

0805932 [2008] RRTA 442 (28 November 2008)

DECISION RECORD

RRT CASE NUMBER: 0805932

DIAC REFERENCE(S): CLF2008/106521

COUNTRY OF REFERENCE: Korea, Republic Of

TRIBUNAL MEMBER: Antoinette Younes

DATE: 28 November 2008

PLACE OF DECISION: Sydney

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

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

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

RELEVANT LAW

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

Definition of 'refugee'

9. Australia is a party to the Refugees Convention and generally speaking, has protection obligations to people who are refugees as defined in Article 1 of the Convention. Article 1A(2) relevantly defines a refugee as any person who:

owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence, is unable or, owing to such fear, is unwilling to return to it.

10. The High Court has considered this definition in a number of cases, notably *Chan Yee Kin v MIEA* (1989) 169 CLR 379, *Applicant A v MIEA* (1997) 190 CLR 225, *MIEA v Guo* (1997) 191 CLR 559, *Chen Shi Hai v MIMA* (2000) 201 CLR 293, *MIMA v Haji Ibrahim* (2000) 204 CLR 1, *MIMA v Khawar* (2002) 210 CLR 1, *MIMA v Respondents S152/2003* (2004) 222 CLR 1 and *Applicant S v MIMA* (2004) 217 CLR 387.
11. Sections 91R and 91S of the Act qualify some aspects of Article 1A(2) for the purposes of the application of the Act and the regulations to a particular person.
12. There are four key elements to the Convention definition. First, an applicant must be outside his or her country.
13. Second, an applicant must fear persecution. Under s.91R(1) of the Act persecution must involve “serious harm” to the applicant (s.91R(1)(b)), and systematic and discriminatory conduct (s.91R(1)(c)). The expression “serious harm” includes, for example, a threat to life or liberty, significant physical harassment or ill-treatment, or significant economic hardship or denial of access to basic services or denial of capacity to earn a livelihood, where such hardship or denial threatens the applicant’s capacity to subsist: s.91R(2) of the Act. The High Court has explained that persecution may be directed against a person as an individual or as a member of a group. The persecution must have an official quality, in the sense that it is official, or officially tolerated or uncontrollable by the authorities of the country of nationality. However, the threat of harm need not be the product of government policy; it may be enough that the government has failed or is unable to protect the applicant from persecution.
14. Further, persecution implies an element of motivation on the part of those who persecute for the infliction of harm. People are persecuted for something perceived about them or attributed to them by their persecutors. However the motivation need not be one of enmity, malignity or other antipathy towards the victim on the part of the persecutor.
15. Third, the persecution which the applicant fears must be for one or more of the reasons enumerated in the Convention definition - race, religion, nationality, membership of a particular social group or political opinion. The phrase “for reasons of” serves to identify the motivation for the infliction of the persecution. The persecution feared need not be *solely* attributable to a Convention reason. However, persecution for multiple motivations will not satisfy the relevant test unless a Convention reason or reasons constitute at least the essential and significant motivation for the persecution feared: s.91R(1)(a) of the Act.
16. Fourth, an applicant’s fear of persecution for a Convention reason must be a “well-founded” fear. This adds an objective requirement to the requirement that an applicant must in fact hold such a fear. A person has a “well-founded fear” of persecution under the Convention if they have genuine fear founded upon a “real chance” of persecution for a Convention stipulated reason. A fear is well-founded where there is a real substantial basis for it but not if it is merely assumed or based on mere speculation. A “real chance” is one that is not remote or insubstantial or a far-fetched possibility. A person can have a well-founded fear of persecution even though the possibility of the persecution occurring is well below 50 per cent.
17. In addition, an applicant must be unable, or unwilling because of his or her fear, to avail himself or herself of the protection of his or her country or countries of nationality or, if stateless, unable, or unwilling because of his or her fear, to return to his or her country of former habitual residence.

18. Whether an applicant is a person to whom Australia has protection obligations is to be assessed upon the facts as they exist when the decision is made and requires a consideration of the matter in relation to the reasonably foreseeable future.

CLAIMS AND EVIDENCE

19. The Tribunal has before it the Department's file relating to the applicant. The Tribunal also has had regard to the material referred to in the delegate's decision, and other material available to it from a range of sources.
20. In support of the application for a protection visa, the applicant provided a Statutory Declaration in which he claimed that:
 21. He is also known as *[Alias]*. In the application forms that comprise the protection visa application, he used 01/01 or 01/Jan where he does not know the precise day or month of a particular event. Some of the years may also be approximations.
 22. When he was making his application, much of his paperwork was unavailable, so he is unsure of some of the details required for the application.
 23. In relation to Question 11 of Form 866B, his father died some years ago, but he has never known the name of his biological mother; his father has had several spouses with whom the applicant has never had much contact.
 24. In relation to Question 33 of Form 866C, in the mid 2000s, he travelled to Country A and Country B and went back and forth between these two countries for about a month, before returning to South Korea.
 25. In relation to Question 35 of Form 866C (Addresses outside Australia) there was not enough room to complete all the addresses (details included). Similarly, in relation to Question 39 of Form 866C, he worked at many jobs simultaneously (details included).
 26. He was born in South Korea. He has always had to fend for himself. He has never known the identity of his biological mother and his father has been in many relationships. He was brought up mostly by a relative. His father frequently abused him and was violent. His father used physical and verbal violence and he was also violent towards step-mother. The applicant had to pay half of his school tuition and he frequently had to repay his father's debts.
 27. He considers himself to be a transgender person; *"that is, although I am predominantly male, I feel that I have a lot of female characteristics. I considered undergoing an operation to become female but felt that it was too medically risky I prefer male sexual partners"*.
 28. When he was a young teenager, he formed a relationship with person 1 who gave him the name *[Alias]*. Person 1 died in the mid 1990s and after his death, he took person 1's family name and added it to his name. He has been known by that name *[Alias]* ever since.
 29. Details regarding the applicant's employment deleted under s.431 as it may identify the applicant.
 30. Although homosexuality is not illegal in Korea, he feels there is significant prejudice against gay and transgender people. For example, he participated in the annual gay rights parade. The police were there and they were supposed to protect them but they did not. Although they had correctly

applied for the parade, the police stopped them and made them detour to a tiny narrow street and prevented them from continuing to the end of the parade. He was pushed violently by the police but he did not react because he did not want to make a scene.

31. He has been in a number of major relationships where his partner has died. Because it was a gay relationship, he was not allowed to grieve for him in public. This would not be acceptable.
32. He obtained a visa and came to Australia. He did not know about protection visas.
33. The combination of his father's brutality towards him as well as his sexuality has always made him feel like an outsider in South Korea. His foreign friends have always treated him well. This is what contributed to his feeling that he must get out of the country and go somewhere where his rights and freedom are better respected.
34. Because he worked for a foreign organisation, the local Koreans see him as an outsider. If he were sent back to Korea, government officials would be set against him because he is gay.
35. He has been physically harmed on several occasions. For example, because he ran gay businesses, he often had fights with gangsters who asked for protection money. He would go to the police for help and although most of them were very antagonistic towards him, one policeman used to help him.
36. Because he is transgender, he would sometimes go to shops to purchase make up. On one occasion, the salesman became aggressive and pushed him violently, asking to see his body. People in Korea think that one has a psychological problem, if they are gay.
37. The Korean government officials would harm him; their response would be that this is a gay man and prejudice against gay people is very prevalent in Korean society.
38. He would be harmed because he is a member of a particular social group that is homosexual. He is identified as gay and effeminate. He would also be harmed because he associates with foreigners and he does not participate in ordinary Korean society. The Korean authorities would not protect him because they are the ones who would harm him. He has experienced harm at the hands of the police. He cannot be true to himself in South Korea because this is impossible. He came to Australia in the hope that he could find a new start in life.

Written submissions

39. In submissions to DIAC, the advisor referred to country information about the ill-treatment of homosexuals in Korea, as well as the legal protections available to homosexuals.
40. In submissions to the Tribunal, the applicant's claims were summarised as follows:
 - a. The applicant participated in a gay rights parade during which he was harassed by the police.
 - b. After the death of his partner, the applicant was not allowed to grieve openly because it was a gay relationship.
 - c. While managing a gay business, the applicant was targeted by gangsters who demanded protection money and when the applicant approached the police, they were antagonistic towards him.

- d. The applicant experienced physical and verbal abuse from salesmen when attempting to buy cosmetics.
 - e. The applicant believes he cannot be his true self in South Korea.
41. The advisor submitted that independent country information indicates that persecution of gay and transgender persons in South Korea occurs and there is a real chance that the applicant would be seriously harmed in the reasonably foreseeable future.
 42. The Tribunal is requested to recommend Ministerial intervention under s.417 in case the Tribunal affirms the delegate's decision. Because of his circumstances, the applicant falls under the "*unique and exceptional circumstances*" noted in s.4.2 of MSI 386.

HEARING

43. The applicant appeared before the Tribunal to give evidence and present arguments. The Tribunal hearing was conducted with the assistance of an interpreter in the Korean and English languages.
44. The applicant was represented in relation to the review by his registered migration agent.
45. The Tribunal asked the applicant about his Statutory Declaration and the application for a protection visa. The Tribunal asked the applicant if he wanted to make any changes to those documents and the applicant confirmed that he did not wish to make any changes.
46. The applicant gave evidence that he came to Australia on a visa. He confirmed that he had applied for a protection. The applicant said that he had wanted to apply for another visa and he had asked a friend for assistance in relation to payment of the application fees.
47. The Tribunal asked the applicant why he did not apply for a protection visa earlier. The applicant stated that he had planned to do so but he was concerned that he would not have been granted a work permit. He said he wanted to save money firstly but that he had always intended to apply for a protection visa.
48. The Tribunal indicated to the applicant that delay in lodging an application for a protection visa is a matter that the Tribunal can take into consideration in assessing the genuineness of his fear of persecution. The Tribunal indicated to the applicant that delay in lodging the application for a protection visa could also raise doubts about the genuineness of his fear of persecution. The Tribunal invited the applicant to comment or respond. The applicant stated that was not right. He said he was in the process of researching. He said he did not know how to prepare documents. He said it was necessary for him to work as well. He said he took time to find out and it was necessary for him to find out the correct ways. The Tribunal indicated that the matter would be considered further. The Tribunal suggested to the applicant however, that the fact that he had applied for a protection visa after being in Australia for a period of time could raise some doubts about his claims.
49. The Tribunal discussed with the applicant his claim that he is transgender. The applicant stated that he used to be a dancer and he needed a lot of experience to perform the shows. He said as a dancer he received a lot of support from management. He said he was a dancer in a nightclub. He explained to the Tribunal that his body has female characteristics and when he applied makeup he looked like a female. He said he received a lot of positive acknowledgement from the club management. He said whilst he was in South Korea he also received female hormones for

some time. He said the hormones worked well even though he did not receive the injections regularly.

50. The applicant said he has not received those injections in Australia. The applicant said the issue for him currently is the cost of the treatment. He said he had stopped the hormone treatment prior to coming to Australia. He explained to the Tribunal that whilst he was working as a showgirl in a nightclub the owners of the club told him that they would help him towards the cost of the operation however he said he felt that it was a big decision to make. He felt he had to think about having surgery for a long time. He said he was also advised that one of the side effects of the gender reassignment surgery is reduced life expectancy by about ten years, which worried him a lot. He said the owner of the business however was pushing him a lot to undergo the operation. The applicant said he had received a lot of advice and consulted many people. He said subsequently he gave up on having the gender reassignment operation and receiving the injections. He said however his sexual taste is that of a female; he explained that he has only had sexual encounters with men. He said he has given up the life of a transgender. The applicant stated that in South Korea there is a misunderstanding that a homosexual is considered to be transgender.
51. The Tribunal asked the applicant if he has any partners in Australia. He said he has had many "*one night stands*" but he is not in a relationship. He said in Australia he has had to work. He said he has had dates. He said the gay culture in Australia is very different to that in South Korea. He said he is also involved in the gay scene in Australia. He said he goes to bars.
52. The applicant provided the Tribunal with a photograph and an article relating to a parade in which the applicant was involved in South Korea.
53. The Tribunal indicated to the applicant that homosexuality in South Korea is legal, although there is evidence of discrimination against homosexuals. The applicant told the Tribunal that during a parade, although the police were supposed to protect those involved in the parade, there was trouble between him and the police. He said that during the parade he had trouble with the police officer about the barricade. He said that although the police were there for protection they considered the participants in the parade as protesters. He said the police officer concerned was wearing riot gear. He said he experienced trouble with the police. He said the government decided to stop one of the routes for the parade and the police pushed him with a shield and an argument developed. He said the police officer used degrading words such as "*dirty... not human*". The applicant said he was very angry after the parade but he was very concerned about the gay image and gay and police relations. He said he therefore offered an apology. He said the police officer referred to him as a "*gay bastard*".
54. The Tribunal referred to the applicant's claims relating to his father. The applicant stated that his father died some years ago. He said he had gone for consultation relating to family matters and difficulties he had experienced with his father.
55. The Tribunal asked the applicant what he thought would happen to him if he were to return to South Korea. He said if the Korean culture was more accepting of homosexuality that would be good and it would be a relief. He said however based on his own experience, Koreans do not really accept the gay culture. He said if he were to return to South Korea he would be questioned by the Korean government about his immigration.
56. The Tribunal indicated to the applicant that the fact that he has sought asylum in Australia is confidential, but in any case even if he would be questioned on his arrival to South Korea that

would not necessarily constitute persecution. He said if it would become known that he had sought asylum in Australia on the basis of his homosexuality, it would be worse for him. He said in Korea the life of a gay is difficult; he said he cannot enjoy living in that environment. He said gay places are not accepted. He said he is scared to return to South Korea because the Korean society would not accept him expressing himself publicly. He said this was based on his own experience.

57. The applicant said that although gay associations are working towards more social acceptance of homosexuality in South Korea, life is more comfortable in Australia.
58. The Tribunal discussed with the applicant independent country information, namely that homosexuality is not illegal in South Korea although there is evidence of harassment and discrimination. The Tribunal indicated to the applicant that the Tribunal needed to further consider independent country information. The Tribunal indicated that the Tribunal needed to further consider whether there is a real chance that he would suffer Convention harm in the reasonably foreseeable future if he were to return to South Korea.
59. Details regarding the applicant's employment deleted under s.431 as it may identify the applicant.
60. The Tribunal asked the applicant if he had anything else to say. He said that he had been very nervous in the last couple of days because he was not sure what to expect in the course of the hearing. The applicant talked about his father and all the problems that he has had with his father.
61. The Tribunal asked the applicant if he needed more time to comment or respond to any of the information that he had been given in the course of the hearing that the Tribunal considered could or would be a reason for affirming the decision to grant him the visa and the applicant asked the Tribunal for about one week to provide more photographs. The Tribunal indicated that it would consider the weight that it would place on that material.

Documents received in the course of and after the hearing

62. In the course of the hearing, the Tribunal received an original copy of the advisor's submissions, a note from the applicant in which he stated "*the biggest reason for my wish to stay here is due to the fact that my gender is not socially accepted to the general public as well as the authorities*", and a newspaper article entitled gay pride marchers step out for tolerance.
63. Subsequently, the Tribunal received copies of photographs.

COUNTRY INFORMATION

Homosexuality

64. Homosexuality is not illegal in South Korea and homosexuals have some protection from discrimination under South Korean law. While homosexuality has gained limited acceptance, South Korea remains a conservative country where "*coming out*" is difficult and gay marriage is not accepted.
65. According to the International Lesbian and Gay Association (ILGA), homosexual acts are legal in South Korea. *Pink News* reports that there is no mention of homosexuality in the South Korean Constitution or Civil Penal Code (Ottosson, Daniel 2008, *State-sponsored Homophobia – A*

world survey of laws prohibiting same sex activity between consenting adults, May, International Lesbian and Gay Association website http://www.ilga.org/statehomophobia/ILGA_State_Sponsored_Homophobia_2008.pdf– accessed 20 November 2008; and [deleted under s.431 as it may identify the applicant].

Legal Protection

66. According to DFAT advice dated 27 August 2008, “[w]hile there may not be specific laws which discriminate against Korean nationals based on their homosexuality, the general lack of social acceptance may create obstacles for persons seeking legal redress or protection from discrimination” (DIAC Country Information Service 2008, Country Information Report No. 08/82 – South Korea: situation for homosexuals and transgender persons, (sourced from DFAT advice of 27 August 2008), 1 September). According to the US Department of State’s Country Reports on Human Rights Practices 2007, South Korean law forbids discrimination on the basis of sexual orientation and the South Korean government “generally respected these provisions.” The US Department of State reports that “while courts have jurisdiction to decide discrimination claims, many of these cases were instead handled by the NHRC [National Human Rights Commission]” (US Department of State 2008, Country Reports on Human Rights Practices 2007 – Korea, Republic of, 11 March, Section 5).
67. According to the NHRC, it is unlawful to discriminate against a person on the basis of their sexual orientation (How to File a Complaint 2004, National Human Rights Commission of Korea website <http://www.humanrights.go.kr/eng/complaint/howto/com01.htm> – Accessed 18 April 2007). A person aggrieved by an unlawful discriminatory act or a human rights violation can file a complaint with the National Human Rights Commission of Korea (NHRC) by phone, mail, in person, fax or email.
68. In 2006, the South Korean Ministry of Justice “finished drafting anti-discrimination legislation intended to complement the National Human Rights Commission Act...by requiring the government to develop plans to eradicate discrimination.” The draft, first announced on 2 October 2007, granted protected status on the basis of 20 criteria including sexual orientation. On 2 November 2007, “following pressure from Christian groups and big business”, the Ministry of Justice dropped seven criteria including sexual orientation. On 5 November 2007, 40 LGBT groups formed the Alliance Against Homophobia and Discrimination Against Sexual Minorities to pressure the government to restore sexual orientation to the legislation. No further information on the status of this legislation was found amongst the sources consulted (International Gay and Lesbian Human Rights Commission 2007, ‘South Korea: Fight to Restore Sexual Orientation in Anti Discrimination Bill’, 14 October <http://www.iglhrc.org/site/iglhrc/section.php?id=5&detail=800> – Accessed 19 November 2008 –; Human Rights Watch 2007, ‘South Korea: Anti-Discrimination Bill Excludes Many’, 5 November <http://www.hrw.org/en/news/2007/11/05/south-korea-anti-discrimination-bill-excludes-many> – Accessed 19 November 2008).
69. An article dated 27 August 2008 in *Pink News* reports that Democratic Party Representative Choi Young-hee, an opposition Member of Parliament in South Korea, “has proposed new legislation that would extend the definition of a rape victim to include men and transsexuals. The article notes that “[u]nder Korean law only women are classed as rape victims.” According to Ms Choi, “15.8% of soldiers in basic training have experienced sexual harassment” (‘New rape law to acknowledge Korea’s male and trans victims’ 2008, *Pink News*, 27 August <http://www.pinknews.co.uk/news/articles/2005-8831.html> – Accessed 19 November 2008).

Politics

70. An update on South Korea by the International Gay and Lesbian Human Rights Commission (IGLHRC) dated January 2008 reports that South Korea's LGBTQ movement is "*contemplating how to weather the next five years under the administration of newly elected ultra-conservative President, Mr. Lee Myung-bank.*" The update notes that President Lee "*has stated in the press that homosexuality is abnormal and that the only "normal union is between a man and woman"*" According to Ibanjiha, one of the organisers with the Alliance Against Homophobia and Discrimination Against Sexual Minorities, "*We expect that we're going to face more severe homophobia and discrimination under the new regime*" An article posted on GayNZ.com on 9 April 2008 reports that President Lee "opposes same-sex marriage" (International Gay and Lesbian Human Rights Commission 2008, 'South Korea: LGBTQ Activists Ramp Up Efforts Under New-Right-Wing Government', January http://www.iglhrc.org/files/iglhrc/program_docs/Regional%20Update-Korea.pdf – Accessed 19 November 2008; and Young, Craig 2008, 'Being gay in South Korea', GayNZ.com website, 9 April http://www.gaynz.com/articles/publish/32/printer_5801.php – Accessed 19 November 2008).
71. An article posted on Fridae, "*Empowering gay Asia*", on 18 March 2008 reports that Choi Hyun-sook became Korea's first openly gay candidate. Choi, chair of the Democratic Labour Party's coalition of civic groups for sexual minorities, is campaigning to represent Jongno district in Seoul. Choi "*came out of the closet shortly after her 2004 divorce.*" According to *The Gay Map of Asia*, Choi lost the election (Kelley, Matt 2008, 'South Korea sees first openly gay politician, but challenges persist for the nation's lesbians', Fridae website, 18 March <http://www.fridae.com/newsfeatures/article.php?articleid=2196&viewarticle=1> – Accessed 19 November 2008 – Attachment 14; and Gardner, Dinah 2008, 'South Korea', *The Gay Map of Asia*, The Out Traveler GPS website, Fall <http://gps.outtraveler.com/files/MapFall08High.pdf> – Accessed 21 November 2008).
72. An article posted on GayNZ.com on 9 April 2008 reports that the South Korean Democratic Labour Party, a centre-left party with ten representatives in the National Assembly, has a Sexual Minorities Committee "which works to end homophobic and transphobic discrimination in South Korea" (Young, Craig 2008, 'Being gay in South Korea', GayNZ.com website, 9 April http://www.gaynz.com/articles/publish/32/printer_5801.php – Accessed 19 November 2008).

Societal Attitudes

73. According to DFAT advice dated 27 August 2008, "Anecdotally, reftel is correct in stating that homosexuality has recently gained limited acceptance in South Korean society. But while homosexuality may be recognised, the topics of ethnically Korean homosexuals or transgender persons remain more or less taboo" (DIAC Country Information Service 2008, *Country Information Report No. 08/82 – South Korea: situation for homosexuals and transgender persons*, (sourced from DFAT advice of 27 August 2008), 1 September).
74. According to Chingusai, a South Korean human rights group for gay men, the oppression of homosexuals in South Korea "is unique in that it takes the form mostly of verbal criticism in the guise of morality or religion as opposed to physical violence". Chingusai notes that "it is still dangerous and harmful because it leads to deep-rooted prejudice and thorough discrimination that seeks to render queer folks invisible" ('Gay Life in Korea' (undated), Chingusai website http://chingusai.net/e_page/e_life_in_korea.html – Accessed 19 November 2008)

75. An article dated 18 June 2008 in The Korea Herald reports that in South Korea “there is a heavy focus on carrying on the familial genetic line”, so “[w]hen it comes to homosexuality, Korea is not yet a tolerant society and far from accepting.” An article posted on Friday on 18 March 2008 reports that “widespread ignorance and bias contributes to a hostile cultural climate for lesbian, gay, bisexual and transgender people” in South Korea. An update on South Korea by the IGLHRC dated January 2008 reports that “homophobia persists” in South Korea. An article posted on Friday on 23 November 2007 reports that “widespread anti-gay bias in Korean society compels most LGBT Koreans to hide their sexual orientation” (Schaneman, Bart 2008, ‘From both sides of the closet door’, The Korea Herald, 18 June; Kelley, Matt 2008, ‘South Korea sees first openly gay politician, but challenges persist for the nation’s lesbians’, Fridae website, 18 March <http://www.fridae.com/newsfeatures/article.php?articleid=2196&viewarticle=1> – Accessed 19 November 2008; International Gay and Lesbian Human Rights Commission 2008, ‘South Korea: LGBTQ and Activists Ramp Up Efforts Under New-Right-Wing Government’, January http://www.iglhrc.org/files/iglhrc/program_docs/Regional%20Update-Korea.pdf – Accessed 19 November 2008; and Kelley, Matt 2007, ‘Exclusion from non-discrimination bill mobilizes Korea’s LGBT community’, Fridae website, 23 November <http://www.fridae.com/newsfeatures/article.php?articleid=2098&viewarticle=1> – Accessed 19 November 2008).
76. In response to the inclusion of sexual orientation in the draft anti-discrimination bill, “a group calling itself the Assembly of Scientists Against Embryonic Cloning distributed a petition warning Korean lawmakers that if the non-discrimination bill was passed, “homosexuals will try to seduce everyone, including adolescents; victims will be forced to become homosexuals; and sexual harassment by homosexuals will increase.”” The group’s director, Pusan University Professor Gill Wonpyong, believes “[i]f homosexuality is allowed, the morals of [Korean] society will immediately collapse and the society will become a world of animals” (Kelley, Matt 2007, ‘Exclusion from non-discrimination bill mobilizes Korea’s LGBT community’, Fridae website, 23 November <http://www.fridae.com/newsfeatures/article.php?articleid=2098&viewarticle=1> – Accessed 19 November 2008).
77. Seoul National University Professor Kang Shin-hoo said South Korea “*doesn’t need to acknowledge gays in society yet*” He said banning education concerning homosexuality will allow more “*confused*” teenagers to define themselves as gay. “*During adolescence, some students are just not sure. It doesn’t mean they are gay. But not educating them on the possibility will make them think they are gay. We are against punishing gays, but we are also against encouraging sexual behavior that does not lead to reproduction or is not approved by our religion,*” he said” (Ji-sook, Bae 2007, ‘Communities Divided on Sexual Politics’, *Korea Times*, 31 October http://www.koreatimes.cokr/www/news/special/2008/07/229_12906.html – Accessed 19 November 2008).
78. A response dated 13 October 2006 by the Immigration and Refugee Board of Canada reports that South Korean society is reportedly “*highly conservative*” and “*homophobic*” (*Gay Times* n.d.; see also Utopia n.d.). ...Until a few years prior to 2006, homosexuality was rarely even discussed (The New York Times 31 Mar. 2006; AP 4 Feb. 2004)” (Immigration and Refugee Board of Canada 2006, *KOR101949.E – Republic of Korea: Current Situation of, and protection available to, gay, lesbian and transgendered/transsexual citizens (2002-2006)*, 13 October http://www.irb-cisr.gc.ca/en/research/rir/index_e.htm?action=record.viewrec&gotorec=450521 – Accessed 18 November 2008).

Coming Out

79. Chingusai provides the following advice on coming out in South Korea:

Moreover, because family cohesion and honor are extremely important values in Korea, not a few LGBT people have been rejected and cast out by their families after coming out to them. Honesty, unfortunately but apparently, is not always the best policy. Consequently, LGBT activists as well as members of the queer community generally agree that coming out should be done after the achievement of economic and social independence, especially since parents' financial support and guidance continue well after children's college years in Korea.

... All LGBT friends who visit or live in Korea should be sensibly cautious in coming out within relationships, networks, or organizations that are public, official, professional, or related to their livelihood because you may still face covert discrimination despite the lack of legal grounds. At the same time, however, there thankfully is no publicly known case to date of any foreign national being dismissed from work for his or her sexual orientation ('Gay Life in Korea' (undated), Chingusai website http://chingusai.net/e_page/e_life_in_korea.html – Accessed 19 November 2008).

80. An article posted on Friday on 17 October 2008 reports on the suicide of actor Kim Ji-hoo. On 21 April 2008 Kim appeared on the TV program, "*Coming Out*". After the episode aired, "*Kim's Web page was inundated with attacks on his sexual orientation. In addition, his modeling and television appearances were cancelled and his management company refused to renew his contract.*" The article notes that "[e]ven after his death, hateful comments were posted on Kim Ji-hoo's personal Web page" An article dated 8 October 2008 in *The Korea Times* reports that Kim's mother said "[h]e underwent many professional and personal difficulties following his coming out". Kim's aide, also homosexual, said "[l]ike me, he suffered from numerous discriminations against him" The article reports that "[p]olice said his suicide reflects public prejudice toward gay people and their difficulty in succeeding in the entertainment industry" (Sisoo, Park 2008, 'Gay Actor Found Dead in Apparent Suicide', *The Korea Times*, 8 October, Global Gayz website <http://www.globalgayz.com/korea-news08-01.html> – Accessed 19 November 2008; and Kelley, Matt & Lee, Mike 2008, 'The deadly reality of South Korea's virtual world', *Fridae* website, 17 October <http://www.fridae.com/newsfeatures/article.php?articleid=2320&viewarticle=1> – Accessed 19 November 2008).
81. An article dated 18 June 2008 in *The Korea Herald* reports that "[i]n the past, gay and lesbian Koreans who have come out to their families have been disowned and forced into "medical treatment" or unwanted marriages. When a famous television actor came out in 2000 he lost his job and when he told his mother "she suggested they drink poison together." Hong, a 25 year old university student who has been openly gay for four and a half years states "I know it's very hard to be 'out' in Korean society but if people are willing to push through, all the way out, I think it's absolutely worth it." Cho Jeong-kwon, a 27 year old university student disagrees, "I think if I say I am gay, I fight the whole Korean society" (Schaneman, Bart 2008, 'From both sides of the closet door', *The Korea Herald*, 18 June).
82. An article posted on Friday on 3 June 2008 reports on the first television talk show series in South Korea about homosexuality. The new 12 episode series which debuted on 14 April 2008 and airs at midnight is called "*Coming Out*" and "*includes dramatic profiles of people who have come out to family, friends and coworkers with advice offered by co-hosts Hong Seok-cheon and Jung Kyung-soon.*" At a press conference, "*Hong told reporters when he first heard about the project, he thought it was "crazy" for Korean to out themselves on national television.*" Hong is

able to sympathise with young Koreans who remain in the closet after his own painful experience. Hong states, “*I don’t advise people to come out because I know it is a hard decision. But for myself, I have never been happier. I don’t have to lie to myself any more*” (Kelley, Matt 2008, ‘Seoul’s spring forecast: More visibility for Korea’s queers’, *Fridae* website, 3 June, Global Gayz website <http://www.globalgayz.com/korea-news08-01.html> – Accessed 19 November).

83. A response dated 13 October 2006 by the Immigration and Refugee Board of Canada reports that “[m]any gay Koreans do not come out of the closet because of the stigma associated with homosexuality (*Gay Times* n.d.; *The New York Times* 31 Mar. 2006; see also Yonhap English News 5 June 2006)” (Immigration and Refugee Board of Canada 2006, *KOR101949.E – Republic of Korea: Current Situation of, and protection available to, gay, lesbian and transgendered/transsexual citizens (2002-2006)*, 13 October http://www.irb-cisr.gc.ca/en/research/rir/index_e.htm?action=record.viewrec&gotorec=450521 – Accessed 18 November 2008).

HIV/AIDS

84. A 2006 publication on East Asia’s response to AIDS reports that the rate of homosexual transmission of HIV may be higher than in official records due to “*prejudice and discrimination against homosexuality*” in South Korea. The publication provides the following information on HIV/AIDS and men who have sex with men in South Korea:

The estimated number of men in Korea who identify themselves as homosexual or bisexual is 10,000–34,400. Based on this number, the HIV infection rate among them is 5.5%. That is 66 times higher than the HIV infection rate among those in the general population who have sexually transmitted infections, a group that is generally considered to be at high risk for HIV as well (Goh 2001). In 36.6% of the known cases of HIV infection, the virus was transmitted through homosexual contact. However, many AIDS experts in Korea warn that the rate of homosexual transmission may be much higher than the official record shows. The reason is that prejudice and discrimination against homosexuality are so great that newly diagnosed people might not reveal their true sexual orientation during an epidemiological investigation (Shin, Surin 2006, ‘Republic of South Korea’, *Fighting the Rising Tide: The Response to AIDS in East Asia* (eds. Tadashi Yamamoto & Satoko Itoh), Japan Centre for International Exchange, p.158 <http://www.jcie.org/researchpdfs/RisingTide/rok.pdf> – Accessed 19 November 2008).

[Country Information deleted under section 431 as it may identify the applicant.]

Advocacy/Support Groups

85. According to DFAT advice dated 27 August 2008, “Post is anecdotally aware of a small number of support and interest-groups serving the homosexual community in South Korea, but again, due to social sensitivity of the topic, these are not widely publicized, nor are they likely to attract government funding or sanction” (DIAC Country Information Service 2008, Country Information Report No. 08/82 – South Korea: situation for homosexuals and transgender persons, (sourced from DFAT advice of 27 August 2008), 1 September).

Transgender

Surgery & Family Registration Record

86. An article dated 23 June 2006 in *The Korea Times* reports on a “*Supreme Court ruling allowing a female-to-male transsexual to legally change gender on the family registration record*”. The

court suggested five criteria in deciding whether to recognise the new gender on official records. The ruling is “expected to help transsexuals in their social life including marriage, getting jobs and military service”. (Rahn, Kim 2006, ‘Milestone Supreme Court ruling allowing a female-to-male transsexual’, *Korea Times*, 23 June, Global Gayz website <http://www.globalgayz.com/korea-news03-07.html> – Accessed 19 November 2008).

87. An article dated 1 August 2006 in *Business Korea* reports that this “*monumental decision means that transgenders are now officially recognized under law as switched genders.*” Before deciding the case, the Supreme Court opened a public hearing to hear opinions on the matter and “*heated debates on the issues followed.*” (‘Still a Long Way Ahead to Go’ 2006, *Business Korea*, 1 August).
88. An article dated 6 September 2006 in *Pink News* reports that since the June 2006 decision, “*17 transsexuals have applied to have their gender registered on legal records*” The article notes that prior to the ruling there were 30 applications in 2006, 28 in 2005 and 22 in 2004. *Korea Times* quotes a court official as saying the “*increasing permission on gender switch at local courts reflects their recognition that transsexuals have the right to enjoy human dignity and respect and pursue happiness*” (‘Transsexual recognition increasing in South Korea’ 2006, *Pink News*, 6 September <http://www.pinknews.co.uk/news/articles/2005-2428.html> – Accessed 19 November 2008).
89. An article dated 29 March 2007 by Yonhap News Agency reports that a “group of transgendered people will file a suit in April to seek the legal right to change their genders in their family registries”. According to a civic group assisting with the action, “[*m*]any have so far been unable to apply for a legal gender change because they don’t know how to or have no courage to do so... We hope this campaign will pluck up the courage of such people” (‘Transgendered people to file for legal recognition’ 2007, Yonhap News Agency, 29 March).

Legal Protection

90. South Korean law does not explicitly protect transgender people from discrimination:

In case there exists a discriminatory act of any violation of the right of equality by a juristic person, organization or private individual. That is, without any reasonable grounds, in case a person is unlawfully discriminated by gender, religion, disability, age, social status, regional, national or ethnic origin, physical condition such as physical features, marital status, pregnancy or delivery, family status, race, skin color, thought or political opinion, criminal record of which effective term of the punishment has expired, sexual orientation, or medical history (‘How to File a Complaint’ 2004, National Human Rights Commission of Korea website <http://www.humanrights.go.kr/eng/complaint/howto/com01.htm> – Accessed 18 April 2007).

91. Human Rights Watch (HRW) reports that the draft anti-discrimination legislation in its “*original and current form lacks explicit protection for transgender people.*” HRW continues:

The South Korean Supreme Court ruled last year that transgender individuals who undergo sex reassignment surgery are entitled to legal identity change (2004Se42). This is a vital step but does not protect them from the multiplicity of human rights violations they experience. Transgender people are some of the most at risk of discrimination in employment, education, housing, and healthcare. Many transgender people are rejected by their families (Human Rights Watch 2007, ‘Letter: Exclusion Undermines Landmark Bill’, 4 November <http://www.hrw.org/en/node/73000> – Accessed 19 November 2008).

92. An article dated 27 August 2008 in *Pink News* reports that Democratic Party Representative Choi Young-hee, an opposition Member of Parliament in South Korea, “has proposed new legislation that would extend the definition of a rape victim to include men and transsexuals. The article notes that “[u]nder Korean law only women are classed as rape victims.” According to Ms Choi, “[t]he bill is also seeking to protect those who change their sex” (‘New rape law to acknowledge Korea’s male and trans victims’ 2008, *Pink News*, 27 August <http://www.pinknews.co.uk/news/articles/2005-8831.html> – Accessed 19 November 2008).

Adoption

93. An article dated 12 June 2007 in *Dong-A Ilbo* reports on adoption by transgender couples in South Korea. When newly-wed transgender singer, Ha Ri-Soo, expressed a desire to “adopt four children” a “heated debate on the right to adoption by transgenders” ensued. *Dong-A Ilbo* reports “that some transgender couples have unofficially adopted children in Korea... But none of them have adopted a child through official channel.” (‘Adoption by Transgenders?’ 2007, *Dong-A Ilbo*, 12 June).

Societal Attitudes

94. According to DFAT advice dated 27 August 2008, “Anecdotally, reftel is correct in stating that homosexuality has recently gained limited acceptance in South Korean society. But while homosexuality may be recognised, the topics of ethnically Korean homosexuals or transgender persons remain more or less taboo” (DIAC Country Information Service 2008, Country Information Report No. 08/82 – South Korea: situation for homosexuals and transgender persons, (sourced from DFAT advice of 27 August 2008), 1 September).
95. An article dated 28 May 2006 in *The Hankyoreh* reports on Lee Cho-rong, a 46 year old café owner who “keeps his transgender lifestyle secret by living as a man during the day and a woman at nights.” The article reports that his café in Sinchon, Seoul may appear “ordinary” but on entering most customers go behind a curtain to put on women’s clothing, a wig and make-up. Lee, the youngest of three sons born to conservative Protestant parents states “I’m planning to have a sex-change operation only after my old mother dies. There’s no way I could now, my mother might be shocked to death.” Lee completed his military service and earned a living in low-paying manual jobs. He states that he “chose such hard jobs in a desperate effort to live a normal life like other men, but couldn’t” Lee, out of loneliness, started the Internet site “Rush for crossdressers” which has 2,600 subscribers. The article notes that, “[t]he presence of transsexuals in society no longer shocks South Koreans thanks to strong media coverage of transsexual stars like Harisu.” Lee notes, however, that “while South Koreans have surely become more generous about people who are different from them than they were before, they are still very conservative.” The article notes that a “considerable number of transsexuals are forced into working in the sex or entertainment industry because their job opportunities are strictly limited, according to the café owner Lee” (‘S. Korea in dilemma over transgender citizens’ 2006, *The Hankyoreh*, source: *Yonhap News*, 28 May http://english.hani.co.kr/arti/english_edition/e_entertainment/126562.html - Accessed 19 November 2008).

96. **[Country Information deleted under section 431 as it may identify the applicant.]**

FINDINGS AND REASONS

97. On the basis of the available information, the Tribunal is satisfied that the applicant is a national of South Korea and that he is outside that country.
98. In essence, the applicant is claiming to fear harm on the basis of his membership of a particular social group, being homosexual males.
99. For the reasons outlined above, the Tribunal finds that the applicant has a well-founded fear of persecution based on homosexuality and imputed transgender.
100. In consideration of the evidence as a whole, the Tribunal accepts that the applicant is a homosexual and that whilst he was in South Korea, he received hormone injections which gave him female characteristics. The Tribunal accepts that the applicant's employer in South Korea was encouraging the applicant to undergo gender reassignment surgery but the applicant had made a choice not to do so. The Tribunal has had the opportunity to see the applicant and the Tribunal is satisfied that the applicant has physical characteristics that would identify him as homosexual and effeminate.
101. The applicant has claimed that he participated in a gay rights parade during which he was harassed by the police. The Tribunal accepts that this took place, however, the Tribunal is not satisfied that the applicant had suffered serious harm on the basis of this incident. Similarly, the applicant has claimed that after the death of his partner, he was not allowed to grieve openly because it was a gay relationship. Whilst this would have been difficult for the applicant, the Tribunal is not satisfied that the applicant had suffered serious harm on this basis.
102. The applicant has claimed and the Tribunal accepts that he experienced physical and verbal abuse from salesmen when attempting to buy cosmetics. However, the Tribunal is not satisfied that the applicant had suffered serious harm on the basis of such incidents.
103. The applicant has claimed that while managing gay businesses, he was targeted by gangsters who demanded protection money. The Tribunal accepts that this took place, however, this is harm by non-state agents. He claimed that when he approached the police, they were antagonistic towards him, which raises doubts about the adequacy of state protection.
104. The applicant has made claims of harm by members of his family. In consideration of the evidence as a whole, the Tribunal is not satisfied that any harm suffered by the applicant on that basis is essentially and significantly related to any Convention ground.
105. Whilst the Tribunal is satisfied that the applicant has not suffered serious harm or persecution, it is accepted that an applicant does not need to demonstrate past harm in order to establish future harm. The comprehensive independent country information referred to in the Decision indicates that whilst there are some positive initiatives, persecution of homosexual and transgender persons in South Korea occurs and the Tribunal is satisfied that there is a real chance that the applicant would be seriously harmed in the reasonably foreseeable future.
106. The Tribunal is satisfied that although country information indicates that homosexuality is not illegal in South Korea and homosexuals have some protection from discrimination under South Korean law, homosexuality has gained limited acceptance; South Korea remains a conservative country where "*coming out*" is difficult and gay marriage is not accepted. There is no mention of homosexuality in the South Korean Constitution or Civil Penal Code. DFAT's advice dated 27

August 2008, “[w]hile there may not be specific laws which discriminate against Korean nationals based on their homosexuality, the general lack of social acceptance may create obstacles for persons seeking legal redress or protection from discrimination” According to that advice, “Anecdotally, reftel is correct in stating that homosexuality has recently gained limited acceptance in South Korean society. But while homosexuality may be recognised, the topics of ethnically Korean homosexuals or transgender persons remain more or less taboo” (DIAC Country Information Service 2008, *Country Information Report No. 08/82 – South Korea: situation for homosexuals and transgender persons*, (sourced from DFAT advice of 27 August 2008), 1 September).

107. A response dated 13 October 2006 by the Immigration and Refugee Board of Canada reports that South Korean society is reportedly “highly conservative” and “homophobic” (*Gay Times* n.d.; see also Utopia n.d.). ...Until a few years prior to 2006, homosexuality was rarely even discussed (The New York Times 31 Mar. 2006; AP 4 Feb. 2004)” (Immigration and Refugee Board of Canada 2006, *KOR101949.E – Republic of Korea: Current Situation of, and protection available to, gay, lesbian and transgendered/transsexual citizens (2002-2006)*, 13 October http://www.irb-cisr.gc.ca/en/research/rir/index_e.htm?action=record.viewrec&gotorec=450521 – Accessed 18 November 2008).
108. Looking at country information cumulatively, the Tribunal is satisfied that as a homosexual with transgender characteristics, there is a real chance that the applicant would be seriously harmed in the reasonably foreseeable future.
109. In consideration of the evidence as a whole and on the basis of the available information, the Tribunal is satisfied that there is a real chance that the applicant would be harmed, in the reasonably foreseeable future, for his membership of a particular social group, namely male homosexuals with transgender characteristics. Independent country information cited in the Decision demonstrates the existence of a serious risk of harm that homosexuality and transgender could attract.
110. In sum and in consideration of the evidence as a whole the Tribunal is satisfied that the applicant has a well-founded fear of persecution for a Convention reason - his membership of a particular social group, namely male homosexuals with transgender characteristics.

CONCLUSIONS

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

DECISION

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

<p>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 <i>Migration Act 1958</i>. Sealing Officer’s I.D. PRDRSC</p>
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