

071263822 [2007] RRTA 115 (13 June 2007)

DECISION RECORD

RRT CASE NUMBER: 071263822

COUNTRY OF REFERENCE: Indonesia

TRIBUNAL MEMBER: Paul Fisher

DATE DECISION SIGNED: 13 June 2007

PLACE OF DECISION: Melbourne

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

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 Indonesia 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 his 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 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 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

The applicant arrived in Australia in the early 2000s and the next month lodged a protection visa application with the Department of Immigration and Citizenship. In his protection visa application he detailed his background circumstances including his protection claims both in responses to questions 40 to 44 of part C of the application form, and also in a discrete statutory declaration, which reads as follows:

[Information about the applicant's history has been amended in accordance with s.431 as it may identify the applicant]

Re: Form C question 40

I am a member of a particular social group being that I am Homosexual. Adding to this fact I am Muslim and in Indonesia was raised in a very fanatical religious area with extremely devoted religious parents, family and community.

My sexuality has created many problems for me and is extremely UN-accepted within my own family and the local and surrounding communities.

My harassment in the community from my sexuality lead me to seek employment in City A. Unfortunately I was unable to renew my visa and, not wanting to become an illegal non - citizen, I returned to my home land in City D, Indonesia.

Upon my return the continual persecution by means of harassment and threats against my liberty increased ten fold from the local community and my family members and I was constantly a victim of continual threats, physical and mental abuse.

After several months the trauma of my continual harassment became too much to bear and I applied for, and was granted a visa to travel to Australia.

Re: Form C Question 41

Since my parents discovery of my sexuality I have been a victim of inhumane and degrading abuse and through my parents total disapproval of my lifestyle, word quickly travelled to my immediate family members and than into the local community which lead me to flee to City A.

Since returning from City A to City D, in Indonesia I have been the victim of ongoing physical and mental abuse which has seen me hospitalized twice.

The first instance was just before the Muslim holy month of Idul Fitri in the early 2000s and again a year later.

Upon my release from hospital and having recuperated, I travelled to Country E to seek out employment but was unsuccessful so I returned to City D, Indonesia.

Since returning to City D the trauma of my continual harassment and physical and mental abuse has seen my state of mind deteriorate immensely and since reaching Australia the well founded fear that I suffer from being hospitalized twice as well as the inhumane treatment from both my parents, family members and local community has made me unwilling to return to my home land.

In my home land I am continually degraded and are the victim of cruel, inhuman treatment because of my sexuality and for these reasons I live in constant fear of being a victim of torture and an attack on my liberty as a human being.

Re: Form C Question 42

I have already been hospitalized twice from members of the local community and I live in fear of this happening again. I am convinced that my inhumane treatment and torture will only escalate if I return to my homeland of City D.

My well founded fear is not only from my local community but the surrounding community as word spreads very fast in my district and where ever I go I am constantly a victim of abuse and my rights as a human being are attacked daily.

I fear that a local or surrounding Muslim community may cause permanent harm to me if i continued to be present in this environment.

Re: Form C Question 43

My homeland district of City D is still very primitive and extremely religious with the vast majority of the community being devote Muslims.

As I have already been hospitalized twice I feel I have sufficient evidence to support my case that my well founded fear is a "real chance" and this sees me unwilling to risk my life and liberty and return to it.

My homeland is very cruel, extremely unstable and spontaneous. My previous beatings came with no warning, and I fear that future beatings are a "probability" and will only increase in velocity which would put my life in grave danger.

Re: Form C Question 44

My last two beatings saw no justice from the local authorities being taken what so ever and future beatings I am convinced what have the same affect.

[Information about the applicant's history has been deleted in accordance with s.431 as it may identify the applicant]

The local authorities are very corrupt and the majority of local authorities are also devote Muslims so having any faith that this kind of law enforcement could protect me would be naive and extremely dangerous to my well being.

If I was to speak out locally about this, it would only increase the probability of serious harm coming to me.

Quite often in Indonesia the law is taken in to the local communities own hands and I have no doubts that with the probability of the increased harm to my life and liberty that the local authorities could and would not offer me any long term protection options.

Statutory Declaration

I travelled to Australia on another type of visa in the early 2000s and cleared immigration at City B International Airport. I am an Indonesian Citizen and was raised a Muslim residing at City D an extremely fanatical Muslim religious area, since my birth.

I am a member of a particular social group being that I am Homosexual and since my local communities discovery of my sexuality I have been a victim of inhumane and degrading abuse. Through my parent's total disapproval of my sexuality, word quickly travelled to my immediate family members and than into the local community.

From then on I have been the victim of ongoing harassment which lead me to flee Indonesia to City A Despite great efforts, unfortunately I was unable to renew my visa and, not wanting to become a illegal non -citizen, I returned to my home land in City D, Indonesia.

Upon my return to City D the continual persecution by means of harassment and threats against my liberty increased ten fold from the local community I was constantly a victim of threats, physical and abuse.

My sexuality has created many problems for me and is extremely UN-accepted within my own family, the local and surrounding communities.

Since returning from City A to City D, Indonesia I have been the victim of ongoing physical and mental abuse which has seen me hospitalized twice. The first instance was just before the Muslim holy month of Idul Fitri in the early 2000s and again a year later.

Upon my release from hospital the second time, and having recuperated, I travelled to Country E to seek out employment but was unsuccessful so I returned to City D, Indonesia.

Now, after several months of trauma from continual harassment, physical, mental abuse and the well founded fear that I have endured daily from being hospitalized twice and the inhumane treatment from both my parents, family members and local community my state of mind has deteriorated immensely and it has become too much to bear.

Due to this well founded fear I am unwilling to return to my home land from fear of the real possibility of being subject to more torment that I am convinced will only escalate if I return to my homeland.

My well founded fear is not only from my local community but the surrounding community as word spreads very fast in my district and where ever I go I am constantly a victim of abuse and my rights as a human being and liberty are attacked daily.

I fear that a local or surrounding Muslim community may cause permanent harm to me if I continue to be present in this environment.

My homeland district of City D is still very primitive and extremely religious with the vast majority of the community being devote Muslims.

As I have already been hospitalized twice, I feel I have sufficient evidence to support my case that my well founded fear is a "real chance" and this sees me unwilling to risk my life and liberty and return to it.

My homeland is very cruel, extremely unstable and spontaneous. My previous hospitalizations came with no warning, and I fear that future torment and abuse is a "probability" and will only increase in velocity which would put my life in grave danger. My last two hospitalizations saw no action from the local authorities being taken what so ever and I am convinced future incidents what have the same affect.

[Information about the applicant's history has been deleted in accordance with s.431 as it may identify the applicant]The local authorities are very corrupt and the majority of local authorities are also devote Muslims so having any faith that this kind of law enforcement could protect me would be naive and extremely dangerous to my well being. If I was to speak out publicly in my homeland about this, it would only increase the probability of serious harm coming to me.

Quite often in Indonesia the law is taken in to the local communities own hands and I have no doubts that with the probability of the increased harm to my life and liberty that the local authorities could and would not offer me any long term protection options.

I declare that all informations stated in this declaration are genuine and correct at the time of composing this statement and I feel I am a person to whom Australia has obligations to protect under the United Nations 1951 Geneva Convention.

The protection visa application was refused by a delegate of the Minister, without the applicant having been interviewed. The delegate appears to have accepted that the applicant is a homosexual, and has (despite the absence of any documentary evidence) been assaulted, but concluded that this did not amount to persecution, and that in any case the problems

experienced appear to have been confined to the applicant's family and local community. The delegate also referred to country information indicating that: homosexuality is not illegal under Indonesian law, although some local bylaws do discriminate against minorities; gay lobby groups are active including outside the capital, and homosexuality seems to be becoming more open – and accepted – in Indonesia. He concluded that the applicant could avoid further problems by relocating away from his family and any areas where the laws are discriminatory.

Review Application

The applicant lodged an application for review of the delegate's decision with the Tribunal, in the covering letter to which he foreshadowed the provision of hospital reports to substantiate aspects of his claims. The Tribunal wrote to the applicant inviting him to attend a proposed hearing in City B. This letter was returned to the Tribunal unclaimed. The Tribunal received advice that the applicant had moved from City B to City C, and a request that the hearing be postponed, to which the Tribunal acceded, inviting the applicant to a rescheduled hearing.

The Tribunal received a faxed letter from the applicant declining the invitation to attend the proposed hearing, enclosing a response to hearing invitation completed in the negative, together with a submission in support of his application and a number of medical reports (with authorised translations) and a police clearance certificate. The covering letter, headed *Response to Hearing Invitation*, included the following:

[With this submission would like to advise the Tribunal that I will not be accepting your invitation to attend my hearing..

I would however like to support my genuine claims of being a victim of persecution, and with this submission, I have included the attached, additional supporting evidence to strengthen my case and genuine claims by providing evidence of previous serious harm and hospitalization that has been inflicted upon in my home country due to my membership of a particular social group.

With this new supporting evidence and my submission I sincerely hope that the Refugee Review Tribunal will acknowledge my genuine claims of previous persecution and my genuine well founded fears of the reality of future serious physical harm being inflicted upon me by granting me compassion and referring my case back to the Department Of Immigration and Citizenship to be reconsidered or overturned.

I would like to sincerely thank the Refugee Review Tribunal for reopening my case and I genuinely hope that upon reviewing my case and the attached supporting evidence I can be granted compassion and recommended to be eligible to remain in Australia.

The submission addressed the various subclass protection visa criteria, including the following:

My argument is, Australia, being a signatory to the United Nations 1951 Geneva Convention relating to the Status of Refugees and its Protocol, the Convention is required to give protection to people who arrive in the Migration zone and fit the definition of a Refugee as stipulated in Article 1A(2);

I feel that with the additional evidence of my hospitalization from brutal violent beatings that have been inflicted upon me due to my homosexuality and membership of a homosexuality that I have provided with this submission the Refugee Review Tribunal can be satisfied that I am indeed a person to whom fears persecution from being a member of a particular social group whom would fall under the definition of a Refugee thus making me a person to whom

Australia has protection obligations under the Refugees Convention as amended by the Refugees Protocol.

I feel the Minister can be satisfied that I am indeed a person to whom Australia has protection obligations.

I feel that with my skills and ability to communicate in one of Australia's community Languages, as well as my already proven ability to settle in to Australian community with very little difficulty and my contributions to the Australian economy being an Australian Taxpayer the minister could be satisfied that by granting me a visa would be in the national interest of Australia and be of assistance to Australia's current skilled and un skilled worker shortage.

I have made these claims and provided evidence of hospitalization as a result of these genuine claims of persecution.

Being a person subjected to persecution and having a genuine well founded fear of Serious harm and discrimination from being a member of a particular social group in being homosexual I feel confident the minister can be satisfied that I am a person to whom Australia has protection obligations.

With the fact that I have been hospitalized twice I feel that [the delegate's] conclusion that I am NOT a person that would have a well founded fear is a gross in justice and obvious oversight.

*In [the delegate's] findings he referred to three extracts to support his findings, which I would like to bring to the attention of the Refugee Review Tribunal that all of these extracts are reported from Jakarta, a modern city and the capital of Indonesia. **Indonesia: Govt to Evaluate discriminatory by laws.***

In this extract it ONLY states that the Indonesian Government is examining the issue of local discriminatory laws, NOT changing them. I also note that this extract is taken from a National newspaper originating in the Indonesian capital of Indonesia, a regency already under Sahría law.

In this extract it also confirms that members of my social group have been victims of discrimination and harassment, which are both forms of persecution under the Refugees Convention as well as highlighting by laws that ARE currently in place outlawing gay and lesbians.

In summary this extract is only a government promise to evaluate the bylaws currently in place against human rights atrocities throughout Indonesia.

Indonesia: Regional Laws based on Islamic Sharia and their effect on homosexuals

*I feel only strengthens my arguments that homosexuals are indeed victim's of Persecution **within Indonesia.***

[the delegate] could once again only nominate the fact that there is a lobby group on behalf of homosexuals but until now have unsuccessfully, managed to change any by Laws.

[the delegate] also noted that similar lobby groups now exist in other areas of Indonesia, such as City G, one of the largest city in Indonesia, City H another highly populated modern city and City F, a smaller city compared to these massive cities .

Indonesia: A Milestone for gay rights as Indonesians gets first pink guidebook

*From this extract [the delegate's] summary was that he feels I could relocate myself within other areas of Indonesia. On this note I would like to bring to the attention of the Refugee Review Tribunal Indonesia's Unemployment rates. The Department of Foreign Affairs states that the **unemployment rate** in Indonesia is 10.28 per cent www.dfat.gov.au/geo/indonesia/indonesia_brief.html Whilst other sources would suggest that the actual figure is as high as 20% <http://www.worldpress.org/profiles/Indonesia.cfm>*

http://www.indexmundi.com/~ndonesia/unemployment_rate.html and for the delegate to suggest that relocation is as simple as he has suggested is an uneducated and crude assumption.

[the delegate] also finishes on the fact that he feels there is no remote chance of me being open to persecution if I was to return to Indonesia even though his personally nominated extracts would suggest differently not to mention the fact that I have already been hospitalized twice would suggest differently.

With this submission and having referred to the Migration Act 1958, the Migration regulations 1993 and The Refugees Convention and protocol I sincerely feel that I am a person whom has a genuine well founded fear of persecution and to recommend that I be returned to my home land which has a terrible history of human rights atrocities would place my life in danger and expose me to serious harm and persecution.

Finally I request that the Refugee Review Tribunal grant me compassion by overturning or requesting that [the] initial decision be referred back to the Department Of Immigration and Citizenship.

I sincerely thank you and hope that the Refugee Review Tribunal can acknowledge my well founded fears and fear of persecution by means of proven threats to my life, liberty and security and physical harassment,

The medical certificates indicated that the applicant had been treated as an inpatient at a hospital, in the regency of City D, on two occasions: firstly, in the early 2000s as a result of having been hit by a blunt item and bruised on parts of his body, and secondly a year later as a result of being hit by a hard blunt item , bruising to parts of the body, and a fracture..

COUNTRY INFORMATION

In 2001 Amnesty International published *Crimes of hate, conspiracy of silence: Torture and ill-treatment based on sexual identity*. Accessed at http://www.ai-lgbt.org/ai_report_torture.html on 4 June 2007, it includes the following:

A key element in protecting LGBT people from torture and ill-treatment is putting an end to the impunity enjoyed by their attackers. In November 2000, a mob of around 200 armed people attacked a conference in Yogyakarta, Indonesia, attended by over 350 people working in the field of sexual health and reproductive rights. Participants included representatives of Indonesian LGBT organizations as well as health workers and lesbian, gay, bisexual and transgender people from Yogyakarta. This attack took place in the context of an increased number of attacks by radical Muslim groups against a range of targets which included bars and discotheques, as well as events such as the Yogyakarta conference. At least 10 people were injured and several required hospital treatment. According to eyewitnesses, the attackers forced their way into the conference building and began terrorizing the participants with clubs, swords, chairs and iron bars.

Indonesia's weak and corrupt judicial system routinely fails victims of both ordinary crimes and human rights violations. In this case, the police reportedly questioned around 57 suspects after the attack, but released them all shortly afterwards without pressing charges. Angered by the failure of the police to conduct further investigations, activists and lawyers in Yogyakarta set up a People's Anti-Violence Committee to launch their own legal proceedings in an attempt to bring the perpetrators to justice. One of the organizers of the conference told AI: "The attack has sent shockwaves through the gay community here. It just doesn't feel safe any more... The attackers must be brought to justice to show that this kind of violence will not be tolerated."

The following article from *The Scotsman* entitled *Gay kiss unlocks ancient taboo* dated 29 September 2004, was accessed at <http://thescotsman.scotsman.com/index.cfm?id=2392004> on 4 June 2007:

FOR a devout Muslim country, a film featuring a gay kiss is an unlikely movie hit.

But Arisan! is drawing local audiences in their thousands, bringing to the fore an issue normally regarded as taboo.

Playing to packed cinemas in Jakarta, Arisan! is a satirical comedy mocking the life of the rich in the nation's capital and tackling the previously unmentionable subject of homosexuality.

To the surprise of many in the Indonesian film industry, state censors passed the movie with almost no cuts. Scenes left untouched include an aerial shot of oral sex in a public toilet and a gay kiss.

"It is a breakthrough," said Dede Oetomo, a sociologist and one of Indonesia's few openly gay activists.

But not everyone enjoyed the kiss.

During one recent screening, some members of the audience jeered and shouted in disapproval when the main gay character planted a passionate kiss on the lips of his new-found lover.

"I heard about the gay thing, but I wasn't prepared for the kiss. It's kind of sickening, don't you think?" said Melisa Soeparman, 28, a housewife emerging from a screening.

The film follows the lives of the few, but very powerful, super-rich in Jakarta, drawn together in a traditional Indonesian-style social-support group known as an arisan.

"It is a true reflection of life in Jakarta," said Nia Dinata, the production's director, puffing on a menthol cigarette.

"I am trying to capture the life and the habits of the rich who always put on masks as if everything was perfect," said the mother of two, aged 33.

Arisan is a common term for a monthly social gathering between friends and relatives who chip in money to be won in turns through a lucky draw.

From villagers in far-flung areas to urban professionals in big cities, arisan - initially contrived as a type of support network for ethnic Chinese merchants - is hugely popular among Indonesia's 210 million people, especially housewives.

"It has become a uniquely Indonesian thing," says the United States-educated Mr Oetomo.

But some arisan in Jakarta have grown into an exhibit of wealth featuring a who's who of high society. The prize draws range from millions of rupiah worth of goodies to a date with a high-class prostitute.

The film's three main characters are struggling to maintain a facade in front of the other Arisan members although in truth their lives are less than perfect.

Meimei is a successful interior designer battling with infertility and married to an unfaithful husband, while Andien, a bed-hopping wife, is also married to an unfaithful husband.

The leading male character, Sakt, is their faithful gay friend who is struggling to "cure" his homosexuality.

Audience reactions might be mixed, but everyone has an opinion. Perhaps more importantly, the critics love it.

The respected weekly magazine Tempo - the voice-piece of the most influential Indonesian art critics - called the film "the freshest movie of the year with an almost perfect script". The daily Jakarta Post described the film as: "Achingly funny, an honest work from the heart".

The film is low-budget by Hollywood standards. But into its third week in Jakarta alone it has drawn more than 100,000 viewers, a huge success in the small and competitive local market, according to an official at Indonesia's biggest theatre chain, Twenty One.

Shot in just 32 days on a budget of two billion rupiah (£129,000), Arisan! is among a crop of new releases interpreted as a sign of a revival in the Indonesian film industry after a decade in the doldrums.

But it stands out among the other offerings, which are confined to the staple fare of teen romance and horror.

Unusually for a Muslim country, Indonesian society is relatively tolerant of homosexuality, but it is unusual for the topic to receive a public airing.

Indonesian law makes no mention of homosexuality and the relatively liberal mass media rarely discuss the issue, despite the presence of a number of gay public figures.

Joko Anwar, the film's scriptwriter, said initial fears of a possible backlash by zealous religious groups have yet to materialise.

Such worries are understandable in a country where the newly democratic government is battling an alarming rise in Islamic militancy.

But, says Mr Oetomo, the lack of outrage does not indicate a new acceptance of gays in Indonesia.

"It's more like, 'I know you exist, but please don't bother me'. That's why we have everything here, from fanatic groups to gay rights groups."

A much earlier interview with Mr Oetomo, published in 1998 by Murdoch University and accessed from <http://www.sshe.murdoch.edu.au/intersections/issue2/Oetomo.html> on 5 June 2007, also contains some relevant observations:

Oetomo is one of the leading gay-rights activists in Indonesia and an academic at Airlangga University, East Java. This is an edited version of an interview I recorded with him on film in December 1992 for a documentary project on Reyog Ponorogo. The intention was to record a seamless response to a series of questions on Reyog Ponorogo which were given to Dede beforehand.

DEDE OETOMO

Let me start by making it clear what my position is with regard to the warok-gemblakan tradition in Ponorogo. I first became interested in the warok-gemblakan tradition when a few of my friends and I started a gay movement in Indonesia. It is interesting to note that actually it was our western friends, academics, who reminded us of the warok-gemblakan tradition in Ponorogo, and of course other traditions as well. So, my position is as an outsider, as an academic in a way, and also as a gay-rights activist. As such, I have learned to be rather careful when talking about homosexuality or about a homosexual community in Ponorogo - as the warok-gemblakan community can be described.

...

As to how this warok-gemblakan tradition came into being, well, Ponorogo has always been known in history as an area that resists the power of the state - Mataram, the Dutch - there has always been a tradition of rebellion. I think this is because Ponorogo has always been a marginal area in Java. There are other marginal areas in Java, Banten is one, Banyuwangi is another. These are areas that have never actually given in to the central state power. They

are always in resistance. This has to do with the economy of the area and it has to do with how people go about arranging their economy.

...

In Indonesian society you will find different traditions of alternative sexualities including homosexuality - warok-gemblakan is one. It is interesting to note there is a double standard in place. Amongst ourselves, we know that there are people who have sex with each other, in mosques for example, in West Sumatra or in the warok gemblakan tradition for that matter. This is something that most Indonesians are not proud of and they are rather disturbed when anthropologists or Indonesianists, bring this up.

There are also the modern homosexual communities of the urban centres. With these communities, most Indonesians will say 'Oh, they are decadent, they are mentally disturbed, ... it's a sin.' But the behavioural reaction would be one of a lot of tolerance - as long as it is not in their own family. Once it is other people's families, a performer, even the village dancer, they don't care. As long as it is not in their own family. Even when it is within the family, once they find out.... the reaction gets less and less strong over time.

It is probably useful to bring in here the fact that the cross dressing waria, the banci are socially more acceptable. I think this is because most Indonesians think that they are asexual, and not a threat to the patriarchy of Indonesian society, whereas homosexual men and lesbian women are seen more as a threat in that sense. But the reaction is different from the West. There is no queer bashing at all in Indonesia.

The Guardian article *Milestone for gay rights as Indonesia gets first pink guidebook*, (28 April 2006, accessed at <http://www.guardian.co.uk/international/story/0,,1763429,00.html> on 4 June 2007) includes the following:

For decades, gay venues in Indonesia, Malaysia and Singapore were forced to operate secretly because of official disapprobation and cultural-religious sensitivities.

But now the acceptance of a homosexual lifestyle in the region has passed a major milestone with the publication of the first gay guidebook to the three countries.

The Utopia Guide to Singapore, Malaysia and Indonesia seeks to "shine a light on an aspect of society that exists in every country around the globe, but has been mostly in the shadows here in Asia", according to its publisher, John Goss.

The book features everything from gay bars in Indonesia to bathhouses in Malaysia and an array of clubs, massage parlours and cultural attractions.

Gay activists are confident there will be little backlash. "In recent years we've been more and more open," Dede Oetomo, an Indonesian gay activist, told the Guardian.

"Conservative religious groups know where to find us and they leave us alone. I think, if anything, the bigger problem will be cultural because many families still don't accept a gay lifestyle."

The article *Gays & Sharia*, published in *Indonesia Matters*, on 22 October 2006, and accessed from <http://www.indonesiamatters.com/764/gays-sharia/> on 4 June 2007 states as follows:

Regional laws based on Islamic sharia and their effect on homosexuals.

The Arus Pelangi (Rainbow Flag) recently launched a national campaign against what they say are a wave of "homophobic" or anti-homosexual, regional laws based on Muslim sharia law. Widodo Budi Darmo, a 35-year-old director for Arus Pelangi, [claims](#) that homosexuals in Indonesia are regularly harassed by the police, often detained without charges and then released after a few days.

On the laws he says:

In 2004, the region of Palembang introduced a regional law that proscribes homosexuality as an act of prostitution that “violates the norms of common decency, religion, and legal norms as they apply to societal rule”. That law says that included under the term “act of prostitution” are “homosexual sex, lesbians, sodomy, sexual harassment, and other indecent acts”.

Dodo claims that there are 52 regencies in Indonesia which have enacted sharia laws and that many of these make specific reference to gays and lesbians.

In Jakarta he says, according to long-standing law, homosexuals are legally regarded as mentally defective and therefore, presumably, they can be sectioned, or incarcerated involuntarily in a mental institution.

Indonesia is full of Islamic nut-jobs says Dodo:

There are many Islamic fundamentalist groups in Indonesia that thrive on premanism, or thuggery, against anyone that goes against what they feel their religion dictates. These groups, in Jakarta they are most predominantly the FPI (Front Pembela Islam) and the FBR (Forum Betawi Rempug), will attack the offices, workplaces, and homes of people they consider to be of particular threat to the morals and values of Islam, and that includes homosexuals.

So far this month Dodo’s group has met with officials from the Department of Justice and Human Rights but came away unsatisfied with the response they received. Arus Pelangi also campaigns against the [RUU APP](#), the anti-pornography and indecency law.

Dodo says that there are some parliamentarians, mainly from the PDI-P and the PKB, that are supportive of the efforts of Arus Pelangi. One Arus Pelangi proposal that has won a little support from MP’s is to include the matter of sexual orientation in a new minority rights, or anti-discrimination, law being considered by parliament presently. But, the dark forces of Islamic conservatism loom, he says:

There has been strong opposition from various fundamentalist and conservative parties who have threatened to block the Minority Rights bill should the sexual orientation issue be inserted.

Arus Pelangi in Jakarta has about 400 members with a 40-30-30% split between lesbians, gay men, and transsexuals. Outside Jakarta offshoots of the organisation include “Us” in Surabaya, Indonesia’s second largest city, a chapter in Medan, North Sumatra, and a new group in the small city of Purwokerto, Central Java, formed to protest the murder last year of Vera, a transsexual. Vera’s murder, it is claimed, has not aroused the interest of local police to any great degree.

Dodo then goes on to detail some of the, according to him, many tales of abuse of gays by policemen and prison warders. Adang, a gay man who was arrested in an environmentalist protest at Bojong, Bogor, West Java, was later subjected to much sexual abuse and rape by prison warders and other prisoners. Suffering from a mild form of tuberculosis he received no medical attention while in prison and his condition worsened. After spending seven months in jail he died three weeks after being released.

Duncan Graham’s article *Dede Oetomo: Welcome to the Gay Archipelago* is dated 19 November 2006, and was accessed from <http://indonesianow.blogspot.com/2006/11/dede-oetomo.html> on 4 June 2007:

Sydney may have led Australia in promoting its Mardi Gras marches, but that doesn’t mean widespread acceptance of sexual difference in the country next door. ‘Poofter-bashing’ is still a hazard for homosexuals in some parts of a nation that claims to be liberal and progressive.

So what about Indonesia, a land rigid with religion, tense with taboos? Some prejudice, but no fear or repressive laws, according to Dede Oetomo the nation's leading gay rights activist. He spoke to Duncan Graham in Surabaya:

It will be a quarter century next year that academic Dede Oetomo, fresh from studies overseas, and a couple of friends published the first newsletter for Indonesian homosexuals. This was during the repressive Orde Baru administration when the government banned transvestites from appearing on TV and sexual issues were seldom discussed.

One woman minister famously said there were no lesbians in Indonesia, though most research suggests about ten per cent of the population anywhere in the world naturally seeks same-sex relationships. The official line was to deny that the Republic had been infected by 'deviants.'

These creatures were fiends from the decadent West, which is where the bright young man from East Java had spent the previous five years. He'd been studying for a doctorate at the prestigious Cornell University in New York, the centre for scholarship on Indonesian issues. Here he'd become part of a campus gay group.

So it wasn't surprising that some people said he was importing American ideas on sexuality that had no place in Eastern culture. What was unexpected was that this criticism came from the academic gays Dede had met in the United States, not from the locals who were trying to define their desires.

It was an intellectual argument: The outsiders thought Indonesian gays should build their own Asian culture of difference based on traditional practices.

But the men and women wrestling with notions that didn't fit the government approved model of marriage and two kids welcomed Dede's initiative. They didn't care where information had come from, as long as it provided help.

"We were really young and naïve and just thought that producing a newsletter was the right thing to do," said Dede.

"Apart from Surabaya and one or two people in Malang, Solo and Jakarta, the openly gay community was tiny. Looking back I now realise our actions were quite subversive.

"Around 1981 two lesbians 'married' in Jakarta and this caused a major media storm. It raised many questions about sexual preference that I felt had to be addressed. I wrote a letter to Tempo magazine and suggested other gays might want to contact me. They did – with up to 40 letters a week."

After the newsletter Dede and friends started Indonesia's first gay organisation, Lambda Indonesia – later to become Gaya Nusantara. This is a national rights group now famous internationally not just for linking people, but also for advocating safe sex and fighting Aids, and combating discrimination.

That's not so difficult in Islamic Indonesia. Unlike Australia and many other Western countries with a Christian heritage, the Republic hasn't made homosexuality illegal. So the searing debates on whether the law should be changed haven't happened here, though there is a discrimination issue with age. Heterosexual relations are legal over the age of 16 – but for homosexuals it's 18.

In Singapore and Malaysia homosexuality is still illegal. These countries inherited their laws from Britain.

"I think there's more tolerance among the moderate Muslims than the Christians," said Dede. "Occasionally some radical Islamic group will try and disrupt a meeting, but usually they just want to make a point and then go. At one recent event in Central Java they went home after we paid them Rp 500,000 (US \$54)."

In his role as an advocate for gay rights for men and women, and open education on sex, Dede has travelled widely overseas and often works as consultant on health programs for aid agencies.

Dede Oetomo was born in Pasuran, East Java in 1953, the eldest of four children in a bookish Indonesian Chinese upper middle class family. Dede said his siblings are all heterosexual – “as far as I know.”

His father, who worked for a multinational, had dabbled in the Pentecostal Church. His mother had a Catholic background. The family believed in education, open discussion and arguing with older people. There’s an element of zeal in his upbringing.

His mother cautioned him against listening to the “mumbo-jumbo” spook stories of the superstitious maids. She urged him to take a rational and scientific approach to life – and to challenge myth from whatever source. He went to a Catholic school but his education was largely secular.

“I realised I was homosexual when I was about 12,” he said. “I thought I could change. I went to see psychologists, but these sessions were more discussions than counselling. Thank God I wasn’t given electric shock treatment. (A common medical procedure at the time when it was thought homosexuality could be cured.)

“I read widely and realised that this was how I was, and that things were not going to change.

“However I didn’t come out with my family till I was in my 20s. It took them about a year to realise that I wouldn’t be supplying any grandchildren and accept me for what I am. Fortunately my parents have never been into melodramatics. Instead they said it would be a good idea if I could help others. I think I come from a fairly unusual family.”

Dede’s parents hoped he’d become a doctor or engineer – he wanted to be an historian, but ended up as a linguist. He enrolled at the Malang IKIP (teachers’ training college, now the University of Malang) where his intelligence attracted lecturers with US contacts.

He was awarded a Ford Foundation scholarship and headed for the states. His PhD thesis was on the language and identity of the Chinese community in Pasuran. When not studying he taught Indonesian to some of America’s top scholars.

Back in East Java he was hit by some covert prejudice when he first sought academic work, finding doors closed despite his high qualifications.

He got a teaching job at the prestigious Airlangga University and started a relationship with a man which lasted 21 years. During this time he wrote extensively for the international media and became the voice of the Indonesian homosexual community.

Now the days of having to meet after nightfall in the yard of a Surabayan government high school have gone. If you’re looking for a partner there are hairdressers, beauty salons, dance studios - and a restaurant in a five star hotel which is well known to be a gay hang out. But it costs Rp 80,000 (US \$9) just to get in, limiting access to the rich.

The ‘pink dollar’ phenomenon which has swept the West with hotels, tour agencies, fashion shops and magazines competing for rich gay clients with high disposable incomes has yet to appear in Indonesia.

The shock-horror tabloid headlines full of contrived moral outrage have faded and in their place is factual comment. Much of this has been driven by the needs of public education regarding sexually transmitted diseases, and the emotional problems facing people whose genes have determined their sexual choice.

Dede is no longer the demon in the dark. His academic credibility, ease with the media, reasoned arguments and acceptance internationally have put him in the mainstream. He’s twice stood as a political candidate on a “rainbow platform” of enhancing the rights of

minorities. Though unsuccessful, in the 2004 election for the local legislature he scored 235,000 votes.

The Internet has given enormous freedom to people with different sexual needs. The furtiveness has largely vanished, though gays and lesbians still keep a low public profile. A recent lesbian 'wedding' in a Surabayan hotel attracted no media coverage.

How much of this change can be attributed to Dede and Gaya Nusantara?

"I agree with those who criticise us because we are communicating with the better educated, media-savvy people in society, rather than those with limited schooling and living in isolated areas," he said.

"But information is now getting out to the wider community because the topic is no longer taboo in newspapers.

"Some say we haven't done much and that change would have arrived anyway through globalisation. That may or may not be so, but we've given space to people, we've opened up the debate. Being gay now is completely different – but also more complex.

"We run a help line, organise face-to-face counselling and offer other services. There's still a lot more to do. The issue of domestic violence in gay relationships has not been addressed.

"I wouldn't want to walk home alone in the dark from Sydney's Mardi Gras Festival, particularly as I'm an Asian. But I feel quite safe in Indonesia. However there are reports of violence by low-ranking military personnel against men who look effeminate

"Now the challenge is to build a new generation of leaders, and reach gay men and women who aren't at the top end of society to educate them on health issues. The statistics are two years old, apply only in Jakarta and are a bit suspect. But they are all we have to go on.

"The figures for HIV (Human Immunodeficiency Virus) infection are 22 per cent of waria (wanita – pria = transsexual), five per cent for male sex workers and 2.5 per cent for gay men. Overall gay men in Indonesia are aware of the risks, use condoms and lubricants and are responsible.

(In Australia HIV cases among gay men are reported to have surged to a 10 year high, after a slump in infections. It's believed the younger generation, no longer bombarded by safe sex messages, has become lax in taking precautions.)

"There's still some prejudice in society but in international terms we're ahead. Where it's really difficult is for men and women who want to come out yet love their family and want to keep that love. We also want happy families. But not the government model."

REGO PONOROGO

The idea that homosexuality is alien to Indonesian culture has been dashed by research conducted by Dede into the warok-gemblakan tradition in the East Java town of Ponorogo.

Here older men called warok, who take a leading role in the Reyog Ponorogo dance, have sex with young boys (gemblakan) in their bid for prowess.

The dance requires the warok, who are usually the local strong men, to wear a huge headdress of a tiger mask surrounded by a mane of peacock feathers.

Dede said he planned to review his research soon. Although the men's behavior would be classified as homosexual it would be wrong to say that there was a homosexual community in the town as the men may also be married. The tradition has an economic component, for the men had to compensate the boys' parents with significant and costly gifts.

In South Sulawesi there's the bissu, a male or female court official who cross-dresses and has sex with people of the same gender. There's also evidence that in the past people who practised alternative sex were considered healers with special powers – a tradition being continued as the gay community is a leader in promoting safe sex.

The following article entitled *Indonesia: Gay NGO Worker and Partner Allegedly Tortured, Sexually Abused in Aceh* is dated 17 March 2007, and was accessed from <http://www.ahrchk.net/ahrc-in-news/mainfile.php/2007ahrcinnews/1065> on 4 June 2007:

A 32-years-old NGO worker and his same-sex partner were allegedly brutally tortured and sexually abused by the Banda Aceh police while in custody in January, the Hong Kong-based Asian Human Rights Commission (AHRC) has revealed.

AHRC has named the NGO official as Mr. Hartayo and his partner as "Bobby".

The alleged underlying motive behind the detention, torture and sexual abuse of the victims is because they are homosexuals, AHRC says in an 'urgent action' appeal.

"We were also informed that the police made the victims to sign a statement to the Village Head Chief not to indulge in homosexual actions again," the appeal says.

"The AHRC is deeply concerned that such brutal violence against the victims was committed without hesitation not only by the civilian attackers but also by the police whose mandate is to protect the rights of people."

On January 22 at around 11:30pm, the victim, Mr. Hartayo, a 32 year-old NGO worker in the Aceh province, was at home with his partner, Bobby, when two men, one of whom the victims identified as an employee of the local Pesona cafe below his boarding house, kicked down his front door and barged into his home, and proceeded to vandalize the property before assaulting both Mr. Hartayo and his partner.

Mr. Hartayo and Bobby were then forced out of their home and ordered to go outside by their attackers, where a crowd of some 15 people had gathered. The beatings and verbal abuse continued. Mr. Hartayo specifically recalled the words of one of his attackers: "You outsiders slander us; you soil our place with your filthy tricks."

Mr. Hartayo was then ordered to immediately vacate the boarding house, and was marched back to his room to pack his belongings. His ID card and wallet were taken from him, and he was then made to squat on the ground with his partner, while his attackers deliberated on what to do next. They eventually decided to inform the local police authorities.

Four police officers arrived at the scene about 1.30am in an official police vehicle. Mr. Hartayo and Bobby were then taken to the Banda Raya police station.

There, both men were allegedly made to strip down to their underwear, and were then viciously beaten and verbally abused by the officers.

In his testimony, Mr. Hartayo alleges that the officers sexually abused him and then forced his partner to perform oral sex on him. Mr. Hartayo started weeping and attempted to push his partner away, only to be kicked and scolded by the officers who took some perverse "enjoyment" out of their humiliation.

The victims were then dragged to the police station courtyard where they were made to squat on the ground in their underwear. Officers then sprayed them with ice-cold water from the courtyard hosepipe. At this point, Bobby asked the officers for permission to go to the toilet. The officers refused, and instead forced him to urinate on Mr. Hartayo's head.

Mr. Hartayo and his partner were then taken to a police cell, where they were detained until the morning. Mr. Hartayo requested several times to contact his family to inform them of what had happened, a basic human right when facing criminal detention. Each time, his request was denied.

While in the police cell, Mr. Hartayo was instructed by the officers to introduce himself to the detainee who already occupied the cell. When Mr. Hartayo innocently stated that he was a homosexual, an officer entered the cell and severely beat him.

According to Mr. Hartayo, he was treated with complete contempt by all the officers he encountered during his detention.

At around 9:00am on January 23, Mr. Hartayo was finally allowed to speak to his fellow NGO co-workers, although for not longer than five minutes. Both Mr. Hartayo and Bobby were asked by representatives from the Aceh NGO Coalition whether they wanted to file a formal complaint.

Physically and mentally exhausted, both men decided not to pursue the case, and were then made to sign a statement to the Village Head Chief not to indulge in homosexual actions again.

"I felt that my dignity as a human being had been trampled," Mr. Hartayo told the Aceh NGO Coalition.

However, the following Human Rights Watch Press release dated 26 March 2007, and accessed from <http://hrw.org/english/docs/2007/03/26/global15546.htm> on 4 June 2007, suggests that the climate in Yogyakarta may have changed. The press release is entitled *The 'Yogyakarta Principles' a milestone for lesbian, gay, bisexual, and transgender rights – Experts Set Out Global Standards for Sexual Rights and Gender Equality*

(Geneva, March 26, 2007) – A groundbreaking set of principles on sexual orientation, gender identity, and international law is a landmark advance in the struggle for basic human rights as well as gender equality, Human Rights Watch and the Center for Women's Global Leadership said today. The document, known as the Yogyakarta Principles after the city where it was adopted, was launched today in Geneva by a group of 29 international human rights experts.

"These principles establish basic standards for how governments should treat people whose rights are too often denied and whose dignity is too often reviled," said Scott Long, director of the Lesbian, Gay, Bisexual, and Transgender Rights Program at Human Rights Watch. "Firmly grounded in law and precedent, they enshrine a simple idea: human rights do not admit exceptions."

The "Yogyakarta Principles on the Application of International Law in Relation to Issues of Sexual Orientation and Gender Identity" were adopted by a meeting of experts in international law in Yogyakarta, Indonesia, in November 2006. They confirm legal standards for how governments and other actors should end violence, abuse, and discrimination against lesbian, gay, bisexual, and transgender people, and ensure full equality.

The experts launching the principles include a former United Nations High Commissioner for Human Rights, as well as UN independent experts, members of UN treaty bodies, judges, activists, and academics. Human Rights Watch was part of a secretariat supporting the work of the experts who developed the principles. The Center for Women's Global Leadership was a member of the advisory committee to the secretariat.

"For more than three decades, lesbians have been among the millions of women's rights activists pressing the international community to put gender equality at the heart of the human rights agenda," said Charlotte Bunch, executive director of the Center for Women's Global Leadership. "These sweeping principles are a bold and important step forward. Addressing civil and political as well as economic, social and cultural rights, they show how sexual rights and gender equality are inextricably interwoven with the full scope of rights protections."

The Yogyakarta Principles were developed in response to well-documented patterns of abuse around the globe. These abuses, perpetrated because of actual or perceived sexual orientation or gender identity, have affected millions.

The principles address:

- *rape and other forms of gender-based violence;*
- *extrajudicial executions;*
- *torture and other forms of cruel, inhuman, and degrading treatment;*

- *medical abuses;*
- *repression of free speech and assembly; and*
- *discrimination in work, health, education, housing, access to justice, and immigration.*

The principles also map out a positive road to full equality for lesbian, gay, bisexual, and transgender people around the world. Each principle is accompanied by detailed recommendations to states on how to end discrimination and abuse. The principles also call for action from the UN's human rights system, national human rights institutions, the media, nongovernmental organizations, and others.

The principles were launched today at the UN Human Rights Council's session in Geneva, where last year 54 states called for the council to act against egregious violations of the rights of lesbian, gay, bisexual, and transgender people.

The following article from the Action on Solidarity with Asia and the Pacific website entitled *Women's movement needs to get its act together*, is attributed to the Jakarta Post - September 2, 2006. It was accessed on 5 June 2007, from <http://www.asia-pacific-action.org/southeastasia/indonesia/netnews/2006/ind33v10.htm>:

Women gathered in a national meeting in East Jakarta this week, focusing on how they could better advocate for women's issues. Among them were lecturer of political studies at the University of Indonesia Ani W. Soetjipto, also of the Center for Electoral Reform and writer of Politik perempuan bukan gerhana (Women's politics is not an eclipse). She talked to The Jakarta Post's Adisti Sukma Sawitri on her views on the women's movement here. The following are excerpts of the interview:

Question: What is the current situation of the women's movement here?

Answer: The movements are exclusive and there are no main issues uniting them. Women groups are focusing on their respective activities instead of working with other possible allies, like those fighting for human rights, the environment and against corruption.

Instead, these potential allies are using women's issues to support their campaigns.

Women groups are also less coordinated and each of them thinks it represents the best issues. And they all compete to grab public attention. In the end, none of them sound significant.

Inconsistency is another problem for us. If we're professional, of course we have to stick with one issue that we agree on. In fact, we have so many interests. Often we deal with issues, which are global trends and what's catching international donors' attention to fund our activities.

How much chance to women have to make necessary reforms here?

The chances are getting smaller because the country is moving to a consolidated government system after the fall of the New Order.

We lost the momentum a few years ago because we put so much energy into amendments to the Constitution, and setting up regional autonomy and decentralization. These reforms, however, have yet to improve women's welfare. Women are still the victims of every public policy process in our country.

In other countries there were similar transitions, like in Uganda, Rwanda and South Africa. But women activists there were well organized enough that they could bring women issues to the center stage of their governments' policies.

These countries allotted bigger budget allocation for women after governmental transitions. Whenever their people talk about democracy, women's issues are at the center.

Why have reforms so far not involved the women's movement?

Regional autonomy complicates things even further because we have different cultural, local political and social conditions in different regions.

In fairly homogenous regions like Bengkulu, the local movement could easily propose a larger budget allocation for women because things are less complicated.

But in regions like Banyuwangi regency (East Java) where the political temperature is high, it is harder for reforms. And Regent Ratna Ani Lestari faces a hard time because most locals have adopted fundamentalist beliefs that are against women being community leaders.

FINDINGS AND REASONS

Country of Nationality

The applicant entered Australia as the holder of an apparently valid and lawfully issued Indonesian passport. He claims to be a citizen of Indonesia, and on the basis of this evidence the Tribunal accepts that he is a national of that country, and has assessed his claims accordingly.

Well Founded Fear of Serious Harm Capable of Amounting to Persecution for a Convention Reason

The applicant has claimed from the outset, consistently and frankly, that he is a homosexual, and has provided detailed evidence of the harm he has suffered on account of his sexual orientation. The Tribunal does not consider that such a claim would be made lightly, and despite the fact that the applicant has declined the opportunity to attend a hearing and elaborate on that claim, the Tribunal is prepared to accept that he is in fact a homosexual.

The applicant has claimed, albeit somewhat vaguely, that he was threatened, abused, harassed, and hospitalised twice on account of the fact that he is homosexual, and he has also provided documentary evidence in the form of medical reports indicating that he has been treated in hospital on a number of occasions for the injuries he says were inflicted on him on account of his sexual orientation. These documents were originally foreshadowed early in the process, and subsequently submitted as promised, and they appear to accord with the applicant's earlier account of what has happened to him, although it does seem somewhat odd to the Tribunal that the fracture referred to in the report did not appear to have been detected when he was X-rayed at a later date, as it is not mentioned in the Radiological Report Form 160, and that the first period of hospitalisation was not even mentioned by the applicant on the Medical Examination Form 26, both of which were completed by Health Services Australia and are evidenced on the departmental file.

The Tribunal therefore has some hesitancy about accepting the medical evidence at face value. Given that the applicant has declined the opportunity to attend in person and give the Tribunal the benefit of testing his sworn evidence in person, it is only with misgivings that the Tribunal is prepared to accept that the applicant has been injured in the past and for the reasons claimed.

The applicant has provided no country information in support of his claims, but the Tribunal has nevertheless established that available country information indicates that homosexuals can and do encounter problems in parts of Indonesia. Dede Oetomo's long-ago assertion that *There is no queer bashing at all in Indonesia* is at odds with some of the other reports cited above, and yet the majority of these reports suggest to the Tribunal that homosexuals do not encounter serious problems in the major cities, where there are homosexual communities and services, and also that things are slowly improving, as can be seen from the steady advances in the provision of gay-oriented services and of public representations of homosexuality such as the first gay screen kiss. There is a suggestion in *Gays and Sharia* that some fundamentalist groups will target people who they consider threaten Islam, including homosexuals, but no actual instances were described, whereas the Duncan Graham article describing the same phenomenon suggests that the problem is not significant, observing that the radical Islamic groups *usually just want to make a point and then go*. Similarly, the fact that a major conference on homosexuality could take place in 2006 in Yogyakarta apparently without incident or controversy, despite a similar gathering in that town less than six years earlier having been attacked by a mob of religious conservatives, implies that there has been progress. Overall, the evidence before the Tribunal suggests that attacks such as that apparently experienced by the applicant are uncommon and unlikely to occur in the major population centres. Nevertheless, the country information does show that in regional Indonesia local bylaws do discriminate against groups, including homosexuals, and the area from whence the applicant comes, and where he says he was persecuted on account of his sexual orientation, does appear from the country information to be a deeply conservative region.

The applicant has indicated that he has no faith that the local authorities would protect him, and in light of the country information which tends to show that the applicant's home region of City D is indeed highly conservative, it is not unreasonable to conclude that treatment such as that experienced by the applicant took on an official quality, in the sense that it is official, or officially tolerated or uncontrollable by the local authorities, as was, evidently, the recent police bashing of a homosexual in the remote Aceh province referred to in the country information set out above.

The Tribunal is also prepared to accept that injuries leading to hospitalisation for several days at a time are serious enough to be capable of amounting to persecution, as it constitutes, in the Tribunal's view, significant physical harassment or ill-treatment for the purposes of s 91R(2) and 91R(1)(b) of the Act. The fact that it has happened on two discrete occasions, and has occurred (the applicant claims and the country information to some extent corroborates) for reason of his sexual orientation suggests that it also amounts to systematic and discriminatory conduct for the purposes of s.91R(1)(c).

It is well-recognised that homosexuals can constitute a particular social group for the purposes of the Convention. See, for example, Appellant S395/2002 v MIMA and Appellant S396/2002 v MIMA t (2003) 216 CLR 473 at [55] per McHugh and Kirby JJ, [65] per Gummow and Hayne JJ. The leading recent Australian authority on the particular social group question is *Applicant S v Minister for Immigration and Multicultural Affairs* (2004) 217 CLR 387 ("Applicant S"). In their majority joint judgment, Gleeson CJ, Gummow and Kirby JJ. set out at paragraph [36] the correct approach to the question of whether a group falls within the scope of the term *particular social group* for the purposes of the Convention:

Therefore, the determination of whether a group falls within the definition of "particular social group" in Art 1A(2) of the Convention can be summarised 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 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". As this Court has repeatedly emphasised, identifying accurately the "particular social group" alleged is vital for the accurate application of the applicable law to the case in hand

On the basis of the country information extracted above it appears to the Tribunal that, generally speaking, homosexuals in Indonesia are identifiable by the common characteristic of their sexual orientation, which characteristic is not a shared fear of persecution, and does set them apart from society at large.

In light of the above, the Tribunal concludes that the applicant faces a real chance experiencing serious harm capable of amounting to persecution in the foreseeable future for reason of his membership of a particular social group comprising homosexuals.

The Tribunal has also considered the possibility, although it has not been squarely put by the applicant, that religion may have been a motivating factor for the harm suffered in the past – and risked in the future - by the applicant, given that the country information suggests that some Islamists perceive homosexuality as being contrary to Islam as a result of which action carried out against homosexuals could be said to be motivated by religion.

However, regardless of whether it is characterised by reference to religion or membership of a particular social group, the Tribunal concludes in light of the above country information that the risk of serious harm capable of amounting to persecution which the applicant faces is confined to localised and conservative regions such as the area where the applicant comes from and where he was apparently attacked on two occasions. The Tribunal does not accept that he faces a real chance of persecution for reason either of his religion (including any perceived lack of it) or his membership of a particular social group, in relation to Indonesia as a whole.

The Tribunal notes that the applicant has claimed, in reference to the availability of state protection, that local authorities are corrupt and failed to protect him; likewise local police who are also devote[d] Muslims. He states that *if I was to speak out publicly in my homeland about this, it would only increase the probability of serious harm coming to me*. However, the Tribunal has found that the risk to the applicant is a localised one, and for the reasons set out below finds that safe relocation within Indonesia is an option which is reasonably open to the applicant. It does not therefore accept that there is a real chance in the foreseeable future that either the need for the applicant to avail himself of state protection will arise, or that he might consequently wish to speak out publicly and thereby increase that risk if such protection were not forthcoming.

Relocation

As indicated above, the issue of relocation was raised by the delegate in his reasons for the decision. The applicant has attempted to address this issue in his submissions to the Tribunal. The submissions appear to misconceive the nature of the obligations which the Convention imposes upon its signatories. The Convention requires that in order to satisfy the definition of a refugee an asylum seeker must, in addition to having a well-founded fear of persecution for one or more of the reasons set out in Article 1A, be unable or, owing to a well founded fear,

unwilling to avail himself of the protection of the country of origin. In some circumstances the claimed persecution may be localised such that an applicant may have a well founded fear in a particular part of the country of origin. If a fear of localised persecution is well-founded, the availability of protection in the remainder of the country must be considered.

In *Randhawa v Minister for Immigration Local Government and Ethnic Affairs* (1994) 52 FCR 437, Black CJ observed that the focus of the Convention is not upon the protection that the country of nationality might be able to provide in particular regions, but upon a more general notion of protection by the whole of the country. At 441, Black CJ considered that the reason for this was that...

If it were otherwise, the anomalous situation would exist that the international community would be under an obligation to provide protection outside the borders of the country of nationality even though real protection could be found within those borders.

His Honour cited James Hathaway, *The Law of Refugee Status* (Butterworths, Canada, 1991, at 133) on this principle:

A person cannot be said to be at risk of persecution if she can access effective protection in some part of her state of origin. Because refugee law is intended to meet the needs of only those who have no alternative to seeking international protection, primary recourse should always be to one's own state.

In *Randhawa*, Black CJ held that given the humanitarian aims of the Convention, the question to be asked is not merely whether an applicant could relocate to another area, but whether he or she could “reasonably be expected to do so”. His Honour stated (at 442):

... a person's fear of persecution in relation to that country [of nationality] will remain well-founded with respect to the country as a whole if, as a practical matter, the part of the country in which protection is available is not reasonably accessible to that person.

Justice Beaumont agreed that relocation must be a reasonable option, stating (at 451):

... that is to say, if relocation is, in the particular circumstances, an unreasonable option, it should not be taken into account as an answer to a claim of persecution.

If it is not reasonable for a person who has a well founded fear in part of a country to relocate to another part, then the person's fear of persecution in relation to the country as a whole is well founded (*Randhawa*, per Black CJ at 443). Conversely, if it is reasonable for the applicant to relocate to another part of the country then that applicant's fear is not well-founded.

What is reasonable will depend on the circumstances in the individual case. It may often be necessary to have regard to a broad range of issues in determining whether an applicant has genuine access to meaningful protection in their country of origin. In *Randhawa* Black CJ endorsed the following passage from Hathaway (at 134, cited in *Randhawa* at 442):

The logic of the internal protection principle must, however, be recognised to flow from the absence of a need for asylum abroad. It should be restricted in its application to persons who can genuinely access domestic protection, and for whom the reality of protection is meaningful. In situations where, for example, financial, logistical, or other barriers prevent the claimant from reaching internal safety; where the quality of internal protection fails to meet basic norms of civil, political, and socio-economic human rights; or where internal safety is otherwise illusory or unpredictable, state accountability for the harm is established and refugee status is appropriately recognised.

In the present case, the applicant was invited to attend a hearing pursuant to s425 of the Act but declined to do so. Instead, he presented written arguments relating to the issues arising in relation to the decision under review, including with respect to relocation. The applicant has, in the view of the Tribunal, sought to deflect the issue of relocation by observing that the country information the delegate cites refers to situations in big Indonesian cities a long way from his home town, implying that it is unreasonable for him to relocate such a distance away. He has also referred to information regarding the unemployment rate in Indonesia, implying that he would face difficulty obtaining work in Indonesia. The Tribunal does not, however, accept that it is unreasonable to expect the applicant to relocate within Indonesia.

The applicant has not claimed, for example, to be at risk of persecution outside of his local community and its surrounding communities. He has asserted that *word spreads very fast in my district and wherever I go I am constantly a victim of abuse* and yet he has not actually identified anywhere outside of his home region where he has experienced problems, or claimed to have attempted unsuccessfully to relocate within Indonesia. Similarly, despite his allusion to the relatively high unemployment rate in Indonesia, the applicant has failed to identify any concrete obstacles such as an inability to work on health grounds which might prevent him from obtaining employment elsewhere within Indonesia. On the contrary, in his submissions to the Tribunal the applicant seems to rely on his very adaptability, a characteristic which suggests that relocation will not be unreasonable for him:

I feel that with my skills and ability to communicate in one of Australia's community Languages, as well as my already proven ability to settle in to Australian community with very little difficulty and my contributions to the Australian economy being an Australian Taxpayer the minister could be satisfied that by granting me a visa would be in the national interest of Australia and be of assistance to Australia's current skilled and un skilled worker shortage.

The fact that the applicant may not be guaranteed a job in Indonesia does not, in the view of the Tribunal, mean that relocation within Indonesia is an unreasonable expectation. After all, there is no guarantee the applicant would be able to obtain a job in Australia.

For the above reasons, the Tribunal finds that it is reasonably open to the applicant to avoid the risk of persecution he may face in his home region of Indonesia by relocating within that country.

CONCLUSIONS

Having considered the evidence as a whole, the Tribunal is not satisfied that the applicant is a person to whom Australia has protection obligations under the Refugees Convention. Therefore the applicant does not satisfy the criterion set out in s.36(2)(a) for a protection visa.

DECISION

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

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

Sealing Officer's ID: R. Lampugnani