

1213081 [2014] RRTA 75 (28 January 2014)

DECISION RECORD

RRT CASE NUMBER: 1213081
DIBP REFERENCE(S): CLF2012/71936
COUNTRY OF REFERENCE: India
TRIBUNAL MEMBER: Chris Keher
DATE: 28 January 2014
PLACE OF DECISION: Sydney
DECISION: The Tribunal remits the matter for reconsideration with the direction that the applicant satisfies s.36(2)(a) of the Migration Act.

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

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

1. This is an application for review of a decision made by a delegate of the Minister for Immigration to refuse to grant the applicant a Protection (Class XA) visa under s.65 of the *Migration Act 1958* (the Act).
2. The applicant, who the Tribunal accepts is a citizen of India, applied to the Department of Immigration for the visa [in April 2012] and the delegate refused to grant the visa [in July 2012].
3. The applicant appeared before the Tribunal [in December 2013] to give evidence and present arguments. The Tribunal also received oral evidence from [Mr A] (file number [deleted]). The Tribunal hearing was conducted with the assistance of an interpreter in the Urdu and English languages.
4. The applicant was represented in relation to the review by his registered migration agent. The representative attended the Tribunal hearing.

CLAIMS AND EVIDENCE

5. The criteria for a protection visa are set out in s.36 of the Act and Schedule 2 to the Migration Regulations 1994 (the Regulations). An applicant for the visa must meet one of the alternative criteria in s.36(2)(a), (aa), (b), or (c). That is, the applicant is either a person in respect of whom Australia has protection obligations under the 'refugee' criterion, or on other 'complementary protection' grounds, or is a member of the same family unit as such a person and that person holds a protection visa.
6. Section 36(2)(a) provides that a criterion for a protection visa is that the applicant for the visa is a non-citizen in Australia in respect of whom the Minister is satisfied Australia has protection obligations under the 1951 Convention Relating to the Status of Refugees as amended by the 1967 Protocol relating to the Status of Refugees (together, the Refugees Convention, or the Convention).
7. If a person is found not to meet the refugee criterion in s.36(2)(a), he or she may nevertheless meet the criteria for the grant of a protection visa if he or she is a non-citizen in Australia in respect of whom the Minister is satisfied Australia has protection obligations because the Minister has substantial grounds for believing that, as a necessary and foreseeable consequence of the applicant being removed from Australia to a receiving country, there is a real risk that he or she will suffer significant harm: s.36(2)(aa) ('the complementary protection criterion').
8. In accordance with Ministerial Direction No.56, made under s.499 of the Act, the Tribunal is required to take account of policy guidelines prepared by the Department of Immigration –PAM3 Refugee and humanitarian - Complementary Protection Guidelines and PAM3 Refugee and humanitarian - Refugee Law Guidelines – and any country information assessment prepared by the Department of Foreign Affairs and Trade expressly for protection status determination purposes, to the extent that they are relevant to the decision under consideration.
9. The issue in this case is the credibility of the applicant, in particular whether he is homosexual and in a relationship, and then on his accepted claims whether he meets the refugees convention

criterion or complimentary protection criterion. For the following reasons, the Tribunal has concluded that the decision under review should be remitted for reconsideration.

10. The applicant is [Mr B]. He is 25 years of age and was born in, [India]. He is Muslim. He completed a Bachelor of Commerce degree in [India]. In Australia he arrived on a student visa [in March 2009], studied a Diploma of Business Management and withdrew from that course in September 2009.
11. His parents live in Hyderabad. His father works as a [government official] with [a government agency]. He has a[family composition details deleted].
12. Details of his claims are as in the delegate's decision and he has provided a copy of that decision with his application for review. The delegate accepted that the applicant was homosexual. The delegate found that the level of harm faced by the applicant if he were to return to India was not at a level as could be considered as persecution. The delegate also found that relocation was a reasonable option.
13. The applicant's claims are that he is homosexual and is in a relationship since about May2009 with [Mr A] (file number [deleted]). They reside together in an apartment and have a joint bank account and lease. He claims that his parents are aware of the relationship and he returned to India in 2011 to try and explain it to them. He was in India 3 weeks and at home for about 2 weeks. He claims when he returned home his parents did not accept that he was homosexual and restrained him in his room in their house. He managed to leave the house with the help of [a friend]. He claims his parents weren't aware that he had a return ticket for Australia. When his family went to the mosque on a Friday he called his friend and he came over and picked him up. He stayed with him about 8 days before returning to Australia.
14. He fears return to India and fears harm from his family, his cousins, and the Islamic community. He has received threats from a local Muslim cleric in [India]. He fears that they will harm him as his being homosexual and his relationship is considered as haram; and because of issues relating to family honour, and morality. He claims in India he cannot live openly with his partner, would have to hide that he is homosexual and in general would face discrimination. He fears for example at he would lose his job if an employer found out he was homosexual and if a landlord found out they would be evicted. He claims that people in India talk about other people and would find out and spread that he is homosexual. He would be laughed at and mocked. He claims he cannot go back to [India] as his family is there. When he returned in 2011 he was attacked by his father and male cousins. His father told him what he was doing was wrong. He wanted him to marry a girl they had chosen. His [cousins] attacked him and one put a knife at his throat and threatened him that he was to change his ways of be killed. His mother said that what he was doing was wrong and "even if she wants to help me she can't ... she is crying and can't do anything else". His aunt and uncle were also there when this happened. He was hit in the face by a cousin and claims he later went to a doctor in India and his nose was twisted but not broken. He said he had the x-ray report at home though post-hearing said he couldn't find it.
15. He claims that he first told his family he was homosexual in July 2009 after he and [Mr A] had been in a relationship for a few months. He claims he had arrived in Australia [in March 2009] and met [Mr A] the next day when he was looking for accommodation. Their relationship became sexual from June 2009. He said he told his father as he was very close to him, thought he would understand and be supportive and "I thought he would help". He claims that even though he is from a Muslim family he had not expected such a harsh reaction. His [siblings] are aware of what has happened and also think what he is doing is wrong. He has not been in any contact with

his siblings for the past 1.5 years. He last spoke to his parents about 1 year ago. They told him he had to change his ways and if he didn't for him not to return to India as he was damaging their family reputation, and "disrespecting our family in society".

16. In Australia he claims that only a few friends know that he and [Mr A] are in a relationship and "a couple". He and his partner live together and have dinners together. He claims he still practices Islam and believes that he can reconcile this with being homosexual as "Allah is his protector and knows what he is doing"; he has a personal relationship with Allah. He attends mosque every week. He claims that in Australia his rights are protected whereas in India they are not and he would face discrimination. People in Australia he considers don't interfere in others personal lives, whereas in India "everyone looks into your life". He does not visit any gay clubs or bars in Australia as he doesn't drink alcohol.
17. The applicant fears that if he returns to India his family, specifically his father and cousins, would harm him. They would force him to marry and "take me away from [Mr A]" or confine me in the house. He fears that his father's position in [a government agency] may assist him in being able to find him if he returns to India and "probably he will try and find us ... In [India] they would find us ... I'm not sure they would be able to find us elsewhere in India".
18. [Mr A] also gave evidence in relation to the relationship and claimed fear of harm on return to India. Part of the hearing was conducted with both applicants' being interviewed together. They claimed they want to get married in Australia and had applied for the ACT marriage proposal and paid a \$200 fee. They intend to move out of their shared accommodation and rent an apartment together. They want to remain together and "we are committed to be together for life ... the law in Australia treats everyone as equal".

CONSIDERATION OF CLAIMS AND EVIDENCE

19. I have carefully considered the claims and evidence of the applicant. The delegate accepted that the applicant is homosexual. I also accept this to be true. I found the applicant to be honest and forthright in relation to his claims and history and find that he is a credible witness.
20. I also accept that the applicant is in a relationship with [Mr A] and has been for the past 4.5 years. I also accept as true the history as detailed by the applicant of his telling his family and his return to India in the hope he would be able to explain his situation to them. This ended in his being assaulted and told he was going to change his ways and marry a girl they had chosen. I accept as true that he was able to leave his home with the assistance of a friend and subsequently he has been told that unless he changes his ways he is not to return to India as he has damaged family honour.
21. I accept that if the applicant were to return to [India] in the reasonably foreseeable future he would be returning with his partner, and it is reasonable to accept he would face the same or similar harm as he faced previously. I accept it is reasonable to believe he would be assaulted and probably be forced to marry, and if he were to refuse he would probably face more serious harm and be killed. I accept that this is serious harm amounting to persecution as meant by the Convention and section 91R of the Act.
22. I accept that his family and the Muslim community in [his home town] would harm him as he is homosexual. I accept that homosexuals in India are a particular social group as meant by the Convention definition and Australian law. I accept that the applicant's fear of harm is well-

founded in that if he were to return to Hyderabad in the reasonably foreseeable future there is a real and not a remote chance he will be so harmed.

23. The delegate found that the applicant could reasonably relocate to another part of India and hence found that the applicant's fear of harm was not well-founded.
24. I have carefully considered the issue of relocation and have taken account of the following:
 - Report by Dr Sheleyah Courtney on "*Homosexuality in India*" dated 25 March 2011. Dr Courtney in part details that in India whilst the Delhi High Court in 2009 has decriminalised homosexuality "at the dominant social-cultural level across India, attitudes of fear, hatred and disgust regarding homosexuality intractably persist". She concludes that "lesbians and homosexuals remain at real and great risk of persecution in numerous forms ranging from extreme violence to economic endangerment"; and further "relocation within India whereby a homosexual or lesbian attempted to live openly as such is impossible since such persecution ... would inevitably ensure in any location in India". The concerns include a "fear of 'contagion' or of a homosexuals active attempts at recruitment ... the most central fear is the perceived threat to marriage reproduction and the family". The types of harm that lesbians and homosexuals encounter include: physical attack, humiliation, police harassment and ridicule. Families attempt to "rehabilitate the deviant member", through "pathologisation: medical/psychiatric, medication. Exorcism"; incarceration, forced secrecy and marriage, beatings, honour murder or a threat of murder, ostracism and withdrawal of financial support. This "makes relocation impossible to sustain". Dr Courtney also comments that the perceived permissiveness of larger cities such as Delhi, Mumbai and others is overstated; they are very expensive for rental accommodation and competitive for work. Relocation would result in family ostracism and a withdrawal of financial support. Religious fundamentalist groups such as "right-wing Hinduism and communalist Islam" are active politically and on the ground engage in vigilantism and have attracted "Indian heterosexual and homophobic youth".
 - Submissions of the applicant's advisor dated 9 December 2013 and 12 December 2013 and material submitted with the application for review. Including country information in both submissions and the last submission which reports that the Indian Supreme Court has set aside the Delhi High Court decision of 2009 and homosexuality in India remains a punishable offence under section 377 of the Indian Penal Code.
25. In India I accept that if the applicant were to return and try to relocate this would result in his being disowned by his family and probably they would seek to find and harm him. The issue of his being homosexual would arise. His father works for [a government department]. It is reasonable to accept that he would engage the police to find him. I accept that the applicant will be effectively cut off from any family financial support. I also accept that the applicant is in a relationship in Australia and if he returns to India it would be with his partner. This would cause additional issues for them in relation to relocation. The applicant and his partner living together would draw attention to them. I also accept that he would not be able to live openly as a homosexual in India at any location, as if he did this would result in ostracism and probable further significant harm. I find that in the applicant's particular circumstances relocation is not reasonable.
26. In relation to State protection, as noted above, the authorities in [his home town] would consider the issue a family matter and not involve themselves. In other areas of the country the police are not supportive or protective of homosexuals and as noted in the report of Dr Courtney

homosexuals are subject to “police harassment and ridicule”. In such circumstances I find that State protection is not available.

27. For the reasons given above, the Tribunal is satisfied that the applicant is a person in respect of whom Australia has protection obligations under the Refugees Convention. Therefore the applicant satisfies the criterion set out in s.36(2)(a).

DECISION

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

Chris Keher
Member