

071723892 [2007] RRTA 323 (5 December 2007)

DECISION RECORD

RRT CASE NUMBER: 071723892

DIAC REFERENCE(S): CLF2007/99004

COUNTRY OF REFERENCE: Fiji

TRIBUNAL MEMBER: Shahyar Roushan

DATE DECISION SIGNED: 5 December 2007

PLACE OF DECISION: Sydney

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

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

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

The applicant, who claims to be a citizen of Fiji, arrived in Australia and applied to the Department of Immigration and Citizenship for a Protection (Class XA) visa. The delegate decided to refuse to grant the visa and notified the applicant of the decision and his review rights by letter.

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

The applicant applied to the Tribunal for review of the delegate's decision.

The Tribunal finds that the delegate's decision is an RRT-reviewable decision under s.411(1)(c) of the Act. The Tribunal finds that the applicant has made a valid application for review under s.412 of the Act.

RELEVANT LAW

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

Section 36(2)(a) of the Act provides that a criterion for a protection visa is that the applicant for the visa is a non-citizen in Australia to whom the Minister is satisfied Australia has protection obligations under 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).

Further criteria for the grant of a Protection (Class XA) visa are set out in Parts 785 and 866 of Schedule 2 to the Migration Regulations 1994.

Definition of 'refugee'

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

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

The High Court has considered this definition in a number of cases, notably *Chan Yee Kin v MIEA* (1989) 169 CLR 379, *Applicant A v MIEA* (1997) 190 CLR 225, *MIEA v Guo* (1997) 191 CLR 559, *Chen Shi Hai v MIMA* (2000) 201 CLR 293, *MIMA v Haji Ibrahim* (2000) 204

CLR 1, *MIMA v Khawar* (2002) 210 CLR 1, *MIMA v Respondents S152/2003* (2004) 222 CLR 1 and *Applicant S v MIMA* (2004) 217 CLR 387.

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

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

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

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

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

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

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

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

CLAIMS AND EVIDENCE

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

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

Application for a Protection Visa

According to his application for a protection visa, the applicant is a national of Fiji. He is ethnically Fijian and a Christian. He completed a number of years of education in Fiji and worked in Fiji.

The applicant claimed to have left Fiji because he was subjected to "physical and extreme verbal abuse" by members of his family. He was subjected to this kind of treatment because he grew up being "gay". His homosexuality caused him to be ostracised by his family, as well as the Fijian community, for the shame he had brought upon them. Before coming to Australia, he experienced physical harassment directed at him by his relatives and "mostly" relative X. He ran away from home to live with a friend for a number of years before he was able to come to Australia. He claimed to fear harm from members of his own family as well as the "Fijian Christian society". The last elected government of Fiji, supported by the Fiji Methodist Church, staged an anti-gay march in Suva. The authorities are unlikely to support him as cases like his are regarded as family matters in Fiji. As homosexuality is illegal in Fiji, the authorities are unable to act even if the matter was serious.

In a separate short statement, the applicant claimed that he was raised by his family. His family is very religious and being gay was a big issue. The last time he saw or spoke to his family was when he moved in with a friend and started working at a local shop. Even after he started working his family still harassed him verbally and was physically abusive towards him whenever they saw him in the streets. He always tried to avoid them, but this was difficult because they lived close to each other. He found it difficult to live in Fiji as a homosexual and decided to come to Australia.

In a supporting written statement, person A stated that he has known the applicant for a number of years. He stated that he travels to Fiji a number of times a year for holidays and to catch up with friends. None of his gay friends in Fiji are in a permanent relationship because of the stigma attached to homosexuality and same sex partnerships. He was in Fiji during one of the anti-gay marches organised by the government with support from the church. He stated that many of his gay friends tell him that they are happy in Fiji, but in reality they are not because they ask him many questions about his living conditions and his rights in Australia.

In another statement, person B stated that the applicant moved in with her sibling when he was a teenager and later was employed in her sibling's shop. He worked there until the shop was sold. In a separate statement, person C described herself as the applicant's best friend and stated that she worked with the applicant in the same shop. She stated that he was well liked by his work colleagues for his "gentleness and good behaviour".

In a supporting letter to the Department, person D stated that she has known the applicant for many years as they grew up in the same area. Ever since the applicant was a young boy he was physically and mentally abused by members of his own family because of his sexual orientation. He also suffered sexual abuse perpetrated by relatives and whenever he cried for help he was accused of making false statements. He also suffered outside of the family environment due to the openly hostile and biased attitude of the Fijian society towards homosexuals. In Fiji homosexuality is illegal and gay sex carries a maximum penalty of 14 years imprisonment. The applicant came to Australia for a holiday and to visit his family members and overstayed his visa due to his fear of returning to Fiji.

In a letter to the Department, person E, the Executive Director of a pro homosexuality organisation in Fiji, stated that Fiji is a hostile country towards members of the gay and lesbian community. Homophobia is reflected in government policy and is spread by Fiji's Methodist Church. Those who display their sexuality openly faced derogatory treatment and speaking in defence of one's behaviour could attract physical retaliation. His organisation has received numerous complaints in relation to the abuse faced by members of the gay and lesbian community. In recent years there has been an increase in the abuse perpetrated by the military and police. They have asked the members of his community to remain silent and not report complaints. Homophobia permeates all levels of the government and is reflected in many policies that discriminate against gay partnerships. Person E attached copies of a number of news items to his letter. These news items dated back to a couple of years ago and concerned the attitude of the church towards homosexuality in Fiji and a case involving the prosecution of gay men for engaging in sex acts.

The applicant also submitted other written statements from friends and acquaintances in Australia, all testifying to his good character and some confirming the fact that the applicant had told them that he was mistreated in Fiji for being a homosexual.

The Department received anonymous information from a member of the community to the effect that the applicant's claims as recorded in his protection visa application were untrue and that he was not gay. The informant stated that the idea was given to the applicant by a female friend when this friend told the applicant and the informant that she knew someone who was able to stay in Australia by claiming to be gay. The informant stated that he was aware of this as he was in the applicant's company when he was preparing his application for a protection visa.

The Interview

The applicant was interviewed by the delegate. The Tribunal has listened to the tape recording of the interview and what follows is a summary of the applicant's claims at the interview:

The applicants stated that he was a Christian, but he did not attend church on a regular basis. In Fiji he attended the local Methodist Church in Suva.

He knew person F when he came to Australia. Person F's family looked after him in Fiji and he worked at her shop in Suva. The last time he spoke to his family was when he was a teenager. He left the family home because he was being abused and mistreated for the reason of his sexual orientation. He never returned to visit his family. He then met the person F's family and started living with person F's sibling. The house where he lived was close to his family home.

He stated that as he was growing up he was aware that he was different from his relatives, but because of religion they did not accept his situation. He was beaten and was not treated well. They did not like the way he was and they verbally abused him. They told him that what he was doing was wrong. Once when he was younger he was beaten by relative X to the point that he collapsed. A relative took him to the hospital, but he regained consciousness soon after. He was asked if his extended family knew about his sexual orientation. He said when he was growing up he was a victim of sexual abuse. He wanted to share this with his family, but he was completely shut out and was accused of making up stories. The sexual abuse started when he was a child. The perpetrators were related to him. The sexual abuse occurred when his family were not at home. He was scared to share this information because he thought it was his fault. This continued until he left home.

The realisation that he was a homosexual began when he was in a child. He noticed that he was attracted to the same sex and noticed that he was different. He talked to a family member about it, but he distinctly felt that she did not approve. But it was only after he moved out that he realised how important the way he felt was. He did not have any homosexual relationships in Fiji. However, he had brief sexual encounters with men. After he came to Australia he went to a few gay nightclubs and began to feel accepted. He felt that he did not have to hide his sexuality. In Australia he was in a number of relationships and they varied in length of time in which they lasted.

The delegate put to the applicant the anonymous community information received by the Department. He said this was not true and that he was 100% gay. He said he had other opportunities to stay, but he was tired of running and wanted to apply for protection because he was fearful of returning to Fiji. His former partner wanted to help him to apply for a spouse visa because they were living together. However, his partner began to use what he knew about him against him and felt as though he was being abused again. He then decided to end that relationship.

It was put to him that he would be able to return to Fiji and live independently from his family. He said before moving to Sydney he discussed the sexual abuse with relative Y. This enraged relative X and other members of his family. The matter is now out in the open and he is afraid that his family would go after him if he were to return. The authorities would not protect him as the matter would be treated as a family matter.

The Hearing

The applicant stated that he left his family home when he was a teenager and was taken in by person G who also lived in the same area as his family. He lived in person G's house for some time then he moved in with person F and her family. He left school after completing his education and worked at person F's shop till person F sold her shop.

The applicant explained that he lived in his family home with his family. Person G lived a distance away from his house and had a shop nearby. People in the neighbourhood knew what was going on in his house as the community was small. When he ran away from home he took refuge in person G's shop and she took him in. He moved back home on a number of brief occasions, but returned to person G's because he was mistreated. After that he did not go back home and his contact with his family was confined to accidental meetings on the street, about once a month. The last time he saw any member of his family was when he ran into relative X on the street before he came to Australia. Whenever he ran into any member of his family he walked the other way. His last meeting with his family was some time before

he shared his story with relative Y. After he spoke to relative Y, his family was stirred up and he was verbally abused on the occasions that he ran into relative X on the street. After he came to Australia he worked and has had no contact with any member of his family since his arrival in Australia more than 5 years ago.

The Tribunal asked him why he was fearful of returning to Fiji. He said the only family who had accepted him, person F's family, lived in Australia. He had no body else in Fiji. Person G is still in Fiji, but has moved. He was asked if there were any other reasons. He said he was scared to face his family.

He stated that he became aware of his sexual orientation when he was still in a child He was very different and was attracted to the same sex. His family members found out that he was gay because of his appearance and mannerism. He was subjected to verbal abuse and was called names He was also subjected to regular beatings by relative X and occasionally by his other relatives. His other relatives beat him in order to toughen or straighten him out. He was punched or hit with a stick by relative X and on one occasion, when he was younger, he had to go to the hospital. The last time he was beaten by relative X or his other relatives was just before he went to live with person G. Relative Z is very weak and could not do much. When he was beaten, she did not say anything and allowed it to happen.

He stated that when he was a child relative X began to sexually abuse him. He was also sexually abused by other relatives The abuse stopped a number of years later because he ran away every time he was about to be subjected to more abuse. No one knew about the abuse until he told relative Z and relative Y. Relative Z did not want to listen, but when he told relative Y she believed him and said that she would talk to his family. After that relative X called him on a couple of occasions and accused him of making things up. When he saw him on the street relative X wanted to confront him, but the applicant avoided him by jumping into a taxi.

He stated that he did not practise his sexuality when he was at home and after he moved out he had a few casual sexual encounters with acquaintances. He did not have a partner until he came to Australia. He did not go out looking for men because he was not comfortable. He had a lot of issues to deal with and for him it was not just about sex. When he came to Australia he felt comfortable and had a family who accepted him, which made him feel easy about his sexuality. He started going to clubs in Oxford Street and he has been involved in relationships.

He was asked if he had ever engaged in sexual acts publicly. He said no, he wanted to have a relationship rather than casual encounters and he preferred not to have casual sex.

The Tribunal explained to the applicant that it wanted to discuss with him country information that could be a reason for affirming the decision to refuse him a visa. The Tribunal explained that he may respond to this information immediately or after an adjournment, either in writing or orally.

It was put to the applicant that the Department of Foreign Affairs and Trade (DFAT) has provided the following recent information in relation to the situation of homosexuals in Fiji. The Tribunal put to the applicant that according to DFAT, the level of intolerance towards homosexuality is higher than in Australia and in many other Pacific Island countries and that people who are openly homosexual regularly encounter verbal abuse or other discrimination. However, there are relatively few incidents of physical abuse/harm against the gay

community. Equal Ground Pasifik had informed DFAT that over recent years there have been some improvements in general attitudes towards the gay community, particularly in urban areas.

DFAT stated that there was no evidence that after the coup the gay community was specifically targeted by the military or the police. There have been no reports, as far as DFAT was aware, of people being mistreated simply because of their sexuality. DFAT also noted that these incidents occurred in the first couple of months after the coup and that no further incidents have been reported since. According to DFAT the alleged mistreatment of homosexuals in the wake of the coup was largely restricted to sex workers rather than the wider gay community. There have been several reports of the police being unable to respond to complaints of burglaries because of a lack of resources. The police may not in all instances respond to a call for assistance from a member of the gay community – but this does not mean that they would deliberately choose not to do so.

Equal Ground Pasifik has informed DFAT that Homosexuals living in urban centres, such as Suva, often found it easier to express their sexuality. There are even reports of “gay clubs” operating in central Suva. Even though the Penal Code still purports to make homosexual acts illegal, there appears to be more tolerance and flexible interpretation of homosexual acts undertaken in the privacy of one’s home. The 2005 decision by the High Court to acquit two homosexual men previously charged and sentenced under the Penal Code for committing a homosexual act was a landmark decision for gay rights in Fiji and has provided a greater level of legal protection for homosexuals. (Department of Foreign Affairs and Trade 2007, *DFAT Report No.719 – Fiji: RRT Information Request: FJI32446*, 25 October)

The Tribunal explained to the applicant that the information provided by DFAT was relevant because it may lead the Tribunal to find that he did not have a real chance of facing serious harm and asked if he wanted to comment on this information now or if he required further time. He said he wanted to respond now. He stated that before he came to Australia there was a lot of abuse directed at homosexuals which sometimes resulted in death. The perpetrators were not punished. The society has not become progressive and homosexuals still experience abuse and name calling on a daily basis. When they go to the police, they are told that they have themselves to blame. The church does not accept homosexuality.

The Tribunal put to the applicant that since he had moved out of his family home, apart from verbal abuse, he did not encounter any serious harm by members of his family in the subsequent years that he remained in Fiji. The Tribunal explained that this could suggest that his chances of facing serious harm at the hands of his family members were remote. He said he was not physically abused out of cultural respect for person F as he was in her care. If they had found him alone, they would have beaten him up. It was put to him that if they wanted to harm him, they could have done so when they ran into him in the street. He said there were people around, but if they had found him alone they would have harmed him.

He was asked why he would be unable to relocate to a different urban area in Fiji. He said relocation is not as easy as it is in Australia. One should go back to the area where they come from, unless there was a job awaiting them somewhere else.

The Tribunal asked the applicant if he wanted to provide further comments in relation to any of the information put to him. He said no.

The Tribunal took evidence from the review applicant's witness, person F. She stated that when the applicant moved out of his home, he lived with her sibling who had a shop in the same neighborhood. Her sibling knew what was going on at the applicant's house and took him. There was always something different about the applicant and they knew he was gay. But it was after he started working at her shop that he confided in her. She advised him to tell relative Z and relative Y about the abuse he had suffered at the hands of relative X. She stated that she had met his partners in Australia and that one of his boyfriends had tried to take advantage of him. She said the applicant was a good person.

FINDINGS AND REASONS

The applicant's claims are based on the Convention ground of membership of a particular social group. The applicant claims to be homosexual and to have suffered verbal and physical abuse at the hands of members of his family. He claims to be fearful of facing further mistreatment by members of his own family and the wider community in Fiji, including the Methodist church.

At the hearing before the Tribunal the applicant gave his evidence in a straightforward manner and impressed the Tribunal as a reliable and truthful witness. The Tribunal does not attach any weight to the community information received by the Department and considers the information not credible.

Having sighted the applicant's passport at the hearing, the Tribunal is satisfied that he is a national of the Republic of Fiji. The Tribunal accepts that he is homosexual and was mistreated by members of his family from an early age for displaying behaviour and mannerism that highlighted his sexual orientation. The Tribunal accepts that this mistreatment consisted of verbal abuse and regular beatings at the hands of his relatives and particularly relative X. The Tribunal also accepts that that he was subjected to repeated sexual abuse by relative X and other relatives from a young age for many years. The Tribunal accepts that the applicant's experiences while he was residing in his family home were serious enough to amount to persecution as defined under s.91R(1)(b) of the Act.

Based on the applicant's evidence, the Tribunal is satisfied that the persecution directed at the applicant in the past was essentially and significantly for the reason of his perceived sexual orientation. The Tribunal accepts that his relatives beat him because they wanted to make him stronger. The Tribunal is also satisfied that the applicant's behaviour and mannerism from an early age was instrumental in imputing him with a certain sexuality and had made him more vulnerable to the sexual abuse he was subjected to by members of his own family.

The country information before the Tribunal indicates that homosexuals in Fiji possess characteristics and attributes that make them distinguishable from the rest of the society and based on the prevailing social and cultural norms in Fiji they constitute a particular social group within the Convention meaning. The Tribunal accepts that the applicant was persecuted in the past for the reason of his membership of the particular social group of homosexuals in Fiji.

That said, the Tribunal is not satisfied that there is a real chance that the applicant will face serious harm amounting to persecution if he were to return to Fiji now or in the reasonably foreseeable future.

The applicant left the family when he was a teenager. According to his own evidence, in the following years that he continued to live in Suva, apart from name calling and some verbal abuse, he did not experience physical violence or any other harm that could be characterised as serious harm. The applicant stated at the hearing that after he moved out of the family home he ran into relative X or other relatives on the street about once a month. At no point he was subjected to physical violence or any form of serious harm. The applicant has claimed he was fearful of retaliation by members of his family who became angry because he had relayed his experiences of abuse to relative Y. However, at the hearing he stated that the conversation with relative Y took place two years before he departed Fiji. During this time he encountered relative X at least on two occasions, but he was not seriously harmed and was able to easily avoid him. The Tribunal does not accept that he was not harmed because members of his family, including relative X, were not able to find him alone anywhere. In the Tribunal's view, if relative X or any other member of his family wanted to inflict serious harm on him, they had ample opportunity to do so. The fact that they did not, indicates that they had no such intention. The Tribunal is not satisfied that there is a real chance that the applicant will be subjected to serious harm by members of his own family if he were to return to Fiji.

The applicant did not claim and there was no evidence before the Tribunal to indicate that he was subjected to any form of harm, let alone serious harm, by anyone other than members of his own family. The Tribunal, however, accepts that the applicant has been generally more open about his sexuality in Australia and had entered into relatively long term relationships. The applicant's oral evidence suggested that he has made a lifestyle choice to enjoy his sexuality in the context of longer term relationships, as opposed to engaging in casual sexual encounters. The Tribunal accepts that the applicant will continue to openly display his homosexuality by engaging in same sex relationships in Fiji.

The Tribunal accepts DFAT's advice that homosexuals in Fiji are faced with a higher level of intolerance in comparison to those living in Australia or in other Pacific Island nations. The Tribunal also accepts that the Methodist Church and other religious groups in Fiji have been vocal in their opposition to homosexuality ('Hindus, Muslims back church' 2006, *The Fiji Times*, 24 September; and ('Fiji Methodist leader says homosexuals should be stoned to death' 2003, Radio New Zealand International website, 6 November <http://www.rnzi.com/pages/news.php?op=read&id=7332>). This level of intolerance, however, does not necessarily translate into serious impediments of harm against homosexuals in Fiji, including those who are openly gay.

According to DFAT, over recent years there have been some improvements in general attitudes towards the gay community, particularly in urban areas. Whilst people who are openly homosexual regularly encounter verbal abuse or other discrimination, there are relatively few incidents of physical abuse/harm against the gay community. This information does not contradict person E's submission to the Department that those who are "out and proud" face derogatory treatment and that this treatment "can get physical if one replies". The applicant did not strike the Tribunal as a person who would engage in this form of verbal altercation. Indeed, his evidence suggested that he had previously chosen to ignore and void verbal confrontations with members of his own family upon encountering them on the street. Based on the evidence before it, the Tribunal is not satisfied the applicant's open display of his sexuality will put him at a real risk of facing serious harm in Fiji.

The Tribunal accepts that the applicant may be subjected to verbal abuse or other similar forms of discrimination in Fiji and appreciates his concerns and general fears in this regard.

However, the Tribunal is not satisfied that regular and petty acts of discrimination, such as name-calling and abusive language are serious enough to amount to persecution within the Convention definition (see *Haji Ibrahim*, *ibid*).

The Tribunal has carefully considered the rest of the contents of person E's submission regarding the situation of homosexuals in Fiji, including the news reports attached to his submission. Specifically, the Tribunal has considered person E's submission that there has been an increase in the abuse of homosexuals by the military and the police. The Tribunal, however, prefers DFAT's independent analysis which suggests that whilst in the context of the 5 December 2006 coup, there were some complaints from gay or transgender sex workers about ill-treatment at the hands of the military and police forces in the immediate aftermath of the coup, these incidents were consistent with the general increase in alleged cases of abuse that occurred at the hands of the military as part of their "clean-up campaign". According to DFAT, homosexuals are not being mistreated by the police or the military simply because of their sexuality. Whilst the police may not in all instances respond to a call for assistance from a member of the gay community, this does not mean that they are unwilling to do so. The police general inability to respond to complaints of crime appears to be attributable to lack of resources. DFAT was also of the view that even though the Penal Code still purports to make homosexual acts illegal, there appears to be more tolerance and flexible interpretation of homosexual acts undertaken in the privacy of one's home. The 2005 decision by the High Court to acquit two homosexual men previously charged and sentenced under the Penal Code for committing a homosexual act was a landmark decision for gay rights in Fiji and has provided a greater level of legal protection for homosexuals. (Department of Foreign Affairs and Trade 2007, *DFAT Report No.719 – Fiji: RRT Information Request: FJI32446*, 25 October). The Tribunal is not satisfied that the applicant faces a real chance of facing serious harm by the police or the military for being a homosexual. Nor is the Tribunal satisfied that there is a real chance that the applicant will be subjected to prosecution under Fiji's Penal Code for the reason of his sexual orientation.

In sum, based on the totality of the evidence before it, the Tribunal is not satisfied that the applicant faces a real chance of facing serious harm by members of the wider community, the Methodist Church, the police or the military for the reason of his sexual orientation or open display of his sexuality if he were to return to Fiji now or in the reasonably foreseeable future. The Tribunal is not satisfied that there is a real chance that the applicant will be subjected to prosecution under Fiji's Penal Code for the reason of his sexual orientation. The Tribunal is not satisfied that there is a real chance that the applicant will be denied protection by the authorities in Fiji for the reason of his sexual orientation. The Tribunal is not satisfied that the applicant's fear of persecution for a Convention reason in Fiji is well-founded.

CONCLUSIONS

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

DECISION

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

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