

**0903346 [2010] RRTA 41 (5 February 2010)**

**DECISION RECORD**

**RRT CASE NUMBER:** 0903346

**DIAC REFERENCE(S):** CLF2009/29876

**COUNTRY OF REFERENCE:** Malaysia

**TRIBUNAL MEMBER:** Rosa Gagliardi

**DATE:** 5 February 2010

**PLACE OF DECISION:** Melbourne

**DECISION:** The Tribunal remits the matter for reconsideration with the direction that the applicant satisfies s.36(2)(a) of the Migration Act, being a person to whom Australia has protection obligations under the Refugees Convention.

## STATEMENT OF DECISION AND REASONS

### APPLICATION FOR REVIEW

1. This is an application for review of a decision made by a delegate of the Minister for Immigration and Citizenship to refuse to grant the applicant a Protection (Class XA) visa under s.65 of the *Migration Act 1958* (the Act).
2. The applicant, who claims to be a citizen of Malaysia arrived in Australia [in] February 2009 and applied to the Department of Immigration and Citizenship for a Protection (Class XA) visa [in] March 2009. The delegate decided to refuse to grant the visa [in] April 2009 and notified the applicant of the decision and her review rights by letter dated [in] April 2009.
3. The delegate refused the visa application on the basis that it was considered that the applicant is not a person to whom Australia has protection obligations under the Refugees Convention.
4. The applicant applied to the Tribunal [in] May 2009 for review of the delegate's decision.
5. The Tribunal finds that the delegate's decision is an RRT-reviewable decision under s.411(1)(c) of the Act. The Tribunal finds that the applicant has made a valid application for review under s.412 of the Act.

### RELEVANT LAW

6. Under s.65(1) a visa may be granted only if the decision maker is satisfied that the prescribed criteria for the visa have been satisfied. In general, the relevant criteria for the grant of a protection visa are those in force when the visa application was lodged although some statutory qualifications enacted since then may also be relevant.
7. Section 36(2)(a) of the Act provides that a criterion for a protection visa is that the applicant for the visa is a non-citizen in Australia to whom the Minister is satisfied Australia has protection obligations under the 1951 Convention Relating to the Status of Refugees as amended by the 1967 Protocol Relating to the Status of Refugees (together, the Refugees Convention, or the Convention).
8. Further criteria for the grant of a Protection (Class XA) visa are set out in Part 866 of Schedule 2 to the Migration Regulations 1994.

### Definition of 'refugee'

9. Australia is a party to the Refugees Convention and generally speaking, has protection obligations to people who are refugees as defined in Article 1 of the Convention. Article 1A(2) relevantly defines a refugee as any person who:  
owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being

outside the country of his former habitual residence, is unable or, owing to such fear, is unwilling to return to it.

10. The High Court has considered this definition in a number of cases, notably *Chan Yee Kin v MIEA* (1989) 169 CLR 379, *Applicant A v MIEA* (1997) 190 CLR 225, *MIEA v Guo* (1997) 191 CLR 559, *Chen Shi Hai v MIMA* (2000) 201 CLR 293, *MIMA v Haji Ibrahim* (2000) 204 CLR 1, *MIMA v Khawar* (2002) 210 CLR 1, *MIMA v Respondents S152/2003* (2004) 222 CLR 1 and *Applicant S v MIMA* (2004) 217 CLR 387.
11. Sections 91R and 91S of the Act qualify some aspects of Article 1A(2) for the purposes of the application of the Act and the regulations to a particular person.
12. There are four key elements to the Convention definition. First, an applicant must be outside his or her country.
13. Second, an applicant must fear persecution. Under s.91R(1) of the Act persecution must involve “serious harm” to the applicant (s.91R(1)(b)), and systematic and discriminatory conduct (s.91R(1)(c)). The expression “serious harm” includes, for example, a threat to life or liberty, significant physical harassment or ill-treatment, or significant economic hardship or denial of access to basic services or denial of capacity to earn a livelihood, where such hardship or denial threatens the applicant’s capacity to subsist: s.91R(2) of the Act. The High Court has explained that persecution may be directed against a person as an individual or as a member of a group. The persecution must have an official quality, in the sense that it is official, or officially tolerated or uncontrollable by the authorities of the country of nationality. However, the threat of harm need not be the product of government policy; it may be enough that the government has failed or is unable to protect the applicant from persecution.
14. Further, persecution implies an element of motivation on the part of those who persecute for the infliction of harm. People are persecuted for something perceived about them or attributed to them by their persecutors. However the motivation need not be one of enmity, malignity or other antipathy towards the victim on the part of the persecutor.
15. Third, the persecution which the applicant fears must be for one or more of the reasons enumerated in the Convention definition - race, religion, nationality, membership of a particular social group or political opinion. The phrase “for reasons of” serves to identify the motivation for the infliction of the persecution. The persecution feared need not be *solely* attributable to a Convention reason. However, persecution for multiple motivations will not satisfy the relevant test unless a Convention reason or reasons constitute at least the essential and significant motivation for the persecution feared: s.91R(1)(a) of the Act.
16. Fourth, an applicant’s fear of persecution for a Convention reason must be a “well-founded” fear. This adds an objective requirement to the requirement that an applicant must in fact hold such a fear. A person has a “well-founded fear” of persecution under the Convention if they have genuine fear founded upon a “real chance” of persecution for a Convention stipulated reason. A fear is well-founded where there is a real substantial basis for it but not if it is merely assumed or based on mere speculation. A “real chance” is one that is not remote or insubstantial or a far-fetched possibility. A

person can have a well-founded fear of persecution even though the possibility of the persecution occurring is well below 50 per cent.

17. In addition, an applicant must be unable, or unwilling because of his or her fear, to avail himself or herself of the protection of his or her country or countries of nationality or, if stateless, unable, or unwilling because of his or her fear, to return to his or her country of former habitual residence.
18. Whether an applicant is a person to whom Australia has protection obligations is to be assessed upon the facts as they exist when the decision is made and requires a consideration of the matter in relation to the reasonably foreseeable future.

## **CLAIMS AND EVIDENCE**

19. The Tribunal has before it the Department's file relating to the applicant. The Tribunal also has had regard to the material referred to in the delegate's decision, and other material available to it from a range of sources, including country information as submitted by the visa applicant's representative.
20. The applicant had been invited to appear before the Tribunal on several subsequent occasions but the visa applicant has not been able to do so for various reasons, including, most recently, that she has not been able to afford the services of her representative. Initially the Tribunal considered that the visa applicant's claims could be better enunciated at a hearing, thereby ensuring the visa applicant "a voice" in the course of this review. On closer examination, over a period of time, and taking into account the applicant's difficulties with meeting financial costs, the Tribunal considered that it could proceed to a decision based on the information before it.
21. The applicant was represented in relation to the review by her registered migration agent.
22. The applicant is a single 38 year old transgender female of Malaysian ethnicity and Hindu religion. The applicant indicates she speaks, reads and writes Tamil, English and Malay and that, at the time of application, was unemployed. Her application contains little detail about her employment or education history. The applicant arrived on 1 February 2009 on a subclass 976 visitor visa which authorised a stay of three months, until 1 May 2009.
23. In her application Form 866C Application for a Protection (Class XA) visa, the visa applicant was asked to detail why she left Malaysia. The visa applicant responded in the following manner:

*I [the applicant] 38 years, of age whom struggling in my life for justice. I would like to take this opportunity to express my feeling sorrow and disappointment at my country which I am living presently.*

*I am a Malaysian which rich in everything except for person like me who born as a boy but living as a girl. I had been going thru painful life during my time. There is no justice, understanding, pity and sympathy on people like us. I had been fighting for life for justice in my country but its failed.*

*My mum doesn't work. She are (sic) housewife the only person who take care of me is my father (he reasonably (sic) past away) there is no one to take care of me.*

*In my country they look down on (transsexual) like me and they don't accept for what I am and who I am they only care for their needs an their races and sex.*

*I am a complete woman now. I tried to get a job they look down on me because of my (Identity). Its return that my gender as are (male). In Malay it means (Lelaki).*

*This is the reason why I am expressing my feeling to you sir/mdm how painful and difficult life I am going thru in my country.*

*I am begging for leniency from you sir/mdm to allow me to stay in your country.*

*I would really appreciate if you sir/Mdm grant my wish...*

24. The visa applicant has submitted evidence by way of a birth certificate demonstrating that she was born as a male on [date deleted: s.431(2)] in Malaysia, which is consistent with the date of birth submitted for the applicant in her protection visa application. Notes from [hospital deleted: s.431(2)] dated [in] November 1995 state “*This 24 year old male had a sex change at [hospital], Thailand on the [date] Dec 1993. Currently, she is fenotypically female. Kindly do the needful for ‘her’*” The visa applicant has also submitted a letter from [hospital deleted: s.431(2)] in Thailand, dated [in] December 1993, confirming that the applicant had undertaken a gender change from male to female, [in] December 1993. The documentation submitted by the visa applicant is consistent.
25. The medical examination for an Australian visa (Form 26) refers to the change in gender by the visa applicant and there is no indication that the medical officers queried the veracity of the change, confirming instead that it was not relevant for “migration purposes” in the broad sense.
26. [In] July 2009, the visa applicant’s representative wrote to the Tribunal to defer a hearing because it was considered that the applicant would “benefit from the independent and objective professional analysis of a psychologist training in assisting and assessing transgender clients” given that the applicant claimed that she had never had any such supportive pre or post-operative counselling, which, had she had the operation in Australia, would have been mandatory. In this submission, the representative also argued that the visa applicant considered that she had faced discrimination that was so significant that it amounted to persecution and that if the Tribunal were not inclined to consider the harm she faced of “serious character” that she had a reasonable fear of apprehension in light of her circumstances, as set out in the *Refugees Convention 1958*.
27. In a statutory declaration dated [in] July 2009, the visa applicant set out the difficulties she was experiencing when she began to realise at 15 that she identified with women more than men, particularly in a Muslim country such as Malaysia. Below is an outline of her claims as set out in the declaration:
28. When she was 21 her father encouraged her to do a hairdressing course to secure her future and she was awarded her diploma. The applicant declares that she started taking hormones unbeknown to her family although it had become evident that she was appearing more feminine. Her father was supportive of her but was concerned that she should not become a

prostitute. Given that her mother and her siblings rejected her choice completely she was forced to leave home and went to live in Kuala Lumpur. On the pretext that her parents were unwell, her brothers and uncle lured her back home where she was beaten by her uncle. Prayer rituals were performed on her and her brother would not let her attend his engagement due to his embarrassment. She then fled again and then told her father by phone when she could speak to him that she wanted to have an operation. Her father agreed to assist as he was adamant that he did not want his daughter to become a prostitute to fund the operation.

29. Her friends assisted her to organise the operation in Kuala Lumpur and she went to Thailand to have the operation performed [in] December 1993. [Person 1] in Kuala Lumpur who had provided her with support, and provided other people with transgender operations support, made sure that she recovered properly. The priest gave her [a] name
30. [Person 1] attempted to assist the applicant get a new identity stating that she was now a woman. The Department for Identity Cards told her that she could change her name, but not her gender. Until 1992, it was possible to have her gender changed on an identity card, but this was no longer the case. She was required to attend a government doctor for a gynaecological examination to be certified that she was a woman but was told that she would not be accepted in Malaysia and that she ought to leave. In 1996 she was able to change her name on her identity card but not her gender and she was still being recorded as being a male.
31. The visa applicant then commenced a relationship with a man, [Partner A], and they lived together until her departure. [Partner A] accepted that she had had an operation. One night the police raided the apartment where they were living and did so as often as three times per week, looking for people who were transgender and people working as prostitutes. The police asked her for her identity card which stated that she was male and she and [Partner A] were arrested because they were living in an area of prostitution. The visa applicant told the police that she was not a prostitute, however, they simply assumed that she was working as a prostitute because it was the common assumption that a person who was transgender was working as a prostitute.
32. They were taken to the police station and [Partner A] was charged with solicitation/prostitution. She spent the night in prison and the next morning the judge found her guilty and fined her RM500 even though she had tried to tell the judge that she was not a prostitute. [Person 1] paid the fine for her or she would have been sent to jail for two weeks.
33. After the arrest [Partner A] continued to treat the visa applicant like a “princess” but about 1 and a half years after they were arrested, [Partner A] stopped going to see her. When she called him he told her that he was engaged and that his parents wanted grandchildren. The visa applicant was distressed. After [Partner A] married he wanted to resume their relationship but the visa applicant would not accept it.
34. The visa applicant was arrested a second time during a beauty pageant. The police stormed the hall and arrested everyone involved. The police told them that they were men and that according to Muslim men they could not wear dresses. The Muslims were fined but the Indians were arrested and photographed. They were given a warning.
35. The visa applicant then claims to have been arrested a third time at [Person 1]’s place. She had gone to her café and was charged with being a transgender – they call this charge ‘cross-dressing’ because they do not accept that persons such as the visa applicant are women even

if they have had surgery. As this was one of a number of times she had been arrested, the visa applicant was fined RM1,000 which she had to borrow from a friend.

36. The visa applicant wanted to work but as soon as potential employers saw her identity card they refused to employ her. Employers do not want to employ transgender persons. Whilst she assisted Pink Triangle, an organisation that helped street workers, this work was not paid. She could not take out health insurance because her identity card did not match her identity and was directed to change her identity card to say 'female' before she could take out a policy. She could only open a bank account in her birth name taken from her identity card which identified her as a male. The bank manager was reluctant to talk to her at all.
37. When her father found out about her plight she returned home and both parents looked after her. Her brothers had married and were living elsewhere now. Whilst she felt safe living with her parents she was sad that she could not find a job; open a bank account or get health insurance and that the government would not accept her or members of her family. She continued to live with her parents until her father passed away in January 2009. Her mother was forced to move in with the visa applicant's younger brother because she could not afford to look after her. She did not go with her mother because her mother had told her that she would not be able to prevent her brother from beating her and he would not permit her to live in his house in any event
38. Her mother encouraged her to leave and gave her the money for an airfare as she still had no job and it was apparent that her brothers would not assist her. Finally, the visa applicant declares:

*In Malaysia I do not count as a person. I am not considered to be a man because I look like a woman. I am not considered to be a woman because my identity card says that I am a man. I have no rights to obtain employment or open a bank account, or even to get health insurance in my name. Because I can't open a bank account I can't purchase a house. If I am sick and go to the hospital, they will put me in the men's ward. Any prescription or receipt they give me will be issued in the name of [applicant's former name]. The pharmacy calls out that name and it is very embarrassing for me to answer to that name in front of everyone. People laugh at me and I worry that someone will try to beat me or assault me because I am transgender. It is not possible for me to change my identity card to say that I am a woman.*

*I cannot live in Malaysia There is nobody to take care of me and I am not allowed to work because of my identity. I was arrested three times just because of who I am and I was forced to pay money just so that I wouldn't be put in jail. I did not do anything wrong but Malaysian society and the government thinks that there is something wrong with who I am. I do not want to work as a prostitute and that is the only life for me there. I am a transgender person I am being persecuted by the government and by the authorities in Malaysia who will not allow me to survive.*

39. In a submission put to the Tribunal by the visa applicant's representative, dated 12 October 2009, it is argued, among other things, that the visa applicant fears persecution as she has already been arrested previously and that should she be charged with more serious offences such as 'Outrages on Decency' or 'Unnatural Offences', as laws against homosexuality are known, she could face a term of imprisonment of up to twenty years. Such a fate, the representative argues, unquestionably falls within the s91R(1)(b) definition of persecutory 'serious harm' by the State. The submission also advances that the essential and significant

reasons for the persecution that the visa applicant fears, are her membership of the following social groups or combinations of the various groups set out below:

- Post-operative transgender women in Malaysia;
- Heterosexual transgender women in Malaysia;
- Members of the *Aravani*;
- Transgender women in Malaysia who are mistaken for prostitutes;
- Transgender women in Malaysia who are deemed by the authorities to be prostitutes;
- People in Malaysia who are deemed by the authorities to be homosexuals; or
- Transgender women in Malaysia without familial or financial support or protection.

40. Among the variety of country information submitted by the visa applicant is a report entitled *State-sponsored Homophobia – A world survey of laws prohibiting same sex activity between consenting adults*, dated May 2009 by Daniel Ottosson, ILGA, The International Lesbian, Gay, Bisexual, Trans and Intersex Association. This report shows that regarding Malaysia, sexual relations are highly regulated even though homosexuality is not specifically mentioned in the Malaysian Penal Code, referring instead to ‘unnatural offences’, involving any gender, deemed to be ‘against the order of nature’ punishable by up to 20 years imprisonment and whipping under section 377 of the Penal Code. The report also states that several states in Malaysia have instated Islamic Sharia laws, applying to male and female Muslims, criminalising homosexual and lesbian acts with up to three years imprisonment and whipping.
41. The visa applicant has now also submitted a psychological report by [Psychologist 1], PhD, MAPS, Clinical and Forensic Psychologist, dated [in] September 2009. In this report the writer states that the applicant had stated “*I will suicide myself if the Australian government make me go back...there is nothing for me in Malaysia*”. The report goes on to state:
- This suicide threat was made more convincing as [the applicant] had twice previously attempted suicide. [The applicant] could not recall the exact circumstances of her first attempt but recalled being upset about her family’s rejection of her and her brother’s verbal and physical abuse. She said she took 5 or 6 paracetamol tablets then changed her mind. The second occasion was in the context of a relationship breakdown where she tried to hang herself after her then boyfriend bowed to family pressure to leave [the applicant] and seek a “normal girlfriend who could give him children”. [The applicant] said she had tied a Sari around her neck when a friend interrupted her. She then went to counselling with the Malaysian Aids Counsel service called Pink Triangle which supports transsexuals. [The applicant] attended counselling between 1994 and 1996. It was here that relocation to Australia was suggested as basic rights, such as privacy and equality, are afforded to all...*
42. [Psychologist 1] states that the applicant currently resided near [region deleted: s.431(2)] where she had secured some casual work as a fruit picker, living in a caravan with three other people.
43. [Psychologist 1] states, in her thorough, report that the visa applicant was experiencing persistent anxiety about the prospect of having to return to Malaysia; her ability to establish herself in Australia; her prospects of developing a long-term relationship; and that she would meet the diagnostic criteria for a chronic Gender Identity Disorder (GID) – a mental disorder characterised by persistent discomfort with the individual’s birth gender and persistent desire to become a member of the opposite gender.



## FINDINGS AND REASONS

44. The applicant claims to be a citizen of Malaysia. She has provided a certified copy of her passport bio-data page and a copy of her Malaysian Identity card with her application. The Tribunal does not have any evidence before it to suggest that the visa applicant is not a citizen of Malaysia. The Tribunal finds, therefore, that the visa applicant is a citizen of Malaysia.
45. As there is no evidence before the Tribunal that the applicant has the right of entry or residence in any country other than the country of reference, that is Malaysia, the Tribunal also finds that the applicant does not have effective protection in a third country under section 36(3) of the *Migration Act 1958*.
46. The applicant claims that she faces serious harm in Malaysia on the basis that she is a transgender female who is prevented from accessing basic services, including a livelihood, because the authorities will not recognise that she has had a gender reassignment and will not change her identity card to reflect this reassignment. This leads to a range of difficulties where she faces discrimination on a daily basis. If the Tribunal accepts the visa applicant's claims, then it finds that the Convention ground of membership of a particular social group, that is, "transgender women in Malaysia without familial or financial support or protection", is the essential and significant reason for the harm feared as outlined in subdivision AL of the *Migration Act 1958*.

### The Departmental decision

47. At the time of application, due to the paucity of information submitted, the Department did not accept that the visa applicant would face treatment amounting to persecution in Malaysia on the basis of the claims submitted or that she would be denied State protection by the Malaysian authorities. The Tribunal notes that at this point the visa applicant was not yet represented.
48. The Department also found that the visa applicant belonged to the membership of the generic particular social group, being "transgender people". The Tribunal has concerns with this very broad particular social group as it does not accept that simply by being a transgender person in Malaysia the visa applicant would be at risk of harm. The Tribunal considers it important to note that in circumstances where a transgender person has support and protection from family and State due to influence, wealth or power that it may be possible for transgender persons to live life without interference from the State, particularly if the State were willing, either lawfully or by means of corruption, to issue an identity card that reflected the reassigned gender of the person.
49. The Tribunal finds, however, that the visa applicant and her family do not have such power or influence and that her means of living here in Australia are particularly modest and that she was vulnerable in Malaysia due to her socio-economic circumstances, brought about principally by the lack of an identity card that would enable her to access every day services, circumventing prejudice and discrimination on a daily basis. It would also mean that by having an identity card that stated she was a female, she would be in a position to avail herself of the protection offered to women by the State. The *United States of America State Department 2008 Human Rights Report: Malaysia* notes that there is a Ministry of Women, Family and Community Development in Malaysia and that the parliament has enacted laws to protect women, even if that protection is not always effective.

50. The centrality of the visa applicant's identity card reflecting the gender to which she is now assigned, is underlined in that society in general in noting the applicant's physical appearance, and the notation that she is "male" on her identity card, is the cause of the social systematic discrimination and abuse she faced and faces in Malaysia as she is considered to be part of the *Aravanti* – the third sex.
51. The Tribunal has had regard to the High Court decision in *Applicant s395* which states that an applicant is not required to suppress their true identity to avoid persecution to activate rights under the Refugees Convention. While the identity card is after all, simply an outward manifestation of what the visa applicant was and does not represent who she currently is, it could be argued that as long as she does not refer to ever having been a male she could possibly avoid persecution. In this case the Tribunal finds that the visa applicant strongly wants to identify as a female and is not required to suppress her male identity to avoid persecution.
52. The Tribunal has also considered the range of particular social groups suggested by the visa applicant's representative as set out above, but finds the majority of these problematic as they do not point to the fundamental factor of socio-economic deprivation, through the absence of an identity card that reflects the visa applicant's current gender. The last particular social group mentioned is "Transgender women in Malaysia without familial or financial support or protection" and the Tribunal considers that this particular social group more closely aligns to the social group identified by the Tribunal as being the one to which the visa applicant belongs and the Tribunal has made its decision on this basis.

#### Credibility of the visa applicant

53. The Tribunal had been anxious to hold a hearing initially because it was evident that, if the visa applicant's claims were genuine, she would be able to discuss specific instances of harm in the past as well as set out more clearly what her subjective and objective fears were. With the provision of further information, in particular a psychological report and statements by the visa applicant that have been consistent, the Tribunal has been prepared to accept that she is a witness of truth. The Tribunal finds, for example, that her description of her feelings on first becoming aware that she identified with women more than men, was realistic and that her account of her family's attempts to accept the visa applicant's reality and life changing decision, is also unaffected and straight forward.
54. The Tribunal has relied significantly on the documentation submitted to show that the visa applicant is a truthful witness and that indeed she has had a gender reassignment in Thailand in December 2003. There is no suggestion that these documents are not genuine. Furthermore, the Tribunal refers to the medical examination held for the purposes of obtaining the visa which confirms the visa applicant's statements concerning her transgender status and notes that similarly, the psychologist who assessed the visa applicant, did not indicate in any way that the visa applicant could be feigning having had the operation.
55. In a submission ([in] October 2009) on behalf of the visa applicant, it is argued that as the visa applicant is considered a man in Malaysia, were she to become involved with a man she would be considered to be a homosexual and that therefore the Tribunal should have regard to country information which sets out how homosexuals are treated by the State and society in general. The Tribunal concurs that this is of relevance, albeit to a limited extent, in that a study of how the State views homosexuality in Malaysia generally provides an indication as to attitudes towards differing sexual practises and lifestyles.

56. Considering, however, that the Tribunal finds that the visa applicant belongs to a particular social group comprising “Transgender women in Malaysia without familial or financial support or protection”, the Tribunal will predominantly confine its assessment to this particular social group as it considers that the task before it does not directly involve the treatment of homosexuality in Malaysia. The Tribunal notes the decision submitted by the visa applicant’s representative by the Refugee Review Tribunal dated 16 February 2007 which involved claims of persecution on the basis of homosexuality in Malaysia: 071070452 [2007] RRTA 32. The Tribunal has found this decision useful in highlighting the non-acceptance, generally, of diverse sexualities in Malaysia at a very broad level and appreciates that the issues of transgender form a part of any discussion on gender, sexuality and transsexualism generally.
57. Having assessed independent country information regarding the treatment of “Transgender women in Malaysia without familial or financial support or protection”, specifically, the Tribunal finds that transsexuality, generally, and particularly that of male to female transsexuals, is perceived as deviant behaviour. A paper by The Yik Koon, presented at the Fourth International Malaysian Studies Conference held from 3-5 August 2004, at the Universiti Kebangsaan Malaysia, directly grapples with the perception of male to female transgender persons, known in Malaysia as *mak nyah*. The paper includes details of “research carried out in 2000 on 507 *mak nyah* respondents on their characteristics”. The paper in particular, discussed the centrality of not being able to have an identity card that refers to the visa applicant’s changed gender (female) without reference to being born male. It is stated in the paper that:

The Malaysian term for male to female transsexuals is *mak nyah* (Teh, 1998: 169). This term refers to those who have undergone sex change operations as well as to those who have not. It has been estimated that there are about 10,000 *mak nyahs* in the country (Teh, 1998: 169). About 70% to 80% are Malay; the rest are made up of Chinese, Indian and other minority ethnic groups. Islam is the religion of the Malay population and is the official religion of Malaysia. The majority of *mak nyahs* are Muslim.

Islam permits only *khunsa* or hermaphrodites to undergo a sex change operation so that the person can be either a female or a male (Teh, 2002; 46). However, Islam forbids males to behave like females in terms of cross-dressing, wearing make-up, injecting hormones to enlarge their breasts, and undergoing sex change operations.

In 1983, the Conference of Rulers in Malaysia decided that a *fatwa* prohibiting sex change operations should be imposed on all Muslims, with the exception of hermaphrodites (Teh, 2002; 46). Cross-dressing is also prohibited. Thus, Muslim *mak nyahs* are considered to violate the tenets of Islam, and consequently are non-entities in Malaysian society. They could be charged in the Syariah Court for violating the tenets of Islam.

Non-Muslim *mak nyahs* are mainly Buddhists, Christians or Hindus. They are generally allowed to be *mak nyahs*, although their religion may not allow it. This is because there are no official religious rulings, as there are among Muslims, to enforce the prohibition. Occasionally, they are caught by the police for cross-dressing, and charged with indecent behaviour under section 21 of the Minor Offences Act 1955.

...The *mak nyahs* had a better standard of living during the colonial days (Teh, 2002; 129-130). There were less sex workers then as compared to present day. Many were *Mak Andams* (bride’s attendants), *joget* dancers, cooks or artistes. In my interview with a 63 years old *mak nyah*, it was related that *mak nyahs* during the colonial time were a happy lot as they were left to be who they wanted to be. The police and the Islamic religious authorities did not harass

them. The police were good to them and accepted them as they were. Sometimes, the police even gave them a treat, but never asked them for any favours. Many *mak nyahs* went overseas to have their sex change operation as they could afford it since they were earning good money. Those who had their sex change operations could have their names and gender in their identity cards changed to that of females.

Today most *mak nyahs* in Malaysia are employed as sex workers. More than a third of them live below the poverty line of RM500 (Teh, 2002; 56-57). Only a small percentage (4%) of transsexuals actually obtain higher educational degrees. The community as a whole suffers high levels of discrimination, which limits their ability to acquire well-paid jobs and this contributes to their relative impoverishment. The current conditions vary sharply from earlier years, where the community faced less stigma and had greater employment opportunities.

The changing status of transsexuals in Malaysia was closely tied to changes in the political climate, notably the ability of the community to obtain a sex change operation. Before 1983, sex change operations were carried out in Malaysia, although few in number due to the lack of qualified surgeons specializing in this area. The Universiti Hospital (University Malaya Medical Centre) was one of a few hospitals that performed sex change operations. The University Hospital had very meticulous procedures in place before it would carry out an operation. For example, a transsexual patient opting for sex change operation would have to undergo two years of pre-counseling to ensure that the operation was really what the patient wanted. They would also have to go through two years of post-counseling so that they could adjust to their new roles.

The *fatwa* that was decreed by the Conference of Rulers in 1983 changed the whole scenario. Muslim *mak nyahs*, with the exception of *khunsas*, are banned from having the sex change operations. Muslim surgeons are also prohibited from carrying out sex change operations. The immediate effect of the law was to increase the stigmatization of the transsexual community. Muslim *mak nyahs* were now considered violators of the tenets of Islam, and consequently less moral.

The religious non-acceptance and stigmatization of the *mak nyahs* has increased discrimination against them. Besides having problems getting decent paying jobs, they were teased and called derogatory names, they have problems renting a place to live, getting bank loans to purchase their own homes and legally adopting children as they are considered unfit parents (Teh, 1998; 176-179). The *mak nyahs* who have had a sex change operation cannot change their names and gender in their identity cards to that of females. They could only add their new female names beside their original ones on their identity cards, but their gender remains the same. The lack of a genuine official gender status creates problems for them; they cannot purchase health insurance because they have female organs while their identity cards state that they are males. They also have problems at the immigration as they look female, but their documentation states that they are males. The impact has negatively affected the quality of life of this community.

The discrimination and non-acceptance by society that the male to female transsexuals in Malaysia face have contributed to self-destructive behaviour like drug abuse. It has been estimated that about half of the *mak nyah* community and about 80% of the transsexual sex workers are addicted to drugs (Teh, 2003). The implication of this self-destructive behaviour on HIV/AIDS cannot be ignored since HIV/AIDS cases have already been detected in this community. About 14 % of the *mak nyah* community had tried committing suicide (Teh, 2002; 88). If this situation is left unchecked, it will get worse (Teh, Y.K. 2004, 'The male to female transsexuals in Malaysia: what should we do with them?', *Paper presented at the Fourth International Malaysian Studies Conference, 3-5 August 2004*, Universiti Kebangsaan Malaysia <http://phuakl.tripod.com/pssm/conference/day236.doc> [See Research Request Number: MYS34932].

58. An Immigration and Refugee Board of Canada response to information request dated 30 August 2005 on the treatment of sexual minorities in Malaysia indicates that “[w]hile there are no laws prohibiting sex reassignment surgery or gender reassignment therapy, no laws allow Malaysian transsexuals to officially change their gender on public documents (The Malaysian Bar 1 Feb. 2005). In addition, the Council of Rulers purportedly forbids Muslims from undergoing sex change operations (ibid.)” The response to information request includes the following information on transsexuals in Malaysia:

A 10 November 2004 article published in *The Malay Mail* cited the leader of a Presbyterian church as saying that his church would offer pastoral counselling to transsexuals.

### **Transsexuals**

An article published by The Malaysian Bar estimated that the proportion of transsexuals in Malaysian society could be as high as one in every 200 individuals (1 Feb. 2005). While there are no laws prohibiting sex reassignment surgery or gender reassignment therapy, no laws allow Malaysian transsexuals to officially change their gender on public documents (The Malaysian Bar 1 Feb. 2005). In addition, the Council of Rulers purportedly forbids Muslims from undergoing sex change operations (ibid.). According to The Malaysian Bar, [b]ecause transsexuals cannot change their identification cards, they face constant harassment and persecution from the police and religious authorities, cannot undergo burial rites in accordance with their religious beliefs, are often refused employment, are deprived of the right to marry lawfully although they are fully functioning members of their chosen sex and are exposed to other dangers such as hate crimes when their sex at birth is revealed. The transsexual community has reported harassment and discrimination even in attempting to open a bank account or applying for a passport. They also face difficulty in finding employment because employers inevitably learn that they were born in the other sex. There are no laws in Malaysia that rule that discrimination against transsexuals at work is unlawful (1 Feb. 2005).

In March 2005, the Taiping Religious Department allegedly arrested a man wearing women’s clothes while he was sitting in the garden of a friend’s house (*Sunday Mail* 20 Mar. 2005; see also *New Straits Times* 7 Apr. 2005). When the officers realized that the transsexual was not Muslim, they promptly released him; the man later complained to police on the grounds of “wrongful arrest, abuse of power and brutality” (*Sunday Mail* 20 Mar. 2005). While the government does not have any data on the number of people arrested in Malaysia for being transsexual, the Minister of the Women, Family and Community Development Ministry said that there were no Malaysian laws against transsexuals or transvestites since the expression of either of these identities does not break any Malaysian laws (Malaysian Bernama 14 Sept. 2004). However, according to The Malaysian Bar, when transsexuals are detained by police, many end up being victims of sexual violence such as being forced to strip (1 Feb. 2005).

In November 2004, several sources reported that a man who had undergone a sex change and was previously a woman lost his bid to the Ipoh High Court to be legally recognized as a male (The Malaysian Bar 1 Feb. 2005; *Sunday Mail* 21 Nov. 2004; *New Straits Times* 20 Nov. 2004; ibid. 16 Nov. 2004; Malaysian Bernama 4 Nov. 2004; see also BBC 5 Nov. 2004). While the High Court stated that Malaysian law did not recognize transsexuals, the deputy home minister declared that the Birth and Death Act of 1957 “will be studied for amendments to cater [to] transsexuals who have undergone sex changes” (*Sunday Mail* 21 Nov. 2004). As well, the government has indicated that it would consider allowing transsexuals to state their new gender in passports and identity cards, provided that certain laws are amended (*New Straits Times* 16 Nov. 2004). While two lawyers have agreed to represent the transsexual pro bono in an appeal (*New Straits Times* 20 Nov. 2004), no information on the outcome of this appeal could be found among the sources consulted by the Research Directorate.

According to the *Sunday Mail*, the Bar Council, non-governmental organizations and religious groups support the rights of transsexuals in Malaysia (21 Nov. 2004). However, the *Sunday Mail* article adds that many transsexuals have difficulty finding employment (*Sunday Mail* 21 Nov. 2004; *New Straits Times* 16 Nov. 2004) and are sometimes abandoned by their families (*Sunday Mail* 21 Nov. 2004). Possibly as a result, many allegedly turn to prostitution (The Malaysian Bar 1 Feb. 2005; *New Straits Times* 16 Nov. 2004) (Immigration and Refugee Board of Canada 2005, *MYS100434.E – Malaysia: Treatment of sexual minorities (August 2004 – August 2005)*).

59. According to an article dated 1 February 2005 on The Malaysian Bar website referred to in the above mentioned response to information request, “[o]ne of the biggest problems faced by the transsexual community in Malaysia is that of exclusion”. It is stated in the article that:

One of the biggest problems faced by the transsexual community in Malaysia is that of exclusion. The transsexual community has frequently been overlooked and excluded from decisions that affect their welfare, livelihood and legal status. While it is true that the Women and Family Development Ministry had in 2000—2001 announced its intention to look into the problems of the transsexual community and to provide such assistance as they could, there was, prior to 2001, no ministry regarded as appropriate to hear and handle issues pertaining to the transsexual community; and transsexuals continue to be heavily marginalised, underrepresented and misunderstood...

For anyone concerned with justice, equality and the moral legitimacy of systemic discrimination against any group or individual, the issues of transsexuals – their legal status, their civil liberties and their fair chance at their employment and making a living – is a pressing matter in urgent need of attention and continual help and support...

(Wong, E.L. 2005, ‘Neither Here Nor There: the Legal Dilemma of the Transsexual Community in Malaysia’, The Malaysian Bar website, 1 February

[http://www.malaysianbar.org.my/gender\\_issues/neither\\_here\\_nor\\_there\\_the\\_legal\\_dilemma\\_of\\_the\\_transsexual\\_community\\_in\\_malaysia.html](http://www.malaysianbar.org.my/gender_issues/neither_here_nor_there_the_legal_dilemma_of_the_transsexual_community_in_malaysia.html)

60. Sections 377a and 377b of the Penal Code, which detail provisions on “carnal intercourse against the order of nature”, have created an environment that allows for discrimination against lesbians, gays, bisexuals and transsexuals and have been used by the government to silence political dissent. Section 377b details the possible punishment for “unnatural” consensual sex, which includes whipping and imprisonment of up to twenty years. In its submission to the UN Universal Periodic Review, February 2009, Amnesty International recommended, among other things, the repeal of Articles 377A and 377B to prevent discrimination against lesbians, gays, bisexuals and transsexuals.

[See *Malaysia: Amnesty International Submission to the UN Universal Periodic Review: Fourth Session of the UPR Working Group of the Human Rights Council, February 2009*: <http://www.amnesty.org/en/library/asset/ASA28/003/2008/en/b8d828ab-9075-11dd-b16..>]

61. Such provisions give the police enormous powers to harass without redress. Activists in South Asia point to “Police powers that are unregulated, and police corruption,” as primary concerns, including “violence at sex sites from police and hooligans, indiscriminate use of laws against ‘public nuisance’ ..and denial of public space for sexual minorities” [See Human Rights Watch 2009, *Together, apart: Organizing around sexual orientation and gender identity worldwide*, HRW website, June <http://www.hrw.org/sites/default/files/reports/Igbt0509webcovr.pdf> ].

62. A press release by Amnesty International 2007, '*Malaysia: Fear for safety/torture or ill-treatment*', AI website, 3 August <http://web.amnesty.org/library/Index/ENGASA280022007?open&of=ENG-MYS> confirms the State's arm of the law: the police's, attitude towards transsexuals. The article sets out how Ayu, a male-to-female transsexual, was seriously beaten by state religious officials who detained her while she was talking to friends at the Old Melaka bus station in Kota Melaka, Melaka (Malacca) state, southwest Malaysia at around 11.30pm on 30 July. According to the press release:

Ayu may be at risk of further abuse, and other transsexual people may also be in danger. Ayu was reportedly approached by three enforcement officers from the Melaka Islamic Religious Affairs Department (Jabatan Agama Islam Melaka, JAIM), a local government body tasked with enforcing social norms based on Sharia law.

The officials, all dressed in civilian clothes, reportedly punched and kicked Ayu when they detained her. One of them reportedly kicked her hard in the genital area. They only identified themselves as JAIM officials when bystanders intervened to try to prevent the assault. When she said she was in serious pain, they took her briefly to the local JAIM office, before transferring her to Melaka General Hospital. She had to undergo surgery on 31 July for a pre-existing abdominal hernia condition, which had been aggravated by the assault.

63. This same press release indicates that abuses against "transsexual people appear to be rising in Malaysia at the hands of both the ordinary and the so-called 'religious police' like JAIM and that *"there are fears that such actions may be creating a climate of vigilantism amongst community groups and society at large against those whose sexuality or gender identity is perceived to deviate from the 'norm'..."*.
64. The State's approach to transsexuals and those considered not to conform to what is considered the norm, is not assisted by the fact that Malaysia has yet to ratify several key human rights treaties generally, including the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social and Cultural Rights (ICESCR), and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. [See *Malaysia: Amnesty International Submission to the UN Universal Periodic Review: Fourth Session of the UPR Working Group of the Human Rights Council, February 2009*: <http://www.amnesty.org/en/library/asset/ASA28/003/2008/en/b8d828ab-9075-11dd-b16...>].
65. In terms of human rights in general in Malaysia, the above report [*Malaysia: Amnesty International Submission to the UN Universal Period Review: Fourth Session of the UPR Working Group of the Human Rights Council, February 2009*] records:

#### **Reforming the National Human Rights Institution**

Almost ten years after the creation of Suruhanjaya Hak Asasi Malaysia (SUHAKAM) through the Human Rights Commission of Malaysia Act 1999, the national human rights institution (NHRI) faces a possible status downgrade from "A" to "B" by the International Coordinating Committee of National Human Rights Institutions after failing to comply with the Paris Principles for an independent and effective NHRI. If downgraded, SUHAKAM will lose its right to participate in the regular sessions of the UN Human Rights Council and will be relegated as a non-voting member of the Asia Pacific Forum on Human Rights Institutions. Civil Society has criticised SUHAKAM for being limited to submitting its opinions and reports to the government and not having any enforcement authority to protect human rights. The institution continues to undertake a number of public inquiries on certain cases and it produces an annual report; however, these are not tabled in the Parliament. On several

occasions, SUHAKAM has refused to hold public inquiries on allegations of human rights violations, because its mandate restricts it from doing so when a case has been brought to court.

### **Infringements on human rights in national legislation**

The government routinely uses administrative detention laws and other restrictive legislation to deny individuals freedom from arbitrary detention, the right to a fair trial and other human rights. These include the Internal Security Act 1960 (ISA), the Emergency Public Order Preventive Ordinance 1969 (EO), the Dangerous Drugs (Special Preventive Measures) Act (DDA) 1985, the Restricted Residence Act 1933 and other restrictive laws such as the Sedition Act 1948 (revised 1969), the Printing Presses and Publications Act 1984 (PPPA), and the Official Secrets Act 1989(OSA).

The government continues to use or threaten to use the Internal Security Act 1960 (ISA) against perceived critics of the government, individuals who distribute alleged “false news” through short messaging service (SMS), persons described as suspected foreign agents and people allegedly involved in “terrorist-linked” activities. It allows for detention without trial for up to two years renewable indefinitely, without the detainee being charged with a crime or tried in a court of law. It limits the political space for important debates on issues of economic policy, corruption and other social challenges. The government has extended the use of the ISA to cover criminal activities such as human trafficking, currency counterfeiting, forgery of passports and identity cards...

### **Torture and other ill-treatment by police**

The period in review saw incidents of torture and other ill-treatment by police during arrest and interrogation. These incidents involve mainly plain-clothes officers of the Special Branch and the Federal Reserve Unit who appear to act with impunity...

The government has also authorised an estimated hundred of thousands of armed civilian volunteers, a group called the Ikatan Relawan Rakyat (Rela), to help maintain public order and arrest undocumented migrations, including refugees recognized by the United Nations High Commissioner for Refugees (UNHCR). Rela volunteers have repeatedly been accused by local and international non-government organizations of employing unnecessary force and illegal policing methods in the course of their work.

66. In considering the independent evidence cited above, it is clear that a person in the visa applicant’s circumstances, where she is unable to work to meet her basic needs and is marginalised in society to the extent that she would not be able to subsist, would be vulnerable to serious harm from both individuals and the State at large (s.91R(2) of the *Migration Act 1958*) The above country information also illustrates that the visa applicant could not expect protection under either religious laws or the laws of the State, as the State’s apparatus is set up to enforce behaviour contrary to the visa applicant’s life decision.
67. In terms of relocation, the Tribunal finds that it is not reasonable given that the laws regarding the visa applicant’s identity card and her inability to survive are implemented nationally.
68. The Tribunal finds, therefore, that the visa applicant would face a real chance of serious harm in Malaysia because she is a transgender woman in Malaysia without familial or financial support or protection were she to return now or in the reasonably foreseeable future.
69. The Tribunal finds, therefore, that the applicant has a well-founded fear of persecution for a Convention based reason.



## CONCLUSIONS

70. The Tribunal is satisfied that the applicant is a person to whom Australia has protection obligations under the Refugees Convention. Therefore the applicant satisfies the criterion set out in s.36(2)(a) for a protection visa.

## DECISION

71. The Tribunal remits the matter for reconsideration with the direction that the applicant satisfies s.36(2)(a) of the Migration Act, being a person to whom Australia has protection obligations under the Refugees Convention.

I certify that this decision contains no information which might identify the applicant or any relative or dependant of the applicant or that is the subject of a direction pursuant to section 440 of the *Migration Act 1958*.

Sealing Officer's I.D. prrt44