

**071862642 [2008] RRTA 40 (19 February 2008)**

**DECISION RECORD**

**RRT CASE NUMBER:** 071862642

**DIAC REFERENCE(S):** CLF2007/119423

**COUNTRY OF REFERENCE:** Vietnam

**TRIBUNAL MEMBER:** Jane Marquard

**DATE DECISION SIGNED:** 19 February 2008

**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, being a person to whom Australia has protection obligations under the Refugees Convention.

## **STATEMENT OF DECISION AND REASONS**

### **APPLICATION FOR REVIEW**

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).

The applicant, who claims to be a citizen of Vietnam, arrived in Australia and applied to the Department of Immigration and Citizenship for a Protection (Class XA) visa. The delegate decided to refuse to grant the visa and notified the applicant of the decision and her review rights by letter.

The delegate refused the visa application on the basis that the applicant is not a person to whom Australia has protection obligations under the Refugees Convention.

The applicant applied to the Tribunal for review of the delegate's decision.

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**

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.

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).

Further criteria for the grant of a Protection (Class XA) visa are set out in Parts 785 and 866 of Schedule 2 to the Migration Regulations 1994.

#### **Definition of 'refugee'**

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.

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.

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.

There are four key elements to the Convention definition. First, an applicant must be outside his or her country.

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.

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.

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.

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.

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.

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**

The documentary evidence is contained in the Department and Tribunal files.

### *Protection visa application*

The following information was contained in the protection visa application.

The applicant is in her 40's and was born in Campuchia. She speaks, reads and writes Vietnamese. She is a Catholic. She is currently a Vietnamese citizen.

She has a Vietnamese passport which was issued in the mid 2000's.

Prior to coming to Australia she lived in Ho Chi Minh City. She has completed her education. From the late 1970's to the late 1990's she worked in a factory. From the late 1990's until she left for Australia she was self-employed. Her immediate family live in Vietnam. She has one sibling who is an Australian citizen.

Attached to her application were the following documents:

- Birth certificate;
- Passport;
- Household book;
- Curriculum vitae;
- Country information from a variety of sources; and
- Statutory declaration.

The applicant's statutory declaration is set out below:

"1. I was born in Campuchia, Cambodia [date deleted]. I have [siblings deleted]. We are Catholics.

2. In about [early 1970's] my family and I moved to Vietnam because of the war in Cambodia. My parents worked for the [details deleted] and when the Khmer Rouge came we all had to escape to safety. We were advised by the [details deleted] to do so before the [details deleted] troops withdrew the area as we would have been killed all for "collaboration with the enemy".

3. We settled in Vietnam in Saigon. Although the war was still going on in Vietnam as well, it was still safer for us than in Cambodia I went to school until I was about [age deleted] years old. At the time, communists came into power in Vietnam and my father lost his job. I had to leave school and start working in the factory so I could help my family. My mum was a [work details deleted] at the time. We had to take whatever jobs we could in order to stay alive. The biggest problem for us was that we are Catholics, which meant that we couldn't get into publicly owned businesses or get government jobs. The private sector hardly existed. We lived with my [extended family], who were trying to help us after my father passed away [date deleted].

4. After my father passed away my mother continued to sell [details deleted] together with some other friends of hers. About [details deleted] months after my father died, my mother was taken by the Police and spent about [details deleted] months in gaol. She was using part of the money to help elderly people who belonged to the former Government. If people like my mother didn't help them, they would have starved to death.

5. We continued going to church although the services were changed due to the restrictions imposed by the communists. There were approximately 50 to 60 people attending the church on a regular basis. They consisted of Vietnamese and Chinese Catholics.

6. I continued going to work, helping my brothers and sisters, visiting my mother [details deleted]. I was constantly tired and didn't have any personal life as there was just no time for that.

7. At about [date deleted] I took some swimming lessons and I was introduced to the swimming coach at the pool whose name was [name deleted] She was [age deleted] years old at the time and I was two years older. After a couple of sessions we became friends and we started seeing each other after my work at the pool. We started going together for picnics, movies, etc, and we talked about everything. After a couple of months we realised that we loved each other and we became a couple.

8. We had to be extremely careful about not being seen as a couple as it is unthinkable in Vietnam to be in a homosexual relationship. We had to hide and pretend to be just friends. We would meet at our friend's places. We couldn't even tell them about our relationship. She was a [work details deleted] and, on her way to work, she would stop at my place. I used to get up early every morning to make breakfast for her. I lived near her place of work.

9. We were in a very happy and stable relationship for many years. The only cloud was that we had to constantly hide even from our closest friends or family. We became even more careful after one of the girls, [name deleted], who lived a few suburbs away my place was bashed up because she was in a homosexual relationship. I knew her well and knew about her relationship but I kept it a secret. We were together in a [details deleted] shop after work at about six o'clock. Suddenly, about [details deleted] appeared. They came to our table and asked my friend if she was [name deleted] She said "Yes". The man who spoke to her first, hit her hard and threw her to the ground. A few others from the group hit her as well while she was on the floor. The man who was talking yelled at her not to approach her girlfriend, [name deleted] ever or she would be dead. He said that it was a warning. They disappeared as fast as they came.

10. I was totally shocked as it all happened so suddenly and so fast. My friend [name deleted] had a cut on her arm apart from bruised face that started to swell. The people who work in the [details deleted] heard everything and they became aware of the relationship. They didn't want to help her up. When the men appeared and abused my friend I ran out and hid under the table. I felt ashamed afterwards but I was so afraid. I went back to the [details deleted] after the men were gone. I was the only one who helped my friend. The others were just staring and pointing at her. I helped her to wash her face and I took her to her place.

11. While we were going to her place the thing that I regretted the most was that we couldn't go to the Police to report the event. In Vietnam, where homosexual relationships are not recognised or even mentioned, people are well aware that they might end up being in trouble if they are homosexual and they were attacked. The general perception is that gay and lesbian are sick people and the society does not have any duty to protect them.

12. My friend [name deleted] even had to hide from her family what happened to her and why. She told them that she fell from the scooter. She loved [name deleted] and she wanted to continue their relationship. They kept on seeing each other for a while, well hidden from anyone. One day during [year and name deleted] disappeared and no one has ever heard from her.

13. Back to my relationship, I was the happiest I have ever been when I was with [name deleted]. We were used to pretending that we were just friends. However, one day at about spring time of [year deleted], my neighbour [name deleted] somehow worked out what kind of relationship I was in. She started questioning me but I denied everything. She kept on asking how come I have never had a boyfriend if I wasn't a lesbian. I was horrified that she might start telling others what her suspicions

were. In Vietnam they treat homosexuals worse than animals, they stop talking to you but they call you bad names behind your back. My worst nightmare was that my employer learns about it as well as the last thing I needed was a prospect of losing my livelihood.

14. It would appear that my neighbour did speak to my mother. My mother spoke to me about [name deleted] and the two of us constantly being together. I denied any relationship as well. She didn't believe me and told me to stop going out with [name deleted]. She told me that lesbians are not normal and they are sick. Mum forbade me to bring her to our place as well as the neighbours were already asking questions.

15. I kept on seeing [name deleted] outside but we were seeing each other less and less, roughly once a week. At the time, she also told me that her father applied to migrate to [Country A]. Her father was a [Country A details deleted] and they thought that they had a good chance.

16. I felt sad and rejected. I had problems at home, with my friends or at work and now I was losing my partner. I became depressed and I started drinking a lot. I stayed back at work a lot so I didn't have to go home. I even slept at my workplace as I hated my home and I didn't want to see anyone.

17. Finally at about [date deleted], [name deleted] and her family left for [Country A] I was devastated and I had to hide my feelings from everyone. I kept on working like mad, drinking and wishing I could have a normal life somewhere. I didn't feel like going to work but I had my family to support. [Name deleted] was writing to me and I was writing to her. My neighbours continued to ignore me and some of them kept on insulting me.

18. A few years later some people at work heard the rumours about my sexuality and started abusing me, calling me names. They stated that they didn't want to be in the same room with me, that they would bash me up. Finally the boss called me one day, at about [date deleted] and told me that he had heard the rumours about me and the other workers were getting angry and he advised me that I couldn't work there anymore although I was one of the best and hardworking staff.

19. I had no choice but to stop working there. My only option was to work for my family. My family [business details deleted]. That is what I have been doing since [date deleted].

20. For a long time I didn't have any relationship mainly due to the fact that I was afraid to go

through the same things all over again. In spring [year deleted] I met [name deleted] and we started seeing each other as a couple. Our situation was not better than before, meaning, we had to pretend to be just friends. We would mainly see each other outside the suburb where I lived as I have already had problems before.

21. I have never introduced her to my family but I visited her number of times at her place and she introduced me to her family as a "friend". She also had another lesbian relationship behind her.

22. At about early [date deleted], I was going home after seeing [name deleted] at the cinema. A couple of streets from my home two men stopped me and asked if my name was [name deleted]. I said it was. One man slapped me on the face so hard that my nose started bleeding and he pushed me to the ground while kicking me. The other one was just watching. The one who kicked me told me: "If you ever see [name deleted] again, you will disappear for ever". I was horrified and shaken. I was afraid to report the matter to the police as I might have been even worse off. I can't remember how I reached home as I was in shock. The following day I told my family that a bike hit me thus explaining my bruises.

23. The following day, [name deleted] rang me and told me that she knew what happened as her family told her that they knew about our relationship and they paid someone to "warn me". Her family is well of and I knew it was most probably true.

24. We stopped seeing each other. I was denied any normal life in Vietnam. Even when I was abused, verbally and physically, I couldn't count on authorities or anyone else to protect me. In some countries even animals enjoy more protection than homosexuals in Vietnam.

25. At about the end of [date deleted] I met [name deleted], from Australia, who brought some money for my family as a present from my [sibling]. I didn't see her when I came to Australia in [date deleted] as she was travelling overseas. However, when I came to Australia for the second time in [year deleted], we started spending lots of time together as she was visiting my [sibling] every night. We started a relationship at about [date deleted].

26. [Name deleted] had a terrible life and she was drinking herself to destruction, so much so that psychiatric treatment couldn't help her. I am giving her all my support and she is already drinking much less than before. Our relationship is only possible in Australia as in Vietnam it would have been doomed."



The documentation provided by the applicant included a lengthy extract from the “International Encyclopaedia of Sexuality: Vietnam” (<http://www2.hu-berlin.de/sexology/IES/vietnam.html>) . The report noted the difficulties of doing sex research in Vietnam It also emphasises the importance of marriage in Vietnamese society and traditional values emanating from the history of Confucianism.

Also provided was an extract from Human Rights Watch, “*Vietnam: Montagnards Face Religious, Political Persecution*” ([http://hrw.org/english/docs/2006/06/14/vietna13542\\_txt.htm](http://hrw.org/english/docs/2006/06/14/vietna13542_txt.htm)). This article referred to the arrest of Montagnard refugees and asylum seekers returning to Vietnam from UN camps in Cambodia in 2006.

Also included was a news article stating from 19 April 2002 stating that Vietnam’s state-run media declared homosexuality a “social evil” on par with drug use and prostitution, and proposed laws to arrest gay couples. (“*Vietnam Media call homosexuality “social evil”, vow crackdown*” <http://www.thebody.com/content/world/art22986.html>)

Another news article referred to an award-winning British pianist who was banned from performing in Vietnam because he was gay and had forthright views on the church (<http://www.freemuse.org/sw19448.asp>).

### *Submissions to the Tribunal*

A submission from the applicant’s representative included the following points (in summary):

- The applicant’s delayed application for a protection visa is explained on the basis that the applicant did not tell her Australian family about her sexuality on her first two visits to Australia. The applicant’s partner tried to encourage the applicant to tell her Australian family but the applicant was too fearful to do so.
- During her third visit to Australia, the applicant finally told her sibling and her partner, who are Australian citizens. However her family was not aware that she might be able to apply for protection.
- A friend of the applicant’s partner first made enquires with IARC or RACS as to whether there was an option for the applicant not to have to go back to Vietnam Upon receiving this advice the applicant took steps to apply for a protection visa.

A psychological report included the following information (in summary):

- The Psychologist assessed the applicant in the presence of her sibling and partner (who acted as an interpreter).
- The applicant is a woman in her mid 40’s with a quiet demeanour and pleasant personality. She understood the questions well and was oriented in time and space.
- The applicant is residing with her partner in a suburb of Sydney. They have been involved in a strong and on-going intimate relationship for some time. They have no children and no intentions of adopting any.

- Prior to this the applicant was romantically involved with at least two more homosexual partners which ended due to the unfavourable status that such relationships bear in Vietnam. There is a deeply entrenched public dislike and disgust towards individuals who engage in homosexuality and it created an atmosphere of fear and objective danger of being humiliated, physically assaulted and mentally tortured. The applicant was a victim of an assault in the mid 2000's when she was brutally beaten. She has been called names such as "sick, and "animal" and other insults and profanities. She is currently in a state of fear as she was "promised to be beaten up whenever she is seen" by her attackers.
- The applicant's relationships were kept secret placing strain on her emotional well-being.
- Her relationships impacted on her professional life as she lost her job over the issue of homosexuality.
- The applicant said in her interview that there is no protection for lesbians in Vietnam. She said that when a lesbian reports abuse to the police such an individual is likely to receive more abuse and humiliation from the police themselves.
- The applicant said that once a person is labelled gay, he/she finds it difficult to integrate in society, find a job, find a place to reside, have friends or actively participate in community living.
- The applicant was never courageous enough to tell her family of her sexual orientation. She was afraid of being rejected by her mother and other relatives and she feared for their safety.
- Living in a constant state of oppression has impacted on the applicant's mental health and she has developed a range of problems including stress, anxiety and depression. She has reported having symptoms suggestive of other medical problems. She reported having difficulties sleeping. She experiences nightmares, poor appetite and excessive drinking. She said that in the early 1990's after losing her partner she attempted suicide. At present she has reported "sometimes thinking of ending it all" but has no intention of carrying it out, primarily due to the love and support of her partner.
- The applicant's partner reported witnessing the applicant's nightmares, frequent crying bouts, depressed moods, episodes of anger, stress and anxiety, all related to the fear of returning to Vietnam and being humiliated, assaulted and/or even killed there. Her partner reported being in fear of humiliation and abuse herself within the Vietnamese community, despite living in Australia for many years. She also never informed her family of her sexual orientation.
- The applicant said that in Australia people are free to love despite their sexual orientation. She is obviously afraid of being sent back to Vietnam. As a psychologist and human being, the doctor is of the view that she faces an objective danger of being humiliated and emotionally and physically abused should she return to Vietnam.

A statutory declaration of the applicant included the following submissions (in summary):

- Her previous statutory declaration is true and accurate.

- She did not know that she could apply for protection, when she visited Australia on two previous occasions. On her first visit she did not tell her sibling and the sibling's partner of her sexual orientation. She did not know their attitude to homosexuality and was afraid. She had had enough problems with her mother and did not feel she could cope with any more strain.
- On her second visit she began a relationship with her partner but did not tell her family. Her partner understood her as she is from the same culture and knew how people and the government treat lesbians.
- It was not through a lack of fear, but a lack of knowledge, that she did not apply earlier for protection.
- During her last visit she met another lesbian. This person telephoned an immigration organisation to talk about her situation and this was when she received information about applying for protection.
- She understands there are people who make applications for protection to work in Australia. She does not have permission to work and does not work. Her application is based on truthful facts.

A statutory declaration from the applicant's sibling included the following information (in summary):

- Her sibling came to Australia in the early 1990's on a spouse visa and is an Australian citizen.
- Her sibling has always been close to the applicant however the sibling did not know anything about her lesbian relationships while the sibling was living in Vietnam.
- Her sibling visited their family in Vietnam once a year, and while the sibling was there, found the applicant to be sad and withdrawn. Her sibling asked her what was troubling her but never received an explanation.
- The sibling and the sibling's partner invited the applicant to Australia on three occasions. She seemed more relaxed in Australia especially during her second visit. She was sad when she had to return to Vietnam.
- On the third visit the applicant told her sibling and the sibling's partner about her sexual orientation. The sibling cried with the applicant as her sibling did not know that she was so unlucky and unhappy because she chose to like people of her own gender.
- They have not told their mother and other siblings as they would not be able to understand and accept her situation.
- Her sibling prays the Australian government will do for the sister what the sister's own government failed to do.

A statutory declaration of the sibling's partner made the following points (in summary):

- The partner is an Australian citizen.
- The sibling realised that the applicant was extremely unhappy. Whenever they spoke to her by telephone in Vietnam she sounded troubled. They did not know the reason. They started inviting her to Australia as the sibling was worried about her.
- They loved having the applicant with them and their children love her a lot. When she was due to go back to Vietnam the first time she cried uncontrollably before she left.
- During her third visit the applicant told them she had been a lesbian her whole life and described what was happening to her. The applicant was worried how they would react. Although they are of Vietnamese origin, they have been living in Australia long enough to accept her choice without judging her. The partner felt deeply sorry for everything that had happened to her in Vietnam. The partner wished that they had known before.
- Having lived in Vietnam, the partner absolutely believes everything she went through was true. The partner knows the attitude and culture of people and the Vietnamese government. Homosexuals and bisexuals are treated worse than animals. It is widely perceived that homosexuality is a sickness not a normal personal choice.

### *Independent country information*

#### *Attitude to lesbianism/homosexuality*

The sources consulted indicate that in general homosexuals and lesbians in Vietnam do not disclose their sexuality to their families and communities; and that most conform outwardly to conservative family and social expectations, even to the extent of marrying a partner of the opposite sex. There are some exceptions to this, and reports indicate that there do exist a few discreet lesbian and gay partnerships where the couples live together without making the nature of the relationship obvious. Some anecdotal sources from gay websites suggest that the social and family pressures on lesbians to marry are even greater than on male homosexuals. Among the sources consulted, the Vietnamese lesbians who had taken the step of disclosing their sexuality to their families were those who had migrated to other countries such as the USA.

A 2005 paper on male homosexuality in Vietnam (in the context of HIV/AIDS prevention) contains these comments on social attitudes to gays and lesbians:

- Vietnamese society is “very normative and based on strict sexual dimorphism (female/male, yin/yang)”. Thus there is little room for a “third gender” (p.663).
- Many regard homosexuality as a “way of life imported from the West or a kind of fashion, but not really a sexual orientation which could be significant in traditional Vietnamese culture” (pp.663-4).
- The homosexual community tends to be “invisible”, perhaps due to the “Confucian ideology [that] a man should reproduce himself and build a family to obey his ancestor’s will” (p.664).
- Homosexual identity tends to be “defined as an inversion of gender roles. Only men who have sex in a passive way are considered homosexual” and likewise only

lesbians “acting as an active partner during sexual intercourse with a female partner” (p.664).

- In general, Buddhist traditions condemn homosexuality, although this varies according to the branch (p.664).
- A 2002 Gay Pride march in Long Hai city was condemned by a Vietnamese newspaper as a “Monstrosity...[an] abnormal phenomenon which is foreign to Vietnam’s cultural tradition” (p.665) (Blanc, Marie-Eve 2005, ‘Social construction of male homosexualities in Vietnam. Some keys to understanding discrimination and implications for HIV prevention strategy’, *International Social Science Journal*, Vol.57 Iss.186, December).

The same document contains this information on the place of homosexual people in the family and contemporary Vietnamese society. It does not discuss the situation of lesbians:

In the past, as we saw in the traditions of Hindu society and other South-East Asian countries, the homosexual was assured of a high social status. Nowadays his status is lower and discrimination confines the homosexual community within a sexual minority...

According to a survey carried out in Ho Chi Minh City in 1997 by Marise St-Pierre from Laval University, nearly half the homosexuals interviewed do not live with their families. More than one third was pressurised to marry a woman. But it seems that the natives of Ho Chi Minh City are less exposed to pressures and discrimination than those from other provinces. According to national newspapers, Hanoi seems to be the most severe towards homosexuals, as police reports show. One third of the interviewees by St-Pierre were bisexual and had sex with women. .Sexuality cannot be discussed in the family (Blanc 2003; Hom 1996; Khuât 2004), which is why a homosexual would rather prefer to leave his family, except in the case where he can bring back home enough money to keep the family. . (Blanc, Marie-Eve 2005, ‘Social construction of male homosexualities in Vietnam. Some keys to understanding discrimination and implications for HIV prevention strategy’, *International Social Science Journal*, Vol.57 Iss.186, December, p.668).

A 2006 paper by Duc and Buffington suggests that there is a strong historical stigma against homosexuality in Vietnam, which is the result of many social, cultural and historical factors including the influence of Chinese Confucianism, with its conservative values and traditions; and the discourse of the French colonial period which characterized Vietnamese men as effeminate and sodomy as the cause of the spread of syphilis among French colonists (Duc, Think Nguyen & Buffington, Nancy 2006, ‘Fairies in the Far East – now and then’, Third Semi-Annual Conference on the Rhetoric of Monstrosity, Stanford University March 2-9 2007, 12 March [http://www.stanford.edu/~njbuff/conference\\_winter07/papers/thinh\\_nguyen\\_duc.pdf](http://www.stanford.edu/~njbuff/conference_winter07/papers/thinh_nguyen_duc.pdf) – Accessed 15 October).

A 2002 article by Vy Nguyen, posted on a gay website, examines the situation of Vietnamese gays and lesbians in relation to their families. It states that:

Like those of any other race or ethnicity, gay, lesbian, bisexual and transgender Vietnamese must choose whether to be open with their families about their sexuality. The decision often isn’t as simple as “in” or “out.” Many tell some family members but not others. Some live with the stress of a double identity, adjusting personal facts depending on the circumstance. Others manage to “don’t ask don’t tell.” Whatever the case, the emotional toll can be high” (Nguyen, Vy 2002, ‘The Closet: Gay and Lesbian Vietnamese ponder whether to come out’,

Mailgate website, 16 March <http://mailgate.dada.net/bit/bit.listserv.gaynet/msg00123.html> – Accessed 12 October 2007).

Of the social pressures on lesbians in particular, the article quotes two Vietnamese lesbians now living in the USA:

According to Gina Masequesmay, who teaches a class on Asian American sexuality, Vietnamese lesbians face their own set of hardships in dealing with family, especially if they live with their parents in traditional homes. Many in-the-closet lesbians have to deal with extra parental scrutiny, night time curfews well into their 30's, and pressure to get married before they become old maids.

“My mom tried to set me up once, and I was so pissed at her,” Masequesmay said. “It wasn't so much because I was a lesbian, but the fact that she did this without telling me. It was more the feminist in me. All of a sudden I came home and there was this guy, and I was supposed to talk to him about my car.”

Older lesbians and gays, especially those who immigrated to the United States as adults, face even stronger cultural pressure. Many realized their sexual identity independent of the gay pride movement of the 1980's that has empowered younger Asian Americans. In addition, Vietnamese often dismiss homosexuality as a relatively new phenomenon brought on by increased exposure to freewheeling American culture. Given these factors, the mainstream construction of “coming out” doesn't necessarily apply.

Nguyeãn Vొông is 60 years old and came to the United States when she was 33. She lives in San Jose and works as a lab technician at Stanford University, while her family lives in Orange County. Although she has known she is a lesbian since she was 20 years old, she never had to tell her family outright. They figured it out on their own.

“If people know, then they know,” Vొông said in Vietnamese. “I live naturally. I was born with a very strong character. My family says I have the personality of a man, not a woman.”

Vొông described the frustration of being pursued by boys as a teenager in Viet Nam. When the boys followed her on their bicycles to and from school or work, Nguyen would delicately try to suggest they might be more interested in someone else.

She said cultural pressure is stronger in Viet Nam. “Asians think being gay is a sickness. They blame your parents, your family” (Nguyen, Vy 2002, ‘The Closet: Gay and Lesbian Vietnamese ponder whether to come out’, Mailgate website, 16 March <http://mailgate.dada.net/bit/bit.listserv.gaynet/msg00123.html> – Accessed 12 October 2007).

Two recent articles posted on a gay website by Richard Ammon are of interest. They recount the impressions of a gay American tourist in Vietnam, and although anecdotal and not particularly authoritative they contain some useful information about the gay scene in Vietnam and the fact that same-sex couples living together are rare.

A 2007 article on gay life in Hanoi states

It is nearly impossible to live any sort of gay ‘lifestyle’ as it is known in the west – two same-gender partners cohabitating privately in their own dwelling, separately from their families, socializing with a circle of gay friends and attending meetings. Such a gay household is unknown here in Hanoi – as unfamiliar as a Zulu mud hut in the fashionable Hamptons (Ammon, Richard 2007, ‘Gay Vietnam (Hanoi): Crouching Love, Hidden Passion’, Global

Gayz.com website, June <http://www.globalgayz.com/g-vietnam-hanoi.html> – Accessed 15 October 2007).

The article goes on:

Although virtually invisible, homosexuality is not technically illegal in Vietnam. ILGA (International Gay and Lesbian Association) reports: “According to some research posted on the VN-GBLF e-mail forum, homosexuality has never been explicitly illegal in Vietnam. The current Penal Code doesn’t mention homosexuality; indeed, it seems that there is no mention of homosexuality in Vietnamese law. “Sex buying and selling in any form” are prohibited. However crimes such as “undermining public morality” (similar to “public indecency” or “soliciting” in certain other jurisdictions) can be used to prosecute homosexual conduct [that takes place in public?].”

More recently (1998), after a couple of notorious gay weddings Hanoi that received international press notice, ILGA notes: “legislators banned same-sex marriages after several homosexual couples tied the knot in recent months, distressing local officials who were unable to stop them. After the legislation passed, Communist Party officials descended on the Vinh Long home of Cao Tien Duyen, 23, and Hong Kim Huong, 30, and secured their signature on a promise that they would never again live together. The two women had wed March 7 in a large public ceremony.”

This came as no surprise to my friend Nic (not his real name), a 22-year-old native who works in Hanoi for an NGO. Sitting at lunch in the trendy Moca Café near the Catholic cathedral, he stated, “People in power have no intelligence about homosexuality. These weddings would be unknown but the lesbians wanted to take a big risk. I’m glad they did, but it came to a sad end. What is so ‘funny’ is that most gay people in Vietnam get married anyway-but not to each other. They take a heterosexual spouse because they cannot face the consequences of being different-gay is very unusual here. It’s not part of good oriental thinking” (Ammon, Richard 2007, ‘Gay Vietnam (Hanoi): Crouching Love, Hidden Passion’, Global Gayz.com website, June <http://www.globalgayz.com/g-vietnam-hanoi.html> – Accessed 15 October 2007).

A 2006 article by the same author discusses the gay scene in Saigon [Ho Chi Minh City], Hoi An and Hue. It states that “90% of LBG folks in Vietnam are married, especially if a comrade is a member of the Communist Party”. It goes on:

The prevailing attitude toward homosexuality in Saigon – and most of Vietnam – is that it doesn’t exist. There is no homophobic campaign, no sex police or gay bashing from the churches, temples or government. Same-sex appeal is unknown for most natives, a mystery for some and a secret for queer ones. Police generally leave gay people alone unless they start to organize or become obvious...

...Sexual orientation in Vietnam is decidedly hetero and virtually every gay man and woman is seriously conditioned not to reveal their truth to family or friends or strangers. It is not a legal crime but is certainly a social stigma that can lead to lifelong misery of scorn and rejection by one’s peers.

As usual there are exceptions, as Guy pointed out. Two of his friends are a long term couple in Saigon and have shared an apartment for years with the knowledge of their accepting families who protect the men’s secret. But it’s easy to pass in a big city like Saigon. It’s not unusual for men to live together since they can pass as friends or coworkers. City communal living in Vietnam is a traditional way of life.



Guy observed that long-term couples don't hang out with other long-timers because it's more obvious when a group of men appear together. Many such couples don't want to be known as gay. Anonymity is important to their secret which results in no visible 'community'.

But for most others being gay is a burden not a fulfillment. There is virtually no hope for any emotional truth let alone sexual freedom. Secret liaisons, fleeting quickies, furtive rendezvous are the norm for most of Saigon's LBG citizens (Ammon, Richard 2006, 'Gay Vietnam (Saigon, Hoi An and Hue): Crouching Love, Hidden Passion', Global Gayz.com website, January <http://www.globalgayz.com/g-vietnam-saigon.html> – Accessed 15 October 2007 )

The article contains these remarks on lesbians specifically:

As for lesbian love and life, Guy said women have it even worse than gay men. The public and private repression is greater for them and few women would ever risk the fierce rejection they would face if they tried to shirk their family marital duties.

It is a very closed sub group. Women do share apartments but not as lovers but as co-workers to save money on rent. Guy has some women on his staff he suspects are lesbian but even they are not out to him (Ammon, Richard 2006, 'Gay Vietnam (Saigon, Hoi An and Hue): Crouching Love, Hidden Passion', Global Gayz.com website, January <http://www.globalgayz.com/g-vietnam-saigon.html> – Accessed 15 October 2007 ).

#### *Laws about homosexuality/lesbianism*

The sources consulted indicate that homosexuality is not against the law in Vietnam, and indeed is not mentioned at all in legislation, although there are certain laws in place which could be used against homosexuals, according to some sources. Vietnamese officials have from time to time taken action against homosexual and lesbian partnerships and venues which became too public; but other reports indicate official tolerance towards the opening of a gay club in Hanoi and towards the introduction of sex-change operations.

A 2005 paper on male homosexuality in Vietnam (in the context of HIV/AIDS prevention) states that "the civil, penal, and marriage codes do not define homosexuality as a fault or an offence" (Blanc, Marie-Eve 2005, 'Social construction of male homosexualities in Vietnam. Some keys to understanding discrimination and implications for HIV prevention strategy', *International Social Science Journal*, Vol.57 Iss.186, December, p.664).

The entry on Vietnam in the 2004-2006 edition of *The Complete International Encyclopedia of Sexuality* contains this section on homosexuality and Vietnamese law:

Proshan (Aronson 1999; "Frank" 2000) writes that neither homosexual identity nor behaviors had ever been explicitly illegal in Vietnam. The ancient legal codes of the Le Dynasty (1428-1787) and the Nguyen Dynasty (1802-1945) detailed the penalties for crimes such as heterosexual rape, assault, adultery, and incest, but left homosexuality unmentioned. The only provisions in the codes that might refer to deviant sexuality were the prohibition against "men who wear weird or sorceress garments" (*Le Code*, Article 640; Nguyen & Ta 1987), and a prohibition of castration and selfcastration (*Le Code*, Article 305; *Nguyen Code*, Article 344). Both provisions were not found in earlier Chinese codes. On the few occasions when homosexual activities seem to have been punished, they had been treated as rape or as adultery (disregarding the fact that both partners were the same sex, and concentrating instead on the fact that one or both were married to other partners). Vietnamese legal codes had always been strongly influenced by the Chinese codes of the same eras. In 1740, when the Ching Dynasty in China elaborated for the first time in Chinese history punishment for sodomy between consenting adults, the Vietnamese did not follow suit, once again omitting



any such prohibitions in the Nguyen Code that was promulgated soon after. Nor did the French colonials institute explicit prohibitions against sodomy or pederasty in their colonies, because under the Code Napoléon, these acts did not fall under the purview of the legal system.

Although homosexuality or sodomy was not specifically referred to anywhere in modern Vietnamese criminal law, “sex buying and selling in any form” was prohibited, as were more general and vague crimes such as “undermining public morality.” In the latest Law on Marriage and Family (1986), no article mentioned the State attitude or any guidelines for public opinion about homosexual behavior. The Penal Code did not mention homosexuality either in its articles on incest, rape, prostitution, sexual assault, or child marriage. But Vietnamese authorities could find legal basis for punishing homosexual behavior if they chose, because crimes such as “undermining public morality” could be used (as similar crimes of “public indecency” or “soliciting” are in the U.S.) to prosecute homosexuality (Pastoetter, Jakob 2004, ‘Vietnam: Homoerotic, Homosexual, and Bisexual Behaviors’, in *The Continuum Complete International Encyclopedia of Sexuality*, eds. Robert T. Francoeur & Raymond J. Noonan, The Continuum International Publishing Group & The Kinsey Institute <http://www.kinseyinstitute.org/ccies/vn.php> – Accessed 12 October 2007 ).

The same publication contains this information on official attitudes to gay and lesbian partnerships in Vietnam. It indicates that discreet relationships are generally tolerated but that if public ceremonies are undertaken there may be some official steps taken:

In Vietnam, there has historically been relatively little male homosexuality, although a few of the emperors of the sixteenth and seventeenth centuries did maintain male concubines. In present-day Vietnam, homosexuality is still regarded as being a foreign problem, and, as in other socialist countries, there is a lack of official research on homosexual behavior. In fact, homosexuality is quite a common sexual behavior. It may well be that the Communist state is reluctant to recognize its existence. As long as it is not practiced “openly,” state officials will not interfere. This is evident in the 1998 case of a lesbian couple who married in public. Because of the public ceremony, Vietnamese authorities were forced to act, even though they did not know how to deal with the couple:

Two women were wed in Vinh Long province (about 70 kilometers from Ho Chi Minh City). Hundreds of people, including friends, family members and a number of curious onlookers attended the ceremony on Saturday to celebrate the marriage of a 30-year-old woman to another woman aged about 20. Local authorities did not know how to react to the marriage (*Lao Dong* [Newspaper] March 8, 1998).

Two months later, the government reacted:

Government officials have broken up the country’s first known lesbian marriage and extracted a promise from the lovers they will never live together. Twenty officials from various Communist Party groups met the couple for three hours at their home in the Mekong Delta town of Vinh Long. They were acting on instructions of the Justice Ministry in Hanoi “to put an end to the marriage,” the *Thanh Nien* newspaper reported. It is unclear what kind of persuasion was used to get the couple’s agreement or what punishment they could face if they change their minds, but they signed a document promising not to live together, the justice official said. “They would have had no trouble with their relationship if they had not chosen to have a public wedding,” a member of the provincial justice department said. The issue was raised at the most recent session of the National Assembly during debate on amendments to the law. There were many other homosexual women living together in the province but Hong Kim Huong, 30, and Cao Tien Duyen, 23, were the only ones who were married publicly, he said. He said the wedding was an unwelcome challenge to traditional sensibilities and public morality but added: “As long as they don’t wed publicly they are left in peace.” (Reuters May 23, 1998).

In 1997, the same newspaper launched a virulent critique of a marriage between two men in Ho Chi Minh City. The apparently lavish ceremony held in a big Saigon hotel provoked an avalanche of protests from residents. Other homosexual marriages have taken place in Vietnam in discrete ceremonies, but homosexuality remains taboo in the country, although it is not officially illegal.

Vietnam's first gay wedding took place in Ho Chi Minh City. The two men celebrated their union at a local restaurant with over one hundred guests. Some authorities, however, were not in the mood to congratulate the grooms. "It should be publicly condemned," said Nguyen Thi Thuong, vice-director of the city's state-run Consulting Center for Love, Marriage and Families. "Public opinion does not support this." The police are reported as saying that no laws exist which would enable them to punish the happy couple. The honeymooners could not be reached for comment (Reuters April 7, 1997) (Pastoetter, Jakob 2004, 'Vietnam: Homoerotic, Homosexual, and Bisexual Behaviors', in *The Continuum Complete International Encyclopedia of Sexuality*, eds. Robert T. Francoeur & Raymond J. Noonan, The Continuum International Publishing Group & The Kinsey Institute <http://www.kinseyinstitute.org/ccies/vn.php> – Accessed 12 October 2007).

A 2004 article from the *Far Eastern Economic Review* examines the legal position of gays in various Asian countries. Of Vietnam it states: "penal code makes no mention of homosexuality, so exact legal status of gays is unclear" ('Gay Asia: Gays and The Law' 2004, *Far Eastern Economic Review*, 28 October).

The following recent news reports provide some further information on official attitudes to homosexuality in Vietnam. They indicate that tolerance is exercised by officials in some situations but not in others.

A May 2007 report states that "Britain's leading concert pianist has been effectively barred from playing a recital in Vietnam after Communist authorities took offence at his recent writings about religion and homosexuality. It goes on to say that an official from Vietnam's Ministry of Culture is believed to have looked at Mr Hough's website and seem that contained an article by him for a religious magazine, *The Tablet*, in which he was critical of the Catholic Church's teaching on homosexuality (Quinn, Ben 2007, 'British pianist is barred from concert by Vietnam "for own safety"', *The Daily Telegraph*, 26 May).

An October 2006 report states that the Vietnamese government was considering legalizing sex change operations in some circumstances:

HANOI, Oct. 9 (Xinhua) -- Vietnam will, under a draft decree, permit transgender people to undergo sexual transformation operation, from next January, according to local newspaper Saigon Liberation on Monday.

Under the draft decree recently submitted to the government by the Vietnamese Ministry of Health, transgender people, whose psychological self differs from the social expectations for the physical sex they were born with (for example, a female with a masculine gender identity or who identifies as a man), and people having unclear gender identity, can undergo the operation. After the operation, they will have new gender identity.

The draft decree also stipulates that people with clear gender identity, including gays and lesbians who deny heterosexual experience due to deviations in their lifestyles or behaviors, are not allowed to undergo sexual transformation operation.

If approved, the decree will take effect on Jan. 1, 2007.

Local media have recently quoted estimation of some local medical workers as reporting that 0.3-1 percent of Vietnam's population of 83.1 million people are now gays and lesbians ('Vietnam may allow transformation operation for transgenderists' 2006, *Xinhua News Agency*, 9 October).

### *Attitude of authorities towards homosexuality/lesbianism*

Some sources indicate that the attitude of authorities toward lesbians and homosexuals in general is negative. In a 1999 article titled 'Gay Life is Persecuted and Condemned in Vietnam', the authors claim that "state police" commit "mental persecutions" on "gays and lesbians". The article also makes claims regarding "increasing attacks of gays and lesbians by state run media", and states that "Vietnamese family values as dictated by Confucianism and Catholicism make it painfully impossible for gay and lesbians in Vietnam to live normal lives". The Activetravel Vietnam website provides advice for gay and lesbian tourists travelling to Vietnam, and states that "authorities turn a blind eye to real crimes that target gay men and visitors such as organized rip-offs in Hanoi and Ho Chi Minh City". (Nguyen, T., Tran, L. & Le, T. 1999, 'Gay Life is Persecuted and Condemned in Vietnam', GayViet website, July 7 <http://www.fortunecity.com/village/xanadu/743/> – Accessed 23 January 2008; 'Advice for Gay and Lesbian travellers' (undated), Activetravel Vietnam website [http://www.activetravelvietnam.com/traveltips/gay\\_lesbian\\_travellers.html](http://www.activetravelvietnam.com/traveltips/gay_lesbian_travellers.html) – Accessed 24 January 2008).

A 2002 posting on an Asian gay website describes a police raid on a gay sauna:

In a step backward for emerging Vietnam, police are reported to have raided a gay sauna and arrested 30 men for undisclosed reasons (homosexual activity is not illegal in Vietnam). A nameless official has been quoted in the press offering lame and irrational reasons for the sudden crack-down on the private, club for adult citizens. The men have reportedly been ordered to attend re-education classes.

Typically, this sort of misguided police harassment backfires, generating huge amounts of publicity among Vietnamese and visitors who might not have otherwise known that all sorts of places exist for gay men to socialize together in Ho Chi Minh City.

Shamefully, police seem to ignore criminals who prey on gays, such as the karaoke extortion scams in Hanoi which have been growing progressively violent ('Vietnam' 2002, Utopia News website, 8 November [http://www.utopia-asia.com/unews/article\\_2002\\_11\\_8\\_010125.htm](http://www.utopia-asia.com/unews/article_2002_11_8_010125.htm)

### *Laws prohibiting discrimination against homosexuality/lesbianism*

No information could be located that reported the existence of laws relating to discrimination or violence against homosexuals or lesbians in Vietnam. Article 8 of the Civil Code of Vietnam theoretically protects its citizens from discrimination due to nationality, gender, social status, economic situation, religious belief, level of education, or profession, but does not specifically mention sexual preference in this article. There would appear to be no law specifically preventing violence against homosexuals or lesbians, but there are general provisions in Articles 26 and 27 of the Civil Code stating that all citizens must "respect the personal rights of others" and that all have "the right to have his/her life, health, and body protected".

### *Passport*

According to the applicant's passport she first arrived in Australia in the mid 2000's on a temporary visa. The visa was valid for three months and the applicant departed on the date the visa expired.

The applicant arrived in Australia on a second visit more than a year later. The visa was valid for two months and the applicant departed on the date that the visa expired.

The applicant arrived in Australia several months later.

### *Hearing*

The applicant appeared before the Tribunal to give evidence and present arguments. The Tribunal also received oral evidence from the applicant's partner and a friend. The Tribunal hearing was conducted with the assistance of an interpreter in the Vietnamese and English languages. The applicant's sibling attended the hearing as a support person and the applicant advised that she was happy for her sibling to attend notwithstanding the confidential nature of the hearing.

The applicant was represented in relation to the review by her registered migration agent who was present at the hearing.

The applicant confirmed that she is in her mid 40's. She confirmed that she was born in Cambodia. She said that her family left Cambodia in the early 1970's because of the war and because of her father's job.

She claimed that she is a Catholic.

She said that her family live in Vietnam. She said that she has one sibling who lives in Australia.

The applicant said that when she was growing up people like her had to hide their sexual orientation and could not express a view. She said there was strong discrimination against lesbianism and homosexuality.

She was asked to tell the Tribunal when she first knew that she was a lesbian. The applicant said that when she was growing up and becoming an adult she tended to favour girls rather than persons of the opposite sex. She said that when she was about 20 years old, she had had some time to think about who she was, and she acknowledged who she was. Prior to this there were many events relating to the Vietnamese Communist government, which were affecting her family. She said that when she acknowledged who she was, she did not know other lesbians as this was not discussed or allowed in Vietnam.

The Tribunal asked if it caused some confusion to her when she first acknowledged her feelings towards women. She said there was a lot of confusion as she wondered if she could lead a normal life like other people. She bottled everything up inside her without expressing it. She was torn apart inside herself because of religion, her family and her society. None of these institutions accepted lesbianism and because of this she fought against herself and was tortured by her feelings.

She was asked to tell the Tribunal about her first lesbian relationship. She said that following the passing away of her father, she enrolled in a swimming class as she wanted to swim well.

She got to know the swimming instructor who was two years younger than she was. The swimming instructor had not been involved in a lesbian relationship before. They became friends and eventually this developed into a relationship. After the instructor finished working, they would go out for dinner or go to the movies, and sometimes she would go to the applicant's house. She said that they did not tell anyone about the relationship and pretended they were normal friends. The applicant said that in Vietnam one cannot disclose such a thing to other people. She was asked whether they told anyone else about the relationship. She said that they told no-one as she dared not, including her siblings and her mother.

She said that the relationship continued for a number of years.

She was asked whether her family questioned her about not having any boyfriends during this time. She said they did, her mother occasionally said to the applicant that she was getting old and should think about having a family. The applicant said that she would answer that she was working hard to save money, and had not found a suitable person. The applicant said that her other siblings were young, and the applicant wanted to assist her mother in looking after them.

The applicant was asked how she knew the friend who was attacked (as referred to in her statutory declaration). The applicant said that she was helping her mother to work as a sales assistant, and she met this lady, who used to be a driver of a co-operative next door. The applicant was asked if she knew that this woman was a lesbian. The applicant said she did, because this lady told her. When asked why the lady told the applicant, she said that the lady treated her as a younger sister. The applicant said that she listened but did not tell the lady that she was also a lesbian. This lady was the youngest born of a middle class family but she was isolated and lonely. The Tribunal asked why this lady would tell her if there was such a stigma against lesbianism. The applicant said that she was not a person who spoke much and this lady felt that she would be honest and she had noticed that the applicant appeared to be isolated from other people. However she does not know the real reason that this lady confided in her, but the lady did ask her not to confide in any other person.

She was asked to tell the Tribunal about the attack on her friend. The applicant said that her friend had a partner working in a service industry, who came from a well-off family. The applicant went out with her friend for coffee. A group of males came in to the coffee shop, and some stayed outside. One of the men asked her friend if she was (a particular person), and then he assaulted her. Her friend was then pushed onto the ground. The applicant was a timid person, and scared, and she hid under the table. The applicant heard the man telling her friend not to approach or meet her girlfriend. The men said they would kill her next time. The applicant said that this may have just been a verbal threat or warning. The men left the coffee shop and the applicant helped her friend up. The other patrons just looked at them. She heard a comment from one of the patrons, that her friend had a "sick nature and this led to bad consequences"

She was asked if the owner of the café intervened or called the police. The applicant claimed that the owner said that he did not want trouble and told them to pay up and leave. The applicant said that she sustained a small injury.

The applicant was asked to tell the Tribunal why they did not go to the police. She said that had she gone to the police she knew the police would not resolve the matter. She felt that the police would not help and that she and her friend might be charged with disturbing the peace.

She was asked how she knew the police would not help them. She said that before that occasionally she read in the newspapers about cases involving homosexual people. In one case, a homosexual person was killed and there was no protection for the partner of the victim. There were comments in the newspaper about homosexuals living a sick life, and living an unhealthy life leading to unhealthy consequences. The applicant said because of this she did not dare report the matter to the police, particularly as she had no evidence to show to the police. She said that there is no law in Vietnam protecting people like her.

She was asked what happened to her friend after this. The applicant said that she went home. She said that they were both shocked by what had happened. There was nothing they could do after that. The applicant said she heard nothing from her friend for a number of years and the applicant was very busy with work. She said that a week after the incident she found out that her friend had resigned. The applicant said that she does not know where she is since then.

She was asked whether from the late 1980's for the next few years she was able to have a lesbian relationship without anyone finding out. She said that it was very hard to keep a relationship quiet for such a long time and there was bound to be suspicion. The applicant said that possibly some people knew because in the laneway near her house she sometimes heard someone whispering, and on one or two occasions someone asked her why she did not have a boyfriend, and why she hung out with her girlfriend. The applicant said that she always kept silent. Sometimes people called out that the "sick person was coming back" The applicant said that her family did not know, but her mother suspected her because rumours from the neighbours reached the ears of her family in about 1990. She said that in Vietnam they live in an extended family. She said that the reputation of the family is important. She said that her mother called her in and said there were rumours and that she should not see this girl anymore. Her mother forbade her from seeing her girlfriend anymore. The applicant said that having a relationship that was not accepted by the community meant that she went into her shell and became very quiet.

She was asked whether she continued to see her partner after her mother spoke to her. The applicant said that she saw her less frequently. The applicant said that there was suspicion in her partner's family against the applicant and the family was hostile to her. The applicant said to her partner that they should see each other less frequently. She said that her partner's father advised they would be moving to Country A They realised that eventually they would have to part company. So they decided they would prepare for the separation. Then the applicant's partner moved to Country A. The applicant said it was a terrible time for her then. Firstly there was pressure from her family and secondly she had lost a soul mate.

She was asked how her workplace found out about her sexuality and what happened then. The applicant said that she burrowed herself in work after her partner left. She became quite good and some workers were jealous. They knew that the applicant went to the swimming pool and they tried to find out information about her. They heard the rumours about her sexuality and spread the rumours at the workplace. The co-workers met her superior, and told the superior of her sexual tendencies. The applicant said that her superior called her and said there was a sensitive situation, and there was conflict between the workers and he told her he would like her to leave and keep the place at peace. After that she had no choice but to return to her mother's shop. Her mother asked her what happened and she said there was not much work at the company where she worked.

She was asked if she applied for other jobs after that. She said that she felt so disappointed with everything she did not.

She was asked to tell the Tribunal about her relationship with her second partner. The applicant said that in the late 1990's she enrolled in a foreign language class to improve her language skills. It was not until several years later when she found another partner who was in her course. Her partner was the youngest of several sisters, and her father was a retired Communist cadre. Her partner took the initiative and they got to know each other. They went out together and eventually the applicant found out that she had the same sexual orientation as her new partner. They would go to the movies and for dinner and sometimes the applicant went to her place and stayed overnight. The applicant experienced unpleasant things in her first relationship, so this partner did not come to the applicant's house much. The applicant said that her partner's family had three houses so initially when she went to visit, she stayed with her parents and sometimes if her sibling was away they stayed there. The applicant said that she thinks that her partner's parents eventually found out because of how often she stayed there. This was why she was met with such opposition later on. Sometime after that the applicant heard from her sisters that the applicant should not stay there.

She was asked what happened in one particular instance. The applicant said that in the evening she had an arrangement to see her partner. They saw a movie and afterwards they said good bye in the parking area. The applicant was riding a bicycle. She reached a laneway and two males on a motorcycle stopped her and questioned her about her relationship with the partner. The applicant was afraid and unable to answer. One of the males slapped her. He said that they did not want anything to happen to her partner's family. So the applicant put two and two together, and thought that these males had been sent by her partner's family. The males warned her that if she continued to frequent her partner's house or continue to see her, she could only blame herself for what would happen in the future.

The applicant said that she is timid by nature and was afraid for herself and for her family. The applicant thought that her partner might have been told what had happened. However her partner still telephoned her and wanted to continue with the relationship. The applicant said that she was too terrified and told her partner that they should terminate the relationship because she feared for herself and her family. The applicant said that had she continued she did not know where or when someone would do something to her and she was not in a position to protect herself.

The applicant said that she did not go to the police for the same reasons she did not report the earlier attack on her friend. The applicant said that she was of the opinion that even if she reported the assault, there was no law regarding her and there would be no protection for her. She was scared there would be repercussions against her. The applicant said that the whole society was against people like her. She said that in Vietnam there was discrimination and no laws protecting people like her

The applicant was asked if this made her fearful of having further relationships after this. The applicant said she withdrew from society and lived in a shell of her own. She wondered if there was a way out and started drinking. She said that apart from work she stayed at home by herself. She said that she saw no way out.

The applicant said that her family had not been aware of the second relationship. She said that after the first experience she did not let anyone find out.

She was asked when she met her current partner. The applicant said that she met her in a particular year when her partner brought some presents to her relative. On that occasion she did not take much notice. She said that when her Australian relative visited, her relative asked the applicant to come to Australia So, the applicant went to Australia as she needed something to cheer her up. She did not meet her partner during that trip. She met her during the second trip as her partner came to visit her Australian relative. She and her partner got to know each other more, and eventually the applicant confided in her. They developed an understanding after that. Afterwards they developed a relationship as she felt that in Australia there was a better environment.

The applicant was asked when she told her relatives about her sexual orientation. She said that it was on her third trip. The applicant said that after her second trip she began to communicate with her current partner by letters, SMS and telephone. She said that on her third trip she asked her relative about whether she would accept her way of life. She was asked what her relative's reaction was. The applicant said that her relative had a broader outlook as she had been in Australia for a long time. The applicant said that unlike Vietnam, people in Australia find their own place to live. So it was acceptable for her relative, and she did not mind, particularly as the applicant would stay with her partner.

The applicant told the Tribunal that she did not apply for refugee status on her earlier trips as it was not something she was aware of or had considered. She said that she first considered applying after her partner's friend explained to her that there are laws for protecting people like her and that she could apply for protection.

The applicant said that she was now in a stable relationship with her partner and living with her.

She was asked whether she has had any contacts with any lesbian groups or lesbian clubs since she has been in Australia. The applicant said that she is on a temporary visa so she does not belong to any groups, although she has met a few people in a similar situation through her partner.

The Tribunal asked the applicant what she feared if she returned to Vietnam. She said that she feared she would again return to a life without any future, a life that is not normal. She said that if she is in a relationship then she would not be able to protect herself and her life would be in danger.

The applicant was asked if there was anything further she wished to tell the Tribunal. She said that she wondered whether she will have a normal life. She said that she has a partner and she wants to be here to share everything with her.

The Tribunal then took evidence from the applicant's partner.

The witness said she is an Australian citizen. She said she has been here since the early 1990's.

She was asked if she was involved in lesbian relationships when she was in Vietnam and she said she was. She said she did not dare let anyone know because her family would not allow her to have such relationships. She said that her family did find out that she was having a relationship with a helper at home. Her mother gave the girl some money and discharged her from her duties. Her family gave her beatings.



She was asked what her experience is of the attitude towards lesbianism in Vietnam. She said that relationships cannot be disclosed at all.

She said that she met the applicant in a particular year when she visited Vietnam. She said that she later got to know her better when she visited her sibling in Australia.

She was asked if the applicant told her about the applicant's experiences in Vietnam because of her lesbian relationships. The witness said that the applicant did tell her, and their experiences were similar.

The witness said that they began a relationship after a few months of being friends. She was asked if her partner was afraid of telling her family. She said that her partner did not dare to tell her family, and she herself has not told her family. The witness took her to see her relative interstate but told her relative that the applicant was just a friend. The witness said that even in the Vietnamese community in Australia there is still a stigma against lesbianism. The witness has not even told her family doctor. The witness was asked if the applicant was afraid of telling her close relatives in Australia. The witness said they detected something and eventually they told them. They asked them not to tell other members of the family.

The witness was asked what the applicant was afraid of if she returned to Vietnam. She said that she is worried and has lost a lot of sleep. They are afraid that even if they returned together the situation would not be like it is here. The witness also loses sleep over it.

The witness said that she and the applicant are compatible and are leading a healthy life together. The witness said that she used to drink and use drugs and the applicant has helped her. The witness said she has no-one else here. They have been together one year already. The witness said that they rely on each other.

The Tribunal then took evidence from a friend of the applicant. The witness is an Australian citizen with Vietnamese background. She has been in Australia for 28 years. She knows the applicant through her relative.

The applicant was asked when she found out the story of the applicant's life. She said she found out about a year previously when she came here.

The witness was asked if there was anything she wished to tell the Tribunal about the applicant's application. She said that she hoped that the Tribunal would be able to help her to come here.

The witness said she is aware that there is no protection for lesbian people in Vietnam.

The Tribunal asked the applicant and her representative if there was anything further the Tribunal should ask the witnesses. They said there was nothing further but the representative made the following submissions. She commented that Vietnamese culture is very polite, even when discussing traumatic events. Vietnamese do not use emotion when talking.

The representative also said that it has taken time for her to hear the applicant's story and she was not aware of the suicide attempt until the psychologist's report. She commented that sometimes it takes time to hear all the issues.

The adviser also said that, in relation to the delay in application, that there are many people who do not know about the possibility of applying for protection visas.

## **Findings and reasons**

The applicant claims that she has a well-founded fear of persecution in Vietnam because she is a lesbian and would continue to have lesbian relationships if she returned to Vietnam. She claims that she has been assaulted, threatened, suffered psychological damage, and lost her job because of her sexual orientation and that she is afraid to return.

### **Country of nationality**

On the basis of her passport, the Tribunal accepts that the applicant is a national of Vietnam, and is outside her country of nationality.

### **Convention nexus**

The Tribunal found the applicant to be a consistent and credible witness. The Tribunal was also persuaded by the open and frank evidence of her partner, and the supportive evidence of the applicant's close relatives

The Tribunal accepts that the applicant is a lesbian, based on her candid evidence and her clear and convincing recollection of events, as well as her partner's evidence which reflected a sincere commitment between them

In order to be granted a protection visa an applicant must have a well-founded fear of persecution for one of five reasons, including membership of a particular social group.

In *Applicant S v MIMA* (2004)217 CLR 387 the majority of the High Court summarised the determination of whether a group falls within the definition of "particular social group" as follows:

"First the group must be identifiable by a characteristic or attribute common to all members of the group. Secondly the characteristic or attribute common to all members cannot be the shared fear of persecution. Thirdly the possession of that characteristic or attribute must distinguish the group from society at large."

Lesbians in Vietnam have a characteristic common to the group, which is their sexual orientation, and not their shared fear of persecution. Notwithstanding the fact that they are largely invisible within the population, they are distinguishable from society at large, as recognised by media reporting and societal attitudes to them.

The Tribunal accepts that lesbians constitute a "particular social group" in Vietnam. This conclusion is supported by authority. In *MMM vMIMA* (1998) 90 FCR 324 at 330, Madgwick J stated : "*ordinarily homosexuals would constitute a social group.*"

Furthermore, the High Court accepted in *Appellant S395/2002 v MIMA and S396/2002 v MIMA* (2002)216 CLR 473 that homosexuals in Bangladesh are a particular social group.

Consequently, the Tribunal finds that the applicant was a member of a particular social group, being lesbians in Vietnam.

The next question for the Tribunal is whether the applicant's fears give rise to a well-founded fear of persecution for a Convention reason. This involves an inquiry as to whether the

applicant faces a real chance of serious harm for the essential and significant reason of belonging to the group the Tribunal has identified, lesbians in Vietnam.

The evidence of the applicant was that she was unable to carry out a normal relationship with a woman due to the social stigma attached to lesbianism and that she hid her relationships from her family and friends. However when people began to suspect that she was a lesbian, she was subject to taunts and insults. She was also assaulted on the street and threatened if she continued to carry out lesbian relationships. She witnessed the assault of another person and threats on that person, based on her sexual orientation. She lost her job because co-workers found out about her sexual orientation. The applicant's evidence, which is supported by evidence of her sibling and their partner, partner and a friend, is that she fears returning to Vietnam because she is afraid of being assaulted or killed due to her lesbianism.

Based on this evidence, the Tribunal accepts that the essential and significant reason for the applicant's fear of harm in the reasonably foreseeable future is her membership of a particular social group, lesbians in Vietnam.

### **Well-founded fear**

The issue in this case is whether the applicant has a well-founded fear of persecution because of her lesbianism.

As the Tribunal has found the applicant to be a witness of truth, the Tribunal accepts that the applicant became involved in a lesbian relationship in the mid 1980's. The Tribunal accepts that she had to be very careful about this relationship because of the stigma attached to lesbianism in Vietnam. The Tribunal accepts that she hid the relationship and the couple pretended to be friends.

The applicant's evidence is consistent with independent country information that in general homosexuals and lesbians in Vietnam do not disclose their sexuality to their families and communities, and that most conform outwardly to conservative family and social expectations, even to the extent of marrying a partner of the opposite sex. Many of the articles sourced refer to the "invisibility" of homosexuality, so strong are the social attitudes against it. While most information on this subject relates to male homosexuality, some articles suggest that the situation is worse for lesbians than it is for homosexuals. For example, one article states: *"as for lesbian love and life, Guy said women have it worse than gay men. The public and private repression is greater for them and few women would ever risk the fierce rejection they would face if they tried to shirk their family marital duties"* (Ammon, Richard 2006, 'Gay Vietnam (Saigon, Hoi An and Hue): Crouching Love, Hidden Passion', Global Gayz.com website, January <http://www.globalgayz.com/g-vietnam-saigon.html> – Accessed 15 October 2007). In May 2007 a British pianist was refused entry to Vietnam after Communist authorities took offence at his writings about religion and homosexuality.

The Tribunal accepts the applicant's evidence that a lesbian friend was beaten up in the applicant's presence and that her life was threatened if she continued to see her girlfriend.

The Tribunal accepts the applicant's evidence that this attack made her afraid and that she and her friend did not report the attack to the police because of the attitude to lesbianism in Vietnam. The Tribunal accepts, on the basis of country information, that homosexuality and lesbianism is not recognised and rarely mentioned and that lesbians are regarded as "sick people". The Tribunal accepts that the applicant and her friend did not report the attack to the

police because in Vietnam there is a belief that the state does not have a duty to protect lesbians.

The Tribunal notes that while lesbianism is not against the law in Vietnam, the authorities can use crimes such as “undermining public morality” to prosecute homosexuality. In 1998 government officials broke up the first known lesbian marriage and extracted a promise from the lovers that they would never live together. The Tribunal accepts that the existence of such laws and actions, along with the conservative attitude to lesbianism, would make lesbians very reluctant to report “gaybashing” crimes to the police. Furthermore, there are no laws in Vietnam relating to discrimination or violence against homosexuals or lesbians.

The Tribunal accepts that around 1990 the applicant’s neighbours began to suspect that she was a lesbian and questioned and taunted her, but that the applicant denied being a lesbian. The Tribunal accepts that the applicant was terrified that she would tell others, because lesbians were “treated worse than animals” She was also concerned that if her employers found out, she would lose her job. The Tribunal accepts that her mother heard the rumours and told her that lesbians were sick and forbade her from seeing her partner.

The Tribunal accepts that rumours about her sexuality started circulating again around the late 1990’s, and that around that time she was fired from her job because of the reaction of workers to her sexuality.

The Tribunal accepts that she later began another lesbian relationship and that she was beaten up when members of her girlfriend’s family found out about the relationship. The Tribunal accepts that she did not go to the police for the reasons mentioned earlier.

The Tribunal finds, on the basis of this evidence that there was a real objective foundation for this fear.

### **Serious harm**

Pursuant to section 91R(1) of the Act, the harm suffered by the applicant must involve serious harm and systematic and discriminatory conduct.

The Tribunal notes that the applicant has been beaten up in the past, and fears being assaulted again were she to return to Vietnam and become involved in another lesbian relationship. The Tribunal also accepts that the applicant has been threatened and seen another lesbian threatened and this has made her fearful for her own life and safety in the reasonably foreseeable future.

The Tribunal finds that there is a real chance that the applicant would face serious harm, in the form of significant physical harassment or ill-treatment, or bodily harm, were she to return to Vietnam. This harm, carried out by individual members of society, but reflecting a general antithesis towards lesbians, is premeditated, intended and targeted towards lesbians, and in this case, the applicant, because of her membership of the particular social group, lesbians in Vietnam.

While it is clear that the acts of serious harm are carried out by private actors, their actions are officially tolerated and sometimes condoned by the forces of law and order. The Tribunal finds, on the basis of the independent country information and the applicant’s evidence, that

the persecution in Vietnam is officially tolerated by the authorities, because of the attitude to lesbianism in Vietnam.

### **Right to enter or reside a third country**

There is no information before the Tribunal to suggest that the applicant has the right to enter and reside in another country. Consequently, the Tribunal finds that s.36(3) of the Migration Act does not apply to this applicant.

### **Relocation**

The Tribunal finds that it would not be reasonable to expect the applicant to relocate within Vietnam, as the risk of persecution is nation-wide rather than localised. Independent country information supports the proposition that negative attitudes to lesbianism, and the consequent risk of persecution to this applicant, occurs right across Vietnamese society.

### **CONCLUSIONS**

The Tribunal is satisfied that the applicant has a well-founded fear of persecution in the reasonably foreseeable future and is therefore a person to whom Australia has protection obligations under the Refugees Convention. The Tribunal finds that the applicant satisfies the criterion set out in s.36(2) for a protection visa.

### **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.