

1108582 [2012] RRTA 247 (22 March 2012)

DECISION RECORD

RRT CASE NUMBER:	1108582
DIAC REFERENCE(S):	CLF2011/50690
COUNTRY OF REFERENCE:	Macedonia, Fmr Yugo Rep of
TRIBUNAL MEMBER:	Kirsten Young
DATE:	22 March 2012
PLACE OF DECISION:	Melbourne
DECISION:	The Tribunal affirms the decision not to grant the applicant a Protection (Class XA) visa.

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

1. This is an application for review of a decision made by a delegate of the Minister for Immigration and Citizenship to refuse to grant the applicant a Protection (Class XA) visa under s.65 of the *Migration Act 1958* (the Act).
2. The applicant, who claims to be a citizen of the Former Yugoslav Republic of Macedonia arrived in Australia on [date deleted under s.431(2) of the *Migration Act 1958* as this information may identify the applicant] December 2008 and applied to the Department of Immigration and Citizenship for the visa [in] March 2011. The delegate decided to refuse to grant the visa [in] July 2011 and notified the applicant of the decision.
3. The delegate refused the visa application on the basis that the applicant is not a person to whom Australia has protection obligations under the Refugees Convention.
4. The applicant applied to the Tribunal [in] August 2011 for review of the delegate's decision.
5. The Tribunal finds that the delegate's decision is an RRT-reviewable decision under s.411(1)(c) of the Act. The Tribunal finds that the applicant has made a valid application for review under s.412 of the Act.

RELEVANT LAW

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

Definition of 'refugee'

9. Australia is a party to the Refugees Convention and generally speaking, has protection obligations to people who are refugees as defined in Article 1 of the Convention. Article 1A(2) relevantly defines a refugee as any person who:
owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being

outside the country of his former habitual residence, is unable or, owing to such fear, is unwilling to return to it.

10. The High Court has considered this definition in a number of cases, notably *Chan Yee Kin v MIEA* (1989) 169 CLR 379, *Applicant A v MIEA* (1997) 190 CLR 225, *MIEA v Guo* (1997) 191 CLR 559, *Chen Shi Hai v MIMA* (2000) 201 CLR 293, *MIMA v Haji Ibrahim* (2000) 204 CLR 1, *MIMA v Khawar* (2002) 210 CLR 1, *MIMA v Respondents S152/2003* (2004) 222 CLR 1, *Applicant S v MIMA* (2004) 217 CLR 387 and *Appellant S395/2002 v MIMA* (2003) 216 CLR 473.
11. Sections 91R and 91S of the Act qualify some aspects of Article 1A(2) for the purposes of the application of the Act and the regulations to a particular person.
12. There are four key elements to the Convention definition. First, an applicant must be outside his or her country.
13. Second, an applicant must fear persecution. Under s.91R(1) of the Act persecution must involve “serious harm” to the applicant (s.91R(1)(b)), and systematic and discriminatory conduct (s.91R(1)(c)). The expression “serious harm” includes, for example, a threat to life or liberty, significant physical harassment or ill-treatment, or significant economic hardship or denial of access to basic services or denial of capacity to earn a livelihood, where such hardship or denial threatens the applicant’s capacity to subsist: s.91R(2) of the Act. The High Court has explained that persecution may be directed against a person as an individual or as a member of a group. The persecution must have an official quality, in the sense that it is official, or officially tolerated or uncontrollable by the authorities of the country of nationality. However, the threat of harm need not be the product of government policy; it may be enough that the government has failed or is unable to protect the applicant from persecution.
14. Further, persecution implies an element of motivation on the part of those who persecute for the infliction of harm. People are persecuted for something perceived about them or attributed to them by their persecutors.
15. Third, the persecution which the applicant fears must be for one or more of the reasons enumerated in the Convention definition - race, religion, nationality, membership of a particular social group or political opinion. The phrase “for reasons of” serves to identify the motivation for the infliction of the persecution. The persecution feared need not be *solely* attributable to a Convention reason. However, persecution for multiple motivations will not satisfy the relevant test unless a Convention reason or reasons constitute at least the essential and significant motivation for the persecution feared: s.91R(1)(a) of the Act.
16. Fourth, an applicant’s fear of persecution for a Convention reason must be a “well-founded” fear. This adds an objective requirement to the requirement that an applicant must in fact hold such a fear. A person has a “well-founded fear” of persecution under the Convention if they have genuine fear founded upon a “real chance” of persecution for a Convention stipulated reason. A fear is well-founded where there is a real substantial basis for it but not if it is merely assumed or based on mere speculation. A “real chance” is one that is not remote or insubstantial or a far-fetched possibility. A person can have a well-founded fear of persecution even though the possibility of the persecution occurring is well below 50 per cent.

17. In addition, an applicant must be unable, or unwilling because of his or her fear, to avail himself or herself of the protection of his or her country or countries of nationality or, if stateless, unable, or unwilling because of his or her fear, to return to his or her country of former habitual residence. The expression 'the protection of that country' in the second limb of Article 1A(2) is concerned with external or diplomatic protection extended to citizens abroad. Internal protection is nevertheless relevant to the first limb of the definition, in particular to whether a fear is well-founded and whether the conduct giving rise to the fear is persecution.
18. Whether an applicant is a person to whom Australia has protection obligations is to be assessed upon the facts as they exist when the decision is made and requires a consideration of the matter in relation to the reasonably foreseeable future.

CLAIMS AND EVIDENCE

19. The Tribunal has before it the Department's file relating to the applicant. The Tribunal also has had regard to the material referred to in the delegate's decision, and other material available to it from a range of sources.
20. **Application for a Protection Visa**
21. *Application Form*
22. According to the information provided in his application for a protection visa, the applicant is a national of the Former Yugoslav Republic of Macedonia (FYROM), born in [Town 1], on [date deleted: s.431(2)]. He claims to be Orthodox. He is not married. He had 12 years of education in FYROM and says he did not have any profession before coming to Australia. He resided at a single address in [Village 2], [Town 1], from May 2000 until December 2008.
23. The applicant departed FYROM legally using a passport issued in his own name [in] December 2008. He entered Australia [in] December 2008 on a student visa.
24. In response to the question as to why he left his country, the applicant claimed that "due to traditional values and morals set in the Macedonian Orthodox as well as the Albanian Muslim society, homosexuality remains a forbidden matter in the public. For this reason I suffered humiliation, discrimination and verbal torture because of my sexuality. It came to the point where my family abandoned me and I was not able to leave my house of fear of being targeted again."
25. In response to the question as to what he feared may happen to him if he went back to his country, the applicant claimed:

If I go back to Macedonia I fear that I will suffer physical harm, torture and unfairness from my family, local police officers and the Macedonian community. In 2007 I was completing my third year at [school]. In October my school went on an excursion to the local beach in [Town 3]. One of the teachers caught me and my boyfriend having a close relationship and he took down our names and details. The next day we were called to visit the principal's office he started screaming at us and told us to visit the psychologist. He also informed us that he had told the school's discipline committee about our behaviour. My parents were also called to visit the principal office to discuss what the principle thought was a problem. My parents then found out about my sexuality and asked me if this was true, I made it very clear that I was only interested men. After hearing this, my father did not want to talk to me and he did not want me in his house. My mother did not think I was serious and she convinced my father to let me stay at home because my education was very important for us. In

[2007] I was celebrating my 18th birthday in a bar/nightclub and after the party had finished I left. I was on my way home when all of a sudden I was attacked (sic) by a young man. I contacted the Police and told them what had happened, they told me to go to the hospital if I was injured. The next day I went to the hospital because I had a cut on my hand. I contacted the police again to find out if what they had done about my attack. They said they will call me when they find the person who attacked me. A few days later the Police contacted me and said that I was to blame for being attacked and that I provoked him. In May 2008 I finished High School but I did not receive my Diploma. I applied to get my diploma and Certificate but failed, I tried again and this time I received my certificate of completion. In August 2008 I applied to go to University but was rejected as my behaviour at high school was very bad. I then started looking for a job in both [Town 1] and [Town 3] as most places I had applied for had heard that I was gay and were not looking to hire a gay person. Eventually my mother realised that I was serious about being gay. She was embarrassed that I was her son and did not want me near her and my brothers. Everywhere I went I would get verbally abused and would even suffer violent attacks by the local people. I was not able to live my life like I used to before people found out that I was gay. I found it very hard to do the things I used to do before like going to café's, shopping centres, parks and even night clubs.

26. In response to the question as to who he thought might harm or mistreat him, he claimed he would be mistreated by the Macedonian Orthodox as well as the Albanian Muslim society, local police officers and the local community. In response to the question as to why he thought this would happen, the applicant claimed he thought it would be due to the traditional values and morals set by the Macedonian Orthodox and Albanian Muslim societies, according to which being gay is not acceptable. Being gay is not illegal in FYROM, yet gay people are not accepted in the society. He claimed that he had previously experienced humiliation, discrimination and verbal torture. He stated that he did not think the Macedonian authorities could protect him from this discrimination and humiliation.

Immigration Interview [in] June 2011

27. The applicant confirmed he was a citizen of FYROM, of the Orthodox religion. Asked if he was a practising Orthodox, he said not a lot. Asked what he meant by that, he said he did his praying at home and did not go to church that much, perhaps twice a year at Easter and Christmas. Asked about his family's religion, he said that they go to church more, mostly on Sundays, depending on whether they had other things on. He said that he, his parents and brothers were from [Town 1]. His family lived in village [Village 2], where about 1,000 people lived, in the north-west of the country. Asked whether he had lived anywhere else, he said with his aunty for about 2 months, sometimes he slept at home, and sometimes he lived with his brother in another place in [a suburb] next to the city of [Town 1], which was a city of about 50,000. He said that he was studying in [Town 3], and when he first started school he was travelling there from the village, then later on he decided to live there but it was difficult so then he went back home, because it was too difficult financially. He did not work and his parents supported him then, around 2006. Asked when he was last in contact with his brothers, he said it was a long time, 2 years ago or so. He tried to contact his brothers but his father found out. He tried to contact them with an Australian number. Asked whether he was in contact with his mother or father, he said no. He said he had not seen his other relatives for years, and when they found out he was homosexual they didn't want contact with him. He said his family disowned him.
28. Asked where he was living, he said in a hostel and stayed with friends in [Town 3]. Asked whether he considered obtaining support from two organisations that support gays and lesbians, he said that he had heard about one of them but they were in the

capital, Skopje, which is 3 hours away by car. Asked whether he applied for his visa to Australia in Skopje, he said yes, through an agent. His aunt who lives in Australia supported his trip and he lives with her in Australia. She was very accepting of him, and had tried to contact his father and explain it was not wrong but he got angry, She said she couldn't help him in FYROM but would find another way to help him. She said she would try to help him come to Australia because here gay people are not considered to be sick or to have a problem with their brain.

29. Asked when the incident at school with his boyfriend took place, he said [in] October 2007, because this was a public holiday and they went on an excursion and went to a beach on the lake, and he was with his boyfriend and the teacher found them. The teacher became angry and took their details, then the next day at school he was called to an interview room with the teacher, principal and director of school. The teacher explained what happened and the director spoke very loudly and said they needed to have extra classes as what they were doing was not right, and that they would get a psychologist if they continued. The school was 95% boys. The delegate said that in any school young people are expected to have a certain code of conduct, so even if a boy and girl were involved, that behaviour would not be acceptable in many schools, even in Australia. If it was a co-ed school he could also get in trouble as well if he was involved in such behaviour. Obviously there was physical contact otherwise they wouldn't have jumped to such conclusions. The applicant confirmed this was the case. The delegate said so there would have been the same treatment if it were a boy and girl. The applicant said no, the contact was in front of the school and there would not have been same reaction. He said he had seen other incidents where a boy and girl were having contact but no one did anything.
30. The applicant confirmed that he graduated from school and that his ex-boyfriend went to another school for hospitality to learn to be a chef, and was not sure if he finished because he later left for [another country]. After the incident, he said that his parents were called and couldn't believe it, and they took him home and his father asked him what was he trying to do? He said nothing, as he was not doing anything wrong. His father started screaming at him, he insisted there was nothing wrong, and his father kept screaming for an hour or so that he had shamed the family. His father offered to pay for doctors or mental hospitals if he needed it. He said there was nothing wrong. His father told him to go away, that he did not want to see him again, and not to come near the house or family. Asked whether he thought this might happen to gays in Australia as well, he said no. Asked whether he thought there were no families in Australia who might their reject son, he said maybe, this would depend on their family background. He said that he was not accepted by his father because the system is different there.
31. Asked about the incident in November 2007, he said he was celebrating his 18th birthday in a nightclub in the next village, where around 3,000 people live. He went there with 2 other gay friends, one from a village close to [Town 3], another from [Town 1] . Asked if it was a gay nightclub, he said it was not and that it was mixed. Asked if it was a club that was tolerant where anyone could go, he said no, if you were a stranger they would check you out. He said that the people there knew of him. Afterwards, he said he was walking home on an old road from the nightclub to his village in the dark. Asked whether the applicant knew the person who attacked him, he said he had no idea. He said he just saw him coming from 2m behind, when he pushed him and the applicant went down and put his hands over his head to protect himself. He

said that his attacker was beating him, screaming. Asked what his attacker was screaming, the applicant said he did not remember, the attacker just pushed him and started beating him. He said he was cut on the hand. After his attacker's friends called him away, the applicant then went to the city centre of [Village 4] and called the police. He explained the situation that he was attacked by a stranger and had no idea why he was attacked. Asked what the police said, the applicant said that the first time they said that they were coming and would be there in 10 minutes. So he went to the church to wait for the police. The guy who had attacked him then came with 3 friends in a car and went all around village screaming, shooting with a gun two or three times. The delegate noted that this was not in the applicant's claim and asked why not. The applicant said that he did not put it there. Asked whether he believed they were looking for him, he said yes. The delegate asked whether the police knew he was in the church, he said that he told them but they never came. He was there until 5.30am, so he called them again. The police said wait there and if you're hurt go to hospital, and then come to see us tomorrow because we're too busy now. So the next morning he went to hospital and a doctor checked everything, no serious injuries. Roughly 1 week later the police contacted him and said they found the guy but that they did not believe that it was his mistake. The policeman said they interviewed him and he said some of his friends were at the nightclub and saw the applicant there and he was too close with his friend hugging and touching him. The police said that they were sorry but they could not help him because he provoked the attack and there was nothing more they could do for him.

32. He said that he stayed in FYROM for another year afterwards. Asked if anything else happened in this time, he said yes, just before he left FYROM for Australia. Asked if that was in his claim, he said no. Asked why not, he said because he was making his claim clear and short. Asked when the incident took place, he said in November 2008. The delegate noted that he had 4 migration visa applications refused because he had showed an intention to migrate to Australia permanently. He said he did not apply and that it was his parents who included him. The delegate noted he had applied twice himself to come to Australia and had been refused because it was felt he did not want to study but wanted to stay in Australia permanently. The delegate then noted that the month the applicant said something happened he had already applied to come to Australia, and [in] November he received his positive visa notification. The applicant said yes, [two days before in] November he was called by the police to come for an interview. Asked why, he said that there was a robbery in the village [Village 4]. There were 4 guys who robbed an internet café, and stole cigarettes, and he did not know what else. He went to the police station, and they told him about the robbery. So he returned from Skopje where he had been applying for visa, and the police contacted him again for another interview. He went there and they asked him many questions. He told them where he was, what he did. The police told him it would be much better if he said yes as it would be easier and better. He said why, he didn't do anything, and then the policeman went to his house with another policeman and checked house. His father said he wasn't living there but they checked anyway. Then they found the people who did the robbery and they were called for interview by the police. He was then called by these guys who did it, who said we need to tell you something very important and told him to meet them at the coffee shop. They said they were at police station for 2 days and that the owner of the coffee shop was pressuring them to say that the applicant did the crime and threatened them otherwise they would go to jail. So they said they were just telling him so he knew. That was his last chance. So he thought he had already applied for Australia and got his police clearance so if they caught him before it would

be the end for going to Australia. He went to see a lawyer and he said they could fight the case. Then they released the guys who did it and told them all they needed to do was say yes at the court. The applicant then went to see the owner of the coffee shop/internet café, who was also the owner of a [transport company].

33. The delegate noted that she did not understand why the applicant had not written the story down before given that it was so long, and asked what the point of the story was. The applicant said when he went to see the owner, he said he did not like gays and that he did not want to see the applicant [in his business again]. The same policeman also gave him a lecture about how he had embarrassed his family and that he would always be in trouble with the police. He said he would try to help him because they were from the village. Asked what he thought would happen to him if he were to return to FYROM, he said he would be treated the same way, because they were small villages. They would use swearing. The delegate asked what about somewhere else such as Skopje, a big city, where he had already been there to apply for visa. She put to him that it was not unreasonable for him to try and live there like other people who might have similar problems. The applicant asked if he could have a few minutes break to think. He said it's a lot bigger in Skopje than where he was living but the people there were more dangerous and you have to be careful all the time to make sure that no one follows you, because people try to grab your bag, steal your money. Being gay is worse living in the capital because it's more difficult to go out in public, you have to be in hiding, be invisible, and move if your neighbours find out. Asked how he knew this, he said that he was guessing and it was his personal opinion. For him it was more dangerous than the place where he lived, to live in big city rather than in village.
34. The delegate noted that there were 2 organisations in Skopje that support gays, and there had been a big march in Skopje to mark gay freedom. She noted that a lot of people had criticised the situation in a draft anti-discrimination law for omitting sexual preference, but there was a response from the Minister for Labour that gay people could ask for protection on other grounds. Nonetheless there was pressure from the EU to do more. So while the legal situation was not perfect, there are gay people living there and depending on where they live the situation varies.
35. The delegate asked if there was anything else that happened to him besides what had already been covered, then summarised the applicant's claims, noting that she had cut him off. The delegate said that he said he had received a letter that he was accepted to college in Australia in November before the incident, been refused twice, but was in the process of another visa application. Then there was a robbery where some acquaintances had done it, the police were interviewing, called him in, his number seems to have been on their phone, then these people met with him and blackmailed him? The applicant said no, they asked his advice, and said they did not want to blame him but they did not have a choice. He told them to tell the police what they thought was best. Asked what happened with this case after he left, he said that he had already applied to go to Australia. Then he had another interview in December that the case was going on him and they were going to blame him, but they didn't have any fingerprints for him or anyone else so they could blame anybody. They said that it would go to court, then the interview was finished and they said you can go, and the owner was going to go to court against him. Asked if he did so, the applicant said that he did, in February 2009, but he was already in Australia. Asked if he had any documents, he said he did not because he was already here. Asked if he was saying that

there were criminal charges against him, he said that the police said he could call a lawyer but that the case was going to court. Asked if he ever heard from the police again after that, he said that he heard from one of the guys who actually did it. Asked if he was in contact with them, he said that he asked one of them later what had happened. He told him it had gone to court. Asked if there was a document saying he had to go to court, he said that there was, somewhere in FYROM in the post. Asked how he knew that, he said that he also contacted his youngest brother, and he said there was a letter for him from [Town 1] court. He contacted him in February 2009 and he told him, but he had not contacted him since. Asked if there had been any other letters afterwards, he said no, he contacted one of the guys who did it and he said that they charged them 100 Euros and the case was closed, finished. He said that he did not know afterwards if they had any problems. But they did not charge him because he was not there, they only charged the other guys. The case in the court was the owner who was making the claim, him as the thief criminal and these other guys were kind of witnesses. He said that he hadn't heard anything since, and he did not have any further documents. He said he had also applied for police clearance from his country and he got it so he had not been convicted.

36. The delegate noted that the applicant had arrived in December 2008 and asked whether there was any reason why he had waited 18 months to apply for a protection visa. The applicant said that he was thinking about this last year but he did not know the law in Australia and how people are here and then he found that there were no problems with the police or any physical attacks here and found that it was safe.

Primary Decision

37. The delegate found the applicant was not a person to whom Australia owes protection obligations.

Pre-hearing submissions

38. [In] November 2011, the Tribunal received the following submission from the applicant's representative:

...

Historical Context

[The applicant] is a [age] citizen of Macedonia. He fears persecution in Macedonia on account of being homosexual. Macedonia was one of the Republics that made up Yugoslavia from, which it declared independence in 1991. Macedonia was admitted to the UN in 1993 but due to a dispute with Greece over the name Macedonia it was admitted under the name Former Yugoslav Republic of Macedonia (FYROM). It is denoted herein as Macedonia.

The dominant cultural influences in Macedonia are, Macedonian Orthodox Christianity and Albanian Islam. Both regard homosexuality as deviant and a sin. Those views are prevalent in the community notwithstanding more liberal government policy which has been adopted, in part, in response to external considerations, not domestic politics, as part of their aspirations to join the European Union.

Homosexuality has been legal in Macedonia since 1996. Last year new anti-discrimination laws in Macedonia were subject to criticism by the European Union, and the parliamentary opposition, the Social Democratic Union of Macedonia, because it did not include sexual orientation as a ground upon which discrimination is proscribed. Macedonia is an applicant for membership of the

European Union and meeting 'European standards' is a motive for enacting legislation to protect human rights. Notwithstanding that, the 2010 legislation was criticised as making Macedonia the only country in the region that has a non-European anti-discrimination law.

[The applicant] and his claim for protection

The delegate reduced [the applicant's] account of his fears of persecution to fourteen dot points;

- Homosexuality is forbidden in Macedonian Orthodox and Albanian Muslim values and hence he has experienced humiliation, discrimination and verbal torture because of his sexuality;
- His family abandoned him and he was not able to leave his house for fear of being targeted;
- [The applicant] was caught with a friend in what was considered inappropriate circumstances on a school excursion in 2007. It was reported to the principal who remonstrated with them, recommended they see a psychologist and reported it to the school discipline committee;
- His family then became aware of his sexual orientation and his father rejected him but his mother prevailed, upon his father to allow him to remain at home to continue his education;
- In November 2007 after celebrating his 10th birthday [the applicant] was attacked and beaten by a drunk. He escaped and hid in a church;
- He called the police who were too busy to attend and told him to go to a hospital as he reported that he was injured. He did attend the hospital and contacted the police again to follow up his report;
- Some days later the police told [the applicant] the attack was his fault because he had provoked it;
- He was rejected for a university place in August 2008 because of bad behaviour at school;
- [The applicant] was unable to find a job in the area where he lived because it was well known that he is gay;
- His mother rejected him too when she realised he is serious about being gay, she was embarrassed by him and did not want him in contact with her or his brothers;
- [The applicant] was verbally abused and physically attacked in his local area and could no longer freely do what he had done previously;

[The applicant] fears that if he returns to Macedonia he will be persecuted by his family, the police and the Macedonian and Albanian communities;

- [The applicant] does not believe that the authorities in Macedonia will change or protect him from persecution by non-state agents;
- He was wrongly accused of a criminal offence at an internet cafe. He was later told he was expected to 'take the rap'. He already had a visa to come to Australia so he left the country. He has subsequently been told by his brother that there had been an attempt to serve court documents connected with this matter on him.¹⁰

Subject to what follows we accept this as a reasonable precis of [the applicant's] claims.

The delegate's decision [in] July 2011

The RRT will consider the application for review of the delegate's decision de nova but, as the facts upon which we rely are the same as those before the delegate, and the law is the same, it is instructive to consider the delegate's reasons for refusing the visa application.

The delegate found that [the applicant's] fears of persecution were for the Convention reason of membership of a particular social group, homosexual men in the Republic of Macedonia, and this was the essential and significant reason for the harm he fears." She also found that the harm feared was serious harm and systematic and discriminatory conduct for purposes of the Act. For purposes of this submission it is assumed that those matters are not at issue.

But the delegate refused the application because:

- she found that the treatment [the applicant] had experienced was discrimination but did not amount to persecution;
- the delay in seeking protection between arriving in Australia [in] December 2008 and applying for a protection visa [in] March 2011 raised serious concerns about the immediacy, gravity and credibility of his professed fears of persecution;
- he did not seek assistance from state authorities or non government organisations; he could relocate to (say) Skopje where she was not convinced that [he] would not be able to live more freely as a gay...

We will address these reasons for refusing the application in the foregoing order.

Discrimination or persecution

We do not accept the delegate's finding that [the applicant's] experience constitutes discrimination but not persecution [the applicant] experienced a beating, albeit by non-state agents, because he was gay. This is clearly significant physical harassment or significant physical ill treatment and is caught by the statutory definition of serious harm! He was unable to find employment because he is gay, which is significant economic hardship that threatens the person's capacity to subsist and/or denial of capacity to earn a livelihood of any kind, where the denial threatens the person's capacity to subsist, and is therefore also caught by the statutory definition of serious harm.

The fact that [the applicant's] injuries were not particularly serious does not mean that he does not have a well founded fear of persecution. [The applicant] effectively went into hiding until, with the assistance of an aunt, he was able to arrange to come to Australia to escape what he regarded as inevitable persecution. The fact that [the applicant] was able to prudently avoid more serious harm than that he had experienced does not mean that his fears of persecution are not well founded.

Delay in application

We do not accept that the delay between [the applicant] arriving in Australia [in] December 2008 and applying for a Protection visa [in] March 2011 indicates that his fears of persecution are not genuine. With the cooperation and assistance of an aunt who is an Australian citizen [the applicant] was able to arrange to come to Australia on a student visa. This was on a pathway that he planned would lead to permanent residency and hence solve his problem of fearing persecution in Macedonia. Eventually his aunt was unable to continue supporting him financially and he applied for protection. [The applicant's] delay in applying for protection is a function of the, fact that his first strategy for avoiding persecution in Macedonia did not work out, not that his fears of persecution are not genuinely held.

State protection

The delegate noted that homosexuality is not illegal in Macedonia. She then noted that there was no evidence of state sanctioned persecution and harassment of homosexuals. These points do not counter the fact that if a person faces persecution from a non-state source, and the state is unwilling or unable to protect him or her, it is still caught by Article 1A(2) of the Convention notwithstanding that the perpetrator of the persecution is not a state agent. In fact [the applicant] did report his first assault to the police who did not attend. When he followed it up he was told that it was his fault. The delegate seemed to accept this view when she found;

...the applicant had chosen to walk home in the dark, late at night and, therefore put himself at heightened risk of being exposed to a random act of violence.'

This is like saying that a woman complaining of sexual assault was 'asking for it' by wearing a short skirt. It is the case that if treatment constitutes persecution and serious harm, as a beating unanswerably does, and it is inflicted for a Convention reason, or state agencies are unwilling to provide protection for a Convention reason, it is within the scope of the Convention and a ground for applying for a protection visa.

Relocation

[The applicant] does not believe there is anywhere in Macedonia that he can safely relocate to and be openly gay. A 2002 study found that 80% of Macedonians regard homosexuality as a psychiatric disorder that threatens the family and 65% thought it was a crime that warrants a jail term. This is a milieu in which those who are inclined to discrimination against, or persecution of, homosexuals will feel they have majority support, and where it is also likely that the state agencies, such as the police, will be comprised of people of a similar view, irrespective of what national government policy on the matter might be. The proportions are so overwhelming that they support [the applicant]'s assessment that there was nowhere in Macedonia that he could relocate to avoid persecution for being gay.

.....

The First Hearing – [November] 2011

39. The hearing was conducted in the English and Macedonian languages with the assistance of an interpreter in the Macedonian language. In the introductory stage of the hearing, the applicant's agent indicated that both the applicant and his witness spoke good English and the interpreter had been requested as a reserve. It was agreed to conduct the hearing primarily in English and to use Macedonian where required.
40. The applicant confirmed details of his personal and educational background and visa status which were consistent with information already before the Tribunal. He said he prepared the protection application form himself without any help, and that he was happy with the contents. He said he did not have the right to reside in any other country.
41. Asked where he lived in FYROM, he said that he lived with his parents and two brothers in village [Village 2], [Town 1], FYROM, until May 2008. He lived with his aunt and her family from July – September 2008, and after that until he left for Australia in a kind of backpacker hostel in [Town 1]. He stated that he was no longer in contact with his parents or brothers and the last contact he had with his parents was in 2008 and his brother early in 2009.
42. He stated he received 12 years of education in FYROM. He graduated in [2008], and then applied to go to university but was refused. He said that he did not work before leaving FYROM. He said that he applied for a student visa to come to Australia in November 2008. His aunt provided financial guarantees for his visa application and paid for his travel to Australia.
43. He stated that he feared returning to FYROM because he would be abused, would not be able to find a job, could not go further with his studies, and it would be "very difficult and the same like it was before". He feared that he would be harmed by local people and by the police because they had done this before.

44. Asked when he realised he was homosexual, he said it was when he was in school and he started getting closer with his friends and they tried physical contact and then he realised he was gay. He said he was 16 or 17 years old. Asked whether he had told anyone he was gay, he said he had not told either his family or friends. Asked whether he had any relationships with men since coming to Australia, he said no. Asked why not, he said that he had not had a chance. Asked what he meant by that, he said that he did not know. Asked whether he went to gay bars or nightclubs, he said yes. Asked whether he just had not met anybody, he said no. Asked whether even if he had not had any long-term relationships with boyfriends, whether he had physical relationships with men he met at those clubs, he said yes.
45. The Tribunal referred to an incident on a school excursion in 2007 where he was caught with his boyfriend referred to in his protection application form, and asked when this incident took place. He said it was in 2007. Asked when in 2007, he said November. He said after he was caught the teacher who caught him called him to the school office and talked to the school principal. As a result, it was recorded in his school certificate that he had engaged in “bad behaviour”, which meant that he had done something wrong.
46. Asked whether this was the first time his sexuality was discovered by his teachers, he said that it was. Asked whether it was the first instance where he had engaged in homosexual behaviour or whether there had been previous instances, he said that he had been involved in homosexual behaviour before. Asked whether there had been many instances, he said no. Asked for how long he had been engaging in homosexual behaviour before he got caught, he said for around a year.
47. He said that he was in Year 11 at school when this happened, and that he continued to go to the same school after he was caught. Asked whether he graduated from the school, he said that he applied to the Ministry of Education to obtain his certificate. Asked whether he graduated, he said that he received his diploma. Asked about the application to the Ministry of Education, he said the school would not give him the certificate so he appealed to the Ministry of Education who sent him to another school to do a test. Asked why he had to do another test, he said to graduate. Based on that test, he was given his diploma. Asked what the difference between the diploma and the certificate of bad behaviour were, he said that that were two separate certificates. Asked how the certificate of bad behaviour impacted on his diploma, he said when applying to university it was necessary to show four certificates in addition to the diploma. The four certificates were to show completion of each year at high school, and would note his behaviour. He said that his certificates for Year 11 in 2007 and Year 12 in 2008 recorded his behaviour as “bad” as a result of this incident. Asked why his certificate for the year after the incident would record his behaviour as bad, he said because they treated him the same. The applicant’s agent then requested a break and the hearing was adjourned.
48. Asked to confirm when he graduated, he said he attended school up until May 2008 and graduated in August 2008. He said that his parents were informed about the incident and that this was when they first became aware of his homosexuality. His father was particularly unhappy and abused him and did not want to talk to him, and his brothers took a distance from him and were not close like they were before, while his mother tried to calm down the situation. He was living at home at the time of the incident. He continued living at the family home after the incident until he finished school in May 2008.

49. The Tribunal asked the review applicant to describe the incident set out in his protection visa application form in November 2007. He said that he was in a nightclub with a friend celebrating his 18th birthday. He said that on his way home from the nightclub he was attacked by a man and he ran and hid in a church. He stayed hiding there all night and the next day he went to the police and to the hospital. Asked whether he contacted the police at the time of the incident, he said that they told him to go to the hospital as they were too busy. Asked whether the police knew him, he said most of them did. Asked how they knew him, he said from on the street where he was living, everyone knew who he was and that he was gay, and that they were also abusing him. The Tribunal asked how everyone knew he was gay if this only took place in November 2007 and it was also in November 2007 that he was caught with his boyfriend at school and this was the first time his homosexuality had ever become publically known. He said that they knew him because when he was walking on the streets people were pointing at him and saying he was gay and abusing him, and that this was after a two or three week period. Asked to clarify the time period, he said that when he went on the excursion it was in the first week of November, then his birthday was [later that month].
50. Asked where the incident of the attack took place, he said it was in a village two kilometres from his home village. Asked whether his attacker said why he was attacking him, he said that his assailant was drunk and abusing him. Asked whether he knew what he was abusing him about, he said that he abused him for being homosexual and gay and told him that he should not be in that place. Asked whether he knew his attacker, he said no. Asked how his attacker knew he was gay, he said that he had been on the opposite table at the nightclub and had seen him hugging his friend.
51. Asked how serious his injuries were, he said that he cut his hand and had bruises to his face. The cut on his hand required 3 stitches. Asked how many times he called the police when he reported the attack, he said that he called them twice and that the first time they said that they were coming, then the second time they said that they were busy and if needed he should go to the hospital. Asked where the police station was he said [Town 1]. Asked how big the police station was and how big was the area it served, he said that it was the main police station for the town of [Town 1] and surrounding villages. Asked how many people would be in the villages served by the police station, he said around 50,000 people. The Tribunal put to the applicant that if he called this police station that was serving a population of around 50,000, and that if he had only been publically identified as being gay about 3 weeks earlier, and he was saying that the police didn't do anything because he was gay, how would they have known this when he was only 1 person in about 50,000. The applicant said that when he went to an interview with the police the next day they were laughing at him. Later on they called him and said that they found the man who had done it and that the applicant had he provoked the man who attacked him because he had been touching and hugging his friend at the nightclub. Asked why the police were laughing at him, he said because he was telling them what he was doing that night, where he went and who he was with in order to be clear. The Tribunal asked the applicant to clarify whether he was saying that the police did not realise that he was gay until he told them that this was the case. The applicant said yes. Asked why the police didn't come the night before when he contacted the police station if they did not know he was gay, the applicant said that maybe some of them knew him and that was why they told him to go to the hospital instead. He said he had no idea why they didn't come.

52. Asked what was the next problem he faced, the applicant said that he applied for university at the end of August 2008, and after a week he received a letter of rejection that gave no reasons for the rejection. He said that he called to find out the reason and was told it was because he had bad behaviour and that he would be the last person on the list. Asked how the university knew about the bad behaviour, he said it was on his school certificates.
53. He said that the next problem that he faced was that he could not get a job. He had been looking for a job since the beginning of September 2008. Asked what kind of jobs he applied for, he said he applied [for a variety of jobs] in [Town 3] and [Town 1]. Asked what happened, he said that he never received an answer. In one place he went to ask for a job they said they were not going to employ him because he was gay and that they would lose business. Asked which job this was in relation to, he said [it was hospitality] in [Town 3]. Asked how many job applications he made, he said roughly 6 or 7. Asked whether any of the other employers referred to his sexuality, he said all of them did. They all said that they would not employ him because he was gay, as they all knew him very well.
54. Asked by the Tribunal for the population figures for [Town 3] and [Town 1], the applicant said that there were roughly 60,000 in [Town 3] and another 50,000 in [Town 1]. The Tribunal put to the applicant that these were reasonable sized towns, and asked whether the applicant was saying that in fairly large towns of this size, every employer he went to knew that he was gay. The applicant asked for the question to be repeated. The Tribunal repeated the question, and the applicant answered yes. Asked how the employers knew that he was gay, he said somebody told them or if nobody told them, then in one place people were outside and abusing him, and the owner heard them and then said sorry, he could not give him a job. Asked how many times this happened, the applicant said that the abuse happened at all of the jobs when they found out about his sexuality. They found out in similar ways, either they already knew or people would start laughing and abusing him so that the owner could hear and then he would understand that there was something wrong with him and then would say it was not acceptable for him to work there. The Tribunal asked him to describe what happened when he went to apply for a job in [Town 1]. He said that he went into the bar when he applied for a job at the coffee shop and asked to see the manager. The manager came out but the people started laughing and pointing at him, saying he was gay, so the boss said that he could not give him a job as he would have problems because the applicant was gay. Asked if he applied for other jobs in [Town 1], he said that he also applied for [another job in the hospitality industry]. Asked what happened with that job application, he said the same thing. He said that he went to see the supervisor of the hotel who also knew that he was gay from before, and who said sorry.
55. The Tribunal said that it was having difficulty with the applicant's account as the way that he described it made it sound as though everywhere he went, even if the employer did not know already that he was gay, someone else would know and draw it to the employer's attention. The Tribunal had difficulty in accepting that in one town of 50,000 people and in another of 60,000 people that everywhere he went everyone knew that he was gay. The applicant said yes, they made jokes, so it was easy to remember. The Tribunal said that it was not a question of whether it was easy for the applicant to remember, but rather whether the Tribunal believed that in towns of this size every where the applicant went there were people there who somehow knew that he was gay.

The applicant asked for the interpreter to interpret the question into Macedonian. The applicant paused at length. The Tribunal asked if the applicant had any comment. The applicant said that the incident that happened at his school meant that most of the students knew about it so it was easy for the information to go around and for jokes to be made. The second thing that happened was the nightclub attack and people knew about that too and were making jokes and telling each other about it.

56. Asked by the Tribunal to describe the next problem he faced, the applicant said that he was abused in the streets wherever he went and could not get a job so it was difficult to find a way to live and survive. The Tribunal asked the applicant whether his claim in his protection application form that everywhere he went he was verbally abused and would suffer violent attacks by the local people referred to the attacks just discussed, or whether he was referring to additional attacks. The applicant said that there were also other times. People would come and kick him from behind and make jokes about him. They would hit him on the head and back and make jokes about him. Asked whether he was hurt badly, he said they kicked him from the back and made jokes and thought it was funny. Asked whether he went to the police, he said that he spoke to the police who said that saying he was gay was nothing and that this was not abuse.
57. The Tribunal asked the applicant about the incident referred to in his agent's submissions where he was accused of robbing the internet café. The applicant said that he was called by the police just before he came to Australia at the end of November – beginning of December for an interview. At the interview the police informed him that he had robbed a coffee shop and wanted him to agree to this. The applicant said that the owner of the coffee shop knew him well and had abused him before many times. He wanted to set the applicant up and that resulted in a court case in February 2009. The applicant said that he told the police he did not do it but that the police were trying to make him say that he did. Before he left for Australia he was sent a letter that he had to go to court in February 2009. He received the letter about 3 or 4 days before he left. Asked whether it was a summons or what kind of letter it was, he said that the court sent the letter stating he needed to go to court in February. The letter said that he was the main suspect for committing the robbery of the coffee shop. Asked whether he had a copy of the letter, he said that he did not. Asked what he did with it, he said that he threw it in the bin. Asked what the formal charges were, he said it was a conviction for robbery of the coffee shop.
58. The Tribunal asked the applicant why this incident was not included in his protection visa application form. He said that there was not enough space so he did not put this claim in. He said that he did not know that he could add an extra page. Asked whether the police indicated whether they had any evidence against him, he said that they told him he was the only one who could have done it and that they pushed him to accept it. Asked whether he had heard about the result of the February 2009 court case, he said that he had heard from his brother that they sent a letter to his family house stating that the case was closed because he was not there and there was nobody to prosecute. Asked what he thought would happen to him in light of the letter indicating that the case had been closed, the applicant said that he forgot to mention that in the letter he received before he left for Australia it was stated that there were two fake witnesses who could confirm that he committed the robbery. Asked what the significance of this was, he said that one of the witnesses was a police officer who lived near that place and who could confirm that he saw him. Asked whether he knew who the other witness was, he said

no. Asked if there were any witnesses he could call in his defence, he said that there were not.

59. The Tribunal asked whether he had heard of any other developments in the case. The applicant said that he had not heard anything further since February 2009 when his brother told him that the case had been closed. Asked whether he had been in contact with anyone else in FYROM about the case, the applicant said no. Asked whether he had contacted anyone else about the case before February 2009, he said he had not, that he had only spoken to the police and no one else, and that he received the letter about the case just before he left. The Tribunal asked whether there was anything further he wished to say about the case. The applicant said no. The Tribunal asked why he thought the owner of the cafe would want to set him up. He said that he had been abused by him many times for a long time and he had no clue why he would want to set him up. The owner of the coffee shop said he was gay and homosexual and a mental case, so he probably couldn't find anyone else to blame and thought if he set him up he would get back some money for the damage. Asked whether there were any other suspects, the applicant said no, that he was the main suspect and he did not know how many people were called. He was interviewed for 6 hours. He had then received the court papers indicating that he was accused and that there were 2 witnesses.
60. The Tribunal asked whether the applicant had tried to get a lawyer to defend him and try to sort out the matter. The applicant said that he did not have enough time before the police called him to the interview and he did not know what it was for, so he thought they would just ask questions and then release him. The Tribunal noted that there was a FYROM police clearance certificate dated [March] 2011 on file and asked whether he thought that would appear to indicate that there was no criminal charge still on the record. The applicant said that he did not think that there was any criminal charge but he was not sure. The Tribunal then adjourned for a short break at the applicant's request.
61. The Tribunal asked whether he really thought it likely that the owner would reinstitute proceedings more than 2 years later given that there appears to be no longer anything on the record and would have no evidence against him so long after the event, so the chances of success would seem very unlikely. The applicant said that he was not sure and that he only had his brother's word about the letter, but he could not be 100% sure that the case was closed. The Tribunal asked whether he wished to say another more about the court case. He said no. A short break was taken at the request of the applicant.
62. The Tribunal asked whether he had many friends who were homosexual in FYROM. He said he had 5 or 6 maybe. Asked whether they had problems too, he said that they all did. One moved to [another country], and this was the same boy he was caught with on the school excursion. Asked what kind of problems his friends had, he said that they suffered the same problems as him like abuse, difficulties in finding jobs or going to university.
63. The Tribunal asked whether the applicant had any other problems as a result of his homosexuality that had not yet been discussed. The applicant said no.
64. The Tribunal asked whether the applicant had considered the possibility of relocating to Skopje where people may not have known him for a fresh start. He said that it would be the same there too, because once people know you then the problem would start all

over again. The Tribunal noted that there were support groups for gay people in Skopje and asked whether he had ever sought their support. He said no, he had no information. The Tribunal asked whether he would consider seeking their support. He said if he had to go back he might but that they still could not do anything to help him as they did not have the power. Asked why not, he said that they could not give him money to live or an education.

65. The Tribunal then heard from the applicant's witness, his [aunt]. She said that she would like to explain that her nephew is gay. She said that when she was in FYROM in 2008 her nephew explained to her that he was gay and that his parents were not happy with that. As a result, she agreed that he could live with her for the 2 or so months that she was in FYROM. After that she wanted to take him away from there so that he would not have the concerns or worries he had there. The Tribunal asked when she became aware of her nephew's homosexuality. She said in 2008 when she was on holiday in FYROM. She said that she is the sister of the applicant's father. Asked how she explained the difference in her reaction to the applicant's father given that they are from the same background, she said that she had been living in Australia for 20 years and for her there was no difference, while overseas it was an embarrassment to be gay and that was how his father had approached the issue. Asked when she was in FYROM in 2008, she said July until [September]. Asked whether the applicant was applying for jobs while he was staying with her, she said that she did not know. Asked whether she was in contact with the applicant's father, she said not a lot. Asked whether she talked to him about the applicant, she said not very much because he was depressed and nervy did not want to talk about that issue.
66. The Tribunal asked the applicant whether he wished to say anything further about his fears if he returned to FYROM. He said no. The Tribunal asked the applicant's representative whether he wished the Tribunal to follow any other line of enquiry or whether he wished to make any submissions. He said that he relied on his written submissions.
67. The Tribunal informed the applicant that there was some adverse information that it wished to put to him.
68. The first piece of adverse information was that the DIAC delegate referred in her decision to two certificates from his school that he used in his student visa application which referred to his behaviour as "exemplary" rather than "bad", which he had claimed was the basis for his rejection by the university based on the two school certificates which noted his performance as bad. The Tribunal asked whether the applicant wished to comment now, or whether he would prefer to respond to the letter that the Tribunal would send raising its concerns. The applicant said that he would wait for the letter to respond.
69. The next piece of information was in relation to his account of the robbery of the internet cafe he was falsely accused of. The Tribunal put to the applicant that he had given at the hearing a different story to the one he had given to the DIAC delegate and that the inconsistencies were glaring. Examples of some of the inconsistencies included the fact that he referred at the hearing to having received a letter from the court before leaving for Australia and made no reference to this letter in the account to DIAC; in his interview with the delegate he gave quite a detailed account of 4 other suspects who were accused of the incident, whereas at the hearing he had said there were no other

suspects; the applicant told the delegate he had spoken to one of these other suspects about the case after he arrived in Australia, whereas he said at the hearing he had not been in contact with anyone other than his brother about the case. The Tribunal put to the applicant that the inconsistencies cast doubt on the credibility of the story.

70. The next piece of adverse information was the delay in his protection visa application. The Tribunal asked the applicant why he waited until [March] 2011 to lodge his application after having arrived in Australia in December 2008. The applicant said that when he came to Australia he had information that he could apply for permanent residency after he had completed school but that after two and a half years there was no more financial support for his studies, and that this was why he decided to lodge a protection application and it was submitted late.
71. The Tribunal put to the applicant that there was another credibility issue in relation to his account of the attack on him after the nightclub and there was an inconsistency between what he said to the DIAC delegate and what he said at the hearing. He had told the DIAC delegate that his attacker did not say anything, whereas at the hearing he had said that his attacker had accused of being gay.
72. The Tribunal also put to the applicant adverse country information that homosexuality is legal in FYROM after having been decriminalised in 1996. There was also evidence that there was increased openness in FYROM towards homosexuals, such as in the area of employment of homosexuals. The European Commissioner for Human Rights for FYROM visited in February 2008 and reported on recent amendments to the law on work relations which prohibited discrimination in the workplace on the basis of sexual orientation. In the same report by the European Commissioner, it was also reported that gay groups in FYROM do not face restrictions on their ability to speak out publicly and that they receive regular media exposure. The Tribunal asked the applicant if he had any comment. The applicant indicated that he would respond to these issues in writing.
73. The Tribunal then asked whether there was anything else that the applicant wished to say. He said no. The Tribunal asked whether the applicant's agent had anything further. He said that he would address any issues he may have in writing.

The Second Hearing - [November] 2011

74. As with the first hearing, the resumed hearing was conducted principally in English with a Macedonian interpreter present to assist if necessary.
75. The Tribunal indicated that the hearing had been resumed because it felt that there were some issues that were not covered adequately at the first hearing. It noted that it had put to the applicant at the end of the first hearing a number of inconsistencies in his evidence, and had informed the applicant that it had not yet had a chance to get on top of all of those inconsistencies at the hearing. The Tribunal was planning to go over those inconsistencies orally at the resumed hearing under s.424AA of the Act later. But first it wished to address some of the issues that it felt had not been adequately covered at the first hearing and that required further explanation.
76. Before starting, the Tribunal asked what the notes he was looking at were. He stated that he had his agents' submissions in front of him.

77. The Tribunal asked the review applicant about his religion. He said that he was of the Orthodox faith but that he was not practising. He said that his family were practising, strict adherents of the Orthodox faith.
78. The Tribunal noted that at the last hearing the applicant had said he had realised he was homosexual when he was in high school when he was about 16 or 17. The Tribunal asked the review applicant to describe the process he went through in order to come to the realisation that he was homosexual. The applicant asked for the question to be repeated. The Tribunal asked whether the applicant would prefer for the question to be translated into Macedonian or whether he wanted it in English. He said in English. The Tribunal asked the applicant to describe the process he went through in order to realise he was homosexual. The review applicant said that before he realised that he was more interested to hang out with boys than girls and that boys were more attractive to him than girls. The Tribunal said that it was going to put the question to him through the interpreter again. The interpreter translated the question. The applicant did not respond to the question. The Tribunal asked whether he was having difficulty understanding the question. The review applicant responded that he did not understand the full meaning and asked whether the Tribunal could be more specific. The Tribunal asked whether he could describe the feelings he experienced when he realised he was homosexual. The review applicant said that he was more attracted to boys, that he went to a school that was 95% boys, and that he was not attracted to girls.
79. The Tribunal asked whether he could describe the impact that this realisation had on his life. He said that he felt that he had so much fun when he was “hanging out” with the boys and that he felt more happy with them and that at a certain time he realised that he was gay and homosexual. The Tribunal asked whether this process of realisation was a positive one. The review applicant said “Excuse me?” The Tribunal repeated the question. The review applicant said yes. The Tribunal asked in what way. The applicant said that he said that he felt happy, that he had fun, and that he liked it. The Tribunal asked whether there were any negative aspects of the process for him. The review applicant said “Excuse me?”. The Tribunal repeated the question. He said no.
80. The Tribunal asked whether his religious background affected how he felt about his sexuality. He said yes. Asked in what way, he said because his religion did not permit homosexuality and this was against his religion. The Tribunal asked what effect that this had on the review applicant. He said that he had been told by his priest to change his sexual orientation. The Tribunal asked whether this had affected his feelings about being homosexual. He said yes. Asked how, he said that his priest had given him lessons that it was not good and told him that he would be stopped from going to church. The Tribunal noted that he had said earlier that he did not go to church. The review applicant said that he went to church in the beginning and the priest gave him the lesson that he was going the wrong way. The Tribunal asked when. He said he could not remember, that he had been a few times in Australia. The Tribunal said it was referring to the time when he discovered he was homosexual. The applicant said at that time the priest gave him lessons about his homosexuality. The Tribunal asked when it was that the priest was giving him lessons. He said it was in December 2007. The Tribunal asked how this came about. The review applicant said that he did not know how the priest knew about him but when he went to church the priest called him into his office and gave him lessons about it. The Tribunal asked why the review applicant had not mentioned this in his statement and he said because it was a religious thing so

he didn't really care. The Tribunal asked why not, and the review applicant said because he didn't even go to church that much and that he didn't follow that religion any more.

81. The Tribunal told the review applicant that his evidence was contradictory and asked him to clarify his religious practice because it was trying to establish the impact of this on his homosexuality. He said that he was going to church before the priest gave him the lesson and then after that he stopped practising. Asked how regularly he was going to church before the priest gave him the lessons, he said he went once or twice a month during some periods, and only two times a year for Easter and Christmas at other periods. The Tribunal indicated that the applicant's evidence on this point was somewhat confusing. The Tribunal asked whether the fact that he was attending church at the time that he realised he was homosexual had created confusion for him. The review applicant said no. The Tribunal asked why not. He said that it just didn't.
82. The Tribunal asked him to describe the thought process that he went through when he realised that he was homosexual. As the applicant appeared to hesitate over the question the Tribunal asked the interpreter to translate it. He said that he felt good and normal. People were saying that he was insane and he had brain problems, but he just felt good and normal and he did not have any problems with his mind. The Tribunal asked what affect this realisation had on him emotionally. He said he was affected a little bit, but not that much.
83. The Tribunal asked how often his parents went to church. The review applicant said that they went every week. Asked whether this was a factor in their response to his homosexuality, he said yes. Asked in what way, he said that they believed the priest that homosexuals were sick or mental people.
84. The Tribunal noted that the review applicant said at the last hearing that he had realised that he was homosexual about one year before the incident where he was caught at school and asked him whether this was correct. He said yes. The Tribunal asked how many same-sex contacts he had during the year before he was caught. He said roughly ten. Asked who they were with, he said mainly with boys from his school, and some other boys from outside the school. The Tribunal asked whether the relationships involved sexual contact. He said some of them. The Tribunal asked why he described the relationships that did not involve sexual contact as homosexual ones. He said because he felt free to talk to them. He said he only had physical contact with some of them. Asked how many, he said roughly six or seven. The Tribunal asked him if he could tell it about those contacts and what happened. After a pause, the review applicant said that he did not understand the question. The Tribunal said that it just wanted him to describe what happened. It said that he did not need to go into intimate detail, but the Tribunal wanted to get a sense of how his relationships developed. After another lengthy pause, the applicant said that he felt free to speak to the boys because they were like him, homosexuals, so they all got closer and they felt they could tell each other their problems. The Tribunal asked where the contacts took place. The applicant said that it was difficult to hear and asked for the question to be repeated. The Tribunal repeated the question. He said at the beach where it was closed and other places in the forest. The Tribunal asked whether any of the relationships turned into lasting boyfriend relationships. He said yes. The Tribunal asked for how long, and he said around 6 months. The Tribunal asked whether this was with one boy, and he said yes. The tribunal asked the boy's name, and the applicant said "Excuse me?". The

Tribunal repeated the question and the applicant responded [name deleted: s.431(2)]. He said that he was the same boy he was caught with at school.

85. The Tribunal asked the review applicant whether he had attempted to conceal his sexuality the year before he was caught. He said yes. The Tribunal asked how. The applicant said that he was making himself invisible, that he was hiding from his parents, that he didn't talk too much to people or openly do things. The Tribunal asked whether that changed at any point. The applicant said yes, a little bit. He said he was a bit safer because they did not know what was in his mind or what he wanted to do, but it was hard to keep it for a long time. The Tribunal asked whether there was a point where he felt he no longer had to hide being homosexual. The applicant asked for the question to be repeated as he could not hear properly. The interpreter translated the question. He said no. The Tribunal asked whether that meant that he was not able to express his sexuality in a public manner. He said that yes, he was not able to express himself.
86. The Tribunal asked whether he had continued to have homosexual relationships with men in Australia. The review applicant said yes. Asked if he could tell the Tribunal about them, he said that he had a few since he came, although not when he first arrived in Australia. He had done this only after he realised that Australia was a free country and that there were places where he could go and meet people. The Tribunal asked again if he could tell it about these relationships. He said that he had been with one guy he met in his English school. The Tribunal asked him to go on. He said that this guy felt free to talk to him, but the applicant felt more fearful until he realised that it was OK and that no one would bother him or abuse him for his sexuality. The Tribunal asked him what happened. He said that they went out a few times together. The Tribunal asked where. He said for coffee and a few clubs. The Tribunal asked what clubs. He said they went to [Club 5]. He then paused. He then said they went to [Club 6], but that he could not remember where they went. The Tribunal asked what kind of clubs they were. He said normal clubs, nightclubs. Asked when this was, he said July 2009. Asked how long the relationship lasted, the applicant said from July 2009 until October 2009.
87. The Tribunal asked whether he had any other relationships since he arrived in Australia, he said not relationships, but "kind of " The Tribunal asked him to describe them. He said that he had met another guy at his other school, who he met at [Club 5], a gay nightclub. The Tribunal asked how long the relationship lasted, and he said only two months. The Tribunal asked if there were any other relationships that he thought worth mentioning, and he said no.
88. The Tribunal asked the review applicant to describe how being homosexual in Australia is different to FYROM. He said that it was very different because in Australia he felt free and could go to any bar or club or place or shop and buy things or do things and if someone asks him he can explain to them his sexual orientation. He said that it is just normal here and they do not look at you like you are strange. The Tribunal asked how that difference affected him when he came to Australia in an emotional sense. He said that in the beginning it was a bit difficult, but then he realised that people were talking about their sexual orientation and after a time he realised that he could be a free person and be who he wanted to be and that he could have any sexual orientation and be normal and no one could abuse or touch him. The Tribunal asked how he came to learn about this. He said that he realised this at his school because people from lots of

different countries felt so free that they could talk about everything and about their own countries and where they came from. They felt free to talk.

89. The Tribunal asked how often he went to homosexual meeting places. The applicant said that he did not go that much as he did not have that much time. The Tribunal asked roughly how often, and he said once or twice a year if he was free. The Tribunal asked what kind of places he went to. He said this year he would go to the gay festival that was taking place on the coming Sunday. His agent added that it was the gay pride festival. The Tribunal asked if he went anywhere else. He said last year he had been to the same event. The Tribunal asked whether he went to gay bars or clubs or cafes. He said yes. The Tribunal asked how often he went. He said the last time he had been was more than a month ago, as he did not have much time or money to go. The Tribunal asked him how often he had been to such gay meeting places, on average, since his arrival in Australia. He said that in the first year he did not go much, maybe ten times, once a month, it depended. The Tribunal asked him how many times after that and he said ten times a year since the first year.
90. The Tribunal then informed the applicant it was going to put to him the adverse information that it had identified from the evidence he had given at the hearings and at other stages of the visa application process formally under s. 424AA of the Act. The Tribunal noted that it would ask the applicant for his response afterwards and that he could ask for time to respond. Some of the information had already been raised at the last hearing so he would already be familiar with it, while some of it was additional information that had not yet been put to him. The Tribunal indicated that it was putting this information to him because if it relied on it the Tribunal may not be satisfied that he would face persecution if he returned to FYROM.
91. The first piece of information concerned the incident with his boyfriend on his school excursion. In his Department of Immigration and Citizenship interview, he stated that [in] October 2007 he went on a school excursion to the lake at [Town 3] when he was caught by a teacher engaging in physical contact with his boyfriend. At the last hearing, he said that the incident when he was caught by his teacher with his boyfriend took place during the first week of November and that it took place three weeks before he went to a nightclub to celebrate his eighteenth birthday [in late] November 2008. The Tribunal asked if he understood the information and he said yes. It noted that it was relevant because it would be expected that he would give a consistent account of when such an important incident took place. It may lead the Tribunal to find that the incident did not take place as claimed and that his account was not credible. The Tribunal asked whether he wanted to comment on or respond to that information now, or whether he needed more time to do so. He said that he needed more time and would respond in writing.
92. The Tribunal put to the applicant the second piece of information, concerning his school certificates and his rejected university application. At the Tribunal hearing, he said that his application for university was rejected in August 2008 because the university had taken into account the two school certificates that listed his behaviour as "bad". He said that these school certificates were issued in 2007 and 2008 as a result of the incident where he was caught by the teacher with his boyfriend. The Department of Immigration and Citizenship decision referred to two school certificates on his student application file that referred to his behaviour as "exemplary". The Tribunal asked him if he understood this information as put to him and he said yes. The Tribunal noted that

the information was relevant because it would be expected that he would give a consistent account about his school record. It may lead the Tribunal to find his school record was not tarnished by the incident with his boyfriend or that this was the reason his university application was rejected. Asked if he wanted to comment on or respond to that information now, or if he needed more time to do so, he said that he needed more time.

93. The third piece of information the Tribunal put to the applicant concerned the physical attack in November 2008. At the Department of Immigration and Citizenship interview, he said that he had no idea if the person who attacked him knew him. He said that his attacker was screaming at him while he was beating him but that he did not remember what he was screaming. He said that the police later informed him that the assailant told the police that his friends told him that they saw him in the nightclub hugging his boyfriend. At the Tribunal hearing, he said that the person who attacked him was shouting abuse that he was homosexual and he should not be in that place. He said that he did not know his attacker but that he knew that the applicant was homosexual because he had been at the nightclub sitting at the opposite table and had seen the applicant hugging his boyfriend. Asked if he understood this information as put it to him, the applicant said yes. The Tribunal stated that the information was relevant because it would be expected that the applicant would give a consistent account about the attack. It may lead the Tribunal to find that the attack did not take place as claimed and that some of all of the information he had provided regarding the circumstances of the attack was not credible. Asked if he wanted to comment on or respond to that information now, or whether he needed more time to do so, he said that he needed more time.
94. The fourth piece of information concerned the accusation of robbery against him. The Tribunal noted that he did not provide any information regarding any accusations made against him about the robbery of an internet café in his protection visa application. The Tribunal then noted it was going to put to him two accounts that he gave of the robbery to DIAC and to the Tribunal, which differed substantially and which were quite long. The Tribunal noted that it would be happy to read these back slowly if he needed this afterwards.
95. In his account at the interview with DIAC, he said that [in early] November 2008 he was called by the police for an interview regarding a robbery at an internet café. He said that later the police found four men who actually committed the robbery. These four men called him after they had been questioned by the police and released on the basis that they agreed to act as witnesses against him at court. They then called him to inform him that the owner of the internet café and the police were pressuring them to falsely say that he had actually committed the robbery. He said that he then went to a lawyer who told him that he could fight the case. He said that he decided to leave for Australia and that he did not have any documents regarding the case because he was already in Australia. When asked whether there was a document saying that he had to go to court, he said that “there was, somewhere in Macedonia, in the post” When asked how he knew that, he said he found out when he contacted his brother in February 2009 and he told him that there was a letter for him from the [Town 1] court. He said that when he was in Australia he also contacted one of the four men who had actually committed the robbery to ask what had happened in the case. He said that he told him that he and the other three witnesses had been fined 100 Euros and that the case was closed.

96. At the Tribunal hearing, he said that just before he came to Australia at the end of November, not [at the beginning of] November as he told DIAC, but the end of November to the beginning of December he was called by the police for an interview. He said that three days before he left FYROM for Australia he received a letter from the court saying that he had to go to court as he was accused of the robbery. To DIAC, by contrast, he said that he didn't have any documents because he had to leave for Australia and the only letter he had came by post and he found out about this when he contacted his brother from Australia in 2009. To the Tribunal he said that the letter named two witnesses, one of whom was a policeman from nearby who knew him and another person whom he did not know. He said that there were no other witnesses or suspects in the case. To the DIAC officer, he had said there were 4 men who contacted him saying that they had been pressured by the police and the owner of the café to falsely give evidence against him. At the Tribunal hearing he said that he never went to see a lawyer about the case, but he told DIAC that he did go to see a lawyer about the case. He told the Tribunal that he heard from his brother in February 2009 that a letter was sent to his house after the court case saying that the case was closed. He told DIAC that he contacted his brother in February 2009 and that there was a document saying that he had to go to court. At the hearing he said that he had not been in contact with anyone else in FYROM about the case at any time since arriving in Australia, whereas to DIAC he had said that he had been in contact with 1 of the 4 men who had been pressured to be a witness against him.
97. Asked whether he understood this information as put it to him, the applicant said yes. The Tribunal said that the information was relevant because it would be expected that he would have referred to these events in his protection application form. In addition, these inconsistencies may lead the Tribunal to decide that the accusations against him and the court proceedings did not occur as claimed and that the information he had provided was not credible. Asked if he wanted to comment on or respond to that information now, or whether he needed more time to do so, the applicant said that he needed more time.
98. The Tribunal then noted that there was another piece of information it wished to put to the applicant. He had said in the interview with DIAC that he was not a practising adherent of the Orthodox faith whereas at the hearing he had said that he was and he had given quite a lot of detail about how often he went to church. He had also introduced a new element that the priest had given him lessons that he should not be a homosexual. The Tribunal asked whether he understood this information and he said yes. The Tribunal said that it was relevant because it would be expected that he would give consistent accounts about whether or not he went to church and it would also be expected that he would have raised in the past the lessons the priest had given him about homosexuality, and that this may lead the Tribunal to find that some of the evidence he had given was not credible. Asked if he wanted to respond now or if he needed more time, he said that he needed more time.
99. Asked if he had anything further he wished to raise, the applicant said no. The Tribunal then asked his representative if there were any further questions he would like it to put to the applicant or whether he had any further submissions to make. The representative said that they would like to respond to the s.424AA matters in writing. The Tribunal agreed to a two week period for response.

100. As with previous hearings, the hearing was conducted principally in English, with an interpreter in the Macedonian language present if needed.
101. The Tribunal noted that it had called another hearing because issues had again emerged from the applicant's evidence that required further examination and required additional questions to be put to the applicant to ensure that he was treated fairly and accorded procedural fairness.
102. The Tribunal said that the first issue that it wanted to put to the applicant was that the evidence that he had given had raised the question as to whether or not he actually was homosexual as he had claimed. The Tribunal noted that it was not putting this to the applicant under s.424AA as it had previously put information to him in the second hearing, so it would not be giving him time to provide a written response as it had done then. It was simply informing him that the issue of whether or not he was actually a homosexual was in question and was asking him whether there was anything he wished to say to that now. The applicant consulted with his representative, who advised him to respond to the question as to whether he was homosexual. The applicant said yes.
103. The Tribunal said that another issue where his evidence raised concern was on the question of his religious background and the effect that this has had on him being homosexual. His evidence on whether or not he was, in fact, a practising Christian was contradictory and confused. At some points he said he did go to church, at others he said he did not. He also gave inconsistent evidence on whether his religious background had an effect on him as a homosexual – at one point he said it did as homosexuality was forbidden by the church, at another point he said that his religion had not created confusion for him regarding his homosexuality. The applicant's representative intervened and stated that these points overlapped with issues put to the applicant at the previous hearing under s.424AA. The applicant was planning to respond to the questions under that process and his representative wondered why the issues were being raised again. The Tribunal indicated that it had thought that the matters were formulated somewhat differently this time, and that it was trying to give the applicant a chance to respond to issues that had not yet been raised with him. However, if the representative felt that the issues had already been covered previously under the s. 424AA procedure he should say so, and it was up to him to decide whether he wished to respond now or not. The Tribunal further noted that the applicant had claimed for the first time at the last hearing that he had been given lessons by the priest and that it may have difficulty accepting this claim given that it had never been advanced at an earlier stage before.
104. The Tribunal also put to the applicant that at the last hearing he had said that he was not able to express his sexuality in a public manner in FYROM and that he had to hide his sexuality. The Tribunal noted that this was inconsistent with his evidence at the hearing that he had been at a bar hugging his boyfriend and that the man who had beaten him up saw him doing this, and this is why he attacked him. The Tribunal asked whether he had any comment on this. The applicant said that he did not.
105. The Tribunal also put to the applicant that his claim that he had to hide his sexuality was also inconsistent with his claim that he could not get a job anywhere because everyone in [Town 3] and [Town 1] knew that he was gay. The Tribunal asked whether he had any comment, and the applicant said no.

106. The applicant's representative informed the Tribunal that he had only just received the recording of the previous hearing and asked for a further two weeks to provide the applicant's s.424AA response. The Tribunal agreed to the extension. The Tribunal asked if the applicant had anything final he wanted to say, and he said no. The applicant's agent also indicated he had nothing further to add.

Post-hearing Submissions

107. [In] December 2011, the Tribunal received the following submissions from the applicant's representative:

...

Further submission re s42 AA particulars of information notified by the Member, and other matters raised by the Member, at hearing [in mid] November and [early] December 2011

At a resumed hearing [in mid] November 2011 the Member:

- questioned [the applicant] about some matters not dealt with at the hearing [in early] November 2011; and
- gave notice under s424AA of five particulars of information that could be the reason, or part of a reason, for affirming the decision to refuse [the applicant]'s application for a protection visa.

And at a hearing [in early] December 2011 the Member:

- invited [the applicant] to respond to possible interpretations of the evidence, viz that he is not gay, which goes to the basis of his claim for protection, and that he has given contradictory evidence about his religious background; and
- raised three more s424AA particulars of information that could be the reason, or part of a reason, for affirming the decision to refuse [the applicant]'s application for a protection visa.

Because one of the non s424AA issues raised [in early] December overlaps with the 'unfinished business' from [early] November 2011 dealt with [in mid] November 2011 and a s424AA particular of information of 19 November 2011 leave was sought to respond to them together in writing.

The date of the school picnic.

An important part of [the applicant]'s account of his fears of persecution for being gay was an occasion at a school picnic where he was caught in inappropriate circumstances with a friend and thus exposed as being gay to the school authorities. The inconsistency which the Member discerned is that:

- [the applicant] told the delegate it was [in] October 2007;

at the hearing [in] November 2011 he said it was November 2007, and + at the resumed hearing he said it was 3wks before his 18u' birthday. NB 3wks before [the applicant's] 18th birthday would be [November] 2007.

These dates are only a few weeks apart. The variations reflect the fact that [the applicant] doesn't have records. At different times he has sought to calculate the date by reference to his birthday and public holidays in Macedonia because the school picnics are held on public holidays. In the same way that, in Australia public holidays are sometimes observed on the Monday closest to the actual date of the event being commemorated, in Macedonia it is Fridays. In that portion of the public and school calendar there are public holidays on 8 November and 11 October which commemorates the

liberation of various parts of the country in WWII. Any miscalculation is an honest mistake. If [the applicant] was seeking to give a false account it would be easy to have a consistent date. The fact that he spontaneously arrived at minor, practically inconsequential, variations when calculating the date is evidence that it is not a contrived account.

Unfavourable school certificates and university entry

The inconsistency discerned by the delegate is that:

- in his evidence [the applicant] stated that when he was 'outed' after the incident at the school picnic, he received unfavourable comments about his character on school certificates, which was why he did not obtain university entry; whereas
- the school certificates submitted with [the applicant]'s student visa application stated that his character was 'exemplary'.

As the decision record notes, the certificate is dated February 2007. The incident at the school picnic occurred in October or November 2007 (see previous particular) and unfavourable comments began after that and, hence, this is not an inconsistency.

The attacker

At DIAC [the applicant] said that he did not know if the perpetrators of the attack after his 18th birthday celebration knew him, that they were screaming at him but he could not remember what, and later that the police told him a friend of the attacker had seen him and his friend together in the bar. At the RRT [in early] November [the applicant] said he had been abused for being homosexual, that he did not know his attacker who had been at the night club and seen him with his friend. The apparent inconsistency is:

- [the applicant] knowing the content of the verbal abuse he received while he was being beaten; and
- that the attacker was in the bar and saw [the applicant] with his companion rather than being told of it by a friend.

[the applicant] concedes that his account at the RRT is an embellishment on what he told the delegate,

But it is not an embellishment for purposes of improving his prospects of convincing the RRT that he has a well founded fear of persecution on account of being gay in Macedonia. It is a surmise from being told by police that the attackers claimed that they had been provoked by [the applicant's] behavior at the night club and that the motive of the attack was clearly his homosexuality. It is [the applicant]'s conclusion after reflecting further on what the police told him and the fact that he could not remember what was being said. This is not an inconsistency that should be the reason, or part of a reason, for affirming the decision to refuse [the applicant]'s application for a protection visa.

The theft

The fourth particular of information that could be a reason, or part of a reason, that would lead to the RRT affirming the decision to refuse [the applicant]'s application for a protection visa concerns inconsistencies between his accounts of the robbery of the internet cafe at the DIAC interview and at the hearing [in early] November 2011. [The applicant] concedes that he embellished the story at the RRT hearing and apologises for this. The account that he gave to the delegate is correct.

Specifically, he did consult a lawyer and was advised that the matter could be defended but he was not confident he would get a fair hearing in a court at [Town 1]. He had in any event already made arrangements to come to Australia.

The letter or document from the court was delivered to his home 3 days before he left for Australia. He had already left for Skopje to collect his passport, visa and tickets and departed Macedonia for Australia from there. He never returned home but he was told about the letter by his brother.

[The applicant] was being framed for a criminal offence that had nothing to do with him because of prejudice against homosexuals. As noted he embellished the account for the RRT and relies on his account to delegate.

[The applicant's] religious commitment

The extent of [the applicant's] religious commitment was raised by the Member in two of the s424AA particulars of information, the remaining matters dealt with [in] November and one of the non s424AA matters that the Member raised [in early] December 2011. There is no inconsistency on this that should be the reason, or part of a reason, for affirming the decision to refuse [the applicant's] application for a protection visa.

[The applicant] was born into a Macedonian Orthodox family in a society where a person's religion is generally ascribed by the family they are born into, which also determines which of the two ethnic groups: Macedonian Orthodox; or Albanian Muslim, they are members of. He is not very religious but his parents are devout.'

[The applicant] currently only attends church intermittently. He was only attending church a few times a month before he was counseled by the priest, and a few times year since then. [The applicant] was quite clear, when pressed by the Member, that he was not personally troubled by religious doctrines and homosexuality because he doesn't care about it, does not go to church often and regards such issues as 'religious not political' viz. not affecting his human rights . This is not inconsistent with his evidence a few minutes earlier that religious disapproval, manifest most notably in counseling by a priest a year after he realized he was gay, affected his feelings about being gay because he was admonished and told he would be 'forbidden' from the church unless he changed.^o But that was a matter of practical survival in a society where identity is, in large part, defined by which religious congregation a person is a member of It was not a matter of personal conscience for [the applicant].

In the terms of the particular of information on this subject notified [in mid] November. [The applicant's] accounts of his religious commitment are not contradictory. He has not based his claim to have a well founded fear of persecution for being gay on experience of persecution by the church. The doctrines of the church include values that characterize gays as deviant and diseased but it is not the church that has been the agent of the persecution he has experienced. 1-10 has experienced denial of educational opportunity, denial of employment opportunity, beating and subsequent police indifference and being framed for a criminal offence he, did not commit, with police concurrence because he was gay in Macedonia.

This has informed his fears if he is returned to Macedonia and those are the concerns he had hitherto submitted to DIAC and the RRT. [The applicant's] 'claims' [in mid] November 2011 regarding the church were in answer to questions of the Member and, properly construed, they are not inconsistent with his earlier answers.

Counselling by a priest

Our comments regarding the previous particular of information apply to this particular of information. This matter arose from questions about [the applicant's] experience with the church. The reason why he had not hitherto raised the fact that he was called in and admonished by a priest is because he does not rely on fears persecution by the church in mounting his claim to have a well founded fear of persecution because of membership of a particular social group if returned to Macedonia. They are proponents of homophobic values in Macedonia that were cited in our submission of 1 November 2011. But they are not the agents of the persecution he has experienced.

This difference, not inconsistency, between [the applicant's] account of [early] December 2011 and earlier occasions was because he had not been asked about it on earlier occasions and, as noted, it was(is) not the basis of his claim. This is not an inconsistency that should be the reason, or part of a reason, for affirming the decision to refuse [the applicant's] application for a protection visa.

Being openly gay

This inconsistency which the delegate discerned that could be the reason, or part of a reason, for affirming the decision to refuse [the applicant's] application for a protection visa is that his evidence [in mid] November was that it was not possible to be openly homosexual in Macedonia but [in early] December 2011 he said that he and his friend were openly hugging in the bar on his 18th birthday. It is not a simple dichotomy. [The applicant] would not have openly lived with his companion or (say) hold hands in the main street during daylight hours and the fact that he behaved 'adventurously' with a companion while drinking in a bar at night does not reasonably suggest that he does not genuinely believe that he cannot live openly as a homosexual in Macedonia. [The applicant] was beaten as a consequence of his behaviour that night which confirms his assertion of [mid] November that it is not possible to live as a homosexual in Macedonia. This is not a reason, or part of a reason, for affirming the decision to refuse [the applicant's] application for a protection visa.

Being known as a homosexual

This particular of information which the Member discerned that could be a reason, or part of a reason, for affirming the decision to refuse [the applicant's] application for a protection visa is an inconsistency between his claim that he had to hide his homosexuality and the fact that 'everyone' in [Town 3] and [Town 1] knew he was gay, [the applicant] was outed at a school picnic against his will. It is known that that fact was made known to university admission authorities. Macedonia's a homophobic society. Whether it was salacious gossip or the sanctimonious transfer of information [the applicant's] reputation in those small communities of 30+thousand and 40.1-thousand population is such that he cannot get a job, It may be that his reputation contributed to his being selected for a beating after his 18th birthday. The fact that [the applicant] finds it prudent to not overtly display gay behaviour in public and exacerbate his chances of experiencing persecution is not inconsistent with the fact that his reputation has spread as far as it has - contrary to his wishes. This is not a reason, or part of a reason, to affirm the decision to refuse [the applicant's] application for a protection visa.

[The applicant's] religious commitment

This was raised by the Member [in mid] November 2011 as one of the matters that had not been covered [in early] November 2011. It was explored in more depth than before. [The applicant's] answers at this point form one leg of the discerned discrepancy that was the s424AA particular of information which was notified later in the hearing and is addressed at pages 3-4 herein.. We rely on those points,

[The applicant's] realization that he is homosexual

This was also raised by the Member [in] November 2011 as one of the matters that had not been covered [in early] November 2011. [The applicant] confidently answered the Members questions about what it was like to realize you are gay in Macedonia. This also touched on religious questions. [The applicant] answered difficult open-ended questions such as:

Describe for me the thought processes when you realised you were homosexual.

Such questions can give effusive witnesses an opportunity to explain their claims but applicants who are reticent can be stuck for words. [The applicant] asked for most of the questions to be repeated and thought carefully about his answers. He explained how in a society where homosexuals are told they 'have a brain problem or are insane' he felt normal. He was affected a little emotionally but not much. He spoke of good feelings, being free to speak to others and able to discuss each other's problems. These were fulsome answers spontaneously given to questions that did not suggest an answer. They credibly answer the questions that the Member asked.

Is [the applicant] gay?

As a preliminary point [in early] December 2011 the Member gave notice that it was open, on the evidence to that point, to conclude that [the applicant] is not gay. In view of the evidence of [the applicant in mid] November cited above about the process of realizing that he is homosexual this notice by the Member came out of `left field'. The evidence of [the applicant] in this matter since the visa application has consistently, and credibly, been that he is gay. Matters that have caused the Member to discern reasons, or parts of reasons, why the decision to refuse his application for a protection visa might be affirmed were formulated as s424AA particulars of information [in] November 2011 and [early] December 2011 and are addressed herein. The Member is urged to review [the applicant's] evidence in the light of the points made herein and conclude that he is gay.

[The applicant's] religious commitment

As a preliminary point [in early] December 2011 the Member also gave notice that the evidence on [the applicant]'s religious commitment was contradictory. This was raised by the Member [in mid] November 2011 as one of the matters that had not been covered [in early] November 2011. It was then explored in more depth than before. [The applicant's] answers at this point form one leg of the discerned discrepancy that was the s424AA particular of information which was notified later in the hearing and is addressed at pages 3-4 herein. We rely on those points.

Submission

It is respectfully submitted that: the particulars of information notified [in mid] November 2011 and [early] December 2011 are not reasons, or parts of reasons, for affirming the decision to refuse [the applicant]'s application for a protection visa; and his evidence in relation to the other matters raised supports the proposition that he has a well founded fear of persecution for being gay if he is returned to Macedonia.

....(sic)

FINDINGS AND REASONS

108. The Tribunal accepts the copy of the applicant's passport that is on file as evidence that he is a national of the Former Yugoslav Republic of Macedonia (FYROM) and has therefore assessed his claims in reference to FYROM. There is no evidence before the Tribunal to suggest that the applicant has a right to enter and reside in any third country.
109. The applicant claims that he is a homosexual and that as a result he has suffered various forms of discrimination and harassment amounting to persecution in FYROM, including the denial of entrance to university; denial of employment opportunities; a physical attack that the police failed to properly investigate; ostracism by his family; ridicule and abuse from his local community; and false accusations of a crime he did not commit. He fears that if he returned to FYROM this treatment would continue and he would be prosecuted for the false charges. The applicant claims that the police cannot protect him as they are responsible for some of the mistreatment feared and because they would fail to protect him due to his homosexuality.
110. The Tribunal accepts that the applicant's claims would be Convention related, if they were made out through the evidence, by the applicant's membership of a particular social group, 'homosexual men in the Former Yugoslav Republic of Macedonia'. It is well-established that homosexuals in a given country can constitute a particular social group (e.g. *Applicant S395 of 2002 v Minister for Immigration and Multicultural Affairs* (2003) 216 CLR 473.)

111. The Tribunal has considerable reservations about the credibility of much of the applicant's evidence, as indicated to the applicant at the hearings. The Tribunal is not required to accept uncritically any or all of the allegations made by an applicant. Further, the Tribunal is not required to have rebutting evidence available to it before it can find that a particular factual assertion by an applicant has not been made out. (*Randhawa v Milgea* (1994) 52 FCR 437 at 451 per Beaumont J; *Selvadurai v MIEA & Anor* (1994) 34 ALD 347 at 348 per Heerey J and *Kopalapillai v MIMA* (1998) 86 FCR 547). Having carefully considered the applicant's evidence in its entirety together with his agent's submissions, the Tribunal does not accept that the applicant is homosexual as claimed. The Tribunal therefore finds that he does not have a subjective fear of harm in FYROM by reason of his membership of a particular social group 'homosexual men in FYROM'. The reasons for these findings follow.
112. The Tribunal found the applicant's evidence in relation to his sexual orientation to be vague, unconvincing and lacking in detail and credibility. The Tribunal observes that, in general, self-identification of an applicant as homosexual should be taken as an indication of the individual's sexual orientation. However, this is only the case if the applicant's account appears credible, or where there "is the full, consistent detail and the plausible noting of small points, unlikely to be observed or recounted by a person who had not had the experiences described." (*UNHCR Guidance Note on Refugee Claims Relating to Sexual Orientation and Gender Identification*, 21 November 2008). In this respect, the Tribunal finds that the applicant has not been able to recount consistently or plausibly the detail of his experiences.
113. The Tribunal is mindful of the fact that an applicant may find it particularly difficult or embarrassing to discuss claims in relation to his or her sexual orientation. (*WAIH v Minister for Immigration and Multicultural and Indigenous Affairs* [2003] FMCA 40 per Raphael FM at [23]). The Tribunal has also taken into account that claims relating to a person's sexual orientation require particularly sensitive investigation. While the evidence of claims of persecution by virtue of religious beliefs or political opinion, for example, can be tested by questioning an applicant about those beliefs or opinion based on objective information, it is particularly difficult to assess whether an applicant's claim to be homosexual is genuine or merely contrived for migration purposes. The Tribunal has also taken into account the difficulties associated with the discussion of what may be regarded as private, sexual matters. However, even taking all of these factors into account, the Tribunal did not find the applicant's evidence regarding his sexual orientation to be credible.
114. The Tribunal found the applicant's account at the hearing about the development and progression of his homosexual identity to be extremely vague and basic. He often gave simplistic and unconvincing responses that lacked the detail that characterized other aspects of his evidence regarding his homosexuality. The applicant also appeared to experience considerable discomfort and difficulty in answering the Tribunal's questions on this issue, which raised serious doubts in the Tribunal's mind as to whether indeed he was homosexual as claimed. He often claimed not to understand straightforward questions about how he became aware that he was gay and the impact that this realization had on him. His evidence on this point was often characterized by lengthy silences. In response to the Tribunal's resulting enquiries as to whether he found answering the questions difficult, he remained silent or asked for the question to be repeated. The Tribunal has taken account of the submissions of the applicant's agent

that he answered questions to difficult open-ended questions that were put to him which "could give effusive witnesses an opportunity to explain their claims but applicants who are reticent can be stuck for words." The submissions then go on to state that after thinking carefully, the applicant gave fulsome answers to questions that did not suggest answers. The Tribunal does not find this characterisation of the applicant's evidence persuasive, and observes that the applicant had no difficulty talking about his sexual orientation when it came to elements of his claim that he had put forward himself, where he had the opportunity to rehearse his testimony. When it came to the Tribunal's efforts to test the applicant's evidence on the question of his sexual orientation, however, the applicant appeared to experience considerable difficulty in answering the questions.

115. The Tribunal acknowledges the challenges of articulating the progression of one's self-awareness, particularly in regard to sexual orientation, and particularly when the applicant comes from a cultural context where homosexuality may not be openly admitted or acceptable. However, according to the applicant's own evidence, he was not affected by these cultural constraints in terms of his own feelings about his developing awareness of his sexual orientation. He said that even though others in his country of origin said he was 'sick', 'insane', or 'brain-poisoned', he felt 'normal' and 'happy' about the realization that he was gay. The Tribunal therefore finds it difficult to accept that the applicant was not more comfortable about talking about his sexual orientation in a spontaneous and open way. When the Tribunal raised with the applicant its reservations about whether he was, in fact, homosexual as claimed the applicant merely stated that he was homosexual.
116. The Tribunal also finds that there were a number of inconsistencies in the applicant's evidence that undermine the overall credibility of his claims.
117. The first inconsistency was in respect of the applicant's evidence in relation to the physical attack which he claims took place after he left a nightclub in November 2008. As put to the applicant at the hearing, he claimed in his interview with the delegate of the Department that he had no idea if the person who attacked him knew him. He stated that his attacker was screaming at him but that he did not remember what he was saying. He said that the police later told the applicant that the attacker's friends told him that they saw the applicant in the nightclub hugging his boyfriend. At the Tribunal hearing, the applicant said that the person who attacked him was shouting abuse at him about his homosexuality. The applicant said that his attacker knew he was gay as his attacker had been sitting at the opposite table at the nightclub and had seen the applicant hugging his boyfriend. The Tribunal has taken account of the submissions of the applicant's agent that acknowledge that the applicant "embellished" his account to the Tribunal. The Tribunal does not find the explanation in the submissions for the embellishment – that this was the result of the applicant reflecting further on what the police told him and that he could not remember what was being said – to be convincing. The Tribunal finds that the inconsistencies in these accounts of the incident cast doubt on whether it actually occurred and the Tribunal finds that it did not. The Tribunal further finds that the applicant's acknowledgement that he has given inconsistent accounts of this incident undermines the overall credibility of his claim.
118. The second inconsistency arose in the applicant's evidence in relation to the false charges regarding the robbery of a café that he claims were laid against him in FYROM. As put to the applicant at the hearing, in his account to the delegate he

claimed that four men who were guilty of the robbery contacted him to inform him that the police had pressured them to act as witnesses against the applicant in court, while at the hearing he said that a policeman and another person who he did not know were named in a court document as witnesses; he told the delegate that he contacted a lawyer but at the hearing he said that he did not contact a lawyer; he told the delegate that he had received no documents regarding the case while at the hearing he said that he received a document 3 days before he left FYROM for Australia; he told the delegate that one of the guilty men informed him that he and the others had been fined and the case was closed, while at the hearing he said that he had never been in contact with anyone else in FRYOM about the case apart from his brother at any time since arriving in Australia. The Tribunal has taken into account the explanation of the applicant's agent that he "embellished" his account at the hearing and that he relies on his account to the delegate of the Department. The accounts are inconsistent in such major respects that the Tribunal does not accept that the false accusations against the applicant were ever made and finds that the evidence provided by the applicant both to the delegate and the Tribunal is not credible. The Tribunal also finds that the extent of these inconsistencies reflects very poorly on the applicant's general credibility.

119. The third inconsistency arose in relation to the applicant's claim at the hearing that he was unable to live openly as a homosexual in FYROM and that he had to hide his behaviour and live in secret. In contrast, he also claimed at the hearing that the reason he was attacked for being gay was because his assailant had seen him hugging his boyfriend at the nightclub. He further claimed that the reason he could not get jobs in the towns of [Town 3] and [Town 1] was because 'everyone' knew that he was gay, and that he would be pointed out and jeered at by passers by in the street of these towns because he was gay. The Tribunal finds that these accounts are inconsistent, as it follows that if the applicant had been forced to 'live in secret' the general population of [Town 3] and [Town 1] would not be aware of his sexual orientation leading to public ostracism and the denial of job opportunities as claimed.
120. The Tribunal does not accept the explanation of the applicant's agent for the contradiction that the fact that he behaved 'adventurously' with his friend at the nightclub does not reasonably suggest that he does not genuinely believe that he cannot openly live as a homosexual in FYROM and that it is not a simple dichotomy. The applicant's evidence on this point was clear – that he had to make himself 'invisible' and that he could not live openly as a gay person. The Tribunal similarly does not accept the agent's explanation for the contradiction that seemingly everyone in [Town 3] and [Town 1] knew about his sexuality because of the incident where he was caught at school with his boyfriend. The Tribunal does not accept that such a relatively minor incident between two schoolboys, even in a society where homosexuality was not widely accepted, would be so widely circulated to the point that everywhere he went - in towns with a combined population of 100,000 – 110,000 according to the applicant's own evidence - people would recognize him and point him out, leading to his inability to get a job as claimed.
121. The Tribunal also finds that the applicant's evidence regarding whether or not he was, in fact, a practicing adherent of the Orthodox faith and the discovery of his homosexuality by his priest was contradictory and confused. At some points he said he did go to church, at others he said that he did not. Even if the Tribunal accepts the submissions of the applicant's agent on this point that he is not basing his claim on

alleged persecution by the church, the Tribunal finds that the general confusion surrounding the applicant's account of his religious background goes to his general credibility. The Tribunal often had the impression that the applicant was making up his evidence on the issue on the spot.

122. Further, the Tribunal found the applicant's evidence in relation to his sexual history in FYROM and Australia to be unconvincing. The Tribunal found the applicant's description of his claimed relationships with males in FYROM and in Australia to be generalized and lacking in detail to a degree that cannot be explained merely by a reluctance to discuss private, sexual matters with the Tribunal.
123. The Tribunal has also taken into account the fact that the applicant did not lodge an application for a protection visa until [March] 2011, over two years after the date of his arrival in Australia that was recorded in his protection visa application form. The applicant's explanation for the delay - that this was due to the fact that the financial support for his studies had come to an end and so it was no longer possible to follow his initial plan to apply for permanent residency after he had finished his studies - indicates that the timing of the lodgement of the visa application had nothing to do with the applicant's fear of persecution in his home country. The delay in lodging a refugee application is a legitimate factual argument and an obvious one to take into account in assessing the genuineness or at least the depth of the applicant's alleged fear of persecution (per Justice Heerey, *Selvadurai v. MIEA & Anor* (1994) 34 ALD 346). The Tribunal does not accept that a person in the applicant's circumstances and genuinely fearing harm if they were to return to their home country would not have lodged a protection visa application closer to their time of arrival in the country.
124. The Tribunal has taken account of the evidence of the applicant's witness but did not find that it outweighed its serious reservations set out above regarding the credibility of the applicant's evidence that he is homosexual. The Tribunal notes that the witness stated that the applicant was gay based on the applicant's self-reporting of this fact. Accordingly, the Tribunal does not accord any significant weight to the witness' testimony.
125. The Tribunal has also taken into account the submissions of the applicant's representative in relation to two other matters put to him under s.424AA, namely the date of his school excursion and the unfavourable school certificates referred to by the delegate. The Tribunal accepts the agent's submissions that the variations in the dates provided for the school excursion were practically inconsequential, and that due to the date of the school certificate there was no inconsistency. The Tribunal has therefore not determined either of these matters to be adverse to the applicant's claims.
126. In light of the above the Tribunal does not accept that the applicant is a homosexual or that he has ever engaged in homosexual acts or relationships in either FYROM or Australia. It follows that the Tribunal does not accept that he was discovered in a gay relationship and reprimanded by his teachers at school; ostracised by his family; attacked on his way home from a nightclub; ridiculed and abused in the street; denied entrance to university and employment opportunities; or falsely accused of a crime he did not commit.
127. Accordingly the Tribunal does not accept the applicant would face a real chance of serious harm as a result of being a homosexual if he were to return to FYROM either at

the hands of his family, the police, educational institutions, prospective employers, the courts, his community or anyone else in FYROM.

128. The Tribunal finds that the applicant does not face a real chance of serious harm amounting to persecution for reasons of his membership of a particular social group or for any other Convention ground. Accordingly, the Tribunal finds that the applicant does not have a well-founded fear of persecution within the meaning of the Convention if he returns to FYROM now or in the reasonably foreseeable future.

CONCLUSIONS

129. 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

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