

1102877 [2012] RRTA 101 (23 February 2012)

DECISION RECORD

RRT CASE NUMBER: 1102877

DIAC REFERENCE(S): CLF2010/158147

COUNTRY OF REFERENCE: Egypt

TRIBUNAL MEMBER: Linda Kirk

DATE: 23 February 2012

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 Egypt, arrived in Australia on [date deleted under s.431(2) of the *Migration Act 1958* as this information may identify the applicant] July 2007 and applied to the Department of Immigration and Citizenship for the visa [in] December 2010. The delegate decided to refuse to grant the visa [in] February 2011 and notified the applicant of the decision.
3. 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
4. The applicant applied to the Tribunal [in] March 2011 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 Regulations.

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, *Applicant S v MIMA* (2004) 217 CLR 387 and *Appellant S395/2002 v MIMA* (2003) 216 CLR 473.
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.
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. The expression 'the protection of that country' in the second limb of Article 1A(2) is concerned with external or diplomatic protection extended to citizens abroad. Internal protection is nevertheless relevant to the first limb of the definition, in particular to whether a fear is well-founded and whether the conduct giving rise to the fear is persecution.

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.

Background and Claims

20. The applicant is [in his mid-twenties] born on [date deleted: s.431(2)] in [town deleted: s. 431(2)], Egypt. He arrived in Australia as a holder of a subclass 572 Student visa [in] July 2007 and applied for a protection visa on [in] November 2010.
21. The application form 866 indicates that the applicant speaks, reads and writes both Arabic and English. In response to the questions asked in questions 42-46 of Part C of the protection visa application form the application provided the following statement:

Since I was about 12 years old I knew that I was not like other boys with respect to my sexuality. Many of my friends were busy trying to get to know women and some were using the service of prostitutes including my brother.

When I was 15 my brother wanted to toughen me up because he thought I was too 'soft'. A few times my brother would tell me that I embarrassed him in front of his friends because I was shy and showed no interest in females. My brother insisted that I go with him to a prostitute. I was scared and did not want to go but he started to call me 'gay' and kept insisting against my wishes. I went with him.

When I was with the prostitute I felt sick with nerves. When the lady was talking to me it was obvious to her that I had no interest. The lady said to be 'what is wrong – you don't want people to call you poofa do you?' Her words affected me greatly. I left her house and my brother behind and returned home.

The word 'poofa' was in my ear and I could not get it out. I became depressed and scared and felt I was abnormal. At this time I thought my attraction to males was a evil thing that I want to stop. I tried to look at females and become interested but I could not.

At about this time the media in Egypt was full with Gay men who had been arrested on a boat. Almost every person was talking about these men in a very degrading way. The arrests had a very significant impact on me because I was at a stage in my life where I was recognising my sexuality. At this time I tried to suicide.

My parents took me to our local doctor. The doctor told my parents that I was going through the normal pressures of growing and I will soon settle. I was given medication which made me tired and sleepy.

I first became sexually active in my first year at Uni with one of my teachers. At first the teacher used to touch me and after a while we started intercourse at the Uni during private lesson time.

After almost 1 year the teacher was exposed and quietly removed from the Uni. Within a few weeks rumours about the teacher began to spread. My father spoke to me and asked if anything happened to me. I was scared and flustered, it was difficult to answer but I said no. My father was uneasy.

When the incident with my teacher settled I started to feel I need to meet another man. I had heard of places in Cairo where men would search for sex. I was able to met (sic) a few men but it was casual short lived relationships.

In December 2006 my uncle saw me with a man. My uncle did not see us actually having sex but he saw us touching each other. My uncle came up to us with a stick and he beat us until we were bruised. [Mr A]– the man with me – ran away. My uncle told my father something else but I do not know what.

My parents were keen to let me travel. I think they thought I would feel better because I was very depressed at the time.

When I arrived in Australia I was unable to adjust to the Australia (sic) gay culture at first. I had a lot of problem meeting men. I went to [a bar] in where there was a lot of people to met (sic) but I felt like a fish out of water.

After about 8 months in Australia I met an Australian man at a bar and returned to his home to have sex. The experience was very bad – the man insulted me and insulted Arabs. I felt very insecure and started to question my whole sexuality. After a little time, I went to [another suburb] and tried to go with a prostitute. I paid her money but I was with her only a few minutes and immediately felt wrong. I had no desire.

I was shattered. I could not identify with males or females. I went through a period of time that I was considering asking my parents to arrange a wife for me so that I could be forced into a standard life.

After about 1 year I settled. I met a number of men but I tend to shy away from Australian men.

I was recently in a relationship for 3 months but my ex-partner [Mr B] was too deeply involved in drugs so the relationship did not work.

It has taken me a long time to come to terms with my sexuality and it was made more difficult by the big cultural difference in Australia.

I am clearly homosexual and I have now accepted this fact that I will not be able to live in Egypt and with my family.

Department Interview

22. The applicant was interviewed by the delegate [in] February 2011.
23. At the interview the applicant told the delegate that he left Egypt because he had many problems living there because he is gay. This caused him emotional problems. Australia is a much more open and tolerant society.
24. He told the delegate that he knew from an early age that he was different to other men because he was not interested in girls. His brother would often ask him why he would act strangely when they talked about women. He would ask him if he was a “poofta” This would upset him although he would try not to let it show. He didn’t want anyone to know about his sexuality because he knew this would cause him big problems.
25. The applicant told the delegate that he recalls the reporting of the gay men who were on a boat and the comments of members of the public who said that they should be executed. He was only 15 years old at the time. He realised he had to keep his sexuality a secret from everyone, including his family.
26. He told the delegate he had his first sexual experience at University with a teacher when he was 19 years old. They had a relationship until the teacher left the University. He tried to contact him after he left but was unable to do so. Following this, he was in a bad emotional state. He thought about committing suicide. But he did not ever try to do so. He sought counselling. He didn’t tell anyone that the reason why he was depressed was because he was homosexual and he was not able to deal with his sexuality.
27. The applicant told the delegate that on one occasion he went with his brother to see a prostitute. When it was his turn he went in to see the woman but he was very scared and did not want to be with her and so he left.
28. The applicant explained that he looked for men on the internet and he also visited some cafés where gay men frequented. He met a man called [Mr A] in a park across from [a] Hotel and began to see him. One day they were discovered by his uncle and he beat him with a stick. His uncle told his father that he had seen him with [Mr A].
29. The applicant told his parents that he wanted to leave Egypt to study in Australia. They were initially reluctant but eventually agreed. His family do not know that he is a homosexual.
30. The delegate asked the applicant whether he had experienced any other violence as a homosexual man in Egypt. He said that he had not. But homosexuals are rejected by society. They cannot live openly.

Delegate’s Decision

31. In a decision dated [February] 2011 the delegate refused the applicant’s application for a protection visa. He did not find the applicant to be a credible, truthful and reliable witness. He did not accept the applicant’s claim to be a homosexual. Therefore he did not find that the applicant’s fear of persecution as defined under the Refugees Convention to be well-founded.

Review Application

32. The applicant applied to the Tribunal [in] March 2011 for a review of the delegate's decision.
33. [In] May 2011 the Tribunal wrote to the applicant advising him that it had considered all the material before it relating to his application but that it was unable to make a favourable decision on that information alone. The Tribunal invited the applicant to give oral evidence and present arguments at a hearing [in] June 2011. The applicant was advised that if he did not attend the hearing and a postponement was not granted, the Tribunal may make a decision on his case without further notice.
34. [In] May 2011 the Tribunal received a response to the hearing invitation indicating that the applicant and his representative would be attending the hearing scheduled for [June] 2011.

Tribunal Hearing

35. The applicant appeared before the Tribunal [in] June 2011 to give evidence and present arguments. He was represented by his registered migration agent, [name deleted: s.431(2)]. He was also accompanied by his partner, [Mr C]. The Tribunal hearing was conducted with the assistance of an interpreter in the Arabic and English languages.
36. The applicant told the Tribunal that he was born on [date deleted: s.431(2)] in [town deleted: s.431(2)], Egypt and is [in his mid-twenties]. His mother and father are alive and live in [place deleted: s.431(2)]. He has [two siblings] who both live with his parents. He is in contact with his family. He speaks to them over the phone or the Internet approximately every two weeks.
37. The Tribunal asked the applicant about his education. He said that he studied until his third year of university in Cairo. He undertook a [degree]. He did not complete his degree because he came to Australia.
38. The Tribunal asked the applicant about his study in Australia. He came here on a Student Visa and initially enrolled in a [Diploma]. He completed this diploma and then enrolled in [a] degree [course]. The Tribunal asked him about his Student Visa and whether it was cancelled in 2010. He still has a valid Student Visa that expires in 2012.
39. The Tribunal asked the applicant to tell it about his experiences as a homosexual man. He said that he realised he was different from other boys when he was 12 years old. He said that whereas his friends of the same age would talk about girls, he was not interested. He wasn't sure at this time because he was only young. But as he grew up he felt differently, and when he would see a man and woman walking together in the street he would look at the man rather than the woman. People noticed this, including his family and his friends; however, he didn't disclose anything to them and kept his thoughts and feelings a secret.
40. When he was about 15 or 16 years of age his friends and his brother went together to a brothel. He was not comfortable about this however he didn't want the others, including his brother, to think that he was different so he went along with them. When he went in to see the woman he felt very nervous and uncomfortable. The woman noticed that he was just sitting beside her and tried to encourage him. He was not however interested and did not remain in the room but just left. When he was walking home he was thinking a lot about what would happen and whether his brother would suspect that he was not interested in girls

and would think that there was something wrong with him. He told the Tribunal that at the time he was about 15 or 16 years old, and his brother [was older].

41. The applicant told the Tribunal that he started to feel that he was different from other men because he didn't feel anything towards women. This affected him psychologically, and he tried to cover up his thoughts and feelings. He was very concerned that his brother might have suspected that he was gay. He felt lost and didn't know what to do.
42. The applicant said that when he attended university he mixed with both men and women. He looked forward to going to university and being able to start a relationship with somebody. He met a teacher who taught him science, and at first he didn't know whether the teacher was gay. One day the teacher asked him something in relation to the subject, and the applicant realised that he was looking at him differently and he thought that the teacher may also be gay. They started to talk and met on a couple of occasions before they commenced a sexual relationship. The applicant said that at first he was scared but he felt very comfortable with the teacher and he was very pleased to be able to have a relationship with him. He told the Tribunal that he would meet the teacher over a period of between eight and nine months in the teacher's office because this was private and the safest place for them to meet and to conduct their relationship.
43. The Tribunal asked the applicant whether their relationship was conducted only at university or whether they would also meet outside of the campus. Sometimes they would meet together for coffee in the cafeteria with other students, but apart from that they would only ever meet together at university. They kept their relationship very private and they both had to be very cautious about it. Neither of them told anyone about their relationship. If his family had found out about his relationship with the teacher they would have killed him. He was very pleased to be with the teacher because he was very understanding and accepted him for who he is. It was not a purely sexual relationship; they both had mutual feelings for one another and cared for each other a great deal.
44. The applicant explained that at the end of the university year the teacher left the university. He believes that the reason why the teacher left was because it had been discovered that he is gay.
45. The Tribunal asked the applicant whether he tried to contact the teacher after he had left the university. He said that he did try to contact him on his phone at home; however, he was not able to get in touch with him. He called numerous times, and on more than one occasion he left a message for the teacher to phone him; however, the teacher never returned his calls. On one occasion a female answered the phone, and he was unsure as to who this woman is. The Tribunal asked the applicant whether the teacher was married, and he said that he believes that he was not married but that he had had a previous relationship with another male.
46. The Tribunal asked the applicant how old the teacher involved was at the time, and he said he believes he was about 28 years old.
47. The Tribunal asked the applicant how he felt at the end of his relationship with the teacher. He said that he was devastated to lose him. As a consequence of their separation his emotional wellbeing deteriorated. After he discovered that the teacher had left the university, and that he was unable to contact him anymore, he didn't feel like talking to everybody and became very withdrawn. He told the Tribunal that his father found out about the teacher leaving the university. His father asked him about his teacher and whether the applicant had

anything to do with him. The applicant denied that he had any form of relationship with the teacher. The applicant believes that his father didn't suspect that the two of them may have been having a relationship.

48. The applicant told the Tribunal that after this experience he did try to see other gay men. He said that it is not possible to search for gay men on the Internet; however, he was able to locate some cafés where men can meet. He went to some of these places and met with a number of men and exchanged contact details with them. This led to a few casual short relationships.
49. After a short break the Tribunal asked the applicant whether his family discovered that he is a gay male. He told the Tribunal that his family, including his brother, do not know that he is gay. Whereas he is able to speak to his brother about almost any topic because they are very close, he said that he cannot discuss this subject with him because it is taboo.
50. The Tribunal asked the applicant about an incident that he described in his Protection Visa application that occurred in December 2006 when his uncle saw him with a man. He explained that he met a man in Cairo by the name of [Mr A]. His uncle worked in Cairo, and on one occasion when the applicant was sitting with [Mr A] in a quiet place he was surprised to see his uncle coming towards them with a stick in his hand. The applicant became very scared because he realised that his uncle was going to hit him. His uncle did hit both him and [Mr A] and beat the applicant severely. His uncle told the applicant that he would let the applicant's father know that he had seen him with this man, and he would tell his father to kill him. His uncle took him home and the applicant entered the house and rushed into his room. As it turns out his uncle didn't tell his father that he had seen him with a man; rather, he told him something along the lines that he should watch his son and make sure that he doesn't get mixed up with bad people.
51. The applicant told the Tribunal that following this he stayed at home and began to think about leaving the country. He started to talk to his family about the possibility of leaving Egypt. At first they weren't happy with the idea, but he persisted and they eventually agreed with his idea that he come to Australia to study. He told the Tribunal that he formed the view that as long as he stayed in Egypt he wouldn't be able to meet a man and have a relationship.
52. The Tribunal asked the applicant why he decided to come to Australia to study. He said that this was the only opportunity available to him at the time, so therefore he went through the process of obtaining a Student Visa. He said that he just wanted to get out of the country.
53. The Tribunal asked the applicant whether he knew of any incidents involving persecution by the authorities of gay people. He said that he is not familiar with the legal aspects, but he knows that if two men are caught together they would be beaten to death. He said that he recalls an incident that happened in 2001 involving a tourist boat on the Nile. All of the people on the boat were gay, and the authorities came aboard the boat and arrested them all. He said that he remembers this incident well because there was a great deal of coverage about it in the media and the newspapers, and everybody was talking about it saying that the men deserved to be gaoled. He said that he also recalls hearing about another incident when a man was killed because he was caught having sex with another man. The applicant said that he had not personally experienced any harassment or harm as a consequence of his homosexuality, but this is because he always acted extremely discreetly and would not display his homosexuality in public.

54. The applicant asked the Tribunal whether the gay men who gather in the cafes that he described earlier in the hearing ever would fear the authorities coming into the café and raiding it in order to arrest gay men. The applicant explained that the places he referred to are public cafés and that gay men go to them simply for the purpose of meeting with other men and getting their contact details. He explained that these are not places where men openly engage in homosexual acts.
55. The Tribunal asked the applicant whether he has heard of circumstances when private homes or residences have been raided by the authorities to arrest gay men engaging in homosexual acts. He said that he had not heard about this. He explained that homosexual behaviour is prohibited, and in order to engage in it, it is necessary for men to be discreet and very cautious.
56. The Tribunal asked the applicant to tell it about his life in Australia. He explained that at first it was very hard for him to cope because he didn't know the language and knew very few people. He was very keen to meet someone but he didn't know how to go about doing this. After about eight or nine months, he went to [street location deleted: s.431(2)] to a place called the [place deleted: s.431(2)]. He said that when he was there he met a man who invited him to his house. He walked with the man to his house which was about 10 minutes away. When they arrived he offered him a drink, and the applicant told the man that he doesn't drink alcohol. The man began to ask him about his background and which country he was from, and when he explained that he was Arabic the man became very nasty and began to curse him and call him foul names. At this point the applicant said he became very scared and left.
57. The applicant told the Tribunal that in July or August 2010 he commenced a relationship with another man called [Mr B]. He said that they had a good relationship for about three to four months but that [Mr B] had drug and alcohol problems and, whereas he loved him, he realised that their relationship had to end because [Mr B] was asking him for money for drugs. The applicant ended that relationship.
58. The applicant told the Tribunal that in February or March 2011 he met his current partner, [Mr C]. He told the Tribunal that [Mr C] is very nice and loves him very much. They met at a shopping centre when they were both there at the same time. They realised that they both speak Arabic, and they went together and had coffee. They exchanged phone numbers and then went out together. After a few weeks the two of them decided that they would move in together. They have been living together for the last four to five months.
59. The Tribunal asked the applicant about [Mr C's] background. He explained that he is from Lebanon and that he came here on a Spouse Visa. He married a young woman in Australia, but because he was gay he was unable to continue with his wife. He married the woman only because his family had arranged the marriage. [Mr C] has been in Australia for five years. He arrived here on [date deleted: s.431(2)].
60. The Tribunal asked the applicant why it was that he waited 3½ years before applying for a Protection Visa. The applicant said that when he arrived in Australia he felt very uncertain, and he found it difficult to meet another man. He said that he didn't know what to do or how to meet people, and he didn't have anyone to help him or encourage him. The Tribunal repeated that what it wanted to know was why it was, if he feared persecution in Egypt, he did not immediately apply for a Protection Visa when he arrived in Australia. He said that he wanted to be able to live openly in a free country and that he wanted to feel safe here in

Australia before making a decision as to whether he wished to remain here permanently. He said that it was not until the end of 2010 when he was involved with [Mr B] that he decided that he wanted to stay in Australia. It was not until this point that he felt that he was safe in Australia and that he would be able to live freely and openly as a gay male and to engage in homosexual relationships. He said that once he made a decision that he wanted to stay here permanently it was then that he decided that he would apply for protection and that he sought advice from his [representative].

61. The Tribunal asked the applicant whether he had informed his parents that he had made an application for protection. He said that he has not told them about it because if he were to do so then they would ask him what it is that he is seeking protection from, and he does not want to reveal to them that he is homosexual. He explained that if he is granted a Protection Visa then he will tell his parents that he has been given permanent residency, but he will not tell them the reason why he has been granted permanent residency.
62. The Tribunal asked the applicant to tell it about what he fears about returning to Egypt. He said that he cannot anticipate what might happen to him if he returns; however, after living here in Australia openly and freely he cannot return to Egypt. He said that he cannot imagine what might happen to him. The first thing that would happen if he were to return is that his parents would want him to marry and have a family. He said that when he was younger there was some pressure on him to marry and to have a family, but now that he is much older this pressure will increase significantly. He also believes that he could have problems with the police or authorities if he were to live openly as a gay man.
63. The Tribunal asked the applicant if there was anything else that he wished to draw to its attention. He said that he wants to be able to stay in Australia and live freely and openly as a gay man.
64. The Tribunal asked the applicant's representative if there was anything that she wished to draw to its attention. She said that she wished to make clear that the reason why her client did not apply for protection earlier than December 2010 was because he wanted to be sure that he was safe and secure in Australia before making a decision to apply for a visa that would give him permanent residency.
65. The Tribunal suggested to the representative that rather than hearing oral evidence from the applicant's partner, that it would be sufficient for him to provide a written statement setting out the nature of his relationship with the applicant. The applicant's representative agreed to provide this statement to the Tribunal. She said that she would also forward to the Tribunal some country information to assist the Tribunal in making its decision.

Post-hearing correspondence

66. [In] June 2011 the Tribunal received from the applicant's representative a Statutory Declaration of [Mr C] dated [June] 2011 confirming his relationship with the applicant and photographs of [Mr C] with the applicant.

INDEPENDENT COUNTRY INFORMATION

67. Homosexuality is not technically illegal in Egypt. Rather, Egypt outlaws ‘fujur’, described as a term meaning ‘sexual excess’ or ‘debauchery’. According to one source, ‘fujur’ is interpreted by Egyptian courts as meaning or including homosexual acts.¹ Consequently, almost all men arrested and sentenced in Egypt for homosexuality are charged with fujur.
68. With the exception of the so-called three year hiatus, Egyptian authorities have staged mass arrests/sting operations of homosexuals over the past decade. The most infamous such sting was the May 2001 raid on the ‘Queens Boat’, moored on the Nile in Cairo. Fifty two men were arrested in the raid.² Since 2007, Egyptian police have renewed their campaign of arresting men on charges of “habitual practice of debauchery”, a charge described by Amnesty International as one “used to prosecute consensual sexual acts between men.” In October 2007, 24 men were arrested in Cairo and Alexandria on charges of debauchery/fejur. According to Amnesty International, the majority of the men were “forcibly subjected to anal examinations to ‘prove’ that they had engaged in homosexual conduct.” Charges were later dropped on three of the men, however, nine were sentenced to between one and three years in prison. Eleven of the 12 arrested in Alexandria were sentenced to two-years in prison.³ More recently, ten men were arrested in Cairo in January 2009 for “habitual practice of debauchery”. According to Amnesty International, the men were detained for five months during investigations before being released on bail. Their trial began in late December 2009.⁴
69. In 2002 *BBC News* reported that “[h]omosexuality is so detested in Egypt” that the country’s largest rights group [the Egyptian Organisation for Human Rights] says it cannot campaign against persecution of gay men despite international concern.” The director of the organisation, Hisham Kassem, is quoted by *BBC News* as asking “[w]hat could we do? Nothing. If we were to uphold this issue, this would be the end of what remains of the concept of human rights in Egypt... “We let them [homosexuals] down, but I don’t have a mandate from the people, and I don’t want the West to set the pace for the human rights movement in Egypt”.⁵
70. Homosexuality is not explicitly prohibited under Egyptian Law; however the local authorities have used existing legal provisions on “prostitution”, “debauchery”, “contempt of religion” and “public morality” to prosecute homosexuals. The most common charge is that of “habitual debauchery” under Article 9(c) of Law 10/1961 which states that “Anyone who habitually engages in debauchery or prostitution is liable to a penalty of three months to three years imprisonment and/or a fine of LE 25-300” (DIMIA Country Information Service 2005, Issues Brief: *Homosexuals and Transsexuals in Egypt*, September, p.3-4).
71. A number of media sources and human rights organisations reported that from October 2007 to early 2008 there had been a new wave of arrests by Egyptian police of homosexual males suspected of having HIV. A joint statement by Amnesty International and Human Rights Watch in February 2008 reported:

¹ Lipson, J. 2007, ‘Human Rights in Egypt: The Gap between Policy and Practice’, *Swords & Ploughshares*, Fall Issue, pp.19-20 <http://www1.sis.american.edu/students/sword/Human%20Rights%20in%20Egypt.pdf> .

² Bahgat, H. 2001, ‘Explaining Egypt’s Targeting of Gays’, *Middle East Report*, 23 July <http://www.merip.org/mero/mero072301.html>

³ Amnesty International 2009, *Amnesty International Report – Egypt*

⁴ Amnesty International 2010, *Annual Report 2009*, p.132

⁵ ‘Egyptian rights group ‘cannot protect gays’ 2002, *BBC News*, 11 February <http://www.gayegypt.com/bbc11feb20eg.html>

Cairo police arrested four more men suspected of having HIV, signaling a wider crackdown that endangers public health and violates basic human rights, Amnesty International and Human Rights Watch said today in a joint statement.

The recent arrests bring to 12 the number of men arrested in a campaign against people police suspect of being HIV-positive. Four have already been sentenced to a year in jail and eight are still in custody. The two organizations called on Egyptian authorities to respect the men's human rights and to immediately release them so as not to cause lasting damage to the country's HIV/AIDS prevention efforts.

...The most recent arrests occurred after police followed up on information coerced from men already in detention, according to the Health and Human Rights Program of the Cairo-based Egyptian Initiative for Personal Rights (EIPR). Two of the newly detained men tested positive for HIV. One had his detention extended by 15 days at his February 12 court hearing, with the prosecutor and judge both claiming he was a danger to public health. Another has a hearing scheduled for February 23.

As in all previous cases, authorities forced the new detainees to undergo HIV testing without their consent. All those testing positive have been held in Cairo hospitals, chained to their beds.

...The wave of arrests began in October 2007, when police intervened between two men having an argument on a street in central Cairo. When one of them told the officers that he was HIV-positive, police immediately took them both to the Morality Police office and opened an investigation against them for homosexual conduct. Police demanded the names of their friends and sexual contacts during interrogations.

The two men told lawyers that officers slapped and beat them for refusing to sign statements the police wrote for them. The men spent four days in the Morality Police office handcuffed to an iron desk, and were left to sleep on the floor. Police later subjected the two men to forensic anal examinations designed to "prove" that they had engaged in homosexual conduct.

...Police then arrested two more men because their photographs or telephone numbers were found on the first two detainees. Authorities subjected all four men to HIV tests without their consent. All four are still in detention, pending prosecutors' decisions on whether to bring charges of homosexual conduct. The first two arrestees, who reportedly tested HIV-positive, are still being held in hospital, handcuffed to their beds.

A prosecutor reportedly told one of the men who tested positive for HIV: "People like you should be burnt alive. You do not deserve to live."

In November 2007, police raided an apartment where one of these men had previously lived, and arrested four more men. All were charged with homosexual conduct. These men told lawyers that police ill-treated them by beating one across the head, and forcing all four to stand in a painful position for three hours with their arms lifted in the air. Authorities also tested these men for HIV without their consent.

A Cairo court convicted these four men on January 13, 2008 under Article 9(c) of Law 10/1961, which criminalizes the "habitual practice of debauchery [fujur]" – a term used to penalize consensual homosexual conduct in Egyptian law. Defense attorneys told Amnesty International and Human Rights Watch that the prosecution based its case on the coerced and repudiated statements taken from the men, without providing witnesses or other evidence to support the charges, which all the men

denied. On February 2, 2008, a Cairo appeals court upheld their one-year prison sentences.⁶

72. On 4 March 2008, Human Rights Watch reported that Cairo prosecutors handed down indictments against five of the Cairo men still in detention on charges of “habitual practice of debauchery”. One of the men was also charged with facilitating the practice of debauchery for the other men. The charges were dropped for three other men.⁷ The three men whose charges were dropped tested HIV-negative. The case files of the five indicted men included the results of forced anal examinations and also contained the results of the compulsory HIV tests. Four of the five men tested HIV-positive. *Agence France Presse* reported that on the 9 April 2008 a Cairo court jailed these five men for three years on charges of “habitual debauchery”. The men were also ordered to pay a small fine.⁸ *Afrol News* reported that on 28 May 2008 a Cairo appeals court’s ruling upheld the maximum three-year prison terms for each of the five.⁹
73. Also, in April 2008, Human Rights Watch reported that police in Alexandria arrested twelve men and subjected them to forcible anal examinations, HIV tests, and other abuse; these men were also convicted of the “habitual practice of debauchery and sentenced to two years” (Human Rights Watch 2009, World Report – Egypt). Eleven of the twelve arrested had their two-year prison sentences upheld by an Alexandria Appeals Court in August 2008 (Amnesty International 2009, Amnesty International Annual Report 2009 – Egypt). It is important to note that a number of the men convicted of “habitual debauchery” did not test positive for HIV and all those detained were subject to anal examinations to determine their sexuality. This lends credence to the view that this was not merely a crackdown on those with HIV but that having HIV was used as evidence to determine whether they engaged in homosexual acts.
74. More recently, an item in *Almoheet* (a Pan-Arab News Internet portal) reported that on 5 January 2009 Egyptian police raided another Cairo apartment and arrested eight men on similar charges. Officials said the apartment was set up as a location for men to have sex¹⁰ This latest crackdown does not have the sensationalist characteristics of the last major crackdown on homosexuals during the “Queen Boat Case” in 2001 where the trials became a media circus and the defendants put on display. But like the “Queen Boat Case”, commentators have analysed these latest developments as another attempt by the Egyptian government to placate and “out-moralize” Islamic parties.¹¹

⁶ Human Rights Watch 2008, *Egypt: Spreading Crackdown on HIV Endangers Public Health*, 14 February <http://www.hrw.org/en/news/2008/02/14/egypt-spreading-crackdown-hiv-endangers-public-health>

⁷ Human Rights Watch 2008, *Egypt: New Indictments in HIV Crackdown*, 10 March <http://www.hrw.org/en/news/2008/03/10/egypt-new-indictments-hiv-crackdown>

⁸ “EGYPT: Egypt jails five ‘homosexuals’ for three years” 2008, *Agence France Presse*, 9 April.

⁹ EGYPT: Egypt court upholds HIV sentences’ 2008, *Afrol News*, 29 May.

¹⁰ Wockner, R. 2009, ‘International News: Police raid Cairo apartment used for sexual liaisons’ *Seattle Gay News*, vol.37, Issue no. 07, 13 February http://www.sgn.org/sgnnews37_07/page9.cfm; “Arrests after ‘Gay Swoops’ in Bahrain, Egypt and Morocco” 2009, *UK Gay News* website, source: *Almoheet*, 23 January

¹¹ Williams, D. 2008, ‘Gay Men Face Jail in Egypt, Kuwait in Bid to Appease Islamists’ *Bloomberg*, 8 April http://www.bloomberg.com/apps/news?pid=20601109&sid=aMsUQI_hCVVo&refer=home; Azimi, N. 2006 ‘Prisoners of Sex’ *The New York Times*, 3 December.

75. According to Hani Shukrallah, executive director of the Heikal Foundation for Arab Journalism in Cairo, homosexuality is a convenient target and “Meaningless crackdowns have become a regular thing...If not gays, devil worshippers. If not devil worshippers, apostates. The government needs to outbid Islamic opponents as guardian of morals”.¹²
76. A 2006 article on gay rights stated:
- The persecution of gay men takes place at a time when Egypt has been plagued with significant economic difficulties — in particular, economic recession... Rather than addressing the legitimate needs of Egyptian society, and in fear of the ever-increasing popularity of the Muslim Brotherhood, the Mubarak Government has tried to divert attention from its failure to address the economic woes of the country. It has done this by capturing allegedly gay men as a means to appease supporters of the Muslim Brotherhood and other religious groups.
- Indeed, as predicted by the Mubarak Government, public support increased after the launch of the attack on gay men, since the regime was seen as promoting Islamic values — the very values that the Muslim Brotherhood espouses.¹³

Community Attitudes

77. DIAC Issues Brief: Homosexuals and Transsexuals in Egypt (September 2005) and DIAC Issues Brief: Sexual Minorities – Egypt: An Update and Addendum to the 2005 Paper ‘Homosexuals and Transsexuals in Egypt’ (July 2009) indicate that men who reveal their homosexuality are met with hostility because homosexuality is considered a stigma in Egyptian society and, as a result, many homosexuals do not ‘come out’ to their families.
78. Information from a number of recent sources indicate that local Egyptians continue to have a negative attitude towards homosexuality and those perceived to be homosexual. According to *Al-Ahram Weekly*, “The social stigma attached to homosexuality, however, remains strong in contemporary Egyptian society”.¹⁴ The US Department of State Country report on Egypt for 2008 also made a note that: “Homosexuals and persons with HIV/AIDS faced significant social stigma in society and in the workplace”.¹⁵
79. Current community attitudes is revealed in a news story that described a recent court case whereby in January 2010 an Egyptian court sentenced two journalists to one year imprisonment after finding them guilty of printing a report in their newspaper about the alleged homosexuality of three celebrities. On 7 January 2010, *Gulf News* reported that:
- The Misdemeanour Court of Al Sayeda Zainab in southern Cairo also ordered the two journalists — Abdou Maghrabi, Editor-in-Chief of *Al Balagh Al Gadida*, and Ehab Al Ajami, a journalist for the same weekly — to pay 40,000 Egyptian pounds (Dh26,700) each in fines for the report, which claimed that Egyptian actors Nour Al Sharif, Khalid Abul Naga and Hamdi Al Wazir were caught in a homosexual situation in a Cairo hotel. Homosexuality is punishable under Egyptian law and sternly frowned upon in Sharia. Most public figures in Egypt want to avoid being connected to homosexuality, which could damage their popularity

¹² Williams, D. 2008, *ibid*

¹³ El Menyawi, H. 2006, ‘Activism from the Closet: Gay Rights Strategising in Egypt’, *Melbourne Journal of International Law*, vol. 7, Issue. 1, May, pp. 28-51.

¹⁴ Nkrumah, G. 2008, *ibid*

¹⁵ US Department of State 2009, Country Reports on Human Rights Practices for 2008 – Egypt, 25 February, Section 5.

among Muslim fans. Al Sharif did not seem bothered by the accusations of belonging to a prostitution network, but was frustrated at being described as a homosexual. "Naming me among homosexuals defamed me and all Egyptian artists. The Journalists Syndicate has to be firm with anyone trying to insult the dignity of Egyptian artists," he said.¹⁶

State Protection

80. In a lengthy report by Human Rights Watch on Egypt's crackdown on homosexuals in 2001 to 2003 it notes that because homosexual men are at risk of arrest and abuse by police, they are defenceless against abuse by private actors. It highlighted cases whereby when homosexual men approached police to report crimes against them, they were subjected to blackmail, abuse and even arrest and charge for "habitual debauchery".¹⁷
81. An article on homosexuality in Egypt in The Guardian states that:

...it has never been easy to be gay in Egypt. In poor areas, men who seem feminine or act in a camp manner are ridiculed and sometimes beaten.¹⁸
82. Another article in 2007 on gay Egyptians quotes an interviewee as saying:

I have heard of worse stories, horrible stories of people being mugged and robbed, or tranquilized, drugged and thrown out of cars while driving on the highway.¹⁹
83. EveryOne, Group for International Cooperation on Human Rights Culture, in a 2009 dossier on human rights in Egypt reported:

Homosexuality is not technically illegal in Egypt, but is considered taboo. Until recently, the government denied that homosexuality existed in Egypt, but recently official crackdowns have occurred for reasons felt to include the desire to appease Islamic clerics, to distract from economic issues, or as a cover-up for closet homosexuals in high places.²⁰

FINDINGS AND REASONS

Country of Nationality

84. The applicant entered Australia on an apparently valid and legally issued Egyptian passport issued [in] February 2007, a certified copy of which is on the Department file. The passport indicates that the applicant was born in and is a citizen of Egypt and on this basis the Tribunal finds that he is in fact a citizen of Egypt, and has assessed his claims on this basis.

¹⁶ Al Sherbini, R. 2010, 'Egypt jails two journalists over homosexuality claims' *Gulf News*, 7 January, <http://gulfnews.com/news/region/egypt/egypt-jails-two-journalists-over-homosexuality-claims-1.564410>

¹⁷ Human Rights Watch 2004, *In a Time of Torture: The Assault on Justice in Egypt's Crackdown on Homosexual Conduct*, p.94.

¹⁸ Whitaker, B. 2001, 'Homosexuality on Trial' *The Guardian*, 19 November <http://www.travelandtranscendence.com/g-egypt.html>

¹⁹ Stack, L. 2007, 'For Gay Egyptians, Life Online is the Only Choice', *The Daily Star – Egypt*, 18 May <http://www.dailystaregypt.com/article.aspx?ArticleID=7281>

²⁰ EveryOne2009, Human rights in Egypt: a brief dossier of a terrible humanitarian tragedy, October 22, http://www.everyonegroup.com/EveryOne/MainPage/Entries/2009/10/22_Human_rights_in_Egypt__a_brief_dossier_of_a_terrible_humanitarian_tragedy..html

Assessment of Protection Claims

85. The applicant claims that as a practising homosexual he fears persecution by his family, the general community and the authorities for that reason. The applicant's claims are based on the Convention ground of being a member of a particular social group.
86. At the hearing before the Tribunal the applicant gave his evidence in a detailed, straightforward and unembellished manner and his evidence was almost entirely consistent with his written claims, oral evidence to the delegate and the independent evidence before the Tribunal.
87. The Tribunal has considered, but draws no adverse inference from the applicant's delay in lodging his application for a protection visa and accepts his explanation in this regard that he wanted to be sure that he could live safely and securely in Australia as a homosexual man before he lodged his application for a visa to remain permanently in Australia.
88. The Tribunal accepts that the applicant has identified as a homosexual since he was 12 years old and that he had his first homosexual relationship when he was 19 years old. The Tribunal accepts that he lived a clandestine life as a homosexual in Egypt and was not able to openly practise or express his sexuality due to his fear of his family and the community. The Tribunal accepts that the applicant gave expression to his homosexuality by entering into a secret relationship with his teacher during his first year at University and that he also had a few other casual relationships with men. Since coming to Australia he has been able to express his sexuality openly and he had one relationship of three months' duration and some other short term relationships. The Tribunal accepts that he is currently in a relationship with [Mr C] and they cohabit together. The Tribunal is not disregarding the applicant's conduct in Australia for the purposes of s.91R(3).
89. The country information referred to in paragraphs 67ff above indicates that whilst homosexuality is not explicitly prohibited in Egyptian law, suspected homosexuals are routinely arrested and charged with "habitual debauchery" which carries a maximum sentence of three years imprisonment. Police routinely torture men suspected of homosexual conduct. In the past, the torture inflicted consisted of both physical and psychological methods, including being whipped, beaten, bound and suspended in painful positions, splashed with ice-cold water, burned with lit cigarettes, and mistreated with electroshock on the limbs, genitals, or tongue.
90. The sources consulted by the Tribunal also indicate that suspected homosexual men continue to be subjected to arrest and charged for "habitual debauchery" or on suspicion of having HIV. Those detained have been subjected to HIV tests without their consent and forensic anal examinations designed to prove that they had engaged in homosexual conduct. Whilst human rights advocates claim that local authorities are now targeting homosexual men having HIV due to the risk they pose to public health, this recent crackdown appears to be more likely an attempt by the Egyptian government to deflect local attention from public dissatisfaction with its response to the economic crisis vocalized in organised demonstrations in April 2008. Societal attitudes toward homosexuals and homosexuality in Egypt are mainly negative and "homosexuality is almost universally despised" and is viewed "as an immoral export from the West" (Human Rights Watch 2004, paragraph 80 above).
91. The Tribunal is satisfied that if the applicant were to return to Egypt he would seek to continue to express his sexuality openly as he has done here in Australia. Based on the

evidence before it, although the applicant did not come to the attention of the Egyptian authorities and did not suffer physical harm in the past, the Tribunal cannot exclude as remote and insubstantial the chance that he would face serious harm as a consequence of being a homosexual and practising his sexuality. In other words, the Tribunal is satisfied that there is a real chance that he would face significant harassment, serious physical harm or imprisonment in Egypt. These acts could be committed by members of the public, or the authorities. The Tribunal is satisfied that such treatment would amount to serious harm for the purposes of s.91R(1)(b) of the Act. The Tribunal is satisfied that the harm he fears involves systematic and discriminatory conduct, as required by paragraph 91R(1)(c), in that it is deliberate or intentional and involves selective harassment for a Convention reason. The Tribunal is not satisfied that the applicant could avoid the persecution he fears by internally relocating within Egypt.

92. The facts of this case suggest that the persecution the applicant would face is for the essential and significant Convention reason of membership of a particular social group.
93. In *Applicant S* Gleeson CJ, Gummow and Kirby JJ gave the following summary of principles for the determination of whether a group falls within the definition of particular social group at [36]:

... First, the group must be identifiable by a characteristic or attribute common to all members of the group. Secondly, the characteristic or attribute common to all members of the group cannot be the shared fear of persecution. Thirdly, the possession of that characteristic or attribute must distinguish the group from society at large. Borrowing the language of Dawson J in *Applicant A*, a group that fulfils the first two propositions, but not the third, is merely a “social group” and not a “particular social group”. ...
94. The evidence before the Tribunal indicates that homosexuals in Egypt possess characteristics and attributes that make them distinguishable from the rest of the society and based on the prevailing social and cultural norms in Egypt they constitute a particular social group within the Convention meaning. The Tribunal accepts, therefore, that homosexuals form a particular social group in Egypt for the purposes of the Convention.
95. Based on the applicant’s past conduct, the Tribunal is of the view that he would be able to avoid the harm he fears by being discreet. However, the Tribunal cannot require a protection visa applicant to take steps and modify his conduct to avoid persecution (*Appellant S395/2002 v MIMA* (2003) 216 CLR 473). The applicant had acted discreetly in the past because of the threat of harm. As noted by the High Court, in these cases it is the threat of serious harm with its menacing implications that constitutes the persecutory conduct (*Appellant S395/2002 v Minister for Immigration and Multicultural Affairs*, per McHugh and Kirby JJ at [43]).
96. The sources consulted make clear that while homosexuality is not “technically” illegal in Egypt, certain laws have been used to impose bans on and punish those who practise homosexuality. Therefore, it appears that the state itself provides avenues for persecution of homosexuals through the operation of certain laws, including Article 9(c) of Law 10/1961. There is no evidence before the Tribunal to suggest that the recent political events in Egypt are likely to have any significant impact on the attitude of the authorities towards homosexuality. Based on the evidence before it, the Tribunal is satisfied that the applicant does not have adequate and effective state protection available to him in Egypt.

97. For the reasons outlined above, the Tribunal is satisfied that the applicant's fear of persecution is well-founded.

Safe Third Country

98. There is no evidence before the Tribunal to suggest that the first visa applicant has the right to enter and reside in any safe third country for the purposes of s.36(3) or of Article IE of the Convention.

CONCLUSIONS

99. 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

100. 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.