

061020474 [2007] RRTA 25 (7 February 2007)

DECISION RECORD

RRT CASE NUMBER: 061020474

DIMA REFERENCE(S): CLF2004/22070

COUNTRY OF REFERENCE: Mongolia

TRIBUNAL MEMBER: Ron Witton

DATE DECISION SIGNED: 7 February 2007

PLACE OF DECISION: Sydney

DECISION: The Tribunal remits the matter for reconsideration with the direction that the applicant is a person to whom Australia has protection obligations under the Refugees Convention.

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

This is an application for review of a decision made by a delegate of the Minister for Immigration and Multicultural Affairs to refuse to grant the applicant a Protection (Class XA) visa under s.65 of the *Migration Act 1958* (the Act).

The applicant, who is a citizen of Mongolia, arrived in Australia and applied to the Department of Immigration and Multicultural Affairs for a Protection (Class XA) visa. The delegate decided to refuse to grant the visa and notified the applicant of the decision and her review rights.

The applicant sought review of the delegate's decision. The delegate refused the visa application on the basis that the applicant is not a person to whom Australia has protection obligations under the Refugees Convention.

The matter is now before the Tribunal.

RELEVANT LAW

Under s.65(1) a visa may be granted only if the decision maker is satisfied that the prescribed criteria for the visa have been satisfied. In general, the relevant criteria for the grant of a protection visa are those in force when the visa application was lodged, in this case 5 April 2004, although some statutory qualifications enacted since then may also be relevant.

Section 36(2) of the Act relevantly provides that a criterion for a Protection (Class XA) 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 Refugees Convention as amended by the Refugees Protocol. 'Refugees Convention' and 'Refugees Protocol' are defined to mean the 1951 Convention Relating to the Status of Refugees and 1967 Protocol relating to the Status of Refugees respectively: s.5(1) of the Act. Further criteria for the grant of a Protection (Class XA) visa are set out in Parts 785 and 866 of Schedule 2 to the Migration Regulations 1994.

Definition of 'refugee'

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

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

The High Court has considered this definition in a number of cases, notably *Chan Yee Kin v MIEA* (1989) 169 CLR 379, *Applicant A v MIEA* (1997) 190 CLR 225, *MIEA v Guo* (1997) 191 CLR 559, *Chen Shi Hai v MIMA* (2000) 201 CLR 293, *MIMA v Haji Ibrahim* (2000) 204 CLR 1, *MIMA v Khawar* (2002) 210 CLR 1, *MIMA v Respondents S152/2003* (2004) 222 CLR 1 and *Applicant S v MIMA* (2004) 217 CLR 387.

Sections 91R and 91S of the Act now qualify some aspects of Article 1A(2) for the purposes of the application of the Act and the regulations to a particular person.

There are four key elements to the Convention definition. First, an applicant must be outside his or her country.

Second, an applicant must fear persecution. Under s.91R(1) of the Act persecution must involve “serious harm” to the applicant (s.91R(1)(b)), and systematic and discriminatory conduct (s.91R(1)(c)). The expression “serious harm” includes, for example, a threat to life or liberty, significant physical harassment or ill-treatment, or significant economic hardship or denial of access to basic services or denial of capacity to earn a livelihood, where such hardship or denial threatens the applicant’s capacity to subsist: s.91R(2) of the Act. The High Court has explained that persecution may be directed against a person as an individual or as a member of a group. The persecution must have an official quality, in the sense that it is official, or officially tolerated or uncontrollable by the authorities of the country of nationality. However, the threat of harm need not be the product of government policy; it may be enough that the government has failed or is unable to protect the applicant from persecution.

Further, persecution implies an element of motivation on the part of those who persecute for the infliction of harm. People are persecuted for something perceived about them or attributed to them by their persecutors. However the motivation need not be one of enmity, malignity or other antipathy towards the victim on the part of the persecutor.

Third, the persecution which the applicant fears must be for one or more of the reasons enumerated in the Convention definition - race, religion, nationality, membership of a particular social group or political opinion. The phrase “for reasons of” serves to identify the motivation for the infliction of the persecution. The persecution feared need not be *solely* attributable to a Convention reason. However, persecution for multiple motivations will not satisfy the relevant test unless a Convention reason or reasons constitute at least the essential and significant motivation for the persecution feared: s.91R(1)(a) of the Act.

Fourth, an applicant’s fear of persecution for a Convention reason must be a “well-founded” fear. This adds an objective requirement to the requirement that an applicant must in fact hold such a fear. A person has a “well-founded fear” of persecution under the Convention if they have genuine fear founded upon a “real chance” of persecution for a Convention stipulated reason. A fear is well-founded where there is a real substantial basis for it but not if it is merely assumed or based on mere speculation. A “real chance” is one that is not remote or insubstantial or a far-fetched possibility. A person can have a well-founded fear of persecution even though the possibility of the persecution occurring is well below 50 per cent.

In addition, an applicant must be unable, or unwilling because of his or her fear, to avail himself or herself of the protection of his or her country or countries of nationality or, if stateless, unable, or unwilling because of his or her fear, to return to his or her country of former habitual residence.

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

CLAIMS AND EVIDENCE

The Tribunal has before it the Department's file relating to the applicant. The Tribunal also has had regard to the material referred to in the delegate's decision, and other material available to it from a range of sources.

The applicant appeared before the Tribunal to give evidence and present arguments.

Evidence before this Tribunal

The applicant's then adviser submitted the following "information on situation with sexual minorities in Mongolia" drawn from a number of web pages:

1. A statement from a webpage from *Mongoldyke / Home*:

We, the homosexuals, of Mongolia

You don't have to live your life feeling ashamed of yourself, of your sexual orientation and/or gender identity that does not conform with your birth gender identity, thinking that you are the only "freak" among so-called "normal" people. Everywhere around the world, from Alaskan icebergs to African forests. We, the homosexuals and genderqueers, or people living beyond the gender hierarchy, exist, have existed and will exist. Various scientific studies, starting with the famed Kinsey's study of sexuality, have revealed the fact that we constitute at least 10 to 15 percent of any given social group. However, latest anthropological and cultural studies show that the previous studies have in fact an underestimation of our numbers, that we constitute at least 25 percent of any social group. Till the moment, science has been unable to determine the causes and reasons of sexual orientation formation, but the sole fact that you must be aware of is. You are not alone. We are plenty, and have a history as well as culture attributable to our existence. Since the Ancient civilizations of Greece, Rome, India. China and Ancient Mongolian Tribes, we have been forming our communities and niches within the heterosexual society. In the context of cultural globalization and other recent phenomena, we have re/discovered our right to exist without shame and ostracization. From '60s and '70s of the last century, we have been fighting for and have been granted one by one recognition of our humanity, of our right to exist in our differences. Legally, we have been granted non discrimination based on our sexual orientation.

Many governments around the world as well as progressive multi-national corporations and companies have introduced officially non-discrimination policy into their practices, and many of our sisters and brothers are protected from arbitrary job refusal and firing, and have been given the corresponding rights to receive spousal benefits, social and health insurance on par with partners of heterosexual people. It has been over six years since the United Nations Socio.Cultural Convention's article 59 (for more information please. go to the Announcements section of the website) was deliberated, and the non discrimination issue was given a highlight to reflect the status of homosexual people. Number of countries have recognized the fact that there ought not to be discrimination based on one's sexual orientation, following which they have Trade amendments to their Constitutions.

However, the situation in Mongolia is not simply different from the above, it is, grossly different. whereby we are treated as dirt and non-humans. The State of Mongolia does not only ignore the international conventions it joins. it simply uses its machineries such as police, to violate our human and civil rights through non-recognition of us as existent. This fact can be very well attested to by people working in LGBT organizations of Mongolia, such as MILC. You yourself being a homosexual might not have ever heard of these organizations which is another evidence of the extent of discrimination that goes rampantly against us. We are fighting everyday for our space, for our safety and our rights after the exemplaries within the community, but we are still unable to reach out to all the community members. To reach out to the queer community in Mongolia, we have started out as a hotline in late 2000 and we had advertized the hotline on two FM radio stations. Now we are using the Internet for the last ten or so months. Meanwhile, the Mongoldyke has seen the birth of its fellow gay sites, another step forward that should be hailed for the stronger we are in our unity and our voicing our realities, the sooner we shall be able to secure our dignity and acceptance in Mongolian context. On the other hand, the longer we are silent, the longer we are meek and disjointed, the more shall we be the victims of anti-LGBT violence, thereby losing our sisters and brothers one by one either to death or to other countries avid then the concept of greyness propagated by one play shall triumph.

Recently, one professor of economics in one Asian country made a queer (considering his straightness) remark during his lecture. He said. "Wherever there are many homosexuals, there you see rapid economic and social development, and that is a proven fact." Upon hearing those words, the faithful Webdyke was thinking, "If only all straights would recognize it... Mongolia will then prosper!" Another thing we must constantly be aware of is non-discrimination within our own communities.

We had been already visited by 1900 computers from all around the world since the new version of Mongoldyke.org.mn had been activated. Thanks for the support and staying with us!

Welcome home. Welcome to your own queer space!

2. **HOMOSEXUAL RIGHTS AROUND THE WORLD MONGOLIA**

LAWS: Has a sodomy law. Section 113 of the Penal Code prohibiting "immoral gratification of sexual desires" can be used against homosexuals.

3. Richard Smith, in an article entitled "Queer Mongolians: Is Isolation Their Destiny?" (IIAS Newsletter, No. 29, November 2002, http://www.iias.nl/iiasn/29/IIASNL29_14.pdf, accessed 28 October 2004), states that by the time of its second general meeting in the summer of 2000, interest in *Tavilan* had waned and there were only five people in attendance. This could indicate timidity or timorousness on the part of the intended constituency. *Tavilan* was able to obtain a grant from the Mongolian AIDS Foundation to fund a 24-hour hotline for "gay," lesbian and bisexual Mongolians; however, the funding evidently ceased.

4. Mongolia News Report 1999, from Ulan Bator Post June 30th 1999

First Gay and Lesbian Group Opens Ulan Bator Office: Group founders plan to fight harassment

Mongolian's first gay and lesbian's rights group, *Tavilan* or Destiny, formed this spring because of accusations of "police harassment and improper sentencing procedures that violated civilian rights."

This past month Tavilan opened a small office in central Ulaanbaatar to begin building an organization to counter such problems.

The accusation of harassment came in a Post interview with one of the group's founding members. The member, one of 22 founders, asked not to be named for fear of intimidation.

Incorporated this past April, the group's aim has been to protect and promote the rights of gay and lesbian people in Mongolia. Members intend to create a social network, link with gay rights groups overseas and encourage better understanding amongst the general public.

Tavilan recently participated in the Run/Walk for AIDS and it regularly organizes a Sunday basketball/volleyball game and weekly social night. New Ulaanbaatar residents are welcome to attend.

Tavilan may be contacted by E-mail at: idre9@hotmail.com and by post at: Box 405, Ulaanbaatar 210644.

5. Gay Mongolia

Presently, according to the latest gossip, the most popular gay cruising place is in front of the State Department store downtown, although, Ron warned "I've also been told that it can be risky. The police are still in the 'commie' mode here and stop people constantly asking for ID. I personally think the cops look sexy in their green Russian army outfits, but I wouldn't trust them at all. It's unclear if homosex is actually against the law, although my UNDP source says it is."

His opinion was that in the "last couple of years so many things have been liberalizing in leaps and bounds so that maybe nobody cares too much anymore about snooping out gay offenses. Maybe. The old Soviet system was hard on gays so one can expect the mentality to be still there. "

6.

Information provided by the Research Directorate of the Canadian Immigration and Refugee Board ("Mongolia: Treatment of homosexuals by the authorities" 26 March 1999, MNG31446.E) argues that homosexuality remains very hidden in Mongolia. The same source states She said that homosexuals in Mongolia who do not remain "closeted" would likely face harassment. -

In another report ("Mongolia: Update to MNG31446.E regarding the treatment of homosexuals," 14 December 2000, MNG35918.E), the Research Directorate noted that Mongolia's first gay and lesbian advocacy group, Tavilan, had been formed in Ulaan Bator in April 1999 because of "police harassment and improper sentencing procedures that violated civilian rights' and `to protect and promote the rights of gay and lesbian people in Mongolia." The report noted that an Internet website that-provided information on Tavilan contains the following information:

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.

At the hearing the applicant submitted the following statement by an official of an organisation (Organisation A):

Being the Young Women's [officer] at [Organisation A], I have come across many stories of persecution and hardship of same sex attracted women. [The applicant]'s call for help is a most exceptional one.

[The applicant] is an openly bisexual woman. [The applicant] has accessed support through [Organisation A]. [The applicant] has communicated to me extensively about her activities with other lesbian and bisexual women.

It is my understanding that [the applicant] had a serious relationship with a [Country B] female partner in Australia. This relationship ended when her partner returned to [Country B]. Since this time [the applicant] has been active in casual sexual relationships with a number of lesbian and bisexual women. [The applicant] has accessed [Organisation A] for sexual health information as well as social support. [The applicant] has shown me photographic evidence of her attendance at various lesbian social nights over the past [number] months.

The unthinkable physical persecution [the applicant] has endured for being bisexual in Mongolia is heart wrenchingly shocking. [The applicant] has suffered severe physical trauma for being in openly lesbian relationship. [The applicant] has also endured the mental anguish and trauma resulting from the rape of her female partner during one of these homophobically motivated physical assaults.

In her culture, [the applicant]'s sexual identity is viewed as an illness. This cultural construct has resulted in social isolation, restricted access to appropriate health care service, and a reduced lack of employment opportunities for [the applicant]. This isolation, and the ongoing physical and mental trauma from the discrimination she has suffered, led [the applicant] to attempt to take her own life in desperation to escape. According to the International Lesbian and Gay Association, Mongolia still has a law prohibiting sodomy as well a section of the Penal Code prohibiting "immoral gratification of sexual desires" (Section 113). Both of these laws can be used to discriminate against homosexuals and bisexuals. Accusations of "police harassment and improper sentencing procedures that violate civilian rights" have been made by the countries only gay and lesbian's rights group, 'Tavilan' or 'Destiny' (Ulan Bator Post, June 30, 1999).

Persecution of lesbian, gay and bisexual people in Mongolia is real and unjust. There is no context of gay community or support in Mongolia, something I would consider vital for [the applicant]'s mental and physical well being. If [the applicant] were to return to her country of origin, she would face possible imprisonment and on-going persecution.

Accompanying this statement were a number of photographs of the applicant at a lesbian social event.

In her oral evidence to the Tribunal the applicant stated that her relationship with a woman Person X had begun when they were 15 and continued for over ten years. She said she had not had any relationships with anyone else during that time but had had slept with a male person prior to coming to Australia. It was for this reason she described herself as a lesbian and a bisexual.

The Tribunal asked what she feared were she to return to Mongolia. She said that when she was there she had been "stressed" by other people. She said this had culminated in the events when she and Person X had been at a bar and had danced and kissed and had been verbally insulted by male patrons who had also tried to assault them. After they left the bar, they had been followed by two men and they had been separated and the men had assaulted them. She described in graphic detail how she had managed to escape from the man who had assaulted her and had run away but Person X had been raped. She said that she had gone to a police station to try and get help and the police had insisted she provide details about the

relationship between them and she had told the police that she and Person X were in a relationship. The police said that that was the reason they had been attacked but had agreed to go with her but they had not found Person X. On the advice of the police the applicant had gone to Person X's home to see if she had managed to get home and Person X had indeed managed to get home but believed that the applicant had abandoned her and so broke off their relationship. Person X asked her not to discuss their relationship or the attack further with anyone.

The Tribunal asked if she had ever been attacked like that before and she said she had not but had "suffered" because of her lesbianism. She said that at school their relationship had become known and reported to her parents and she had been excluded from school for several months. She said that her parents were highly critical of her sexuality and had tried to "hit" her and eventually "disowned" her. She said that her father later was killed in mysterious circumstances and had continued to love with her mother while she studied and completed her university degree. She said that after the attack she was very stressed and had even tried to commit suicide. The Tribunal asked whether she had made contact with a gay counselling service. She said she had talked to someone who confirmed that there were "many" in Mongolia like her but that they could do nothing to protect her. They said they would try and find someone to help her given her current psychological stress and suicidal tendencies. She said she wanted them to talk to her mother which her mother did but this only increased her mother's high blood pressure and her mother then forbade her to have any further contact with the counselling service and their doctor advised the applicant to leave her mother alone so as to reduce her stress.

She said that she was not aware of the lesbian website cited in the submission and that her then adviser had found it. She said she had not known of it in Mongolia. She said she had had no contact with other lesbians in Mongolia.

The applicant said she was worried about being able to get employment in Mongolia. She had only applied for one position after graduation but had not been successful and had been given no reason. The applicant said that the girl who got the job had been a fellow student and that "may be" she had reported to them that the applicant was a lesbian.

She said she had come to Australia on another visa that had been arranged for her and for which she had to pay money.

Independent evidence

Government reports:

UK Home Office 2005, *Country of Origin Information Report – Mongolia, October*

The UK Home Office *Country of Origin Information Report* was published in October 2005 and includes references to a number of sources, including the Immigration and Refugee Board of Canada, International Institute for Asian Studies, International Lesbian and Gay Association and Utopia website. Please note that the sources referred to are dated 31 July 2000, November 2002, 5 December 2003 and 7 June 2005. The UK Home Office provides the following information on homosexuality in Mongolia:

- 6.62 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.” [18]
- 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.” [19d]
- 6.64 As noted by the Asian AIDS/HIV Information Archive, accessed on 7 June 2005, the Youth Center for Gay Men was formed in 2003 and organises training about safe sex. [21] (p6)
- 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.” [24]

Immigration and Refugee Board of Canada 2003, MNG42200.E – Mongolia: Update to MNG31446.E of 26 March 1999 on the current treatment of homosexuals by the authorities, 5 December

INTERNET: http://www.irb.gc.ca/cgi-bin/fofiocgi.exe/refinfo_e

The Immigration and Refugee Board of Canada provides the following information on homosexuality in Mongolia:

Citing from a 30 June 1999 *Ulan Bator Post* article, the International Lesbian and Gay Association’s (ILGA) World Legal Survey on Mongolia states that in April 1999, Tavilan or Destiny, became Mongolia’s first lesbian and gay rights group (17 Sept. 1999). Tavilan’s mandate was to protect and promote gay and lesbian rights, to establish international networks with other gay rights groups and to foster understanding among the general public in Mongolia (ILGA 17 Sept. 1999).

One member of the group stated to the *Ulan Bator Post* that the group formed because of “‘police harassment and improper sentencing procedures that violated civilian rights’” (ibid.). Another article, authored by a former member of the US Peace Corps

who served in Mongolia and published in the International Institute for Asian Studies Newsletter (IIAS), stated that Tavilan was created after the murder of a gay man and the subsequent police interrogation of known gay men (IIAS Nov. 2002). The IIAS article adds the following details about the group:

In the summer of 2000, Destiny had its second general meeting, but only had five people in attendance. Perhaps queer Mongolians were afraid to meet in the Children's Palace, a public building in the centre of Ulaanbaatar. At that meeting, a lesbian joined the group as a member of the board of directors. As an employee with a woman's NGO, she held workshops at various universities on gender and was able to come out during some of her presentations.

Although membership waned, the group was able to get a grant from the Mongolian AIDS Foundation to fund a 24-hour hotline for gay, lesbian, and bisexual Mongolians who had questions about HIV/AIDS/STD prevention. Unfortunately, as international donor interest in Mongolia declined, the funding for this grant dried up (ibid.).

In 2002, after failing to generate new members and organize community activities via an online discussion group, the founder of Tavilan reportedly posted the following Internet message:

“We just killing [*sic*] and sad. There is no gay community in Mongolia. And also there is still no gay life in [Ulan Batar]. Why do we have no connections, no trust, and no information? We need do something [*sic*] for gay, lesbian, bisexual, trans, community” (ibid.).

Regarding the socio-political climate for homosexuals in Mongolia, the author maintains that

Mongolia has no sodomy laws per se, but it lacks any specific human rights protections 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 (ibid.).

Moreover, in the author's opinion, homosexuals who leave Mongolia “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” (ibid.).

UK Home Office 2003, *Mongolia Bulletin 1/2003*, August

The UK Home Office *Mongolia Bulletin* was published in August 2003 and includes references to a number of sources, including the Canadian Immigration and Refugee Board and the International Lesbian and Gay Association. Please note that the sources referred to are dated March 1999 and December 2000. The UK Home Office provides the following information on homosexuality in Mongolia:

6.B.22 Although the Constitution does not penalise homosexuality per se and there are no specific laws banning homosexual activity, gay groups believe that Section 113

of the penal Code, which prohibits “immoral gratification of sexual desires”, may be used to punish homosexual acts. Limited anecdotal evidence suggests that homosexuals have been detained and questioned about their contacts and it is believed that the police keep files on known homosexuals. There is societal distaste for same sex relationships, with one expert in March 2000 stating that most homosexuality remains deeply hidden and that known homosexuals would quite likely face harassment. A social and advocacy group called Tivilan (Destiny) was launched in April 1999 and subsequently received official recognition. Tivilan, which currently had 130 members, has opened an office and switchboard in central Ulaanbaatar. It organises safe sex courses and social events. [3c][3n][4f]

DIMIA Country Information Service 2003, *Country Information Report No. 40/03 – Mongolia: Homosexuality in Mongolia* (sourced from DFAT advice of 28 February 2003), 4 March
CISNET Mongolia CX73861

DFAT provided the following information on the current legal status of homosexuality in Mongolia, support services available, the current social attitudes to homosexuals and how homosexuals are treated by the police:

Questions: [24/01/03]

Q.1 What is the current legal status of homosexuals in Mongolia? If homosexuality is legal from what date did legality commence?

Q.2 What support services are specifically available for homosexuals in Mongolia?

Q.3 What are the current social attitudes to homosexuals in Mongolia? How are they treated by police?

Answers: [28/02/03]

A.1 Homosexuality is not illegal in Mongolia. The new criminal code, which came into effect on 1 September 2002, contains no specific reference to homosexuality. Under the previous criminal code, homosexuality in Mongolia was illegal.

A.2 Support services for homosexuals in Mongolia are extremely limited. There are no registered organisations dealing specifically with homosexuals, though health organisations working in HIV prevention have contact with the homosexual community.

A.3 Social attitudes to homosexuality in Mongolia remain negative, particularly among the conservative older generation, though the younger urban population is more accepting. The negative portrayal of homosexuals in popular tabloid newspapers reinforces negative social attitudes. We have no direct evidence, but understand from one NGO we spoke to that homosexuals may be subject to discrimination and social exclusion. We have heard second hand rumours that police monitor groups of homosexuals when they congregate in public places, and maintain an unofficial list of homosexuals.

Immigration and Refugee Board of Canada 2000, MNG35918.E – Mongolia: Update to MNG31446.E regarding the treatment of homosexuals; whether there are any gay clubs/bars/discotheques in Ulaanbaatar (Ulan Bator); whether known homosexuals were arrested in connection with the murder of a singer in 1996, 14 December

INTERNET: http://www.irb.gc.ca/cgi-bin/fofiocgi.exe/refinfo_e

The Immigration and Refugee Board of Canada provides the following information on Tavilan, Mongolia's first gay and lesbian advocacy group:

Mongolia's first gay and lesbian advocacy group, an, was formed in Ulaanbaatar (Ulan Bator) in April 1999 (Tavilan n.d.; ILGA 1999). According to the UB Post as cited by ILGA, the group was formed because of "police harassment and improper sentencing procedures that violated civilian rights" and "to protect and promote the rights of gay and lesbian people in Mongolia. Members intend to create a social network, link with gay rights groups overseas and encourage better understanding amongst the general public" (ibid.). The ILGA report adds that the Tavilan member interviewed for the UB Post article "asked not to be named for fear of intimidation."

A Website that provides information on Tavilan contains the following information:

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 Tivilan flourish (n.d.).

NGO REPORTS

Garner, Robyn 2006, Email to RRT Country Research: 'Re: harassment of lesbians in Mongolia', 25 August

Robyn Garner, an Australian journalist living and working in Mongolia who has more than two years' involvement in the "very much underground LGBT community in Mongolia", provided the Tribunal with the following advice on the treatment of lesbians in Mongolia on 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.

Olhонууд, Anaraa Nyamdorj 2006, Email to RRT Country Research: 'Information request on harassment of lesbians in Mongolia', 25 August

Anaraa Nyamdorj Olhонууд, Founder/Coordinator of the Mongolian Lesbian Information and Community Centre, provided the Tribunal with the following advice on the treatment of lesbians in Mongolia on 25 August 2006:

In regard to the documentation pertaining to human rights violations against LGBT people, the MILC doesn't have direct documentation such as photographs of victims of homophobic crimes, even though such occurrences are not rare at all. For instance, my very close gay male friend P. has been beaten up twice, once in December 2003 and once in April 2005 because of his sexual orientation. The first time he was followed till his home by a gay-basher who had seen him and his boyfriend at a nightclub and the basher beaten P. quite badly right at the doorstep of the flat he lived with his boyfriend in. The second time the violence was perpetrated by his own relative to whom he came out and who consequently beat him within a hairsbreadth of his life. My friend has since left Mongolia and now lives in Thailand.

...I must stress here that a limited documentation does not, however, mean that such abuses do not take place. Indeed, it could be argued that the lack of such documentation directly points to the huge extent of violence and social intolerance towards LGBT people whereby even the victims themselves are not able to report such crimes to the police since they will be unwilling to disclose the grounds of them being attacked. It must also be stressed that usually such violence comes from the

closest people – family and relatives to whom LGBT people either come out, or who find us out to be gay – and not usually from just random strangers. When violence takes place, the victims never file any charges due to fear of secondary victimisation by the police, which would explain why there is a lack of documentation with the law enforcement agencies. Plus, to the best of my knowledge, the Police Department of Mongolia and the National Security Agency keep a dossier on Mongolian homosexuals, claiming that we, homosexuals, are a threat to the national security of Mongolia. In such setting, there is no question of ever going to the police about victimisation one faces, since the victimisation that one will then have to face from the police is much worse.

Being gay in Mongolia at times is dangerous to the point of death. There is no mention in the 1992 Constitution of Mongolia regarding non-discrimination based on sexual orientation, even though Mongolia has joined all the UN human rights conventions and covenants, among which there are covenants that specifically mention non-discrimination based on sexual orientation. The functioning UN Office of the High Commissioner On Human Rights in Ulaanbaatar does not identify LGBT discrimination and human rights violations as one of the areas of concern in Mongolia, neither does Amnesty International Mongolia Office, and their inability to identify the human rights violations that take place against LGBT people is solely based on their heteronormative framework of the human rights. There is a total lack of information and wide-spread misinformation regarding the LGBT people in Mongolia, where sexual orientation is deemed as something frivolous and something that can be decided and changed on one's own volition. With the exception of the Sexual and Reproductive Health Secondary School subject textbook where lives of three gay people are described (my life narration as well as narrations of two gay men), secondary education curriculum does not carry any comprehensive information regarding sexual orientation, which further helps to normalise the idea of heteronormativity.

Olhонууд, Anaraa Nyamdorj 2006, *Life Denied: LGBT Human Rights in the Context of Mongolia's Democratisation & Development*, Paper presented at the Outgames International LGBT Human Rights Conference, July 26-29, 2006, Montreal, Canada

Anaraa Nyamdorj Olhонууд, Founder/Coordinator of the Mongolian Lesbian Information and Community Centre, presented a paper on LGBT human rights in Mongolia at the Outgames International LGBT Human Rights Conference held in Montreal between 26 and 29 July 2006. The following extracts provide information on the treatment of homosexuals in Mongolia:

Now a decade and a half later, Mongolia is recognised as one of the free countries according to the Freedom House index, projecting a high indicator of two for both political rights and civil liberties. However, there are grave doubts regarding Mongolia as a free country based on the real-life experiences of the LGBT people in Mongolia which raise questions such as: how free is Mongolia really? Have all civil liberties been assessed when evaluating Mongolia as free.

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 7th 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.

...During the socialist times, the Government outlawed not the LGBT identities per se, but the 'immoral gratification of one's carnal needs' in the Section 113 of the Criminal Code of Mongolia, a section that remains unmodified even after Mongolia's democratisation and even after similar sections of Criminal Code have been repelled from laws of the Russian Federation and the CIS countries, the former USSR republics.

...From the early 1991 and 1992, with the introduction of the cable television in Mongolia and influx of foreign movies and muscid channels, etc., social attitudes changed: at last the heteronormative public discourse was breached with images of homoeroticism and homosexuality, leading toward potential enabling of the public sphere for the first time in the history of the 20th century Mongolia. It was further contributed to by the mass media's newly found (but yet to be fully realised) freedom of press: it exposes Mongolian society to the existence of the LGBT people in Mongolia itself with reports on and interviews with two publicly out gay men, Gambush and Anaraa. However, mass media's ignorance, reflective of the general population's ignorance regarding the LGBT people, also led to the sensationalisation of the LGBT identities as un-Mongolian and therefore the socialist rhetoric and discourse of immorality was further reinforced through unethical mass media reporting.

Increased visibility always brings more risks to the marginalised community. Since there was more awareness in the straight community that LGBT existed among their midst, social attitudes toward LGBT became pronouncedly intolerant than compared

with those of the socialist times, giving a rise to a systemic discrimination, homophobic violence and incitement of violence against LGBT through various homophobic television Q&A programmes, and popular art.

Since there is now increased awareness and self-acceptance among the LGBT about the human rights and fundamentality of one's sexual orientation, there have been a number of sporadic, but short-lived efforts to desensationalise the LGBT identities through activism, community empowerment and human rights advocacy, as is discussed in the next section.

One of the most troubling developments in regard to the LGBT rights in Mongolia is the fact that the State began its rhetoric of 'homosexuals as a threat to the national security' in the early 2004 as a consequence of the HIV/AIDS panic in the country, and many gay males were forced to undergo HIV tests under physical and psychological coercion that presumably involved threats and emotional blackmail. The rhetoric is not waning, but strengthening in its force and magnitude, as the registered cases of HIV+ people in Mongolia have reached their record high as of 23 by July 2006.

FINDINGS AND REASONS

The applicant claims that she has suffered an assault and social ostracism in Mongolia for reason of her sexual orientation as a lesbian and fears serious harm should she return to Mongolia.

The Tribunal found the applicant to be credible and accepts her evidence that she was in a long relationship with a woman in Mongolia and that they were attacked after exhibiting affection in public. The Tribunal further accepts that she had suffered social ostracism in the past for reason of her sexual orientation. The Tribunal also accepts the evidence of Organisation A that the applicant is a lesbian.

The Tribunal accepts the independent evidence that the police in Mongolia do not provide effective protection against attacks on gay and lesbian people. Indeed the independent evidence suggests that they share the societal prejudice against homosexuals and have themselves been responsible for harassment of homosexuals in Mongolia. The independent evidence likewise suggests that social attitudes towards homosexuality remain negative throughout Mongolia

In the face of the evidence before it, the Tribunal finds that she is a member of a particular social group in Mongolia, being a lesbian. . The Tribunal finds that this particular social group would have characteristics that unite the collection of individuals and which set the group apart, as a social group, from the rest of the community, and that they are cognizable in Mongolian society. The Tribunal further finds on the basis of the independent evidence cited above, that members of this social group are vulnerable to serious harm and that the police, as indicated by the independent evidence cited above, lack sufficient professional training to afford appropriate protection to women, such as the applicant, facing harm and that they may even be agents of such persecution.

The Tribunal has also considered the option of relocation. However, the Tribunal finds that the independent evidence indicates that the applicant would not be able to avoid the serious

harm she fears by relocating elsewhere within Mongolia. Indeed the situation outside the capital city is likely to be even less favourable to her.

In the light of these findings, the Tribunal therefore finds the applicant to fit the profile of someone now at risk and hence finds that the applicant's fear of persecution upon return to Mongolia for reason of her membership of a particular social group to be well founded.

CONCLUSIONS

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

DECISION

The Tribunal remits the matter for reconsideration with the direction that the applicant is 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>. PRRRNM</p>
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