is aged in his [age range] According to the details in his original application he qualified as a [Occupation B] in [year] and after completing his military service he worked as a [Occupation B] in a [factory] in [City C] from [year] to [year] He said that he had then been unemployed for a year and had retrained as a [Occupation D]. He said that he had been employed as a [Occupation D] at a hotel in [City C] from [month, year] until [month, year] when he came to Australia.
16. In a statement accompanying his original application the applicant said that he had been persecuted both physically and psychologically in Ukraine because of his sexual orientation. He said that his family had distanced themselves from him because he was a homosexual and that his church, the [Church E], regarded sodomy as a sin. He said that he had first faced mistreatment when he had been doing his military service. He said that '[o]nce' he had been ridiculed, beaten, kicked and spat upon after his sexual orientation had come to the attention of his comrades. He said that there had been no investigation, none of his torturers had been punished and his commanders had pretended that nothing had happened.

17. The applicant said that at the [factory] his sexual orientation had also come to the attention of the other workers who had mocked him and the administration had discriminated against him in various ways. He said that his 'partner' had prompted him to become a [Occupation D] and that he had got the job at the hotel in [City C] because the manager had been homosexual himself. The applicant said that he had been attacked a lot of times and that almost each time he had appeared in public he had been mocked and punched in the chest and face.
18. The applicant said that in [year] he had become a 'gay activist' He said that they had set up an association although it had not been registered and they had gathered in private homes. He said that this had come to the attention of hate groups and they had been persecuted even more severely. He said that nationalists and town hoodlums 'with silent support of the authorities started a regular homosexual hunting' and that he had been singled out as a gay activist and persecuted more severely. He said that these people had caught him in the streets and they had burst into his place of work and had abused him there. He said that he had regularly received hate mail, [information deleted in accordance with section 431 as it may identify the applicant].
19. The applicant said that in [month, year] he had made a short business trip to [Country F] with a delegation of businessmen as a [Occupation D] and general hand. He said that he had thought that he might apply for asylum in that country but that during his short stay in [Country F] he had had the opportunity 'to rub shoulders with some of our brothers and sisters' and that '[t]he unanimous opinion was that [certain people] in [Country F] [information deleted in accordance with section 431 as it may identify the applicant] targeted homosexuals'. He said that '[a] lot of my new [Country F] acquaintances were victims of homophobia and hate crimes' and that he had abandoned the idea of applying for asylum in [Country F].
20. The applicant said that when he had got back to [City C] he had found that a drunken mob had burst into their meeting place and that two of their number had been [injured] and a third had been [attacked with a weapon]. He said that the local police had started an investigation but it had been doomed not to be finished. The applicant said that the manager of the hotel had migrated to [Country G] and he himself had decided to look for freedom in Australia.
21. The applicant said that the authorities in Ukraine turned a blind eye to homophobia and that even though Ukraine had abandoned communism there were a lot of people who could not abide homosexuals due to distorted religious or moral viewpoints. He said that the media did not report crimes against homosexuals which were usually presented as drug or alcohol-related crimes rather than hate crimes. He said that gays and lesbians were afraid to report crimes because they feared losing their jobs and being ostracised by their families.

### **The Departmental interview**

22. The applicant was interviewed by the primary decision-maker in relation to his application on [date]. He said that he had been assisted by someone named [Person H] in preparing his original application. He said that [Person H] was a friend of a friend and that he was not a migration agent. The applicant agreed that [Person H] was the person whom he had asked to ring the Department on his behalf a couple of times because he himself was not fluent in English. The primary decision-maker noted that the interpreter's declaration in the application form had been filled out by [Person J]. The applicant said that he did not know this person.

23. The applicant said that there were no mistakes in the application which he wished to correct. Asked how he knew what was in the form he repeated that [Person H] had helped him to fill out this form. He said that [Person H] had explained to him what he had written. He said that he had spoken to [Person H] in Russian and that [Person H] had read back to him in Russian what he had written in English. He said that [Person H] had been living here for a long time so he knew English well.
24. With regard to how he had obtained the visa which he had used to travel to Australia the applicant said that a friend of his in [City C] had introduced him to another person who lived in Kiev. He said that he had gone to Kiev where he had met this person in a café and had given this person his passport. He said that he had paid [amount] for the visa and the ticket. The applicant said that he had met this person in [month] and that he had collected the passport and ticket on [date] in Kiev and had left Ukraine on [date]. He denied that he had signed the application form for the visa which he had used to travel to Australia. He said that he had wanted to leave and he had just paid the money and had received the passport. He said that the person who had assisted him had not told him how he had obtained the visa.
25. The applicant said that he sometimes attended the Ukrainian [Church E] in [suburb]. He said that the priest at his church in Ukraine had not wanted him to attend church and had told his parents that it was a shame on the family that the applicant was homosexual. He said that this had been about five years previously. He said that he had gone to another church where nobody had known him.
26. The applicant said that when he had been doing his military service he had witnessed his comrades beating another homosexual and he had helped this man. He said that his comrades had understood that he too was homosexual so the next time they had beaten him up as well. He confirmed that he claimed that the commanders had known what had happened but no one had investigated. He said that he had been beaten up several times but he had only had to wait a couple of months before he was demobilised so he had not told anybody.
27. The applicant said that from a young age he had felt that he was not attracted to girls so he had spent most of his time with boys. He said that when he had been in the army he had been afraid to talk to somebody about it because nobody respected gays or lesbians. He said that the job he had had at the [factory] had been a good job but he had met another young man who had also been gay and they had spent time together. He said that once someone at work had noticed them together and straightaway he had been put down in a lower position at work. He said that he had faced discrimination with regard to granting leave in [Season], for example. He said that he had been the first to lose his job when people had been laid off but they had given him a job which no one else had wanted, as a cleaner. He said that whenever he had walked past people they had spat on him and they had used bad language. He said that they had written offensive words and had drawn offensive pictures on the walls. He said that they had written things with filth and he had had to clean these things off. He said that he had done this job for several months but eventually he had not been able to bear this any more so he had left.
28. The applicant confirmed that he had been unemployed for a year, doing casual work on building sites, before he had retrained as a [Occupation D]. He confirmed that he had learned this trade for [number of] months and that he had then been employed as a [Occupation D] at the hotel in [City C]. He said that he had been the only male [Occupation D]: there had been [information deleted in accordance with section 431 as it may identify the applicant]. He said that other employees had come to know that he was homosexual because other homosexuals

had come to him at his place of work. He said that the other employees had ignored him, treating him as if he was not there, and they had not let him work with their children. The applicant confirmed that the manager of the hotel had been homosexual and that the manager had helped him to get the job. He said that the manager had been very discreet so no one had known that he was gay. He said that the manager had given him a trial for two weeks so no could have suspected that he had got the job because he was gay. He said that they had not had contact because the manager had been afraid and the manager had subsequently left for [Country G].

29. The applicant said that in claiming that he had become an activist in [year] he had been referring to the organisation which he and other homosexuals had formed. He said that they had gone to the officials to ask for registration but nothing had happened: they had not been registered. He said that bars and restaurants had refused to give them space. He said that they had met in different people's homes. He said that there had been [number of] members but now there might only be [number] people because most were leaving Ukraine. The applicant said that they had usually met once a week. He said that their purpose had not been to be political: they had just wanted to be left alone, to live as normal people, to be good citizens, to work, to be quiet and not to expose themselves but the situation had been such that this had not been possible.
30. The applicant said that they had gathered together to discuss their problems and if one of them had fallen ill they had tried to find gay doctors to help them. He said that even when they had gone to the police and had said that somebody had been beaten up the police would not send anyone to find out anything. He said that his organisation had tried to help these people. He said that they had also helped them to find jobs and had helped them at home. He said that sometimes they had collected money to help people. He said that they had wanted to have an organisation which could solve all the problems for gay people. He said that if a young person came to them who had been beaten up they would keep him in a place where gay people lived and bring a doctor. He said that whenever they asked the police the police would say that they did not have fuel for the police car and if they went to the hospital they would not have medications. The applicant said that because he had worked as a [Occupation D] people had known him and had come to him for help and he had tried to help them.
31. The applicant said that when he himself had been beaten up he had written to the police about what had happened to him but no one had read the letter. He said that sometimes the police had told him that he should go to the West where gays were free to do what they wanted to do. He said that after this he had decided that he really had to leave Ukraine. He said that in countries like [Country L] and [Country M] the situation was the same as in Ukraine. He said that on one occasion he had gone with friends to [Country F]. He said that the others had been businessmen but he had gone there as a [Occupation D], just to work for them. He said that they had gone to a suburb of [City P], to a big house. He said that he had been taken with them because one of the businessmen had also been gay. He said that this person had not been his partner. He said that one evening he had gone with this businessman and had met some gay people who lived in [Country F] but he had understood that he could not stay there because the situation was not good. He said that he had found that the situation with the [type of people] there was terrible.
32. The applicant said that when he had returned from [Country F] he had found that some young men had been beaten up again. He said that they had written to people in higher positions in [City C] saying that some people had been beaten up but the letter had not been answered. He said that after that he had decided to go but he had not known where to go. He repeated

that the manager of the hotel had gone to [Country G]. The applicant said that he had known that Australia was a free and democratic country and that every year the gays had festivals. He said that he had left his partner of a year and a half behind because his partner had not wanted to go. He said that maybe his partner had had somebody else: he said that whenever he had asked his partner to go his partner had given him excuses, saying that he could not fly and that on a ship he would be ill.

33. The applicant said that he thought that if he had stayed in Ukraine he would not be alive now: somebody would have killed him. The primary decision-maker asked the applicant if he had considered moving to a bigger city, like Kiev. The applicant said that the situation was the same in Kiev, in [City N] or in [Country L] or [Country M]. He said that in Australia homosexuals lived and worked freely whereas in Ukraine people only had rights on paper. The applicant said that Kiev had a big homosexual community but people were killed there. He said that it was not a life if you were afraid that someone might kill you because you were homosexual.

### **Evidence given at the first hearing**

34. In a submission to the Tribunal dated [date] the applicant repeated the claims set out in the statement accompanying his original application. He argued that the treatment he had experienced amounted to persecution involving 'serious harm' as required by paragraph 91R(1)(b) of the Act and that the situation in [Country F] was as bad as it was in Ukraine. He said that it would be impossible for him to relocate to Kiev because of the difficulty of paying the rent and the strict limitations imposed by the *propiska* system.
35. At the first hearing before the Tribunal on [date] the applicant confirmed that the information in his original application and the accompanying statement was true. He said that his then representative, [Person J], had helped him with the application and the statement and that he had told his representative all his story and had given him all his evidence. He said that his representative had written this down and had filled in the application forms. The applicant also confirmed that what he had said at the interview with the primary decision-maker was true.
36. The applicant said that his fellow soldiers had found out about his homosexuality in the second year of his service in the army, in the [Season], when he had helped another homosexual who had been being beaten. He confirmed that this would have been in the [Season] of [year]. He subsequently said that, as he had started his army service in the [Season] of [year], by the second year of his service he had meant [year-year] and it had therefore been in the [Season] of [year] that his fellow soldiers had found out about his homosexuality.
37. The applicant said that he had been working in [section] with [number of] other soldiers. He said that the problems had been with their friends who had visited in the evening. He said that they had made him laugh, play the guitar and take off his clothes, they had verbally abused him and harassed him and when they had been very drunk they had kicked him or hit him. He said that they had also forced him to drink vodka and to tell them the details of his sexual relations with his partner. He said that they had beaten him until he had been half alive. He said that this had happened once a month or once every two months during the period from the [Season] of [year] until [month, year], when he had been discharged. He said that during this period he had been beaten on [number of] occasions, on [number] of which he had fallen unconscious. He said that on the number] occasion an officer had entered the



room and this had saved his life. He said that the army was like a gaol: if you told someone that you were homosexual they would just kill you.

38. The Tribunal noted that in the statement accompanying his original application the applicant had said that 'once' he had been ridiculed, beaten, kicked and spat upon after his sexual orientation had come to the attention of his fellow soldiers. The applicant said that he had not mentioned how many times it had happened because he had not counted the times when he had been kicked somewhere in the kitchen or when somebody had just hit him on the head when they had been passing by. The applicant said that he had just told his representative that he had been bashed.
39. The applicant said that he had lost his job as a [Occupation B] at the [factory] at the beginning of [year] and had worked as a cleaner after that. He agreed that this had not been for a very long time. He said that the [factory] had been being broken up or sold off at this time. The applicant said that he had only undergone training as a [Occupation D] for [period of time] in [month] or [month, year] but he had been trained to [undertake work]. He said that normally it would take [period of time] to qualify as a [Occupation D] but he had been registered at a special office for people who did not have jobs and this office had arranged retraining for people. He said that one of his friends had suggested that he try [Occupation D].
40. The applicant said that he had started to [do this work] when he had been in the army. He said that he had also received further training on the job. The Tribunal noted that in his original application the applicant had said that he had undertaken the [Occupation D] course from [month, year] to [month, year]. The applicant said that he had made a mistake as to the year and that the course had comprised [period] of study and [period] of practical experience. He said that he had a copy of his Ukrainian [Occupation D]'s qualification at his home in Australia so he would be able to provide it to the Tribunal that afternoon. He said that he had called his friends in Ukraine two weeks previously to provide him with the original. He said that the manager of the hotel had left Ukraine for [Country G] some time in the [Season] of [year].
41. The applicant said that during the first two years for which he had been working as a [Occupation D] people had not known that he was homosexual but then his friends had started coming to his place of work and because of their looks people had realised who they were. He said that young men had come to the shop and had called him names. He said that they had not started any fights in the shop because there had been two women who had worked with him but when he had gone out in the street they had been able to kick him or hit him. He said that he had encountered drunken people who had abused him verbally and physically. He said that on one occasion they had [information deleted in accordance with section 431 as it may identify the applicant].
42. The applicant said that it had been worse in [Season] because the shop had stayed open until 8.00 pm so it had been dark when he had been returning home. He said that he had not been attacked if he had been accompanied by the women who had worked with him. He said that many times he had been beaten half to death and he had not been able to go to work for a few days. He said that he had lived in the same street where the hotel was located, in the house of an old woman whom he had helped with the housework. He said that he had been assaulted in her front yard on several occasions so he had tried not to stay there but to go from place to place.

43. The applicant referred to the gatherings of his friends. He said that one of the gatherings had been invaded by a group of people who had [attacked] some people and injured one of his friends with [a weapon]. He said that it had been after this incident that he had decided to flee because it had been impossible to live like that. The applicant said that this incident had happened at the beginning of [year]. He said that the authorities had done nothing: there had been no investigation. He said that they had been treated as if they had not been people at all. He said that even when he had got his passport they had told him to leave the country.
44. The applicant said that he had had an opportunity to go to [Country F] because he had been working with a group of businessmen who had been going to [Country F]. He said that they had suggested that he go with them and that he might be able to stay there. He said that in the mornings he worked with them. He said that then, with the driver who had known [Country F], they had gone to the clubs and had talked to other homosexuals about the situation in [Country F]. He said that they had told him that the situation in [Country F] was no better than it was in Ukraine because there were lots of fascist organisations in [Country F] fighting for the nation to be clean and these organisations gave homosexuals a difficult time. He said that [Country F] was a democratic country only in the newspapers. He said that he had thought that in Ukraine at least he could speak the language and he had had some friends there. He said that this was why he had returned to Ukraine and had looked for another country to which he could go.
45. The applicant said that when he had returned from [Country F] he had found out about the accident which had taken place at one of the gathering places. He said that this was the incident which he had said earlier had taken place at the beginning of [year]. He said that every person could make a mistake. He said that he had been trying to explain his situation and that no one had protected him. He said that he just wanted to live and to work. He said that when the manager at the hotel had been leaving for [Country G] he had advised him to go to Australia and had given him the telephone number of the person in Kiev who could help him.
46. The applicant said that he had given his passport to the agent in Kiev before he had gone to [Country F] and that it had indeed been the agent who had obtained the [type of] visa which he had used to travel to [Country F]. He said that he had paid the agent for this. He said that the agent had returned his passport to him so he could travel to [Country F]. He said that he had gone back to the agent after things had not worked out in [Country F] and then in [number of] months' time the agent had been able to obtain an Australian visa for him.
47. The Tribunal put to the applicant that it found his decision not to remain in [Country F] difficult to accept. It noted its understanding that [Country F] was an extremely liberal country in relation to homosexuality. It noted, moreover, that even if that had not been the case, with a [type of] visa the applicant could have gone to any of a number of other nearby countries, for example [Country O], which was even more liberal than [Country F].
48. The applicant said that he had asked the agent to get a visa for him to go to Australia. He said that it had just happened that the agent had called him and had told him that he had been able to obtain a [type of] visa for him. He said that he had had to go to [Country F] in two days. He said that at that time he had found out that one of his clients who was a businessman was going by car to [Country F] and he had asked this client to take him with him. He said that it had been like a coincidence: it had all been happening together. The applicant said that he had not had any information about the situation in [Country F] or any other country. He said that when they had come to [Country F] they had not had much time.

He repeated that the driver who had known a little [Country F] had been taking him around and they had been talking to people, the ones they had been able to find. He said that according to their stories he had not liked the situation in [Country F]. He said that [Country F] was a very good country but from what he had heard about the situation in that respect he had not wanted to stay there.

49. The Tribunal also put to the applicant that the situation for homosexuals in Ukraine was improving, in Kiev in particular. It asked the applicant why he could not have left [City C] and have gone to live in Kiev, for example. The applicant said that the hotel manager who had also been homosexual had gone to Kiev and had told them that democracy was only on paper but in real life it was all different. He said that maybe it was a political act and that Ukraine was trying to represent the situation as much better than it really was because they wanted to enter the European Union. The applicant said that he had not seen this with his own eyes: this was what the hotel manager had told him. He said that the hotel manager had gone to [Country G] and had advised him to go to Australia and he had trusted the hotel manager. He said that it was very difficult to find newspaper reports of cases where homosexuals in Ukraine had been beaten up or had disappeared or had been rammed by a car. He said that he had told the Tribunal what had happened to him.
50. The applicant's then representative, [Person J], said that in preparing the applicant's application he had acted mostly as a translator. He said that he saw his main task as being to listen to people and to write down their stories as accurately as possible. He said that he and the applicant had spoken and he had compiled a story which had been lodged with the Department. He said that it had been difficult to do this because the applicant had not been able to tell him the story starting from the beginning. He said that the applicant had recollected various episodes, not in chronological order. He submitted that the Tribunal should take into consideration that he was sure that the applicant was nervous and that it was rather difficult for the applicant to reproduce all these things.
51. The applicant's then representative also submitted that the Tribunal should take into account the applicant's horrible experiences in Ukraine and the nature of the case, which was very delicate and very personal. He submitted that the applicant might have been wrong in some particular dates or particular details, there might be some discrepancies, but he would not say that the applicant was lying. It was just a matter of confusion or failure on the part of the applicant's memory. He also said that when he had written in the statement which he had prepared for the applicant that 'once' when the applicant had been doing his military service he had been ridiculed, beaten, kicked and spat upon after his sexual orientation had come to the attention of his comrades, this had just been 'an example' He said that he had not been writing a novel. He said that the statement 'reflects the nature of his persecution'. He agreed with the Tribunal that he had presented only a summary of numerous episodes. He said that 'once' should be read as meaning 'for example'.
52. The applicant's then representative referred to the submission dated [date] from the applicant referred to above which he referred to as his submission (although it is presented as being from the applicant). He submitted that the Ukrainian authorities did not do anything to prevent persecution by society or by separate officials. He submitted that they had demonstrated negligence towards specific acts which were very numerous. He said that in Soviet times homosexuals had been sent to labour camps and the same mentality still prevailed among the prosecutors, police and judges who still held office.

53. The applicant did not provide the copy of his [Occupation D]'s certificate which he had said he had at his home in Australia to the Tribunal that afternoon. His representative wrote to the Tribunal on [date] stating that the applicant was seeking to obtain a document with regard to his qualifications from Ukraine but that 'Ukrainian bureaucrats are not in a hurry' which was why a delay had occurred. The Tribunal responded indicating its view that the applicant had not been truthful when he had said at the hearing that he had this document at his home in Australia. The applicant's representative subsequently provided the Tribunal with a poor copy of a document faxed from the Hotel [City C] in Ukraine indicating that he had completed a course with an educational institution in [City C] between [date] and [date] and that he had been awarded the qualification of [Occupation D] on [date].

### **Evidence given at the second hearing**

54. At the second hearing before the Tribunal on [date] the applicant produced a copy of a different document indicating that he had completed a course as a [Occupation D] at the [City C] [name of training centre], from [date] to [date]. He also produced a diploma in '[diploma name]' issued by a training centre in Kiev in [month, year]. He also produced a reference indicating that he had been employed at the hotel in [City C] in the position of [Occupation D] from [date] until [date]. The applicant also produced evidence that he had undertaken an English language course and [an Occupation D] course in Australia and that he was working as a [Occupation D].
55. The applicant said that he did not fear persecution in Ukraine for any reason other than his homosexuality. He said that he had been given a trial period at a [Occupation D]'s shop in Australia but that his employer had told him that whether he could be given permanent employment would depend on his migration status. He said that he was living in a rented house with a woman from Ukraine who lived there with her young child. He said that he and his housemate had a mutual friend who lived in another city. He said that his housemate worked two shifts a day so she left home before 6.00 am and returned after midnight. He said that he sometimes looked after her child but most of the time her child looked after itself because the child was very independent. He said that his housemate had [stated days] off but that he himself worked on those days.
56. The applicant said that he did not have many friends, just schoolmates from the English and [Occupation D] courses. He said that he had had one friend here but once he had started his studies he had cut himself off from everyone and had devoted himself to his studies. He said that he had believed that any relationship would hinder his studies. He said that there were only two male students in his [Occupation D] course, the rest being women, so he had not met any homosexual men there and in his English classes the students changed all the time. The Tribunal asked the applicant if any of his friends knew that he was a homosexual. The applicant said that he did not advertise it because he went to the [Church E] and people there did not see homosexuals as normal people.
57. The applicant said that because of his limited English he relied on his Ukrainian friends for help with everything. He said that although he did work for them they did not suspect anything because he kept his homosexuality to himself. He said that it was not something you would want people who went to the [Church E] to know. He said that his housemate knew that he was homosexual because he had told her when she had come to Australia from Ukraine. He said that the only other person who knew was his representative, Mr A. He said that now that he had learned English and now that he had the prospect of a full-time job he would be able to go out and make new English-speaking friends. He said that since he had

arrived in Australia he had not had any sexual contacts at all nor had he yet visited any gay bars or been to any gay venues. He said that he knew this was hard to believe but when he had lived with Ukrainian people he had not been able to go anywhere because he had had to stay with them. He said that if he had gone somewhere he would have had to speak in English so he had decided to start to study English.

58. The Tribunal noted that at the time of the hearing the applicant had been in Australia for [number of] years and that it found it difficult to accept that he had not been able to make contact with any homosexuals in that time. The applicant referred again to his English language skills. The Tribunal noted that there were many people in Australia who did not have English as their first language and that it was surprised that the applicant would suggest that this was a barrier to someone who was homosexual and who wished to take advantage of Australia's liberal environment. The applicant repeated that he had devoted himself to his studies. He said that he was not interested in just sex: he wanted to find a person who could understand him and he would not be able to explain about everything that had happened to him.
59. The applicant said that he did use the Internet, but he had only had access to the Internet since he had started living together with his housemate in [month]. He said that he had an email address but he had not yet indicated to anyone in any email communication that he was homosexual. He said that even communicating on the Internet you needed to be able to put it in the right words to explain yourself. The Tribunal asked the applicant if he had had any contacts with Ukraine, noting that the applicant had said that he had been a gay activist in Ukraine. The applicant said that after he had left Ukraine he had not really communicated with anyone like that. He said that he had only recently got access to the Internet and the computer was not his but his housemate's.
60. The Tribunal noted that it was trying to explore ways in which the applicant might be able to demonstrate that he was homosexual. The applicant said that, with regard to the organisation of which he had claimed to have been a part in [City C], everything had collapsed when he had left Ukraine. He said that the organisation had not had a computer or access to the Internet so he had had no one from that organisation to communicate with. The Tribunal noted that there was a great deal of information on the Internet about homosexuals in [City C]. The applicant said that he was talking about the situation [number of] years previously. The Tribunal noted that the applicant had claimed to be a gay activist which suggested that he had had a commitment to improving the situation for homosexuals in Ukraine. The applicant referred again to his commitment to his studies. He said that he had not watched any Russian language films nor had he communicated with any of his Russian friends. He said that his friends were people from the church and his schoolmates.
61. The Tribunal explored various other ways in which the applicant might be able to demonstrate that he was homosexual such as photographs or correspondence with anyone. The applicant said that he had no photographs and he had lost contact with everybody in Ukraine. He said that he had been to the Sydney Gay and Lesbian Mardi Gras every year. Asked if he had been to any other gay events he said that he had been to Kings Cross lots of times but he had been too shy to approach people because of his English language skills. He said that he had heard a lot about Kings Cross and he had gone there and he had seen lots of bars there. He asserted that there were lots of homosexuals that went to those bars so he thought this was really the centre where most of them went. Asked if there were any other centres where homosexuals went the applicant said that he knew that there were a lot of them but he repeated again that he had been dedicated to his studies.

62. The applicant said that when he had visited [Country F] he had gone to [City P] but he did not know where in [City P] he had gone. He said that he had not paid too much attention. He said that he had gone to [Country F] to find out if there could be a possibility of him staying there but he had seen there was hardly any chance. He said that it would have been going from one dangerous place to another. He said that he had seen [type of person] bashing everybody up there. The applicant said that in [City P] they had gone to a bar at night where they had seen a man who looked like he might be homosexual. He said that his friend who knew the language had approached this man and had asked him about the situation there. He said that his friend had been homosexual and had been able to communicate in [the language of Country F], but not fluently. He said that the man to whom his friend had spoken had told them that in the newspapers it was all glossy pictures and they represented everything as fine but the reality was not like that. The applicant said that he had been too scared to stay and also he had not known any [language of Country F]. He said that in the whole of Europe the situation was the same: the newspapers said that everything was fine but no one reported on the real situation, how many people were killed and for what reason. The Tribunal noted that this did not accord with the independent evidence.
63. The Tribunal again explored any ways in which the applicant might be able to demonstrate that he was homosexual. The applicant said that some people were very open whereas other people like himself were more modest. He said that he really believed that in any country first you had to be independent: you had to know the language and you had to have a job to support yourself and then your religion came and you had to go to church. He said that the last place was taken by your personal life. He said that he had been like this in Ukraine as well: his job and his religion had taken priority over his family life. The Tribunal noted that this was very different from what the applicant had said in the statement accompanying his original application to the effect that he had been a gay activist, that he had been known to people as a homosexual and that it had been for this reason that he had had to leave Ukraine. The applicant said that in any country you had to support yourself, you had to know the language, you had to have a job. He said that in Ukraine he had known the language and he had had a job but his inner world had been full of anger towards the situation. He said that this had prompted him to become an activist and to stand up for who he was. He said that people got bashed, people got raped. He said that now it was all free but the situation then had been different. He confirmed that he believed that the situation in Ukraine was different now.
64. The Tribunal put to the applicant that Ukraine had undergone significant changes since the applicant had left in [year] and was considered a much more open and tolerant society. It noted that homosexuality had been decriminalised some time previously and there had also been a shift in general public acceptance although some people did not approve, just as they did not approve in Australia. It noted that in places like Kiev and [City Q] there were significant numbers of gay people living quite freely. The applicant said that it was hard for him to judge because then there had been freedom of speech but journalists had been being killed. He suggested that the information did not reflect the real situation and that people were being killed but it was not being reported. He said that there was no certainty with regard to what would happen to him if he went back to Ukraine.
65. The Tribunal noted that publications from gay groups in Ukraine supported the view that the situation was much improved and that particularly in places like Kiev and [City Q] gay people could lead their lives like anywhere else in Europe. The Tribunal referred to information from a Ukrainian gay Internet site referring to the organisation 'Nash Mir' and to

the club scene in Ukraine as examples of the much more open attitudes prevailing now. The applicant said that at the time in Ukraine he had been overcome by fear and he had had to leave. The Tribunal noted that it was concerned with the situation now and that the information suggested that the police and lawmakers and the media were becoming more accepting and positive towards gay people in Ukraine. If gay people had problems there were telephone hotlines and the police would accept complaints if there was violence against them. There were publications and there was a Gay Pride march now in Ukraine.

66. The applicant said that he understood that there was freedom and democracy in Ukraine but it was only on paper. He said that the goal was to become a part of the European Union. He said that this was all on paper but what really happened to people on an individual basis was another matter. The Tribunal noted that this information was from gay organisations like 'Nash Mir'. The applicant said he had not been persecuted by the authorities but by the society and the people had not changed.
67. The applicant said that his reference in the statement accompanying his original application to his 'partner' having prompted him to retrain as a [Occupation D] was not a reference to a lover but to a close friend. He said that he had had a partner in Ukraine. Asked about this partner the applicant said that he was an intelligent, kind and loving person who had taught him a lot about life. He said that this partner had taught him how to help people and how to be needed in the community, to make a contribution to society. The applicant said that he had been together with this partner from [year] to [year]. He said that this partner's name had been [Mr R] and that after he had lost his job at a [factory] he had started selling things at the market. With regard to the fact that he had not mentioned [Mr R] in the statement accompanying his original application the applicant said that maybe he had not been asked about him. He said that when he had been filling out his application the person who had been helping him had advised him just to write about his biography. The Tribunal observed that it would have thought that one of the most important parts of a person's biography would be their partner. The applicant said that this was inside.
68. The Tribunal put to the applicant that the fact that he had returned to Ukraine from [Country F] cast doubt on his claim that he had feared persecution in Ukraine. It also put to him that it was simply not credible for him to claim that he had heard that the situation in [Country F] was just as bad as that in Ukraine. It put to him that [Country F] was very liberal for gay people. The applicant said this had been a really short trip and a good opportunity to leave the country and to have a look if there was an opportunity to stay. He said that there had only been one night when he had been able to go out and to see things for himself. He said that there had been no way for him to get information because he did not know [Country F] He repeated that he and his friend had approached a person who they had thought might be homosexual. He said that a person who was scared to lose their life believed everything they were told. He said that they had been unable not to believe the person who had given them this information.
69. The applicant said that he had travelled to [Country F] with 'several' business people, one of whom had been the manager of the hotel. He said that they had taken him as a [Occupation D] and he had worked with them before their meetings. Asked how many times he had done specific work the applicant responded, 'Not just [that work], [other work].' Asked what business the other members of the group had been involved in the applicant said that he had not been interested and he had not listened or if he had listened he had not paid any attention. He said that he had gone there solely because it was an opportunity to leave Ukraine. He said that the manager of the hotel had organised the trip for him because he had wanted to help

him. He said that it had been after they had come back that the manager of the hotel had left for [Country G]. He said that the manager had advised him to leave for somewhere but not in Europe, to Australia or somewhere else. He said that the manager had been just a friend and that he thought that the manager had had a partner but it had not been something they had talked about. He said that there had been a big age difference between them.

70. The applicant said that there had been [number of] people in the gay organisation in [City C], sometimes more. He said that they had met in different places because otherwise it would have been dangerous. Asked about his claim that he had been a gay activist, the applicant said that lots of people had visited the [Occupation D] shop so he had been an information link: he had passed on information about where the next meeting was going to be. He said that when they had decided to register their club he had been the one who had gone to do this and he had helped some people who had been beaten up very seriously, even suffering [type of] wounds. He said that he had helped them to try to find justice. He said that they had gone to the police and to 'so many avenues' but nobody had done anything. He said that the name of the club had been '[name]'.
71. The applicant said with regard to his experiences when he had been doing military service that one of his friends who had been homosexual had been beaten up and he had helped him to get up and wash his face. He said that this was how it had started. He said that he had not counted the number of times when he had been called names or kicked or hit. He said that everything that had happened had not been seen by the officers. The Tribunal noted that in the statement accompanying his original application the applicant had said that he did not know how it had happened that his sexual orientation had come to the attention of his comrades. The applicant said that the Soviet Army was like a prison. He said that he had just helped a person. He asked why it mattered. The Tribunal noted again that in the statement accompanying his original application the applicant had said that he did not know how it had happened that his sexual orientation had come to the attention of his comrades. The applicant said that he could only guess why it had happened.
72. The applicant said that he had not reported what had happened to him to anyone. The Tribunal noted that the applicant had said that there had been no investigation but obviously there would have been no investigation if no one had reported anything. The applicant asserted that the officers had closed their eyes to what had been happening. With regard to how it had come to the attention of his workmates and the administration at the [factory] that he was homosexual the applicant said that he did not know. The Tribunal noted that the applicant was saying that in Ukraine at the time no one had talked about homosexuality yet everyone had known that he was homosexual whereas in Australia, where homosexuality was openly talked about, he said that no one knew that he was homosexual. The applicant said that in the Soviet Union homosexuality and sex in general had not been talked about. He said that when he had lost his job as a [Occupation B] at the [factory] nobody else had lost their jobs. He said that he had asked to work as a cleaner but the attitude of people towards him had been so bad and he had found it so humiliating that he had had to leave that place.
73. The applicant said that he thought that the manager of the hotel in [City C] had kept the fact that he was homosexual to himself. The applicant said that he had come to know the manager because he had come to the shop to get work done but then slowly they had started telling each other about their problems. He said that the hotel manager had put him in contact with some of his friends. The Tribunal referred to the applicant's evidence in the statement accompanying his original application that there had been regular bashing of homosexuals by nationalists. The applicant said that the people who had been injured had gone to the police



and the police had opened cases but these had been closed unsolved. He said that they had been told that without witnesses and evidence they would not do anything. He then said that the police had not investigated because the victims had been homosexuals.

74. Asked how many of his friends had been injured in the incident which he had said had happened while he had been in [Country F], the applicant said that everyone who had not been able to run away had been bashed up. He said that a few people had suffered [type of] wounds and one person had been [injured by a weapon]. The Tribunal put to the applicant that there was no evidence that the police in Ukraine denied protection to homosexuals. The applicant said that there was no evidence that incidents in which homosexuals were beaten up or killed in Ukraine were investigated, that those responsible were arrested and that they were punished. He said that when a journalist got killed it was reported widely but when a homosexual was killed it was not reported in the newspapers. He said that the attitudes towards homosexuals in Ukraine were still the same as they had been in the Soviet Union.
75. The applicant said that he bought Russian, Polish and Ukrainian newspapers because he could read all three languages and he kept in contact with people at his church who had contacts in Ukraine. He said that he talked with these people about everything except homosexuality. He said that from this he concluded that nothing had really changed in Ukraine. The Tribunal referred to the fact that, for example, a student in Ukraine had recently won damages for discrimination on the basis of homosexuality. It noted that there were some incidents of violence against homosexuals reported which suggested that the media reported both positive and negative developments. The applicant said that he did not think that everybody read this newspaper and it was not a government publication. The Tribunal put to the applicant that this was why the Tribunal believed that it told the truth.
76. The Tribunal raised with the applicant the possibility of his moving to Kiev or [City Q]. The applicant said that it was hard for him to make an assessment. He said that he could not know what might happen there. Asked if there was any reason which would make it difficult for him to live in a place like [City Q] or Kiev, the applicant said that he had left Ukraine because he had feared for his life. He said that even if he went to [Country L] or Kiev or Russia or Ukraine he would not have any certainty about what might happen. He said that he had been lucky to escape. He said that it was not possible to live in a society where you had been persecuted and physically injured. At the very end of the hearing the applicant said that he had told other people whom he had lived with in Australia that he was homosexual but he said that that they had treated it as a joke.

### **Evidence given at the third hearing**

77. At the third hearing before the Tribunal on [date] the applicant said that before he had left Ukraine he had lived at [Address S] in [City C] and that before that he had lived with an old lady whom he had helped. He said that he had lived there for [period of time] and before that he had lived with friends and acquaintances. He said that after he had finished his military service he had lived with his parents. The applicant confirmed that he had completed his military service when the Soviet Union had still been in existence.
78. The applicant said that he had left Ukraine because he had been really scared for his life. He said that at that time, in Ukraine, the situation for homosexuals had not been the same as in the developed capitalist countries. He said that they had been beaten, harassed and humiliated and this had been what had happened to him. He said that he had worked at the [Occupation D]'s shop in a hotel in [City C] and most of his gay friends had come to him for

[his Occupation B work]. He said that they had told him how they had been severely beaten up and humiliated and the same thing had happened to him. He said that they had tried to turn to the police for some help but the help had not been provided to them.

79. The applicant said that people had been waiting at the hotel for him and had beaten him up a few times in [year]. He said that they had called him names and had told him that they would [attack] him. He said that he had been scared to go to work. He said that the first time he had been beaten up had been in [year], at the end of [month]. He had gone outside after work and had seen a group of men who had been shouting quite loudly and who had looked as if they were drunk. He said that they had asked him for a cigarette and when he had said that he did not smoke they had started beating him up. He said that at first they had used their hands but after he had fallen down they had kicked him. He said that they had called him gay but in a very rude way.
80. The applicant said that he had been injured and he had gone to the hospital where he had been treated as an outpatient and bandaged. He said that he had gone to the police but they had not investigated. He said that he had not worked for a week or so. He confirmed that this had happened right outside the hotel where he had worked which had been in the centre of [City C] He said that he thought some people had seen what had happened to him but they had not protected him. He said that he had not known the people who had attacked him and that he did not know how they had known that he was gay. He said that it was possible that it was because he had been [performing Occupation B work] for his gay friends and that this was how the news had spread around.
81. The applicant said that the next time he had been physically assaulted had been [period of time] later, in the same place near his place of work. He said that once again he had been going home after work when he had encountered a group of people. He said that it had seemed to him that it had been a new group of people but some voices had been familiar to him. He said that they had called him names and had used bad language and then he had been beaten up. He said that they had formed a circle and they had pushed him from one person to another. He said that then they had thrown him to the ground and had started kicking him. He said that they had been laughing at him and they had spat on him, then they had thrown some [rubbish] over him and had left. He said that this had been the end and he had not been able to bear it any longer.
82. The applicant said that on this occasion he had again gone to the police and to the hospital. He said that he had been in hospital for [number of] days. He said that he had been experiencing difficulty breathing. He said that once again nothing had happened with the police investigation. He said that he had not been able to identify his attackers because he had not known them. He said that he had contacted the police after he had been discharged from hospital and they had told him that they were still looking for the people who had attacked him but with no result.
83. The applicant said that after this second incident there had been 'minor hooligan attacks'. He said that they had come to his place of work and had written bad things on the windows, then they had knocked at the door. He said that he had tried to use the back entrance to the hotel to escape this. He said that his employer had just given orders to clean the windows but he had not been able to do anything about the situation. He said that he knew that his employer had turned to the police but that the police had not reacted. He said that this had been going on for more than half a year: it had started in [month] and had continued until [month, year]. He said that it had happened once or twice a month.

84. The applicant said that he had tried to come to work an hour earlier and to leave earlier or later to escape the situation. He said that he had used the back entrance. The applicant said that he had at least expected the police to come to the place where he had been beaten. He indicated that what he meant was that he had expected the police to come to the hotel and to wait for him to be attacked again. The Tribunal suggested that this was unrealistic, given the limited resources available to the police. The applicant said that it seemed to him that the police were the only people to whom one could turn for help.
85. The applicant confirmed that he had travelled to [Country F] on one occasion with a group of businessmen. He said that one of these businessmen had been his boss who had also been gay and who had taken him with him. He said that after looking at the situation in [Country F] his boss had decided that it was not a good country for gay people to live in. He said that this had been why he himself had come to Australia and his boss had gone to [Country G]. The Tribunal asked the applicant why he had not moved away from [City C] if he had been having the problems he claimed. The applicant said that the same situation prevailed all over the country: gay people were beaten, harassed and humiliated. He said that his boss had been giving him advice to leave the country for another country where he would be able to live in peace.
86. The applicant said that he had not had time to think of going to Kiev, for example, because his boss had been planning his own escape and his boss had told him to plan his trip. He said that it had not been such a long period of time since he had come back from [Country F]: it had just been [period of time]. The applicant said that the hotel for which he had worked in [City C] had been owned by the state but the manager of the hotel had been his friend and had protected him.
87. The applicant said that he still feared returning to Ukraine because of what had happened to him in the past. He said that despite the information that Ukraine had become more open to gay people and that they had clubs and communities he did not think that it would be safe for him to return to Ukraine. The Tribunal put to the applicant that Kiev had a lively gay scene. The applicant said that he did not know about the situation now but his boss had been aware of the situation in the whole country for homosexuals. He said that his boss had left the country and he had done everything possible in order for him to leave the country. He repeated that he had listened to his boss.
88. The Tribunal put to the applicant that there was no official discrimination against homosexuals in Ukraine and that the evidence did not suggest that the police did not take complaints seriously or that they did not investigate complaints. The applicant said that not everything that happened in Ukraine was in the reports. He said that he knew for sure that the reports that were available did not depict the reality. He said that he had told the Tribunal what had happened to him. He said that he did not know what was happening to the people all over the country but he had given the Tribunal the details of his life.
89. The Tribunal emphasised that it had to look at whether there was a real chance of Convention-related persecution if the applicant returned to Ukraine now or in the reasonably foreseeable future. It referred again to the independent evidence which suggested that homosexuals were not persecuted in cities like Kiev and [City Q]. It noted that the applicant had been prepared to relocate from [City C] to Sydney and it asked him again why he could not relocate to Kiev, for example. The applicant repeated that he had told the Tribunal about the incidents that had taken place in his life. He repeated that he did not accept that the independent evidence reflected the reality in the country. He said that if a person feared for

their life it was possible for them to move from [City C] to Sydney and he was not so sure that everything was so open and smooth as would appear from the independent evidence.

90. The applicant produced a business card and a photograph which he said was of a man named [Mr T] with whom he had previously worked. He said that even now he was going every Saturday to help him. He said that the Tribunal could telephone this person and ask him anything the Tribunal would like to ask. He agreed that this man had not known him in Ukraine. He said that this man was his boyfriend.
91. After the hearing the Tribunal wrote to the applicant in accordance with section 424A of the Act inviting him to comment on information that, subject to any comments he might make, might form the reason or a part of the reason for affirming the decision under review. The applicant responded in a letter dated [date] in which he repeated that he feared persecution in Ukraine because of his sexual orientation. He said that any discrepancies in his evidence with regard to what had happened to him were due to his being under stress or nervous. He said that he had been very unwell at the second hearing before the Tribunal but it was in fact at the third hearing before the Tribunal that he claimed to be unwell but declined the offer made by the Tribunal for the hearing to be adjourned so he could come back on another day.
92. With regard to the independent information he produced some reports downloaded from the Internet which he said proved that homosexuals faced harassment in Ukraine. He also said, however, that '[w]hatever is found in the literature can not [sic] be considered true because there are human rights violations in USA even if all the publications state that there is none'. He said that the Tribunal should assess his application 'in a practical way not theoretically' because 'social practice is different than the principles'. The applicant produced:
  - A report from the *Kiev Post* of 19 October 2000 reporting that the gay and lesbian group Nash Mir had said that it faced harassment from the government, referring to the fact that the government had at the time refused to register it, although it said that society's attitude towards homosexuals in Ukraine had improved significantly since the Soviet era when homosexuality was treated as a crime;
  - A report from the *Sacramento News & Review* of 13 July 2006 reporting on the irony that Ukrainian evangelical Christians who had fled to [Country G] to escape religious intolerance were at the forefront of protests against gay rights in California;
  - Travel advice issued by the Australian Department of Foreign Affairs and Trade for Australian travellers to Ukraine which, while it warns against various dangers (such as robbery, pick-pocketing and bag-snatching), says nothing about the situation of homosexuals in Ukraine; and
  - A summary of news from Eastern Europe and the former Soviet Union relating to events in 2004 which refers to Viktor Yushchenko's triumph in the presidential election held in December that year after the so-called 'Orange Revolution'.

### **Evidence given at the third hearing**

93. At the third hearing the applicant indicated that he was happy to proceed with an interpreter in the Russian language. He said that [Person H] had helped him to fill out his original application. He said that [Person H] and [Person J] were the same person: [Person H] had changed his named in Australia.

94. I referred to the applicant's evidence that he had completed his military service in the old Soviet Army between [year] and [month, year] and I asked him where he had lived after he had completed his military service. The applicant said that he had lived in the city of [City C], at different addresses, mostly at [Address S]. I noted that at the third hearing before the Tribunal the applicant had said that after he had completed his military service he had lived with his parents. The applicant said that he had only stayed with his parents for one or two days after he had completed his military service. He said that they had lived on the outskirts of [City C]. He confirmed that his parents lived in [location], where he himself had said he had grown up.
95. The applicant confirmed that [Address S] was the address of the Hotel [City C]. He confirmed that he had only started working there in [year] but he said that he had lived there before then. He said that a lady who worked there had allowed him to live in a small room at the back of the hotel. I noted that the applicant had said previously that he had lived in the same street as the hotel, in the house of an old lady whom he had helped with the housework. The applicant said that this woman had lived next to the hotel and he had helped her with the housework. He said that initially he had lived at her place and then she had found him a room in the hotel. He said that while he had been working at the hotel he had always lived at the hotel. He then said that he had not lived there all the time and that sometimes he had stayed elsewhere for a day or two.
96. I put to the applicant that he had said previously that while he had been working at the hotel he had been attacked when he had left the hotel after work. The applicant said that he had worked at the hotel on the ground floor and he had been attacked in front of the hotel, near the entrance to the hotel. I noted that he had just told me he had been living at the hotel. The applicant said that to go shopping you had to leave the hotel. I noted that he had said that he had been attacked when returning home from the hotel, particularly in [Season]. The applicant said that he had been leaving the hotel in order to go and buy something to eat and then he had been going back home. He said that he had not reached the shop because he had been attacked.
97. I put to the applicant that at the third hearing before the Tribunal he had said that to avoid these attacks he had tried to come to work an hour earlier and to leave work an hour earlier or an hour later to escape the situation. The applicant said that there had been two entrances to the hotel, one at the front and one at the back, and when he had been leaving the hotel to go to the shops he had used the front entrance. He said that this had been when he had been attacked. I put to the applicant again that at the third hearing before the Tribunal he had said that he had tried to come to work an hour earlier and to leave work an hour earlier or an hour later to escape the situation. I put to the applicant that this did not make any sense if he had been living at the hotel. The applicant referred again to his need to go shopping. I asked him how this was relevant to his evidence that he had tried to come to work an hour earlier. The applicant said that they were not related. He said that he had been coming earlier and he had been cleaning there. I indicated to the applicant that this went to whether I believed that he was telling the truth about what had happened to him in Ukraine. The applicant said that he had nothing further to add in relation to this issue.
98. The applicant said that he did not fear persecution for any reason other than his homosexuality if he returned to Ukraine. He said that he had not had a homosexual relationship with anyone while he had been working at the [factory]. I noted that when the applicant had been interviewed by the primary decision-maker he had said that he had met another young man at the [factory] who had also been gay and that they had spent time

together. The applicant said that they had not spent time together at the [factory]. I noted that the applicant had said that someone at work had noticed them together and that this had been how they had come to know that he was homosexual. The applicant said that they had been 'communicating' together at the [factory] but they had not been in a homosexual relationship. He said that people could think whatever they wanted to think. I put to the applicant that they would not have thought he was homosexual just because they had seen him together with another young man. The applicant said that maybe they had known that the other young man had been gay and then when they had seen him and the other young man together, just talking and communicating, they had thought that he was gay as well.

99. The applicant confirmed that he had not been in a homosexual relationship with the other young man at the [factory]. I noted that in the statement accompanying his original application the applicant had referred to someone whom he had identified as his 'partner' who had suggested that he retrain as a [Occupation D]. The applicant said that his friend [Mr R] had suggested that he undertake this course because he had been working with [Mr R] and some of his friends. I noted that at the second hearing before the Tribunal the applicant had said that it had not been his 'partner' who had suggested that he retrain as a [Occupation D] but a close friend. He had said that his relationship with [Mr R] had run between [year] and [year]. The applicant said that he had got confused because he had been being asked these questions for [number of] years. He said that at that time he had been under great stress and he had been thinking how to escape. He said that it did not seem to him to matter who had suggested it to him, his partner or his friend.
100. I indicated to the applicant that I considered the timing of his relationship with his partner [Mr R] to be something quite significant in his life. The applicant said that he remembered very well about the relationship but he did not think that it was very important who had suggested that he escape. I noted that we were not talking about someone suggesting that the applicant escape: we were talking about whether his relationship with his partner [Mr R] had started when he had already been working at the Hotel [City C], in [year], or whether he had known him earlier, when he had suggested that the applicant should retrain as a [Occupation D], back in [year]. The applicant said that he had started working as a [Occupation D] in [year] and [Mr R] had started coming to him. He said that he had known [Mr R] much earlier but just as a friend. He said that it had been in [year] that they had become close. I noted that the applicant had said previously that he had started working at the [Occupation D]'s shop at the hotel in [City C] in [year]. The applicant said that this was correct but it had maybe only been one month before [year]. I noted that he had said in his original application that he had started working in the [Occupation D]'s shop at the hotel in [City C] in [month, year]. The applicant said that this was correct. I noted that this was not one month before [year]. The applicant agreed.
101. The applicant confirmed that his relationship with [Mr R] had been from [year] to [year]. He said that this had been his only homosexual relationship in Ukraine. I noted that when the applicant had been interviewed by the primary decision-maker he had said that when he had left Ukraine in [month, year] he had left his partner of [number of] years behind. The applicant said that he could not remember for sure. I put to him that he would surely remember if he had had a partner for [number of] years before his departure from Ukraine. The applicant said that it was very hard for him and he was very stressed. I noted that all he had to do was to tell me the truth. The applicant said that he was trying to tell the truth but it was not easy because every person could make a mistake if they were being asked about events which had taken place [number of] years ago. I put to him that if the evidence he had

given at the interview with the primary decision-maker were to be believed he had had a partner in Ukraine for the [number of] years before he had left Ukraine and he had left that partner when he had left Ukraine. I put to him that it was difficult to accept that he would forget something like this. The applicant said that he was very stressed and he asked for and was granted a brief adjournment.

102. After the adjournment I asked the applicant if he was still in touch with any of his friends in Ukraine and he said that he was not. I noted that at the first hearing before the Tribunal he had said that he had a copy of his Ukrainian [Occupation D]'s qualification at his home in Australia so he would be able to provide it to the Tribunal that same afternoon but he had not done so. The applicant said that he had asked [Person H] to do this on his behalf because he had not had the right level of English. He said that [Person H] had had a fax machine and [Person H] had promised him that he would do this. I noted that what the applicant's representative had faxed to the Tribunal had been a copy of a document which had been faxed from the hotel in [City C] after the hearing. I showed the applicant a folio from a Tribunal file. The applicant said that he could not be responsible for the actions of another person. He suggested that maybe his representative had lost his document.
103. I asked the applicant how his representative would have been able to obtain a document from the hotel in [City C], noting that this was where the applicant had worked, not where his representative had worked. The applicant said that his representative had translated the letter saying where he had been working so it would have been very easy for him to use the details from this letter to find out. He said that maybe his representative had made a mistake and had wanted to correct this mistake. I asked the applicant if he was saying that he had had nothing whatsoever to do with this document. The applicant said that his representative had been the one who had been doing all this and who had had all his documents. I noted again that the document had been faxed from the Hotel [City C]. The applicant said that he had this document at home.
104. I noted that at the second hearing before the Tribunal the applicant had produced a different document. I showed the applicant another folio. The applicant said that it was not a different document. He said that he had been undertaking a course in three stages and at each stage he had been getting a different document. I noted that the documents were the same except for the dates: one said that he had been doing the course from [date] and the other said that he had been doing the course from [a later date]. The applicant said that he had not written the documents himself and he did not know who had made the mistake. He said that he had a third document stating that he had studied a course for [period of time] in the city of Kiev. I noted that this document was before the Tribunal as well ([folio reference]). The applicant confirmed that he had actually studied for [period of time] in Kiev. I noted that the reason I was asking the applicant this was that he had said previously that he knew nothing of the situation for homosexuals in Kiev and that he had had to rely on what had been told him by the manager of the hotel. The applicant said that this was correct. I noted that now he was saying that he had spent [period of time] there. The applicant said that he had spent [period of time] there studying this course.
105. The applicant said that the manager at the hotel in [City C] had gone to [Country G] maybe [period of time] before he himself had left. I noted that at the first hearing before the Tribunal the applicant had said that the manager had left in [year]. The applicant said that he did not remember for sure. I put to the applicant that this could not be correct if the applicant's evidence at subsequent hearings had been correct because the applicant had said at subsequent hearings that the manager had gone with him to [Country F] in [month, later

year]. The applicant said that they had gone to [Country F] together. I put to the applicant that this would mean that the manager had not left in [year] and that he had not left in [season]. The applicant said that he did not know for sure.

106. I noted that the applicant had said that it had been the manager at the hotel who had recommended him to the travel agent who had arranged for him to come to Australia. The applicant said that the manager had advised him to go to Australia and that the manager himself had gone to [Country G]. I put to the applicant that this was why I thought that he would probably remember when the manager had left Ukraine. The applicant said that the manager had left [period of time] before him.
107. I put to the applicant that one possibility that had occurred to me was that he had not gone to [Country F] at all. I noted that he had said that he had used an agent in Kiev to obtain his Australian visa and that this visa had been obtained on a completely false basis. I noted that many agents of this nature put false visa stickers and stamps in people's passports to establish a record of previous travel outside the country. I indicated to the applicant that it had therefore occurred to me that I should give him the opportunity to tell me if in fact he had not gone to [Country F]. The applicant said that he had not in fact gone to [Country F]. He said that they had taken his passport to Kiev and he had not cared what they had been doing or what kind of country they would put in his passport: he had just wanted to run away. I asked him if he still said that the manager of the hotel had left [period of time] before he had rather than in the [season] of [year] as he had said at the first hearing before the Tribunal. The applicant said that he could not remember for sure. He said that this had not been very important information for him.
108. The applicant said that he was currently living in a flat in [Suburb V] and that he had been living there for [number of] years or maybe even longer. I noted that at the time of the second hearing before the Tribunal the applicant had been living with a Ukrainian woman and her young child in a semi-detached house in [Suburb U]. The applicant said that he had not stayed there for a long time: he had left for [Suburb V]. I noted that this still suggested that he had been living in [Suburb V] for less than [number of] years. The applicant agreed. He said that he lived on his own in the flat at [Suburb V] and that he was not in a homosexual relationship with anyone at the moment. He said that he was temporarily not working. He said that he did not have a permanent job: he said that he [did Occupation B work] from time to time and he worked as a [type of worker] from time to time.
109. I noted that applicant had qualified as a [Occupation D] at TAFE and at the second hearing before the Tribunal he had said that he had the offer of a job at a [Occupation D]'s shop in [Suburb V]. The applicant said that he had worked there for a short period of time when he had still been studying but he had not liked it there very much. He said that they had not treated him very well, he did not know why. I noted that at the third hearing before the Tribunal the applicant had said that he had been working at a [business] and that he had said that at the time he had still been working there on Saturdays. I noted that the applicant had produced a photograph of someone called [Mr T] who had been the manager there and who he had said had been his boyfriend. The applicant said that this had been correct at that time.
110. I noted that at the moment I did not have any evidence before me other than the applicant's own evidence to support his claim that he was homosexual. The applicant said that he lived by himself and that he did not have a boyfriend now. He said that if he had wanted to prove this it would have been very easy for him to have gone to Oxford Street and to have paid money to someone to come to the hearing as a witness. He said that he had taken an oath on



the Bible to tell the truth. I noted that the applicant had been in Australia for almost [number of] years at the date of the fourth hearing. I noted that at the second hearing before the Tribunal he had said that the reason he had not made any contacts in the gay community in Australia was that he had been concentrating on his work, his church and his studies. The applicant said that at that time he had been really busy.

111. I noted that, when the Tribunal had been exploring with the applicant all the various ways in which he could provide some sort of evidence that he was in fact gay, the applicant had said that it was difficult because of the language barrier. The applicant said that this had been correct at that time. I noted that at that time it had appeared that his circle of friends had been focused on the [Church E] at [Suburb W]. The applicant said that he believed in God and he went to church on Sundays, although not every Sunday. He said that he went to this church because he was Ukrainian and he was able to speak his language with some people there. He said that now his English was better and he had some English-speaking friends or more accurately acquaintances from TAFE, where he had been studying, and from the college where he had been improving his English. He said that he did not meet them every Sunday for example but from time to time they called him and they saw each other. He said that now when he went out he could communicate in English.
112. I noted that at the hearing in [year] the applicant had said that once his English language skills improved he would be able to widen his circle of friends. I noted that the reason this had importance was that he had said that he could not discuss anything regarding homosexuality with his friends from the [Church E]. The applicant said that he still could not discuss those issues with his friends from the [Church E]. I noted that at the hearing in [year] the applicant had said that the only person in Australia who knew he was gay was the Ukrainian woman with whom he had been living at the time. I indicated to the applicant that I was trying to explore whether there were other people whom he had met, socially or through work, who would actually know that he was homosexual. The applicant said that he had some acquaintances whom he met from time to time at the cinema or in the pub or on the street and they might talk for a few minutes, just exchange some words, but he did not have their contact telephone numbers. He said that he was quite isolated from society and he did not go to the pub a lot. He said that rather than go out he would read a book or do something at home.
113. I indicated to the applicant that I was not trying to impose any expectations on him as to what sort of lifestyle he might lead. The applicant said that so far as he understood I was asking him to produce some evidence that he was gay but unfortunately he could not produce a licence like a driver's licence. I indicated to the applicant that I was not asking the applicant for this but that, as had been explored at the second hearing before the Tribunal, there might be a lot of ways in which someone who was homosexual might be able to demonstrate this. The applicant said that it was not his fault that he was not in a relationship. I noted that it was not necessarily a matter of being in a relationship: a lot of gay people were not in relationships.
114. I indicated to the applicant that what the Tribunal had tried to explore with him as well was why he had not sought out and formed a circle of gay friends in Australia, if, as he had said, he had fled Ukraine because he was homosexual and he had come to Australia because he believed that Australia provided greater freedom for homosexuals. The applicant said that when he had come to Australia he had gone to the Mardi Gras, he had walked down Oxford Street and he had gone to the cinema but it was not easy to find a friend, not just for a sexual relationship. He said that it took time. I noted that the gay community was obviously much

more than Mardi Gras and nightclubs on Oxford Street. The applicant said that he agreed and that this was why he did not want to shout and to dance to demonstrate that he was that kind of person. He said that he would like to have a simple life. He just liked to meet with people, to talk with them and to help them and he was doing that.

115. I asked the applicant how he was doing this. The applicant said that if he met somebody he would give them advice if he could see that they were in need of advice. He could [do Occupation B work], he could [do labouring work] because in Ukraine men could do these sorts of things. He said that he thought it was the right thing to do, to help people. I noted that this was very laudable but that the applicant had said that in Ukraine he had been involved with a gay organisation which had specifically helped gay people. The applicant referred to his evidence that this organisation had not been registered. He said that the gay organisation Nash Mir or 'Our World' was just a bureaucratic trick to allow Ukraine to enter the European Union and to show that it was a democratic country. He said that he had a document proving what was really happening to the gay community in Ukraine. He produced various reports downloaded from the Internet and a copy of a decision of the UK Immigration Appeal Tribunal.
116. I indicated that we would come back to this information but the point I had been trying to make was that the applicant had been talking about the help he could provide to people here, saying that he could [perform Occupation B work], [and] he could [do labouring work] I noted again that the applicant had said that he had been part of a gay organisation in Ukraine which had helped people in various ways. I noted that there were similar organisations in Sydney which provided help to people in the gay community. I noted that when he had previously been asked about these sorts of things the applicant had said that his English language skills prevented him from being involved in these sorts of organisations but that now his English language skills had improved and he had said that he could help people in the community. I asked him why he had not for example become involved in one of these organisations which helped people in the gay community. The applicant said that one did not need to be part of an organisation to provide assistance to people.
117. I indicated to the applicant that this was perfectly correct but that the only organisation with which he seemed to be involved in Australia was his church at [Suburb W]. The applicant agreed. I noted that I was not saying that there was anything wrong with that but I noted that the applicant had said that he could not discuss his homosexuality there so obviously no one there could assist by supporting or confirming in any way his claim that he was homosexual. The applicant agreed. He said that the people who were religious were the same in Ukraine as here: they did not accept people like him. He said, however, that he was quite happy in the [Church E] and that they were not persecuting him. He said that he was not telling them what he had in his heart. He said that he was trying to help the people in the church in the same way as he helped other people. He said that he always carried his Bible with him.
118. I put to the applicant that one of the problems - which once again had been raised with him at the second hearing before the Tribunal - was that he claimed to have been a gay activist in Ukraine. I put to the applicant that nothing in his behaviour since he had been in Australia had suggested any involvement in gay activism at all. The applicant said that in Ukraine he had been very active trying to get registration for the gay organisation. He said that they had been trying to have an organisation which would protect the rights of homosexuals and which would protect them against wrongdoing. He said that he had been very active but they had not succeeded in their activity. He said that when he had come to Australia he had not been

able to see any need in Australia to organise something like that because they had freedom here in this respect.

119. I put to the applicant that the people who were gay activists in Australia would differ with him because they said that they did not have complete freedom here and there were various campaigns which they were fighting. I noted that as had been discussed at the previous hearings and at the Departmental interview, homophobia and anti-gay violence existed in Australia, even in Sydney on Oxford Street. The applicant said that he had been in Australia for six or seven years and he had never seen on television or in the mass media about gay people being killed or persecuted or harmed in any way except those who were organising drunken fights in Oxford Street. I put to the applicant that I considered this an extraordinary statement for him to make, referring for example to well-known incidents in which a gay man had been bashed on Oxford Street and a gay newsreader had been killed. The applicant said that he had never heard or read anything about this.
120. The applicant asked if it was obligatory for him to be part of some kind of organisation. He asked why he should do this if he did not want to do this. I put to him again that he had said that he had been a gay activist in Ukraine. The applicant said that he had been active in Ukraine because he had been trying to protect and defend people and he had been trying to show to other organisations that they were doing something wrong. He said that he had not seen any violence here in Australia against homosexuals. He said that if he saw something like that he would definitely try to protect the person.
121. I put to the applicant that homosexuality had been decriminalised in Ukraine in 1991. I put to him that the information available to the Tribunal indicated that public attitudes towards homosexuals were generally tolerant in Kiev and [City X] There was a small gay scene - clubs and bars and the like - in both cities. As was stated in one of the documents which the applicant had produced to me, some prejudice and discrimination against homosexuals remained but attitudes towards homosexuals were improving, particularly among younger people. Homosexuals were reported to feel quite comfortable living, studying and working in Kiev. A student who had been expelled from his college for distributing leaflets encouraging homosexuals to be more open and asking other students to be more tolerant of homosexuals had been awarded monetary compensation in 2006 (UK Home Office, *Country of Origin Information Report: Ukraine*, June 2006, paragraphs 6.106-6.108; Research Directorate, Immigration and Refugee Board of Canada, 'Treatment of homosexuals in Kiev: availability of state protection for homosexuals in Kiev', 27 February 2006, UKR100976.E).
122. I put to the applicant that, as was stated in the document which the applicant had produced to me, the police in Ukraine for the most part treated homosexuals claiming to be victims of a crime as such and followed the required procedures in conducting an investigation. The sexual orientation of a complainant did not usually affect the timing and quality of the police response (Research Directorate, Immigration and Refugee Board of Canada, 'Treatment of homosexuals in Kiev: availability of state protection for homosexuals in Kiev', 27 February 2006, UKR100976.E). I put to the applicant that this mattered because, as had been discussed at the previous hearings, the Australian courts had said that what was required for the purposes of the Refugees Convention was not an absolute guarantee of protection. The State was required 'to take reasonable measures to protect the lives and safety of its citizens, and those measures would include an appropriate criminal law, and the provision of a reasonably effective and impartial police force and judicial system' (per Gleeson CJ, Hayne and Heydon JJ in *Minister for Immigration and Multicultural Affairs v Respondent S152/2003* (2004) 205 ALR 487 at [26]).

123. The applicant said that I had not read from the very beginning of the document he had produced to the very end and he said that if I had done so I would be able to find many cases where homosexuals had been treated wrongly or discriminated against. He said that there was a speech of the President in 2002 or 2006 which showed his attitude and there was the attitude of the church towards homosexual minorities. He said that if you read all the documents you would see how homosexual minorities suffered in Ukraine. He said that if you searched for problems of homosexuals in Ukraine on the Internet you would find millions more examples of how badly homosexuals were treated there. He said that you would also be able to find millions of positive examples that Ukraine was a democratic country and that everything was improving there.
124. I put to the applicant that the document he had produced entitled 'The situation of gays and lesbians in Ukraine' dated from 2000. The reference to a statement made by the President in the document was a reference to a statement made by Leonid Kravchuk who had even then been an ex-President. I put to the applicant that, as I was sure he was aware, things had changed a lot in Ukraine, particularly since the so-called 'Orange Revolution' in 2004. The applicant said that one of the documents he had produced dated from 2002. He asked why he had not been believed at that time. He said that in one of the court proceedings he had been shown a document saying that people treated homosexuals quite well but this was not true. He said that if he tried to find some information on the Internet he was sure that he would be able to find both negative and positive material. I noted that he had already given me material from the Internet. The applicant said that this was just one drop of water in the sea.
125. I referred to the fact that at the first hearing before the Tribunal the applicant's then representative, [Person J] or [Person H], had asserted that the applicant could not relocate within Ukraine because of the *propiska* system. I put to the applicant, however, that a new system of registration had been introduced in 2005 replacing most elements of the *propiska* system which inhibited the free movement of individuals. I put to him that human rights groups had said that a person could now live, work and receive services anywhere in Ukraine (UK Home Office, *Country of Origin Information Report: Ukraine*, June 2006, paragraph 6.65). I put to the applicant that what this suggested was that if he were to return to Ukraine he would be able to relocate to another city where the evidence suggested that the situation for homosexuals was more tolerant than it was in the more rural areas in Ukraine. The applicant said that everything you could find on the Internet was written about the cases which happened in the big cities. He said that nobody would write about something which happened in a small city, that somebody was persecuted or beaten and then their statement was not taken by the police. He said that after all the information he could get from the Internet he was scared to go back to Ukraine.
126. I put to the applicant that the document which he had produced himself said that both 'Nash Mir' and the International Lesbian and Gay Association (ILGA) stated that the situation for gays and lesbians in Kiev was better than in other areas of Ukraine and that gays and lesbians felt quite comfortable living, studying and working there. The applicant said that I was just reading the positive comments, not the negative ones. I put to the applicant that I could not see anything negative about feeling quite comfortable living, studying and working there. The applicant repeated that I had not read the document out from the beginning to the end. I gave the applicant until [date] to produce additional evidence to me.
127. On [date] the Tribunal received a letter from the person named [Mr T] whom the applicant had mentioned at the third hearing before the Tribunal. [Mr T] stated that he was the manager of the business where the applicant had worked on a casual basis between [month,

year] and [month, year]. He said that on one occasion the applicant had told him a few personal things about his life, ‘how he was struggling in Ukraine’, ‘about his beatings and the persecution’ and the fact that ‘men of a non-traditional sexual orientation aren’t well accepted there’.

## FINDINGS AND REASONS

128. I accept 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)
129. As the Full Court noted in that case, this statement of principle is subject to the qualification explained by the High Court in *Minister for Immigration and Ethnic Affairs v Guo* (1997) 191 CLR 559 at 576 per Brennan CJ, Dawson, Toohey, Gaudron, McHugh and Gummow JJ where they observed that:
- ‘in determining whether there is a real chance that an event will occur, or will occur for a particular reason, the degree of probability that similar events have or have not occurred for particular reasons in the past is relevant in determining the chance that the event or the reason will occur in the future.’
130. If, however, the Tribunal has ‘no real doubt’ that the claimed events did not occur, it will not be necessary for it to consider the possibility that its findings might be wrong: *Minister for Immigration and Multicultural Affairs v Rajalingam* (1999) 93 FCR 220 per Sackville J (with whom North J agreed) at 241. Furthermore, as the Full Court of the Federal Court (O’Connor, Branson and Marshall JJ) observed in *Kopalapillai v Minister for Immigration and Multicultural Affairs* (1998) 86 FCR 547 at 558-9, there is no rule that a decision-maker concerned to evaluate the testimony of a person who claims to be a refugee in Australia may not reject an applicant’s testimony on credibility grounds unless there are no possible explanations for any delay in the making of claims or for any evidentiary inconsistencies. Nor is there a rule that a decision-maker must hold a ‘positive state of disbelief’ before making an adverse credibility assessment in a refugee case.
131. In the present case, as I indicated to the applicant in the course of the fourth hearing, I consider that there are good reasons to reject much of the applicant’s evidence on credibility grounds. First, at the fourth hearing the applicant conceded that he had not in fact gone to [Country F] in [month, year]. This no doubt explains the inconsistencies in his evidence about that journey, given that the account he gave of it on different occasions was a complete fabrication. However I consider that the fact that the applicant was prepared to lie about this matter is clearly relevant to his credibility. The applicant referred in the course of the fourth hearing to the fact that he had taken an oath on the Bible to tell the truth but he gave evidence on oath at the first, second and third hearings before the Tribunal at all of which he maintained his claim that he had gone to [Country F]. I consider that this demonstrates that

he is prepared to lie if he believes that it will assist his case despite having taken an oath on the Bible.

132. Secondly, the applicant said at the fourth hearing before the Tribunal that while he had been working at the hotel in [City C] he had lived at the hotel. As I put to him, at the third hearing before the Tribunal he said that he had been attacked by people waiting outside the hotel when he had been returning home after work. The applicant said that he had been leaving the hotel in order to go and buy something to eat and then he had been going back home to the hotel. However, as I put to him, at the third hearing before the Tribunal he said that he had tried to come to work an hour earlier and to leave earlier or later to escape the situation. As I put to the applicant, I do not consider that this makes sense if he was in fact living at the hotel.
133. The applicant then suggested that his evidence about trying to come to work an hour earlier had not been related to his desire to escape being attacked. I have taken into account the fact that the applicant has given evidence both to the Department and to the Tribunal on a number of occasions over several years. However I do not accept that the applicant would have difficulty remembering the circumstances in which these attacks occurred. I consider that his evidence that he was attacked outside the hotel when returning home after work makes no sense in light of the fact that he was living at the hotel and I consider that this once again casts doubt on his credibility.
134. Thirdly, the basis of the applicant's claims is that he was a gay activist in Ukraine who was involved in an organisation which tried to help gay people. However, as I put to him, although he has been in Australia for several years now, it does not appear that he has made any contacts in the gay community. As I noted, this issue was explored at some length at the second hearing before the Tribunal in November 2005. At that hearing the applicant said that the reason he had not made any contacts in the gay community in Australia was that he had been concentrating on his work, his church and his studies. The applicant has now completed his studies and he said at the fourth hearing that now when he went out he could communicate in English. However, as I put to him, it seems that the only organisation with which he is involved in Australia is the [Church E] at [Suburb W]. The applicant confirmed at the fourth hearing that he could not discuss anything regarding homosexuality with his friends from the [Church E]. He said that he had some English-speaking friends or more accurately acquaintances from TAFE, where he had been studying, and from the college where he had been improving his English. He said that he did not meet them every Sunday for example but from time to time they called him and they saw each other. He also said that he had some acquaintances whom he met from time to time at the cinema or in the pub or on the street and they might talk for a few minutes, just exchange some words, but he did not have their contact telephone numbers.
135. At the second hearing before the Tribunal the applicant said that the only person in Australia who knew he was gay was the Ukrainian woman with whom he had been living at the time. At the third hearing before the Tribunal he said that a man named [Mr T] with whom he had previously worked was his boyfriend and after the fourth hearing the Tribunal received a letter from [Mr T] who confirmed that they had worked together and said that on one occasion the applicant had told him a few personal things about his life, 'how he was struggling in Ukraine', 'about his beatings and the persecution' and the fact that 'men of a non-traditional sexual orientation aren't well accepted there'. In summary it appears that apart from the applicant's representatives he has told only two people in Australia that he

claims to be homosexual. It appears that the applicant has not sought out and formed a circle of gay friends in Australia of the sort he claims to have had in Ukraine.

136. As I was at pains to stress to the applicant in the course of the fourth hearing, I am not using some sort of template to impose particular expectations on him with regard to how he should behave. I accept that a lot of gay people are not in relationships, that the gay community is much more than Mardi Gras and Oxford Street and that there are obviously gay people who prefer a quiet life and who are not involved in any organisations. However the basis for the applicant's claims is that he was a gay activist in Ukraine who was involved in an organisation which tried to help gay people. I do not consider it unreasonable, therefore, to expect that the applicant would have wanted to become involved in similar organisations in this country or that he would have wanted to seek out friends in the gay community in Australia as he claims to have done in Ukraine.
137. The applicant suggested that if he had wanted to prove that he was gay it would have been very easy for him to have gone to Oxford Street and to have paid money to someone to come to the hearing as a witness. He said that he had taken an oath on the Bible to tell the truth. However for the reasons given above I consider that he has demonstrated that he is prepared to lie if he believes that it will assist his case despite having taken an oath on the Bible. I consider that the applicant's evidence that he did not see the need for any organisation to campaign for gay rights in Australia and that he was not aware of any incidents of violence against homosexuals in Australia casts doubt on his claim that he was a gay activist in Ukraine who was involved in an organisation which tried to help gay people and that he was persecuted for that reason. Once again I consider that this is also relevant to the applicant's overall credibility.
138. For the reasons given above, I do not consider that the applicant is a credible witness. I consider that he has demonstrated that he is prepared to lie if he believes that it will assist his case despite having taken an oath on the Bible. I do not accept on the evidence before me that the applicant is homosexual, as he claims, that he was a gay activist or a member of a gay organisation in Ukraine or that he was persecuted for reasons of his sexual orientation or his membership of that gay organisation in Ukraine. I do not accept, in particular, that the applicant was persecuted while undertaking his military service because his sexual orientation came to the attention of his comrades, nor that he was discriminated against at the [factory] for reasons of his sexual orientation, nor that while he was working at the Hotel [City C] he was attacked or received hate mail because of his sexual orientation or his involvement in an organisation which tried to help gay people.
139. Since I do not accept that the applicant is homosexual, I do not accept that he encountered prejudice or discrimination from his church or the wider community in Ukraine because of his sexual orientation. I do not accept on the evidence before me that [Mr T] was the applicant's boyfriend as the applicant claimed at the third hearing before the Tribunal. I note for the sake of completeness that I do not consider on the evidence before me that the applicant has engaged in any conduct in Australia for the purpose of strengthening his claim to be a refugee and I therefore do not consider that there is any conduct which I am required to disregard in accordance with subsection 91R(3) of the Act. Since I do not accept that the applicant is homosexual or that he is a gay activist, as he claims, I do not accept that there is a real chance that, if he returns to Ukraine now or in reasonably foreseeable future, he will be persecuted for reasons of his sexual orientation or his involvement in gay activism, whether as an individual or as a member of any organisation.

140. Furthermore and in the alternative, even if I were to accept that the applicant was a homosexual and a gay activist in Ukraine - which for the reasons given above I do not accept - I would not accept that there was a real chance that he would be persecuted for reasons of his sexual orientation or his involvement in gay activism, whether as an individual or as a member of any organisation, if he were to return to Ukraine now or in the reasonably foreseeable future. As I put to the applicant in the course of the fourth hearing, homosexuality was decriminalised in Ukraine in 1991. As I put to him, the information available to the Tribunal indicates that public attitudes towards homosexuals are generally tolerant in Kiev and [City X]. There is a small gay scene - clubs and bars and the like - in both cities. I accept that some prejudice and discrimination against homosexuals remains, but the information available to the Tribunal indicates that attitudes towards homosexuals are improving, particularly among younger people. As I put to the applicant, homosexuals are reported to feel quite comfortable living, studying and working in Kiev (UK Home Office, *Country of Origin Information Report: Ukraine*, June 2006, paragraphs 6.106-6.108; Research Directorate, Immigration and Refugee Board of Canada, 'Treatment of homosexuals in Kiev: availability of state protection for homosexuals in Kiev', 27 February 2006, UKR100976.E).
141. As I put to the applicant, the information available to the Tribunal indicates that the police in Ukraine for the most part treat homosexuals claiming to be victims of a crime as such and follow the required procedures in conducting an investigation. The sexual orientation of a complainant does not usually affect the timing and quality of the police response (Research Directorate, Immigration and Refugee Board of Canada, 'Treatment of homosexuals in Kiev: availability of state protection for homosexuals in Kiev', 27 February 2006, UKR100976.E). As I put to the applicant, this matters because the Australian courts have said that what is required for the purposes of the Refugees Convention is not an absolute guarantee of protection. The State is required 'to take reasonable measures to protect the lives and safety of its citizens, and those measures would include an appropriate criminal law, and the provision of a reasonably effective and impartial police force and judicial system' (per Gleeson CJ, Hayne and Heydon JJ in *Respondent S152/2003*, referred to above, at [26]). I do not accept that on the evidence before me that there is a failure on the part of the Ukrainian authorities to provide protection to homosexuals in the sense of a failure to meet the standards of protection required by international standards as referred to in *Respondent S152/2003* at [27].
142. It is relevant in the present case that 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: see *Randhawa v Minister for Immigration Local Government and Ethnic Affairs* (1994) 52 FCR 437 per Black CJ at 440-1. The issue is whether it is reasonable, in the sense of practicable, for the applicant to relocate to a region where, objectively, there is no appreciable risk of the occurrence of the feared persecution. What is 'reasonable', in the sense of 'practicable', will depend upon the particular circumstances of the applicant and the impact upon him or her of relocation within his or her country of nationality. However it should be noted that the Refugees Convention is concerned with persecution in the defined sense, not with living conditions in a broader sense. Whether relocation is reasonable in the sense of practicable is therefore 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: see *SZATV v Minister for Immigration and Citizenship* [2007] HCA 40 at [23]-[25] per Gummow, Hayne and Crennan JJ (with whom Callinan J agreed).



143. At the first hearing before the Tribunal the applicant's then representative, [Person J] or [Person H], asserted that the applicant could not relocate within Ukraine because of the *propiska* system. As I put to the applicant, however, a new system of registration was introduced in 2005 replacing most elements of the *propiska* system which inhibited the free movement of individuals. As I put to him, human rights groups have said that a person could now live, work and receive services anywhere in Ukraine (UK Home Office, *Country of Origin Information Report: Ukraine*, June 2006, paragraph 6.65). As I put to the applicant, I consider that this information suggests that if he were to return to Ukraine he would be able to relocate to Kiev where the evidence referred to above suggests that the situation for homosexuals is more tolerant than it is in the more rural areas in Ukraine.
144. The applicant responded to this information by saying that I would be able to find many cases where homosexuals had been treated wrongly or discriminated against in Ukraine. I accept that such cases are reported, including in the document to which I referred in the course of the hearing. As I noted, the applicant himself produced a copy of this document at the fourth hearing. However, as I put to him, the document said that both 'Nash Mir' and the International Lesbian and Gay Association (ILGA) stated that the situation for gays and lesbians in Kiev was better than in other areas of Ukraine and that gays and lesbians felt quite comfortable living, studying and working there. I find on the evidence before me that it would be reasonable for the applicant to relocate to Kiev and that he would not face a real chance of being persecuted in Kiev for reasons of his sexual orientation or his involvement in gay activism, whether as an individual or as a member of an organisation. Accordingly, even if I were to accept that the applicant was a homosexual and a gay activist in Ukraine - which for the reasons given above I do not accept - I would not accept that there was a real chance that he would be persecuted for reasons of his sexual orientation or his involvement in gay activism, whether as an individual or as a member of any organisation, if he were to return to Ukraine now or in the reasonably foreseeable future.

## CONCLUSIONS

145. For the reasons given above I do not accept that the applicant has a well-founded fear of being persecuted for one or more of the five Convention reasons if he returns to Ukraine now or in the reasonably foreseeable future. It follows that I am not satisfied that the applicant is a person to whom Australia has protection obligations under the Refugees Convention. Therefore the applicant does not satisfy the criterion set out in paragraph 36(2)(a) of the Act for a protection visa.

## DECISION

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

<p>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 <i>Migration Act</i> 1958. Sealing Officers ID: PRRTIR</p>
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