

**071848546 [2008] RRTA 162 (7 May 2008)**

**DECISION RECORD**

**RRT CASE NUMBER:** 071848546

**DIAC REFERENCE(S):** CLF2007/120386

**COUNTRY OF REFERENCE:** Mongolia

**TRIBUNAL MEMBER:** Jonathon Duignan

**DATE DECISION SIGNED:** 7 May 2008

**PLACE OF DECISION:** Sydney

**DECISION:** The Tribunal remits the matter for reconsideration with the direction that the first named 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 decisions made by a delegate of the Minister for Immigration and Citizenship to refuse to grant the applicants Protection (Class XA) visas under s.65 of the *Migration Act 1958* (the Act).
2. The applicants, who claim to be citizens of Mongolia, arrived in Australia and applied to the Department of Immigration and Citizenship for Protection (Class XA) visas . The delegate decided to refuse to grant the visas and notified the applicants of the decision and their review rights by letter
3. The delegate refused the visa application on the basis that the first named applicant is not a person to whom Australia has protection obligations under the Refugees Convention.
4. The applicants applied to the Tribunal for review of the delegate's decisions.
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 applicants have 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. Section 36(2)(b) provides as an alternative criterion that the applicant is a non-citizen in Australia who is the spouse or a dependant of a non-citizen (i) to whom Australia has protection obligations under the Convention and (ii) who holds a protection visa.
9. Further criteria for the grant of a Protection (Class XA) visa are set out in Parts 785 and 866 of Schedule 2 to the Migration Regulations 1994.

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

10. 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.

11. 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.
12. 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.
13. There are four key elements to the Convention definition. First, an applicant must be outside his or her country.
14. 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.
15. 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.
16. 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.
17. 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.

18. 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.
19. 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**

20. The Tribunal has before it the Tribunal and Department's file relating to the applicants. 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.
21. In her Application for a Protection visa lodged with the Department, the first-named applicant (hereafter *the applicant*) indicates that she left her country because she is the single mother of her child and lesbian. She was born in Mongolia and she left her country because of her sexuality and concerns about her child.
22. The applicant explained that she became interest in same sex relationships from early adolescence and she started a relationship with a woman in Mongolia. The couple had a long term relationship which was hidden from others including relatives and colleagues. After some time friends and relatives became suspicious and they would ask questions about the applicant getting a boyfriend or when she was planning to settle down. The applicant pretended she was very busy with her career.
23. On one occasion the applicant was caught by a person at her work when kissing her girlfriend. The person hated her after this. The applicant did not wish to return to work because her city did not have a large population and someone could easily become known for bad reasons. The person told the applicant that she hated her and the applicant begged that he not tell others that she was lesbian. The person did so and from that time the applicant began to be isolated from her work. Colleagues would use swear words against her and send bad e-mails. She felt under a great deal of pressure and it was difficult to live in Mongolia.
24. The applicant travelled to a third country for a few months to try to find another way to live. She returned to Mongolia because of her visa conditions and started a relationship with a man in Mongolia. She claims that this was only to stop people saying that she was lesbian. She continued her association with lesbians during the period of her heterosexual relationship.
25. The applicant became pregnant to her partner and gave birth. During her pregnancy her partner heard a lot of things about her relationships with women. She was beaten by him over and over again. He said that she used him to make a baby and things were extremely hard for her. . The applicant tried not to have contact with him but he was physically strong and he had sufficient money to do anything.
26. Her partner told her that he would take her child. She did not want her child taken from her and she had to protect him.
27. The applicant feared harm should she return to Mongolia. She explained that her partner had made public claims about her and she believed that everybody thought he should have

custody of their child. She explained that it was hard to live safely as a lesbian in Mongolia and that she would have to live without her reputation, job, money or social life as everyone now knew she was lesbian. The applicant's partner had threatened that he could do anything to get rid of her and take their child

28. The applicant explained that she thought Mongolia was an unsafe place for her and her child. Her partner is a wealthy man and because Mongolia was a less developed country he could pay bribes to those who may decide custody issues. She did not want to lose her child and wished to live safely in Australia.
29. The applicant did not think authorities of her country would protect her if she returned to Mongolia because she was lesbian. She explained that she would be ignored and could not rely upon authorities for protection. They may give her partner a fine but he would ignore it and she would be ignored by authorities.
30. The delegate was not satisfied that the applicant was a person owed protection obligations by Australia and refused to grant her or her child visas.
31. The applicant, on seeking review of the decisions, provided to the Tribunal additional evidence, being:
  - a translation of a document from Mongolia which referred to the case of her and her partner. The document referred to the applicant's background and past experiences as a lesbian in unflattering terms, referring to her sexual deviancy and the fact that this saw her child separated from his father;
  - a letter from the National Centre Against Violence which refers to aid given to the applicant during a certain period of time, including legal and psychological services as the victim of domestic violence. One time the applicant was injured severely and she was housed for several days in temporary accommodation;
  - a letter from a particular Police station indicating the number of times the applicant called the police to report violence in which she suffered severe injuries. Her partner was taken into custody in accordance with the rules of administration in Mongolia on one occasion.
32. The applicant provided to the Tribunal a further statutory declaration detailing her experiences in Mongolia. This referred to the applicant's past experiences. It referred to her family finding out of her lesbian relationship as a result of a discovery by a family member. She was then isolated from her family and that person indicated that he hated her. After discovery at her workplace the applicant was isolated in her job and ultimately forced to leave her employment. She decided to leave Mongolia and used her savings to travel to a third country. After this, her mother told the applicant that she should seek a heterosexual relationship and she took this decision. After the birth of the applicant's child her partner became aware of her sexual orientation and was repeatedly violent toward her. The applicant sought available assistance as indicated above and on some occasions the police would take action and others they would dismiss her. They made reference to her sexual orientation after this became known.

33. On one occasion her partner indicated that he could kill her in a certain way and make this look like suicide. A neighbour heard this and the police were called and spoke with the applicant and her partner. The applicant had attempted to live separately from her partner, however, he found where she was living and she was twice more attacked by him. Her partner referred to the fact that she is known to be lesbian and said that he hated her and verbally abused her. He told the police she was lesbian and a whore and beat her more severely after she had called police.
34. The applicant believed she would be killed or driven to suicide as a result of the harassment and violence she had experienced from her family, former workmates, partner and had no trust in the police or society generally in Mongolia to protect her.
35. The applicant and her witness gave evidence at a hearing before the Tribunal. The applicant gave evidence consistent with the above about her past experiences. She was consistent in relation to the development of her relationship with a woman in Mongolia and the discovery of this by a family member. The applicant referred to her difficulty finding employment in Mongolia after leaving her first job. She explained that she had referred to later employment in her Application for a Protection visa because she had been told that she should show she was employable and thought this would be beneficial to the application.
36. The applicant's family had significantly pressured her in Mongolia to stop her sexual behaviour and relationship with her first girlfriend. A family member told her she would not be accepted by the family if she continued and her mother told her to marry, which the applicant did.
37. The applicant had travelled by herself to a third country and used her savings to do so. She would have loved to seek protection there but did not know how to do so and did not know that she would be protected there. She had travelled there to escape the hardship in Mongolia.
38. The applicant explained that her partner was repeatedly violent towards her after the birth of their child. She explained that she did not initially call the police but later did so. It was correct that on one occasion her partner had been detained for a period by police as stated in the letter.
39. The applicant was aware of the operation of the group Tavilan, which is a gay and lesbian rights group, in Mongolia. She did not contact the group because she did not believe they would be of any assistance to her. From information she had seen about Tavilan she thought they would be more interested in the details of her relationship than in practical help to her.
40. The applicant's witness gave evidence about her life with the applicant in Mongolia and knowledge of the applicant's activities. The witness gave consistent evidence in respect of the applicant's relationship, the witness's own contact with the applicant's lesbian partner over time. She became aware of the applicant's sexuality in a certain year from a family member in Mongolia. She was aware of difficulties the applicant experienced in her employment and the violence she had suffered at the hands of her ex-partner.
41. Subsequent to the hearing the Tribunal sought written permission from the applicant to contact the National Centre Against Violence to confirm the genuineness of their document. The applicant gave this permission. The Tribunal made an attempt to confirm the genuineness of the document with the author, however, no response to the Tribunal's enquiries was forthcoming.

42. In respect of other evidence regarding the circumstances for lesbians in Mongolia, the available reports indicate a less restrictive approach over time, however, that significant social approbation still exist.

43. In 2005 the United Kingdom Home Office reported that:

As reported by the International Gay and Lesbian Association, ILGA (World Legal Survey: Legal provisions, 31 July 2000), there are no laws covering homosexuality. As noted by the same source, "Section 113 of Penal Code prohibiting 'immoral gratification of sexual desires', can be used against homosexuals."

6.63 As noted by the Canadian IRB in a report dated 5 December 2003, information on the treatment of homosexuals in Mongolia is scarce. Citing a report by the IGLA the IRB report stated:

"Mongolia has no sodomy laws per se, but lacks any specific human rights protection on the basis of sexual orientation and does not recognize same-sex relationships [through] a domestic partnership or civil union policy. Although Mongolia's queers fear rejection from family and friends and some have reported getting into fistfights with family, there are no organized hate groups."...

...6.65 According to an article published in November 2002 by Richard Smith, who served in Mongolia as a volunteer with the US-peace Corps:

"In a country with a population of only 2.5 million, it is very difficult to get the terminal [sic] mass of gay men and lesbians to organize a simple association, let alone a commercial and retail industry to cater to their economic desires... Mongolian queers who immigrate to Europe or North America are not so much escaping persecution by the state or hate groups as they are seeking a place where they can experience their sexuality, free from the expectation that they will have a heterosexual family and kids." (UK Home Office 2005, *Country of Origin Information Report – Mongolia*, October).

44. The situation can result in significant and persistent acts of violence as detailed in the comments of Robyn Garner, an Australian journalist living and working in Mongolia, dated 25 August 2006:

Having had much first-hand experience of the reality of life for the homosexuals of Mongolia, and being part of the community, I would like to add my views on the often dire and violent situation facing this country's lesbians and gays in tandem with the assessment my partner and Mongolian gay activist Anaraa Nyamdorj has been asked to provide through the Mongolian Lesbian Information and Community Centre (MILC).

Mongolia is a country with deeply entrenched social and institutional intolerance of homosexuals; intolerance that manifests itself in varying forms, from ostracism and harassment to violence and, in extreme cases, murder. Because of the institutionalisation of the intolerance and discrimination (all levels of government, police, the legal and health sectors and the media) and the reality that there is very little, if any, likelihood of legal recourse, victims in the main do not report incidences of discrimination or violence for the very real fear of further harassment, predominantly from the police. Hence there is nothing in the way of comprehensive documented evidence to support the negative experiences of Mongolia's LGBT community, and thus most evidence is anecdotal, as told to other lesbians and gays and as reported to organisations like the MILC.

I have travelled widely in Mongolia, and it has been my experience that there are very few lesbians and gays who have escaped harassment and violence when their sexual orientation has become known. The violence most often comes from family members. Indeed, I have witnessed the immediate results of one such familial assault in which

the victim in question was savagely beaten with a club by an uncle, an attack solely based on sexual orientation. The victim was fortunate enough to be able to escape, but with serious injuries that required hospital treatment. The reason behind the assault could not be disclosed to medical authorities, nor could the assault itself be reported to police for fear of further violence. The retributive violence of the police is similarly supported by anecdotal evidence and is a very real fear for lesbians and gays. Such beatings are by no means isolated incidents, and equally affect lesbians and gays in both urban and rural areas.

There is no anecdotal evidence to suggest that harassment is based on geographical location. On the contrary, it affects people throughout the country. In the smaller towns and villages of Mongolia, lesbians and gays maintain a very low profile and try to keep their sexual orientation hidden. Overall there is much misunderstanding and outright ignorance about homosexuality throughout Mongolia, but more so in the country's rural areas. This nationwide ignorance is perpetuated by the media, which helps to reinforce discrimination. What little news coverage is given to the issue is predominantly sensational, highly prejudicial and laced with derogatory and inflammatory language. This negative and ultimately harmful rhetoric is also used by politicians at all levels of government. In essence, what this does is create a climate of hatred, fear and mistrust against lesbians and gays and give justification to acts of violence and harassment on the part of individuals and the police. There are very serious and potentially life-threatening problems for the homosexuals of Mongolia and a demonstrated and justified need for the granting of asylum to those who have been genuinely persecuted.

45. There have been incidents of violence, for example those noted by the Research Directorate of the Canadian Immigration and Refugee Board and taken from the Tavilan website during 2000:

The Tavilan organisation was established in April 1999. At that time, gays and lesbians mainly lived secluded lives, were not visible and they had to hide. We asked for official recognition of Tavilan by the Mongolian authorities, which was granted. Tavilan is now an official lesbian and gay organisation with a small office in Ulaanbaatar.

Our first attempt to reach out to the public was not successful. A first newspaper article with the involvement of a colleague was a distressing experience as the article was quite sensational and elicited a negative response.

Earlier, in December 1998, there had been a notorious murder case. A gay man was stabbed 53 times and died. At that time, police started to round up people for questioning and interrogation during 48 hours. Strangely, all gays arrested were mainly asked for information about their gay contacts.

One member had come out earlier in 1997 and police officers often asked for him. At last, they found him in a hotel where he was having a business meeting and in February 1999 he in his turn was imprisoned for 48 hours. Again, police only wanted to know what contacts he had. After that, there was no serious police harassment.

At the moment, Tavilan involves approximately 130 people. It started with friends contacting other friends, but we now rent a room in Ulaanbaatar which serves as office and switchboard and in June 1999 we organised courses for safe sex among gay men.

We also want to reach out more to lesbians, but are finding this difficult. Consequently this first safe sex course was attended by approx 20 persons and lasted for 3 days. In addition, since May 1999 Tavilan organises basket ball games during weekends. The aim is mainly empowerment and networking, but we realise that we don't have enough experience for education, lobby, funding and building a more or less professional organisation.

We are noticing that slowly people are starting to open up and to feel more comfortable - but this is a lengthy process. We are aware, that police still have files on gays and lesbians, but the Mongolian constitution does not penalise lesbian or gay sexuality.



A recent newspaper article published in June 1999 was quite positive and honest. There was a huge response from people asking the newspaper company for more information - but also a negative response from people who did not want to hear about homosexuality at all. At the moment, we are opting for a very quiet and moderate approach. We are concentrating on reaching out, building networks and finding funds and know-how abroad in order to make Tavilan flourish.

46. The current situation for Tavlian does appear to indicate that it has reduced numbers involved and its primary presence is through the website it maintains.

47. The most recent report of the United States Department of State in respect of human rights in Mongolia (March 2008) notes that:

Homosexuality is not specifically proscribed by law. However, Amnesty International and the International Lesbian and Gay Association criticized a section of the penal code that refers to "immoral gratification of sexual desires," arguing that it could be used against homosexuals. Homosexuals reported harassment by police, but remained divided over the overall level of societal discrimination.

There was no official discrimination against those with HIV/AIDS; however, some societal discrimination existed.

48. While homosexuality has not been illegal in Mongolia for some time, in 2006 Anaraa Nyamdorj Olhonuud in his paper entitled *Life Denied : LGBT Human Rights in the Context of Mongolia's Democratisation & Development* , gave his views at the Outgames International LGBT Human Rights Conference in July 2006 in Montreal, Canada:

Mongolia (as in the Government) does not officially recognise the existence of LGBT people on its territory – there is an overwhelming silence regarding LGBT, not once the words ‘homosexual’, ‘lesbian’, ‘gay’, ‘transgendered’ or ‘transsexual’ appear in any official legislations or legal instruments. The very omission of LGBT from the newly promulgated Mongolian Constitution of 1992 must point to the non-citizen of the LGBT; or perhaps, the omission points to the secondary status of the LGBT as citizens, however, strong evidence points to the first explanation, rather than the second. Whichever the case it is, the heteronormativity is institutionalised in both social as well as legal spheres through the State’s silence, disregarding desperate indications such as:

- High rate of hate-inspired crimes against LGBT people;
- Suicides/attempted suicides, chronic depression among LGBT;
- Legal and social invisibility and subsequent marginalisation;
- Denial of the fundamental human right to sexual orientation;
- Endemic non-recognition and delegitimation of LGBT identities;
- Non-citizen/secondary citizen status of LGBT people;
- Secondary victimisation by various state agencies;
- Lack of understanding of same-sex domestic violence, subsequent silence around LGBT domestic violence in the LGBT community itself as well as the civil society organisations working on domestic violence.

And it even enabled the State to lead unethical and ignorant rhetoric of ‘gays as a threat to the national security’ since the early 2004 with the 7<sup>th</sup> case of HIV+ person identification. The fact that the State is leading the rhetoric of the national security being compromised by the sexuality minority raises grave concerns regarding the human rights issues not only pertaining to the LGBT people in Mongolia, but other presently silent social minority such as sex-workers

## FINDINGS AND REASONS

49. The Tribunal accepts that the applicant and her child are nationals of Mongolia and no other country. They travelled to Australia using passports issued by that country and the applicant and her witness have presented a consistent account of their circumstance such that the Tribunal is satisfied that both were born there as claimed.
50. Considering the basis of the applicant's claim to be a person to who Australia has protection obligations, there is some reason for concern regarding whether the applicant falls within the required definition. She was not truthful in respect of the application form by her own admission and her travel to a third country in the past and return to Mongolia would tend to undermine her claimed fear of return.
51. There was an initial concern regarding the documentation provided by the applicant from the National Centre Against Violence. The Tribunal has not been able to independently verify that document, however, has confirmed that it states the correct address and that the signatory is an office holder in the organisation. The applicant's evident and responsive willingness to have the documentation checked tends also to support the conclusion that the document is genuine and the Tribunal is satisfied of this.
52. Considering the evidence overall the Tribunal is of the view that the applicant has presented a credible and consistent account of her past experiences, which has been supported by independent evidence which is accepted by the Tribunal. This was also supported by the applicant's witness who was able to give a plausible, coherent and independently consistent account of the applicant's past experiences and activities.
53. The Tribunal accepts that from a young age the applicant found she was lesbian in her sexual orientation and has in the past pursued lesbian relationships. The Tribunal accepts, on the basis of the evidence of the applicant and her witness, that this led to considerable pressure from her family and some rejection of her and difficulties in the workplace which has been claimed.
54. In this context, in the Tribunal's view, it is not implausible that a person in the applicant's position then, as a young, single woman, would travel away from Mongolia for a short period to escape the stress and to make decisions concerning her life. The information from the United Kingdom Home Office from 2005 supports the view that this may be a reason for travel by lesbians from Mongolia. The applicant's return to Mongolia, at that time, however is reasonable given that she was yet to experience significant personal physical harm as a result of her sexuality. Her problems at that time centred on workplace harassment and personal rejection by her family which she may reasonably have felt could be resolved.
55. The subsequent decision to commence a heterosexual relationship, partly prompted by her mother's insistence, could also be seen to undermine her claim. However, it is the view of the Tribunal that taking account of all the circumstances affecting the applicant, this was a reaction to the situation she found herself in. It is not unknown that women and men who are lesbian and gay have been within heterosexual relationships at some time. This confusion in the applicant's relationships would, in the Tribunal's view, be even more likely in a country where societal limitations on homosexuality were greater than in Australia.
56. The Tribunal accepts then, that while the applicant has entered a heterosexual relationship, and this resulted in the birth of a child, the applicant has at all relevant times seen herself as

lesbian. The actions she took were, in the Tribunal's view, prompted by the negative social implications of homosexuality in Mongolia and among members of her family.

57. In the context of the applicant's heterosexual relationship, the Tribunal accepts that she has suffered serious harm, being violence directed at her over time by her partner. It is also clear, however, that the police have, at least on one occasion responded to that violence, with her partner being detained for a period. The applicant herself, has also made use of available resources for women who are the victims of violence.
58. It is the case, however, that in this matter the violence directed at the applicant by her partner is, essentially and significantly, based on the fact that she is lesbian. Her evidence, which is accepted by the Tribunal that it is the fact that she is lesbian which has prompted his violence, that he makes reference to this on occasion when perpetrating violence and that he has told the police about her sexuality. In the Tribunal's view then, this matter extends beyond a matter of violence between domestic partners, were one may say that there is no Convention reason for the violence being directed at the partner. In this case, it is evident that the applicant's sexuality is an integral part of the reason that her partner directs violence towards her, apparently because he feels that she has used him to have a child and it reflects on his reputation to have had a relationship with a person now identified generally as lesbian.
59. The Tribunal is of the view that harm would be directed at the applicant because she is lesbian. The Tribunal is also satisfied that lesbians form a particular social group within Mongolian society. The commencement of the group Tavilan, the expression of a common sexual orientation and experience of relationships are the indicia that such group exists within Mongolian society, notwithstanding there may be official and societal attempts to deny this.
60. The protection offered by the Mongolian authorities to the applicant have been limited over time. While they have on occasion intervened to protect the applicant and on one occasion have detained her former partner for a substantial period, in the Tribunal's view, the protection offered to the applicant cannot be considered adequate and effective to an international standard in respect of the applicant's situation. The Tribunal accepts that most recently the applicant has herself been subject to verbal abuse by police involved in the reporting of violence against her. As her sexual orientation has become more widely known the Tribunal accepts that this has seen the police be more reluctant to assist her and make threats against her which could further the harms she has experienced. This is consistent with the independent country information which indicates that entrenched hostility to lesbians is evident in institutions in Mongolia, and that the police continue to keep files in respect of a person's known sexual orientation. The applicant herself has expressed an unwillingness to seek the protection of police because of her past treatment by them and this is consistent with the experiences of Ms Garner who reports a lack of reporting of violence for fear of further harassment from police themselves.
61. It must also be considered whether the applicant would be able to obtain protection from harm by relocating to another area of Mongolia. The Tribunal accepts that the applicant's former partner has attempted to find the applicant in the past after she had tried to separate from him and that he would likely do so on return to Mongolia. This could particularly be said to be the case where, as here, the parties have a child with whom the former partner is interested in having a continuing relationship. The chance of the applicant being located must be said to be one which is real, given that she is a single mother of a young child, with limited family support and financial resources. Her former partner is wealthy, with a reasonable capacity to search for the applicant should she return.

62. It is also true that the general country information in respect of lesbians in Mongolia indicates that there is considerable social discrimination and harassment directed at homosexuals, which on occasion can be expressed as violence and this appears to be evident throughout the country. While there has been efforts by police to deal with the applicant's former partner, the Tribunal accepts the applicant's evidence that this has also led to abuse of herself by police once her sexuality has become known. Her general experience of social isolation from her relatives, demands made by them of her, difficulties in finding and securing employment and unkind references to her sexuality being common are all consistent with the independent information about how lesbians and gay men are treated in Mongolia.
63. Considered in context then, there is a strong possibility that on return the applicant would find herself not able to access whatever protection is available to her in Mongolia. It is likely on return that her family would continue to offer only limited support if she continued in lesbian relationships and that this may, over time, impact on the interest of police in assisting her should she require their protection. These factors, coupled with the continued threat of direct physical violence from her former partner, lead the Tribunal to the conclusion that there is a real chance that the applicant would suffer persecution on return to Mongolia in the terms contemplated by the Refugees Convention and s.91R of the Act. The Tribunal is satisfied that the harms involved would be serious and would systematically be directed towards the applicant.
64. While there have been some developments in recent years regarding the treatment of lesbians and gay men in Mongolia, in the Tribunal's view the balance of the available country information still supports a conclusion that there are serious social difficulties encountered by lesbians and that in this case there is a real chance that this could see the applicant come to serious harm, which is systematic and discriminatory
65. The Tribunal finds that there is a real chance of the applicant experiencing serious physical harm for reasons of her membership of the particular social group of lesbians in Mongolia.
66. For these reasons the Tribunal is satisfied that the first named applicant is a person to whom Australia has protection obligations under the Refugees Convention. Therefore the first named applicant satisfies the criterion set out in s.36(2)(a) for a protection visa and will be entitled to such a visa, provided she satisfies the remaining criteria.

## DECISION

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

I certify that this decision contains no information which might identify the applicant or any relative or dependant of the applicant or that is the subject of a direction pursuant to section 440 of the *Migration Act 1958*.  
Sealing Officer's I.D. prrt42