REFUGEE STATUS APPEALS AUTHORITY
NEW ZEALAND

REFUGEE APPEAL NO. 2151/94

R B J A

AT AUCKLAND

Before:	E M Aitken (Chairperson) L Tremewan (Member) S Joe (Member)
Counsel for Appellant:	M L Robins
Representative for NZIS:	No Appearance
Date of Hearing:	30 May and 22 June 1996
Date of Decision:	13 November 1997

DECISION DELIVERED BY S JOE

This is an appeal against the decision of the Refugee Status Branch of the New Zealand Immigration Service (RSB) declining the grant of refugee status to the appellant, a national of Malaysia.

INTRODUCTION

The appellant first arrived in New Zealand on 22 December 1990. She was issued a visitor's permit upon arrival. Having married a New Zealand citizen on 12 June 1991, she subsequently lodged an application for residence on the grounds of marriage. She returned to Malaysia on 31 August 1991 but re-entered New Zealand on 21 September 1991. In March 1992, her application for residence was declined and she was subsequently served with a removal order on 8 July 1993. She returned to Malaysia on 15 August 1993, returning again to New Zealand on 14 October 1993. The appellant has remained in New Zealand since that date, lodging an application for refugee status on 14 December 1993.

She was interviewed by the RSB in respect of this application on 1 February 1994. Her application was declined by letter dated 22 February 1994. It is against that decision that the appellant has now appealed to this Authority.

The appeal was advanced on a number of grounds, including her claim to be a lesbian now living in a lesbian relationship. It is therefore appropriate to record that a considerable amount of country information obtained by this Authority through UNHCR on the status of lesbians in Malaysia was disclosed to counsel prior to the appeal hearing.

The Authority would like to express its regret for the considerable length of time it has taken to release this decision. As will become clear from this decision, however, the Authority experienced difficulties obtaining further relevant country information on the key issue of the Internal Security Act legislation and its application in Malaysia and the application in that country of shari'a law towards Muslim lesbian women. As regards the former, the Authority was able, finally, to obtain some material on this Act through the assistance of the Refugee Review Tribunal in Australia, and this was subsequently disclosed to counsel for comment. Twenty-one days leave was allowed for further submissions from counsel. Her response in this regard has been taken into account in determining this appeal.

The Authority's task in obtaining information about the application of shari'a law in Malaysia to persons such as the appellant (i.e. Muslim lesbian women) has proved much more elusive. A considerable cause for the delay in delivering this decision can be attributed to the Authority's real efforts made to discharge its inquisitorial duty to enquire, particularly on the real chance issue as it relates to the appellant under shari'a law. The numerous enquiries made culminated in the further disclosure of information to counsel on 25 August 1997 and 22 October 1997, and resulted in further submissions being received from counsel on 27 August 1997 and 23 October 1997 respectively.

All submissions made and country information obtained have been considered in determining this appeal.

THE APPELLANT'S CASE

The following account has been detailed in an unusually, but necessarily, fulsome manner. This was considered by the Authority to be appropriate due to the very unusual and complicated factual background to the appellant's case.

The appellant is a 29 year-old Muslim woman from a small rural village in Kedah State, West Malaysia. Her father died in 1994. Prior to his death, he supported his family by farming paddy rice on his own land. The appellant's mother also inherited a block of land from her father (a former village chief), which was also used by the appellant's father to grow rice.

Apart from being a farmer, the appellant's father was also a trained religious teacher who taught religion to school children in the early 1970s.

The appellant's upbringing was strongly imbued with religion. Because she was unable to attend a religious school, she was required by her family to supplement her education with daily religious studies' classes. She was not allowed out of the house unaccompanied, or to have a boyfriend. The family prayed five times a day, and observed all religious holy days.

In 1988 the appellant performed *haji* (a pilgrimage to Mecca) as had all her elder siblings before her. Since that time, she has permanently kept her hair covered.

She has four sisters and one brother. All her siblings are married except the youngest sister. Her eldest sister, with whom the appellant has maintained ongoing contact over recent years, works as an immigration clerk in L. She is married with three children.

The appellant's second eldest sibling, her brother, lives in Kedah and works as a technician for a government department.

The appellant's next eldest sibling, a sister, also lives in Kedah. She has six children. Prior to her marriage she attended an institute of technology, graduating as an accountant in 1978. She has worked since that time, and is currently employed as an accountant in an agriculturally based firm. The appellant has no direct contact with this sister because of her attitude to the appellant's marital break-up.

The appellant's third sister is currently employed as a marketing manager, having also completed studies at the institute of technology.

Finally, the appellant's younger sister, who left Malaysia in 1988 to undertake computer studies in London, now works in Kuala Lumpur as a systems analyst.

The appellant attended an institute of technology, completing a computer science course in 1986. She worked as a computer operator from mid-April 1986 until late 1989, when she married. The appellant's marriage was an arranged one. Her parents chose her husband, a Muslim. He had previously been married and was divorced. Nine years older than the appellant, he was a manager in a private telephone company and was a man of considerable wealth.

Their first meeting was for only one hour. This was the first time the appellant had been out with any man. Although she met with him a few more times after that, she eventually told her parents she could not accept him, nor could she love him as a husband, although she could regard him as a friend. Notwithstanding this, her parents insisted that she accept him. After six months of what the appellant regarded as intense family pressure, she advised her parents that she would still not agree to the marriage. However, by that time her mother had made significant arrangements for the wedding, having fixed the date and extended invitations. It was made clear to the appellant that cancelling the wedding would bring an enormous disgrace upon the family. It was also clear to the appellant that her refusal to go through with the marriage would devastate her mother, the family member to whom she felt the closest. Although she conveyed her reluctance to her sister in Kuala Lumpur, that sister responded by telling her that there was nothing which could be done, as the wedding was already planned and that she (the sister) had already purchased airline tickets for the appellant to return for the wedding. Only the appellant's eldest sister counselled her against marrying someone for whom she did not feel any real affection. Although this sister offered to support the appellant in her refusal to marry, because of her lack of standing within her family (she having chosen her own husband, who was not wealthy), the appellant felt she could not realistically rely on her for any real support should she refuse to comply with her parents' wishes.

Although the appellant went through with the wedding ceremony, she did not indulge, nor did she allow the family to indulge, in any of the normal pre-marital rituals associated with a Muslim wedding. In particular, she did not have the

traditional wedding costume made, nor would she attend with her future husband to choose gifts to exchange with one another. It was clear from the appellant's evidence that she felt she had no choice but to proceed with the wedding and that this was also a matter of enormous stress for her. On the day of the wedding, she did her best to hide this to all but her closest friend, JN.

The wedding took place in the morning with the newly-weds spending their first night at the appellant's family home. Although she tried to avoid or prolong her avoidance of going to the bedroom with her husband, she was eventually directed by her mother to go to him. The appellant outlined to the Authority the events which took place following the wedding where her husband required her to be intimate with him, something she found to be both unpleasant and distressing.

The following day, the appellant left for Kuala Lumpur with her husband where they lived in his house. During the following two weeks, she told the Authority that she did everything to avoid having sexual relations with her husband, although that was not always possible. Her mother came to stay after two weeks, and both she and the appellant's husband realised that the appellant was very unhappy. The appellant felt unable to tell her husband of her repulsion for the relationship he expected with her. As soon as her mother arrived, the appellant took the opportunity to share a bed with her mother to avoid sleeping with her husband. As a result of this, the mother took the view that there was something wrong with the appellant and, in particular, that she must have been "charmed". The appellant's husband agreed with this. He and the appellant's mother decided that the appellant should return to Kedah where she could "be cured".

It was clear from the appellant's evidence that she found her family, particularly her mother and brother, to be overbearing influences in her life. For most of 1990, the appellant's family embarked upon a variety of methods for "curing", prescribed by different medicine men. These frequently involved insisting the appellant follow a special diet, and drink special potions. She was also required to bathe in water drawn from special wells, sit in front of a door and be sprinkled with rice and other charms, and partake in other special rituals. On one visit to a medicine man, she was made to look into a mirror within which her mother, brother and the medicine man said that they could see the image of the men who had put a spell on her. When asked whether she recognised them, the appellant said that there was no-one in the mirror except her own reflection.

The appellant's husband returned at regular intervals every month throughout this year. Whenever he returned, he expected to resume sexual relations with the appellant. On these occasions, the appellant locked herself in the toilet to avoid having any contact with her husband. She stayed in this room all weekend, having chosen it because this was the only room in the house in which she could lock herself. Despite her behaviour her husband continued to come, also believing that someone had put a charm on her.

During this time the appellant tried to tell her family that she was not under a charm, but simply did not love her husband. Her family would not believe her. She felt trapped in her family home, having no money, no job, and nowhere else to go. She was not allowed to leave the house unless accompanied by a chaperone. Most of those visiting the home urged her to return to her husband.

In March 1990, the appellant's former boss offered her a job as a computer operator. She regarded this as a very good job offer and wanted to accept. She was, however, instructed by her family to seek her husband's permission first. When asked, he agreed to her working only on the condition that she returned to his home to be his "full-time wife". Because of her attitude to her husband, she was unable to do that and was therefore forced to turn down the offer of work.

The appellant turned increasingly to her religion during this year of confinement, fasting obsessively to the point where she was often too weak to stand. Despite her religious upbringing, she was berated for her religious observance, her mother commenting that "God would not accept [you], because [you] will not obey what [your] mother and husband say". Her brother stated that he considered that all her prayers were just for show, and that if she was truly religious she would return to her husband.

In about September 1990, the appellant's eldest sister, who had previously been the most supportive of her, urged the appellant to now return to her husband on the basis that she had now been living at home too long and should go back. At about this time, the appellant received a visit from a friend of hers, JN, whom she had met in 1987. The appellant told JN that her family was forcing her to return to her husband and begged her to help her escape. Although initially reluctant, particularly as the appellant had not taken her passport from her husband's home, JN eventually agreed to help her escape from Malaysia.

The appellant was allowed out of the house with JN, because she had the trust of the family. Together they went to the police station, where the appellant reported the loss of her international passport. Although she was expecting to be issued with a new one, she was told that it could take up to five years for that to be issued. In desperation, the appellant asked if there was any other way to get a travel document, persuading the authorities that she had to leave the country to study in New Zealand or Australia. Eventually the authorities issued her with a restricted passport (which only permitted travel between Malaysia and Singapore) and with an emergency certificate valid for one year but for one journey only. These documents were issued on 4 December 1990. The money to purchase her airline ticket was provided by another friend who had attended her wedding, and in whom the appellant had confided about her distress at the impending marriage.

On the morning of departure, the appellant and JN left the house through the bedroom window while the rest of her family were praying. They made their way to Penang, before boarding a flight to Kuala Lumpur and on to Auckland. During this trip, the appellant travelled on the emergency certificate, retaining the restricted passport so that if she was forced to return to Malaysia, she could at least escape to Singapore. She arrived in New Zealand on 22 December 1990.

In February 1991, the appellant and JN met ZI, also a Malaysian Muslim woman. The three of them lived together with ZI's de facto partner, G, until JN left New Zealand.

In June 1991, the appellant entered into a bigamous marriage with JT, a New Zealand citizen, and subsequently applied for New Zealand residence. As the appellant had readily acknowledged to the RSB, and also to the Authority, this marriage was one of convenience only, entered into for the sole purpose of obtaining residence in New Zealand. Subsequent to their marriage, the appellant and her husband did not cohabit.

Around about this time, the appellant wrote to her Malaysian husband asking for a divorce. She received no reply.

In August 1991, the appellant was contacted by an officer of the Malaysian High Commission office who said he had received instructions from the Internal Affairs Department (IAD) to escort the appellant back to Malaysia. The officer said the Department had received instructions from Kedah state that the appellant had run

away from home and left the country without proper documents; that she had entered into a marriage of convenience in New Zealand; and that she had taken money and jewellery from her mother's possession. The appellant told this officer she could not return to Malaysia, to which he replied that she had to. Given the involvement of the IAD, notwithstanding her great reluctance to return, the appellant was concerned that if she did not return, her travel documents would be revoked, prohibiting her ability to travel anywhere should her application for permanent residence in New Zealand be refused.

The officer from the Malaysian High Commission arrived in Auckland and escorted her to the airport and into the transit lounge. He showed her the facsimile he had received from Kedah State ordering her return. The officer also said he knew she was related to the Deputy of Kedah State. Because of this knowledge, and the contents of the facsimile, the appellant was in no doubt that her family had used their influence to persuade the Malaysian authorities to order the appellant's return home. She was also advised that her parents had already paid for her ticket to Malaysia and met the expenses involved in her being escorted home. Prior to her departure, however, the appellant converted her pre-paid one-way airline ticket into a return ticket upon payment of a sum of money.

Upon her arrival at Kuala Lumpur airport, the appellant was met by ZI's father. She went to his home. The same evening she received a visit from her cousin and brother-in-law who wanted her to go to her family home. The appellant could not explain how her family knew she was staying with ZI's parents as she had not yet contacted them. Two days later, she returned home to stay with her family.

During the following two weeks, the appellant tried to explain her marriage of convenience to her family and to discuss her future with them. In particular, she told them she wished to return to New Zealand because of her interview regarding her residence application. Her father threatened to disown her if she returned saying that she could "go to hell", which, in the context of the appellant's cultural upbringing, was a scathing insult. Her mother arranged for the medicine man to visit and perform similar rituals with respect to the appellant as had been done in the past.

In the meantime, the appellant had also attempted to contact her husband to try to obtain her passport and a divorce. He would not speak to her. Her family insisted

that he was out of the country although he had answered the telephone when she called.

Although her parents were unaware the appellant had purchased a return ticket to New Zealand until shortly before her departure date, she did tell them that she was returning.

On 21 September 1991, the appellant returned to New Zealand. Still without her international passport, she used her restricted passport to enter Singapore. From Singapore, she travelled to New Zealand on her emergency certificate. The appellant acknowledged that the certificate was valid for one journey only, and that she had already used it for a single journey to travel to New Zealand previously in December 1990. She had, however, deliberately chosen to fly with Air New Zealand and not with Malaysian Airlines, as she thought this way there was less chance of the validity of the certificate being called into question. She did, however, know she was taking a risk in seeking to leave Singapore on the emergency certificate and that the risk was that she would be denied the right to leave, and instead be returned to Malaysia. The appellant said that this was, however, the only way she could think of to leave Malaysia.

The appellant found out two years later (in September 1993) that her family had not expected her to be able to leave the country in 1991, as her brother had written to the Director-General of Immigration that year requesting that a restriction be placed on her travel documents preventing her from travelling outside Malaysia. So sure were the family members that this was in place, that they had waited at the airport, after ostensibly seeing her off, for her to be returned. They were, however, unaware that she was travelling on her restricted passport, and not her international passport (which at that stage, was still with her estranged husband).

Following her return to New Zealand, the appellant resumed living with ZI, JN and G. On 26 September 1991, the appellant attended her residence interview. Her residence application was subsequently declined in March 1992.

In September 1992, JN left New Zealand. Not long after that, ZI and G separated, as he had formed a relationship with another woman. The appellant and ZI continued to live together and over the following two months the nature of their relationship changed from being a platonic friendship to a lesbian partnership,

some of the details of which were outlined to the Authority. This relationship was on-going at the date of the hearing.

In April 1993, the appellant was asked by her Malaysian husband to agree to their marriage being annulled, as he wished to re-marry, and could only do so with her consent. The appellant agreed to the annulment and eventually he returned all of her belongings to her sister, including her international passport.

In July 1993 the appellant was served with a removal order which required her to leave New Zealand within 42 days, forcing her to return to Malaysia for a second time. The appellant went with a friend to the Malaysian High Commission to obtain a further emergency certificate, given that the previous one had expired. She considered that she would not have been able to obtain one without appearing in person. She applied for another certificate on the basis that she had to return to settle her marital affairs and because her family wanted her there. She was therefore issued with an emergency certificate valid for a single journey from Auckland to Kuala Lumpur to be taken within the next three months.

The appellant purchased a return airline ticket and duly left New Zealand on the emergency certificate. She intended to return on her international passport which her former husband had returned to her sister. (At that time, the passport had expired but the appellant thought she could extend it for a further five years without difficulty.)

Upon arrival at the Immigration section of Kuala Lumpur airport, the appellant's emergency certificate was taken away from her and she was given a letter dated 15 August 1993 addressed to her at her family home address and signed on behalf of the Chief Immigration officer at Subang. The letter states:

> "EMERGENCY CERTIFICATE NO: A 271994/WELLINGTON/29.7.93
>
> I am instructed to inform that your Passport/Emergency Certificate have been brought forward to:-
>
> HEAD DIRECTOR OF IMMIGRATION
> IMMIGRATION DEPARTMENT OF MALAYSIA
> BLOCK 1, JALAN DAMANSARA
> PUSAT BANDAR DAMANSARA
> DAMANSARA HEIGHT
> 50550, KUALA LUMPUR.
>
> for further action. (Attn: Security Section)

> 2. You are required to report in person to the above address after 1 month from the date stated on this letter to know further the current situation.
>
> Thank you.
>
> "SERVICING FOR THE COUNTRY'
>
> Yours in service...
> On behalf of Cheif (sic) Immigration
> International Airport
> Subang, Selangor Darul Ehsan."

Before complying with the request in this letter, the appellant took her international passport for renewal at the Immigration Department in Ipoh, as her sister worked there. Her sister attempted to process her application for renewal but was prevented from doing so because the computer command in response to the request stated that the passport could not be renewed, extended or used. The appellant was then advised that only head office (i.e. Head Director of Immigration) had the authority to look inside her file. Her sister suggested that there must have been a "block" on her file because of the letter written by her brother to the Head Director before she left Malaysia in September of 1991.

Subsequently, after many enquiries and letters, including persuading the appellant's brother to write to the Director of Immigration withdrawing his restriction on his sister's ability to leave Malaysia, the appellant was issued with an international passport on 28 September 1993. However, unusually, this document was only valid for one year until 28 September 1994, and not the usual five years, and only allowed her to travel within six months of the date of issue. Despite numerous enquiries by both the appellant and her sister, no explanation was given for this, although her sister believed that there must still be a further "block" or restriction recorded against her within the Immigration Department.

Having persuaded her parents that she had to return to New Zealand to sell her business, she and ZI left Malaysia on 14 October 1993, the appellant travelling on her recently issued international passport.

In November 1993, the following month, the appellant was advised by Immigration that they suspected her of working on a visitor's permit, and that the permit would be revoked. Fearful that she would be forced to return to Malaysia, she consulted a lawyer the same day, and was advised to lodge an application for refugee status which was filed on 14 December 1993.

On 1 February 1994, the appellant was interviewed by the Refugee Status Branch (RSB) at which time she disclosed her lesbian relationship, her attitude to her family's efforts to force her to marry and remain with her husband, and her view of Malaysia as a repressive society. Her application was subsequently declined by letter dated 22 February 1994 on the basis that her fear was not well-founded, as her return to Malaysia "would not necessarily be intolerable". The letter of decline was sent to both the appellant and to her solicitor, but the appellant did not receive her copy (a matter which has subsequent relevance). She was, however, made aware of the contents of the letter through her solicitor. An appeal was lodged to this Authority.

As her passport was due to expire on 28 September 1994, the appellant applied for it to be renewed on 16 September 1994. When she had had no response by the time of expiry, she wrote to the Malaysian High Commission on 5 October 1994 regarding her application. Still receiving no reply, she telephoned an officer in that office and asked him why there was a delay in the processing of her application. She telephoned him several times over the next few months, and his replies were generally oblique, referring only to the need to wait for a decision from Malaysia. He eventually, however, advised the appellant that he did not know when the passport would be renewed because he was waiting further instructions from the Malaysian Department of Internal Affairs because "we have received a letter regarding the UN Conventions and your relationship".

The Authority heard reasonably detailed evidence from the appellant that a Malaysian male acquaintance who had spent some time sharing accommodation with the appellant and ZI in 1992, had subsequently returned from time to time to collect his mail from their letterbox. He also apparently developed a fixation for the appellant, who rejected his advances. From information she has obtained from others within the Malaysian community in Auckland, the appellant believes that her decline letter from the RSB was removed from her letterbox by this man and forwarded to the Malaysian High Commission. She can think of no other explanation for how the Commission came to be aware of it. Further, she is aware that the letter has also been shown to other people within the Malaysian community, one of whom has referred to the written decision and asked her directly about her relationship with ZI. On 16 January 1995, after taking legal advice, she made a complaint to the Papakura police concerning the interception of her mail, pursuant to section 11(2) of the Postal Services Act 1987. Evidence of this was produced to the Authority.

If she is returned to Malaysia, the appellant fears that she will be detained under the Internal Security Act, and her passport taken from her preventing her from leaving Malaysia in the future. She believes her detention would be on the basis of her known relationship with ZI, her manipulation of the immigration passport controls, and her criticisms of the Malaysian Government, as referred in the RSB's decline decision of 22 February 1994. She fears that she will be detained indefinitely.

She also fears that she will not be able to live openly in a lesbian relationship, as she has been able to do in New Zealand for over four years. She fears continued rejection from her family.

She further fears that she would be punished in terms of shari'a law. Having made the pilgrimage to Mecca, she believes that her "offences" of bigamy, marriage to a non-Muslim, and lesbianism will be treated even more harshly.

The appellant produced a substantial number of documents in support of her claim, including letters regarding her passport renewal, letters from her family and former husband, letters to and from the shari'a court regarding her divorce and correspondence with the New Zealand police regarding the interception of her mail (including a copy of her full statement made to them). In particular, we note that her previous legal advisor sought, and submitted to this Authority, an opinion obtained from a Malaysian practitioner, Mr John Heah, dated 11 May 1994. In general terms, it can be said that this information does not assist the appellant's case.

THE ISSUES

The Inclusion Clause in Article 1A(2) of the Refugee Convention relevantly provides that a refugee is a 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."

In terms of Refugee Appeal No. 70074/96 Re ELLM (17 September 1996), the principal issues are:

1. Objectively, on the facts as found, is there a real chance of the appellant being persecuted if returned to the country of nationality?

2. If the answer is Yes, is there a Convention reason for that persecution?

ASSESSMENT OF THE APPELLANT'S CASE

CREDIBILITY

Before commencing on an assessment of the appellant's case, we must first determine whether or not she is a credible witness and whether we accept the evidence presented by her, being both her oral evidence and written documentation.

The Authority accepts that the appellant is an honest and credible witness. She gave her evidence over a two-day period, speaking clearly in English. She gave detailed answers to the Authority's questions, was not evasive, and proffered evidence that, objectively, did not always advance her claim.

She impressed the Authority as a thoughtful, intelligent woman who had put a considerable amount of effort towards preparing her own case before instructing counsel. She adduced a number of documents in support of her claim, including copies of letters between herself and the shari'a courts in respect of her divorce, between her brother and the Malaysian Immigration Service regarding the stop he put on her passport, and between herself and her family. As regards the appellant's divorce, while traditionally a Muslim man is allowed four wives whom he can divorce simply by saying so in the presence of a witness, it is noted that this process in Malaysia is now far more involved, requiring the consent of all parties and the permission of the State Religious Council (see "Going by the Book", Asiaweek (11 August 1989) at page 30).

Despite starting with the difficulty of admitting that she had lied to the immigration service in pursuing her application for residence based on her sham marriage with JT, the manner and content of the appellant's evidence before the Authority persuades us that she was not lying to this Authority. There were no significant inconsistencies between her evidence before us and the evidence she has given in her previous statements (both written and oral) made by her throughout the

refugee determination process. The details she provided, together with the spontaneous manner in which she answered all the Authority's questions over a relatively gruelling two-day hearing, persuade us that she is a witness upon whose evidence we can rely.

In particular, we accept that the Malaysian High Commission here in New Zealand, and therefore the Malaysian authorities in Malaysia, are aware of both the fact of her application for refugee status, and the reasons for it. Given the significance of this finding, the Authority carefully scrutinised the appellant's evidence in this regard.

There was clearly a significant delay in the return of the appellant's passport, notwithstanding the number of requests made by both the appellant herself and her legal advisors. The only explanation that the appellant received from the Malaysian High Commission for that delay was that the Malaysian authorities were aware of her application for refugee status and her relationship with ZI.

As to how they came to know, the appellant gave detailed evidence of a conversation between ZI and another member of the Malaysian community in Auckland, part of which was taped and the tape produced as part of the appellant's evidence. The Authority has carefully considered the transcript of this conversation, the content of the appellant's complaint to the New Zealand police regarding her mail interception, and the statement made to the police in support of that complaint. When considering all the evidence, the Authority must conclude that either the appellant has gone to extraordinary lengths to fabricate her evidence, or it is entirely truthful. Having found the appellant credible in all other material respects, the Authority simply has no reason to conclude that she has not been truthful in respect of the issue of how her application for refugee status came to be brought to the attention of the Malaysian High Commission in Wellington.

Accordingly, we accept that the Malaysian government is aware of the appellant's sexual orientation, her illegal departure from Malaysia having abused the passport system, and her application for refugee status.

Specifically in the context of this appeal, therefore, we are satisfied:

1. That the appellant is a lesbian and has lived in a lesbian relationship in New Zealand since September 1992;

2. That the appellant fraudulently obtained Malaysian travel documents, being both the first and second emergency certificates, in an effort to leave Malaysia when she knew of no other recourse available to her;

3. That the Malaysian authorities are aware that the appellant had obtained her travel documents other than through regular channels;

4. That the Malaysian authorities are aware of both the appellant's claim to refugee status and the reasons for it, and hence are aware that she is in fact a lesbian;

5. That under shari'a law the appellant has committed egregious breaches including adultery, marriage with a non-Muslim, disobedience to both her husband and family, and "unnatural behaviour" in that she has now lived in a lesbian relationship for several years.

It is against this background that the Authority turns to consider the primary issue as specified above: namely whether, objectively on these facts, there is a real chance of the appellant being persecuted if she returns to Malaysia.

OBJECTIVELY, ON THE FACTS AS FOUND, IS THERE A REAL CHANCE OF THE APPELLANT BEING PERSECUTED IF RETURNED TO THE COUNTRY OF NATIONALITY?

In considering whether or not there is a real chance that the persecution feared will occur to the appellant, the Authority must make an assessment, not only on the facts as found, but also in the context of the country information prevailing as at the date of determination.

A. REAL CHANCE OF PERSECUTION BASED ON LESBIANISM

1. An appropriate starting point is the Penal Code of Malaysia (FMS) CAp.45, (1986), which provides at section 377:

> "**Unnatural Offences**:
>
> Whoever voluntarily has carnal intercourse against the order of nature with any man, woman or animal, shall be punished with imprisonment for a term which may extend to 20 years, and shall also be liable to fine or to whipping.

> *Explanation -* penetration is sufficient to constitute the carnal intercourse necessary to the offence described in this section."

Commentary has been provided by the International Gay and Lesbian Human Rights Commission (IGLHRC) in its Legal Information Sheet No. 1 (Pink Triangle) on Homosexuality and the Penal Code of Malaysia with other sections of the Penal Code of Possible Relevance to the Functioning of Pink Triangle (1988), on the interpretation of this section. In this paper it is stated that:

> "There is a lot that is open to interpretation and argument in these two sections, 377 and 377A [further section of the Indian Penal Code relating to aiding or rebutting the commission of an act of gross indecency between males]. But their basic meaning is clear: that ACTS of sexuality which go against what is considered acceptable by heterosexual and conventional standards could be substantial grounds for prosecution. Please note that, with regard to homosexuality, it is clear that being homosexual is not a crime matter under these two sections but ACTS of homosexuality would be. There is a distinction here, and as a counsellor it could be important for you to make this distinction clear. No one is committing a crime just being gay: even admitting that one is gay is not incriminating, although to admit that one indulges in gay sex would be." (sic)

Despite exhaustive efforts over a considerable period of time, the Authority has not been able to find any evidence that section 377 has been invoked against lesbians, notwithstanding a thorough review of information provided by the IGLHRC. Relevantly, in an undated article entitled "They Don't Stone Homosexuals Do They?", the Pink Triangle Malaysia comments that, while it is:

> " …difficult to be gay in Malaysia…homosexual men and women…are able to express their sexual desire. [They] are able to cruise, have sex, live with and love one another, go to gay and lesbian parties…We are not aware of any instances of persecution based on sexual orientation in Malaysia."

In fact, the article concludes:

> "Western media reports may in inclined to sensationalise the situation of homosexuals in Malaysia. A situation which in many ways is no different from homosexuals anywhere in the world - 'not very good'."

2. A suggestion is made in the publication Spartacus 93/94, issued by IGLHRC, that the trend in Malaysia is one of increasing conservatism towards homosexuals. The author notes, at page 554:

> "According to section 377 of the Malaysian Penal Code, homosexual acts are illegal and punishable with up to 20 years imprisonment, fines, as well as whip lashes. Attempts at trying to establish gay contacts (cruising) can

> also be punished with up to two years imprisonment. Until just a few years ago this paragraph was scarcely ever enforced; however, since Islamic fundamentalists have gained more and more power in state government as well as in this society at large, it has been applied with more regularity."

As to this, however, there is no reference in this article, nor in any of the information before the Authority, to any recorded case of prosecution.

3. Counsel submitted that country information referred to the potential for abuse of various legislation which could be used by the State to maintain control over women's sexuality in Malaysia. In particular, she referred the Authority to the Women and Girls' Protections Act 1973, and the Minor Offences Act 1955. These two Acts are both referred to in the article "Unspoken Rules: Sexual Orientation and Women's Human Rights" (1995) at pages 112 and 113. The commentary on lesbianism in Malaysia records that:

> "Lesbianism is not outlawed in Malaysia. Section 377D of the Criminal Code prohibits 'gross indecency', but **this law is not known to have ever been enforced against lesbians.** The Minor Offences Act 1955 which prohibits acts that offend public morality, is often used against sex workers and transsexuals; it too, could conceivably be used against lesbians, **but there are no known cases of this happening." (emphasis added)**

As to the Women and Girls' Protection Act 1973, the same article notes that this legislation makes no specific mention of lesbians. However the author speculates that, given the Act permits the arrest and detention of young women who "may be exposed to moral danger", it could quite possibly be used against sexual minorities such as women living in lesbian relationships. However, there is no evidence before the Authority of this Act ever being so invoked, and we therefore reach the conclusion that to find otherwise would be pure conjecture.

4. Counsel has referred to the reservation to paragraph 96 of the Beijing Declaration and Platform of Action (drafted as a result of the Fourth World Conference on Women in Beijing, September 1995) lodged by the Malaysian government representative . Paragraph 96 states:

> "The human rights of women include their right to have control over and decide freely and responsibly on matters related to their sexuality, including sexual and reproductive health, free of coercion, discrimination and violence. Equal relationships between women and men in matters of sexual relations and reproduction, including full respect for the integrity of the person, require mutual respect, consent and shared responsibility for sexual behaviour and its consequences."

The particular reservation lodged by the Malaysian government representative reads:

> "First, the interpretation of the term 'family', and the terms 'individual and couples' throughout the document refer to the traditional family formed out of a marriage or a registered union between a man and a woman and comprising children and extended family members.
>
> Second, we are of the conviction that reproductive rights should be applicable only to married couples formed of the union between a man and a woman.
>
> Third, we wish to state that the adoption of paragraph 96 does not signify endorsement by the Government of Malaysia of sexual promiscuity, any form of sexual perversion or sexual behaviour that is synonymous with homosexuality or lesbianism ..."

With respect to counsel, it is difficult to see the relevance of this information to her client's claim of *persecution* of lesbians by the Malaysian government. The Authority notes that the Malaysian government was one of a number of countries that sought to have reservations lodged in terms of this particular paragraph. At best such reservation evidences nothing more than the Malaysian government's decision to not openly endorse homosexuality or lesbianism. Such action falls well short of amounting to evidence of state sanctioned *persecution* of lesbians in Malaysia.

5. Finally, in a newspaper article in the Gay Times (March 1996), at page 36, a report from the Sydney Star Observer also referred to harsher penalties for the 'crime of homosexuality and lesbianism' being announced as a part of a legislative package for consideration by the State Assembly in Malaysia. However, we can find no evidence that the law in Malaysia has, in fact, been amended in this regard**,** and given that our findings must be made on the basis of all of the country information available as at the date of determination, such comments must, therefore, be regarded as pure conjecture.

Taking all of these matters into consideration, while the Authority accepts that lesbians are discriminated against in Malaysia, as may be the situation even in a number of open, democratic and so-called western countries, the issue before us is whether there is a real chance of *persecution* of the appellant by reason of her lesbianism. Despite extensive enquiries from a range of country information sources, including information issued by the gay and lesbian rights organisation,

Pink Triangle Malaysia, we are satisfied that if there was a real chance of persecutory acts against lesbians, that organisation, at the very least, would have specifically referred to that risk in its literature. It has not. In our view, the overwhelming tenor of the material provided by that gay organisation is that " it [is] difficult to be gay in Malaysia", but no more than that. Therefore, after careful consideration of all of the country information which the Authority has been able to obtain, together with that submitted by counsel, it cannot, in our view, be said that there is a real chance of the appellant being persecuted in Malaysia by reason of her sexual orientation.

B. FEAR OF PERSECUTION BY REASON OF OFFENCES RELATING TO TRAVEL AND TRAVEL DOCUMENTS

We accept the appellant's frank admissions that she has misled the Malaysian immigration authorities on one occasion by leaving on a travel document that she knew to be invalid. We also accept she obtained that document in the first place by reporting her passport as lost when in fact she knew it to be in the possession of her then estranged husband. It would also appear from the letter written on behalf of the Chief of Immigration that the authorities are aware of at least the former of these two offences.

As to the likely consequences of these acts, what is clear on the facts of the appellant's case is that:

(a) When the appellant entered the country in August 1993, while her emergency certificate was taken from her, and she was handed a letter directing her to report to the head of immigration, she was not, on that occasion, detained;

(b) The appellant did not, in fact, attend at the office of the Head of Immigration as directed by the letter, but instead, with the assistance of her sister, was able to obtain a fresh international passport, albeit only valid for one year and not the usual five. Prior to this, the appellant's brother had written to seek the withdrawal of his (and by implication his family's) restriction on the appellant's ability to leave Malaysia.

(c) The appellant left Malaysia on that passport without incident.

(d) Notwithstanding the difficulties she experienced in having that passport extended, it was in fact renewed by the Malaysian High Commission in Wellington in or around June 1995. No restrictions whatsoever have been placed on that passport.

Given these facts, we are satisfied that there is no real chance that the appellant will be prosecuted for any offences relating to her travel documents, and therefore her fears in this regard are not well-founded. Alternatively even if she were to be subject to prosecution for these offences, there is simply no evidence that the consequences meted out to her would amount to persecution, nor that any such prosecution would be for any one of the five Convention grounds.

On the issue of travel documents generally, the appellant submitted that such misdemeanours as she has committed fall within the ambit of the Internal Security Act 1960 and, although no particular provision was specified in this regard, she feared she would be detained and prosecuted under this Act.

Under that Act, and in certain defined circumstances, the Minister of Home Affairs, the King and the police have the power to detain any person:

> "… with a view to preventing him from acting in any manner prejudicial to the security of Malaysia or any part thereof or to the maintenance of essential services therein or to the economic life thereof."

(See sections 8 and 73 of the Internal Security Act 1960). Section 8B provides that there shall be no judicial review of any decision made pursuant to those sections by the King or the Minister.

A helpful summary of the Internal Security Act, 1960 and its amendments is contained in an Amnesty International Report dated 28 April 1990:

> "In passing the ISA the Malaysian parliament delegated immense authority to the executive in the person of the Minister of Home Affairs, who has the authority to detain persons without trial. Under section 8 of the ISA, the Minister of Home Affairs has the power to detain anyone whose activities are deemed "prejudicial to the security of Malaysia". Under section 73 of the Act, police officers have the power to arrest any person, without warrant, and detain them for up to 60 days for investigation if grounds for detention under section 8 are believed to exist, or if they believe that the person "has acted or is about to act or is likely to act in any manner prejudicial to the security of Malaysia". The authorities have no legal obligation to inform those held in custody of the allegations against them until the end of the investigation period.
>
> If the Minister of Home Affairs is satisfied that grounds for continued detention have been established, he has the authority to issue a two-year detention order,

> renewable indefinitely. The detention order must be issued before the 60 day investigation period has concluded. All ISA detainees have the right to appear before an Advisory Board, and to appeal against the allegations against them. The Board makes recommendations to the Yang di-Pertuan Agong (King), but these are not binding on the government or the Minister of Home Affairs. In addition, detainees formerly had the right to challenge the legality of their detention - again after the detention order had been issued through procedures of habeas corpus. In June 1989, a major amendment barred the judicial review of all actions and decisions by the King or the Home Minister in the exercise of their discretionary power under the ISA."

As a result of the Authority's enquiries, we are aware that the Malaysian Government has announced proposed amendments to the Internal Security Act 1960. This announcement was set out in a cable from Kuala Lumpur, a copy of which was obtained through the country information service available to the Refugee Review Tribunal in Australia. This report notes in particular that:

> "The proposed amendments mean that the period of detention of the Internal Security Act will no longer be a mandatory two years, instead the Home Minister will be empowered to decide the length of detention based on the progress of a detainee's "rehabilitation".
>
> Announcing the changes, Deputy Home Minister, Megat Junid also said that another current provision, (empowering the government to act under the auspices of the ISA as long as police believed that a person "could endanger public safety and political stability"), was too wide. Offences would now have to be specified as either espionage, incitement of racial and religious hatred, economic sabotage or falsifying identification and travel papers."

Clearly, however, the Authority must assess the real chance of persecution of the appellant as at the date of determination. At today's date, the Authority finds no evidence that these proposed amendments have come into force, or that a date has been set for their being introduced into legislation. However, the issue remains one of whether there is a real chance that the appellant would be prosecuted under any provision of the Internal Security Act 1960 for her travel offences and, if so, whether any subsequent punishment could be said to be persecutory in terms of the Convention.

One of the reasons for the delay in issuing this decision, is the time spent by the Authority in undertaking exhaustive enquiries in its search for information as to the circumstances in which these particular provisions of the Internal Security Act 1960 are invoked. We can say at the outset that the Authority has found no evidence whatsoever that Malaysian citizens who transgress travel regulations are regarded as having acted in the requisite "prejudicial" manner. The only information the Authority has been able to obtain unequivocally establishes that the Act has, since its inception, been invoked against politicians, trade union

leaders, newspaper editors, and religious leaders (see Stephen Hall, "Preventive Detention, Political Rights, and the Rule of Law in Singapore and Malaysia", LawAsia (1990-1995) at 14). The Authority does not consider that the appellant falls into any of these categories. In the absence of any other evidence as to the use of these provisions, there is simply no objective evidence to support the appellant's submission that there is a real chance she will be so detained or, for that matter, that this would be by reason of any one of the five Convention grounds.

C. FEAR OF CONSEQUENCES OF REFUGEE STATUS APPLICATION BEING MADE KNOWN TO MALAYSIAN HIGH COMMISSIONER

The RSB's decline letter of 22 February 1994, which we accept has been disclosed to the Malaysian High Commission office, makes it clear that the appellant has, *inter alia*, applied for refugee status in this country and is a lesbian. Relevantly, however, the contents of this application contain no direct or implied criticisms of the Malaysian government, although it was counsel's submission that the *fact* of the application alone could cause the appellant to be viewed as a "disloyal Malaysian citizen". It is the appellant's fear that this will result in her being detained under the Internal Security Act 1960 upon her return to Malaysia, although once again this claim was made without reference to any particular provision of that Act.

The Authority has set out in the preceding section relevant country information relating to the Internal Security Act 1960. The only possibly relevant provision is section 8 and the issue here is whether there is a real chance that the appellant would be regarded as someone who has acted in a manner "prejudicial to the security of Malaysia" by making an application for refugee status or because the contents of such application are now known to the Malaysian authorities.

Neither counsel nor the Authority have been able to obtain any information on what activities are deemed to be "prejudicial to the security of Malaysia", other than some information as to the people against whom the Act has been used in the past (see Stephen Hall "Preventive Detention, Political Rights, and the Rule of Law in Singapore and Malaysia" op. cit.). As we found in the preceding assessment, the Authority does not consider that the appellant's act of applying for refugee status, nor her reasons for so doing, bring her within the known ambit of this Act. In the absence of any other evidence as to the use of these provisions,

there is simply no evidence to support the appellant's submission that there is a real chance she will be detained under this Act upon her return to Malaysia.

We are reinforced in our conclusion by the fact that, notwithstanding the High Commission's awareness of her refugee application, her passport was, in fact, re-issued. It was issued without any restrictions, even though the Internal Security Act 1960 would have allowed the Minister of Home Affairs to impose them (see section 8(5) Internal Security Act, 1960). The Authority also considers it significant that, while the appellant was formally escorted by the Malaysian High Commission back to Malaysia in August 1991, no similar action has been taken against the appellant since her refugee application has been made known to them. Had the Malaysian government had any interest in pursuing the appellant by reason of her having lodged such an application, the Authority considers that they would have done so by now.

For all of these reasons, therefore, we are satisfied that there is no real chance that the appellant would be subject to any persecutory treatment as a result of either the fact of her having lodged the application or its contents.

E. CONSEQUENCES OF APPELLANT'S ACTIONS UNDER SHARI'A LAW

Finally, we consider the appellant's claim that she would also be subject to persecutory treatment under the shari'a law, by reason of her sexual orientation, she having committed the offence of bigamy, and by virtue of her marriage to a non-Muslim.

The Authority's effort to discern from the country information available a cohesive commentary on the application of shari'a law in Malaysia, has been fraught with difficulty. The current status of the shari'a courts and place of Islamic law in Malaysia can be stated as thus:

1. We note that when dealing with family and religious matters, Muslim women are also subject to Islamic law. (See United States Department of State Country Reports on Human Rights Practices on Malaysia 1996 (published February 1997) at page 10). Traditionally, shari'a courts have held jurisdiction over personal and family law for Muslims. They adjudicate on matters involving inheritance, divorce or child custody. They mete out penalties for offences against Islam, such as the imbibing of alcohol, failure

to observe the fasting month of Ramadan, or the commission of *khalwat* or *sina* (adultery). (See "Going by the Book", Asiaweek (11 August 1989) at pages 28-29).

2. The Malaysian Constitution grants all citizens the right to freedom of worship, but about 53% of the country's 17million population is Muslim and Islam is the official religion. It is not nationally organised, and Islamic affairs are the preserve of state authorities. In the nine states in which hereditary monarchs reign, the Sultan is the titular head of religion. The King fulfils that role for the Federal Territories of Kuala Lumpur and Labuan, Malacca, Penang and the east Malaysian states of Sabah and Sarawak. As a result, shari'a legislation can and does vary from one state to another (ibid., at page 28).

3. There are, therefore, two judiciaries, namely the centrally administered civil courts, and the Islamic courts whose rulings vary from state to state, but which have the force of law for Muslims (see "Beauty and the priests", The Economist (23 August 1997) at page 21). Part of the difficulty is that it is not clear exactly what the religious courts' powers are, given this divergence (ibid.).

4. As to the inter-relationship between the two jurisdictions, it appears that, pursuant to a major constitutional amendment which came into force in June 1986, the High Court's power to intercede in shari'a court decisions no longer applies, and that no shari'a court decision can now be questioned at the civil bench. Under separate legislation, shari'a courts were removed from the purview of the Departments of Religious Affairs, making them subordinate only to the heads of Islam in the various states (see "Going by the Book", Asiaweek (11 August 1989) page 29). Further, given Malaysia's federal structure of government, there is no federal means of overturning a state law short of amending the Constitution (See United States Department of State Country Reports on Human Rights Practices on Malaysia 1996 (published February 1997), at pages 668-669).

5. There are, nevertheless, more recent indications that the place of shari'a law in Malaysia today is undergoing review even at a federal level and that the federal government has on occasion, when considered necessary,

effectively intervened in state Islamic affairs, notwithstanding the Constitution.

(a) For example, several government leaders were reportedly accused by the *mufti* (senior cleric) of Selangor of being guilty of apostasy for disputing Islamic laws according to an opposition party PAS newspaper published on 11 August 1997 (see The Economist, "Beauty and the priests" (23 August 1997) at page 21). The *mufti* cited, as an example of the type of government intervention which amounted to apostasy, its refusal to allow Kelantan, the only state controlled by PAS, to implement the *hudud,* or Islamic criminal code, which provides for amputation for thieves and stoning for adulterers.

(b) Significantly, following a dispute in June 1997 over the enforcement of the *fatwa*, or religious prohibition banning women from taking part in beauty contests in the state of Selangor, the Prime Minister intervened, calling for a review of all Islamic laws. The legal proceedings against the three beauty contestants at the centre of the dispute have in the meantime been suspended pending this review (see the article "Beauty and the priests", The Economist (23 August 1997) at page 21).

In "Beauty and the priests" (op. cit.) the Prime Minister's intervention in this dispute is regarded as going much further than mere party politics:

> "But for Dr Mahathir the dispute goes much further than party politics, *turning as it does on his vision of a modernised Malaysia with a modernised, tolerant Islam*. In this he has the support of non-Malays, who worry about the growing assertiveness of Malay Muslims, and some of whom resented a recent ruling to make the study of "Islamic civilisation" compulsory in universities…But even some Malays complain about the "Arabisation" of Malaysian Islam." (emphasis added)

(c) Such a call for review by the Prime Minister had been interpreted by earlier commentators as a call for uniformity in the application of Islamic laws in Malaysia (see for example, "Beauty and the priests", The Economist (23 August 1997), supra). Subsequent actions by the Prime Minister demonstrate, however, that this call for a 'review' of Islamic laws is, in effect, a call for a more *moderate application* of

Islamic law away from rigid Islamic practices in Malaysia. As much can be discerned from the recent speech given by the Prime Minister at the annual Convention of Malaysia's dominant party, the United Malays National Organisation (UMNO) in September 1997. There, Prime Minister Mahathir Mohamad gave what was described as a "bolder than expected" speech calling for "a reformation in the attitude of Muslims toward their religion warning them that devotion to rigid Islamist practices could thwart the nation's economic development". At the Convention, the Prime Minister also "scorned Muslims who give more attention to the outward signs of their religion than to real substance", calling into question even whether the traditional Muslim dress code was "[any] longer effective in reining in the lust in a multi-racial society". "We practise Islam in moderation," he said (refer "Mahathir's Worldly Concerns", Asiaweek (19 September 1997), 32-33).

It is in this context that Zainah Anwar, a member of Sisters In Islam, (described as a Muslim group committed to the struggle for women's rights within a religious framework), wrote:

> "Prime Minister Mahathir Mohamad's call for reform of Malaysia's Islamic laws and the administration of Islam in the country reflects a growing public concern. Intolerant and repressive teachings and practices are slowly creeping into society. Nowhere is this more true than in matters relating to women's rights and fundamental liberties. These pose a challenge to the progressive vision of Islam that the federal government supports, and that Dr Mahathir himself relentlessly champions" ("Modern, and Moderate, Islam", Asiaweek (19 September 1997) at 34).

Roger Mitton, the author of the article "Mahathir's Worldly Concerns" (ibid. at page 32), suggests that the Prime Minister's speech:

> " … epitomises the conflict between reformist Muslims led by Mahathir and orthodox Islamists, who dominate the more conservative wing of UMNO….The prime minister has identified one of Malaysia's most daunting challenges: how to practice Islam in a modern world. Mahathir is deeply worried that obsessive religious practices, and adherence to rituals at any cost, will so preoccupy his fellow Malay Muslims that the nation's bid to achieve industrialised status within the next 20 years will fail."

(d) Although the review of Islamic laws is, at the date of this decision, currently pending, the Authority nevertheless finds the intervention

and public call for moderation by Prime Minister Mahathir Mohamad against the conservative forces of Islam in Malaysia to be a significant development. Moreover, from the debate, one of the Prime Minister's staunchest supporters has been shown to be the chief minister of the appellant's home state of Kedah, Sanusi Junid. While Prime Minister Mahathir Mohamad was attacked by many as an apostate for his intervention in the Selangor beauty contestant dispute, the Kedah state chief minister warned in no uncertain terms "that if those who accused Mahathir of being an apostate came to Kedah, there would be a blood-bath".

6. The Authority has also conducted extensive enquiries as to whether there are any known prosecutions under shari'a law of lesbian women in Malaysia, but has found no evidence of any such prosecution. In responding to the Authority's enquiry by Internet on 7 August 1997, a doctor of law at a Malaysian university had this to say:

> "Regarding to your request, as far as myself and my associates are concerned there is no case in Malaysia where Muslim lesbian are being prosecuted in the Syariah courts. If that was the case, it would have received media attention similarly to the recent case on indecent dressing committed by three young muslim girls who participated in a peagent's competition. These girls were charged in the Syariah Court of Selangor for wearing swimming outfit which is conceived to be contrary to Islamic teachings. The case has received full media attention and instigated a public debate which caused the Prime Minister himself to interfere by announcing federal government's plan to streamline Islamic law in Malaysia which hitherto under state's jurisdiction.
>
> However, state's law prohibits any act which could be construed as lesbian known as musahaqah. Section 26 Syariah Criminal Offences (Federal Territories) Act 1997 provides that: "Any female person who commits musahaqah shall be guilty of an offence and shall on conviction be liable to a fine not exceeding five thousand ringgit or to imprisonment for a term not exceeding three years or to whipping not exceeding six strokes or to any combination thereof". Section 2 of the same Act defines musahaqah as "sexual relations between female persons"."(sic)

It is acknowledged that the appellant comes from Kedah State, and that the above Act applies to Muslims resident in the Federal Territories. We note however from the doctor's subsequent clarification to the Authority dated 20 August 1997 that each of the states in Malaysia have very similar laws in content and would similarly provide for the prosecution of lesbianism (*musahaqah*). (This information is contrary to that provided by Mr John Heah, the Malaysian practitioner who provided a legal opinion in May 1994 to the appellant's former solicitors. In his opinion, Kelantan was the only

State to make lesbianism an offence under shari'a law. Clearly, Mr Heah's now dated assessment of the 'current' law has been superseded by more recent country information on this point.)

The Authority has also made enquiries through the gay and lesbian rights organisation, Pink Triangle Malaysia, on the specific question of whether there have been any known prosecutions against lesbians under shari'a law. While speculating that there may have been cases *"relating"* to shari'a law and lesbians, no accurate account could be given by this group and thus their response on this specific issue is of no assistance.

7. In her submissions, counsel referred the Authority to the opinion of the writer of "Beauty and the priests" (op cit.) that "the beauty contest incident" referred earlier "may indicate that the religious authorities are growing more assertive". In further support of this particular submission, counsel cited Zainah Anwar's comment in her article that "intolerant and repressive teachings and practices are slowly creeping into society" (see "Modern, and Moderate, Islam" (op cit.)). Counsel submitted this trend was occurring *despite* the efforts of Prime Minister Mahathir Mohamad. Counsel further commented that the powers of the Islamic courts are difficult to define and predict. Citing Ms Anwar's article above, she submitted that religious edicts (*fatwa*) have the force of law and override the fundamental liberties of Malaysians. Few Muslims have the courage to question or even discuss Islam in public (ibid.). Thus "the appellant is unlikely to receive any support whatsoever".

As previously stated, however, it is the view of this Authority that the federal government is pursuing a more moderate stance on matters relating to the application of Islamic law in Malaysia, and is actively interfering with the application of such law in situations that could be described as more extreme. This is clearly evidenced by the recent acts of the Prime Minister in relation to the Selangor beauty contest. A review of Islamic laws in Malaysia is now being carried out as a direct result of the Prime Minister's intervention into this dispute. This review, according to the country information available, has clearly been brought about by the Prime Minister's desire for a more moderate application of Islamic law in Malaysia, a matter about which he spoke strongly at the annual UNMO Convention in September 1997.

8. It was conceded by counsel that they (she and the appellant) were simply unaware whether any lesbians had actually been punished by the Islamic authorities in or outside the shari'a courts, or whether lesbians never come to the attention of the authorities, religious or otherwise, "simply because it is too dangerous for them to do so". It was submitted that the fact remains there were severe penalties for anybody who commits "*musahaqah*". This threat, and the anticipated reaction of the community, was sufficient to force lesbians to keep their sexuality private which amounts to a denial of the appellant's fundamental human rights under articles of the 1948 Universal Declaration of Human Rights and 1966 International Covenant on Civil and Political Rights.

With respect to counsel, we do not agree. As stated, the Authority has made direct contact with the Pink Triangle in Malaysia, a gay and lesbian rights group. As to the prosecutions of lesbians, this organisation is not aware of any specific prosecutions. In our view, if such prosecutions had occurred, or if there were specific penalties meted out to Muslim lesbians by reason of their religion, then this is the very sort of organisation which the Authority could expect to provide such information. They simply have not. Further, the doctor of law also considered that he, too, would have been aware of any such prosecutions, but is not.

As to the lifestyle, generally, of Malaysian lesbians, information obtained by the Authority indicates that this group lives a reasonably open gay social life, there being, for example, specific gay bars and night-clubs, and the open operation of the Pink Triangle group itself. Again, had there been information that Muslim lesbians were not able to similarly participate, the Authority considers that this too would have come to our attention in the course of our enquiries but again, it has not.

Taking all of the above matters into consideration, the Authority finds that there is no real chance that the appellant would be prosecuted under shari'a law by reason of her lesbianism. In reaching this conclusion, the Authority has taken into account the fact that despite its extensive enquiries over a prolonged period of time, there is simply no evidence of any prosecutions having been made against those who commit "*musahaqah*" under shari'a law in Malaysia. Had there been so, the Authority considers that, given the seriousness of the offence and the

nature of the punishment provided for against lesbianism under shari'a law, the matter would have been well-publicised, as has occurred in the recent case of three Muslim women participants who took part in a beauty contest. The Authority has also taken into account the country information which establishes that a review of Islamic law is currently pending with a view to achieving, at the Prime Minister's explicit direction, a *moderate* application of Islamic law throughout Malaysia. Such intervention into ostensibly state Islamic affairs has, moreover, the explicit support of the chief minister of the appellant's home state of Kedah. Having considered all of these factors together, we find that the risk of persecution of the appellant falls below the level of a real chance.

This is not to say that the appellant would not face any discrimination by reason of her lesbianism. This much is clear from the Pink Triangle Malaysia statement entitled "They Don't Stone Homosexuals Do They?" (*supra* at page 17). However, we reiterate that the onus falls on the appellant to establish her case, (see Refugee Appeal No. 523/92, Re RS (17 March 1995)) and, based on all the information available to the Authority, we find that while a remote and highly speculative possibility, there is no real chance that the appellant would be persecuted under shari'a law in Malaysia.

We have also considered counsel's submission regarding the appellant having to keep her sexual orientation private should she return to Malaysia, which she submitted to the Authority was, in itself, persecutory. We respectfully disagree. Given our finding that there is no real chance of persecution, as distinct from discrimination, we see no reason why the appellant could not safely return to Malaysia notwithstanding her lesbianism. In reaching this conclusion, the Authority has considered both the country information and the characteristics of this particular appellant.

As to the country information, while Malaysian society generally may not be so openly tolerant of lesbians as others, country information already detailed in this decision makes it clear that there is no need for homosexuals or lesbians to effectively hide their sexual orientation (see particularly the comments from the IGLHRC in the article "They Don't Stone Homosexuals Do They?" as cited at page 17 of this decision). As to this particular appellant, the Authority had the opportunity to observe her over a full two-day hearing. She gave evidence that, even in New Zealand, she had kept her sexual orientation a private matter. She has not joined any gay and/or lesbian groups, nor has she participated in any of

the activities of such groups. She and her partner, in fact, returned to Malaysia together and shared a room at her partner's father's home without attracting any attention. In short, she appeared to the Authority to be a very private person, who had no need nor inclination to openly display her sexual orientation. It cannot be said, therefore, that she will have to change her lifestyle in any significant way if she returns to Malaysia.

In terms of prosecution for the offence of bigamy and her marriage to a non-Muslim, the Authority considers that the appellant's fear in this regard is similarly not well-founded. The appellant has since divorced her Muslim husband, and this was effected with the consent of the Islamic authorities in Malaysia. Had the Islamic Courts sought to bring any action against the appellant for the abovementioned offences, we consider that such proceedings would have been instigated or notified to the appellant quite some time ago. Given the further effluxion of time, we find that the appellant's fears in this regard are, at best, a remote possibility, but not well-founded.

Finally, we record that, through Counsel's earlier submissions, the appellant claimed a fear of rejection by her family because of both her marriage breakdown and her sexual orientation. As to the former, the appellant has now obtained a divorce from her husband. She has returned to Malaysia where her family has withdrawn its objection to her leaving the country. There is no evidence, therefore, that they will react adversely to her for this reason alone.

As to the latter point, we accept that the appellant's family is unaware of her sexual orientation and we are prepared to accept that, given the place religion plays in the lives of this family, their response may well be one of vehement rejection. However, it cannot be said that such a response would be any different from that which many gay and lesbian people receive from their families in this and many other countries. More importantly, it cannot be said that the appellant is in any way dependent on her family. We note that her sisters have all chosen their own husbands, and pursued independent careers free of any family constraints. There is no evidence that the appellant's family could or would prevent her from living and working in Malaysia if she were to return there with or without her partner. To this extent, therefore, we are again satisfied that there is no real chance of the appellant coming to harm from her family if she returns to Malaysia.

Before concluding we note that, given our findings that there is no real chance of the appellant being persecuted if she returns to Malaysia, it is unnecessary for the Authority to consider whether a Convention ground has been established.

CONCLUSION

Accordingly, for the reasons given, the Authority finds the appellant is not a refugee within the meaning of Article 1(A)2 of the Refugee Convention. Refugee status is declined. The appeal is dismissed.

…….
Member