

1104510 [2011] RRTA 671 (28 July 2011)

DECISION RECORD

RRT CASE NUMBER: 1104510

DIAC REFERENCE(S): CLF2010/175752

COUNTRY OF REFERENCE: United States of America

TRIBUNAL MEMBER: Don Smyth

DATE: 28 July 2011

PLACE OF DECISION: Brisbane

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 United States of America (USA), arrived in Australia on [date deleted under s.431(2) of the *Migration Act 1958* as this information may identify the applicant] March 1987 and applied to the Department of Immigration and Citizenship for the visa [in] December 2010. The delegate decided to refuse to grant the visa [in] April 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] May 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 Regulations.

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 (*Applicant A*), *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 (*S152/2003*), *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 has also had regard to the material referred to in the delegate's decision, and other material available to it from a range of sources.
20. The applicant appeared before the Tribunal [in] June 2011 to give evidence and present arguments.
21. According to information provided in his protection visa application, the applicant was born in Brooklyn, New York. He indicated in his application that he is of Christian religious faith. He has never married.
22. The applicant indicated that he had received twelve years' education in the USA. He described himself as being self employed and indicated that he had done "odd jobs".
23. The applicant indicated that he had arrived in Australia [in] March 1987, using a US passport issued [in] July 1985. The applicant indicated that he had departed the USA legally on a six-month tourist visa. He claimed that his passport was held by the Australian government and that he could not find out where. He claimed that it had been taken by detectives from his home and could not be located. He indicated that he had been convicted of [details deleted: s.431(2)] in Australia in September 2010.
24. The applicant described himself as a US citizen. He set out in his application various addresses at which he had lived in Queensland.
25. The applicant stated that he had contacted the US Embassy by phone but they had been unable to advise or help. He stated that he would now try to get an application for a US passport.
26. With regard to why he left the USA, the applicant replied, "Too much violence and I live in fear." In response to the question, "What do you fear may happen to you if you go back to that country?", the applicant stated, "I will live in fear." The applicant indicated that he was "not sure" who might harm or mistreat him if he went back to the USA. In response to the question, "Why do you think this will happen if you go back?", he similarly responded, "I am not sure."
27. The applicant also responded to the question, "Do you think the authorities of that country can and will protect you if you go back? If not, why not?" In this regard, the applicant stated, "No. Country is not able to."

28. The applicant indicated that he would provide a copy of his US birth certificate and passport as well as his Florida Drivers Licence. He provided the Department with a Police Certificate from the Australian Federal Police.
29. The applicant also submitted a "Personal particulars for character assessment" form in which he provided details of other family members. He indicated that his parents were deceased.
30. The applicant's representative informed the Department that the applicant did not wish to be interviewed by the Department.
31. The Tribunal's file also contains records relating to health checks undertaken on the applicant in Australia.

Tribunal Hearing [in] June 2011

32. By letter [in] May 2011, the Tribunal invited the applicant to attend a hearing [in] June 2011. [On a date prior to the hearing], the applicant requested a postponement of the hearing on the basis that he required treatment and monitoring in relation to his HIV positive status, and had an appointment [on the scheduled hearing date]. He referred to a further appointment [in] July 2011. He stated that, after his appointment [in] June 2011, he would be in a better position to decide on his future plans. He subsequently requested that the hearing be held by [video] and as late in the day as possible.
33. The hearing was rescheduled to 2.30pm [on a further date in] June 2011. The applicant attended the Tribunal [hearing]. In accordance with the applicant's request, the hearing was conducted by [video conference].
34. The Tribunal notes that there is evidence that the applicant has some health problems. He has also referred to having suffered a nervous breakdown. The Tribunal has had regard to this. However, at the hearing the applicant attended the hearing and gave evidence at some length. He displayed an ability to provide evidence in a manner that was responsive to the Tribunal's questions. The Tribunal notes also that the applicant did not provide any medical evidence to indicate that he was not in a position to participate in a hearing. The Tribunal is satisfied that the applicant was able to participate in the hearing, and that he had a very real opportunity to give evidence and present arguments at the hearing.
35. The applicant indicated at the hearing that he had prepared a statement that he wished to read to the Tribunal. The Tribunal permitted him to do this.
36. The applicant expressed a fear of American culture and discrimination. He also referred to a "conflict of political policies" He indicated that he had tried to migrate to Australia in the past and was not qualified so did what he had to do to be here. He had tried to migrate to Scotland, Puerto Rico, Mexico and Hawaii. He stated that it had been his childhood dream to get out of the US. He had had nothing but bad experiences in the US. He was stabbed at school when he was a child. He was bullied and bashed and discriminated against. He had to quit high school because of "threats and things" He had a very bad home life. He was not a sportsman type person. His sexuality was always questioned. He had been called every name that could be imagined and had been unable to defend himself. He said that he was not as much of a wimp now as he was then. He stated that he had left home at 16. He said that there had been two "break and entries" in his flats. He was once robbed on the street, beaten, had a broken jaw and walked the streets in a coma. He found himself in hospital in a coma.

37. The applicant referred to his family history. He said that the agencies recommended when he was 10 or 11 that he should be taken out of his home environment. His father was unknown. His birth certificate was changed when he was four and his “stepfather of the year” had his name put on it. He had several stepfathers. He did not know who his father was. He had bedwetting problems. He was stinky and filthy as a kid. That added to his abuse by other children.
38. The applicant stated that by law he was conscripted into the military. He said that he was a bit of a reclusive person. It caused him tremendous health issues. When the military realised they might be liable for his health issues caused while he was in the military, they offered him an honourable discharge. Anxious for a change, he just took it. It was not until years later that he realised that there was a method to what they were doing.
39. The applicant stated that he had been discriminated from youth as his sexuality was always questioned due to no female relationship, his love of the arts and his lack of interest and ability in sport.
40. The applicant stated that he had not left Australia since 1987. He had borrowed no money. He had never tried to get financial government assistance. He worked very hard to economise to accumulate money to retire because he had no intention to have government assistance in his retirement. The applicant stated that he had paid over \$460,000 in income taxes and had created jobs for tradesmen and others in his restoration of properties. He had never been in debt. For retirement security, he had put money into a fund. The applicant described losing this money “due to the bad laws in this country” He said that the fund had been frozen. His other investment for future security was his purchase of a unit for \$475,000. He said that the unit was now on the market at a \$65,000 loss. It had been on the market for a couple of years.
41. The Tribunal expressed doubt that the matters to do with his financial situation in Australia were really relevant to whether he had a well-founded fear of persecution in relation to the US. The applicant said that he understood but he needed to accumulate some money to do anything. His money was tied up in this unit. The applicant referred to the construction of a high rise that would block the ocean views from his unit and reduce its value. He said that, when the unit was sold, he would have capital to do business. The applicant described his experience in a number of areas. He said that he was unable to work or volunteer, and had no income. The applicant described his solicitor as his only true ally. He said that his will left his assets to Australian institutions.
42. The applicant said that he had done what he needed to do to live here but was charged with [details deleted: s.431(2)]. He was sentenced for [details of sentence and correctional facility deleted: s.431(2)]. The applicant stated that the magistrate was told that he owed money to no one and took nothing from anyone. The charges were simply [details deleted: s.431(2)]. These were the things one would have to have to function. The applicant described inhuman conditions and inadequate medical services at [correctional facility deleted: s.431(2)] and claimed that this had caused him ongoing health problems. He said that he had been found to be HIV positive in jail and said this was being monitored by a government sponsored clinic. He said that the stress of immigration issues and court appearances had caused him to have a nervous breakdown, resulting in a failed suicide attempt a year earlier.
43. The applicant stated that he had no future outside Australia. He said that this was his home. He was too old to start his life over again in the US, the country that he feared. He said it had changed for the worse. He had no connections or associates there. He said that going there

would be the death of him. He asked the Tribunal to consider humanitarian and unique and exceptional circumstances. He asked that he be granted a protection visa, allowing him time to recover money from his investment property and the right to work and contribute to Australia. The applicant indicated that he had finished reading his statement.

44. The Tribunal noted that there were parts of what he had raised that did not appear relevant to the decision it had to make. It explained to him that all it could consider was whether he met the criteria for a protection visa. If it was not satisfied that he was a refugee, it did not have any discretion to look at broader humanitarian issues.
45. The Tribunal referred to the applicant's claim that he had had nothing but bad experiences in the US. The Tribunal asked the applicant whether he was claiming that he was bullied, bashed and discriminated against while he was at high school. The applicant replied that it was even from well before high school. The applicant confirmed that he was stabbed while at high school. When asked who it was who stabbed him, the applicant stated that it was another student whose name he could not remember. It was junior high school. The applicant said he had not tried to remember every incident of misery and fear in his life. He stated that he even had daily discrimination in Australia but he could expect that anywhere in the world. If a person was not married and did not have kids and was not willing to lie about their situation, their sexuality was questioned. It had been an ongoing problem almost every day of his life. But in America it was accompanied with violence and no protection. In Australia the law protected people. They did not protect people in America. They could not be bothered.
46. The Tribunal asked the applicant why he thought he was bullied, bashed and discriminated at school. He said that because of his home life he was very introverted. He was not clean. He did not learn to change his socks until he was 12 or 13. He was very neglected at home and this did not make for a very attractive child. He would sit in class and wet himself. He was a nervous wreck. That was why it was recommended that he be placed because finally a counsellor came to his home to investigate why the applicant was having such problems. The counsellor recommended that the applicant be placed out of that home. He rated the applicant as highly intelligent.
47. The Tribunal asked the applicant whether it was the case that he could not remember the details of the stabbing. The applicant said that the boy wanted to fight him. They went out into the schoolyard and he tried to defend himself because the boy was not very big. He thought maybe he could handle this. He did not know the other boy had a knife. The boy was not even suspended from school for it. No police action was taken maybe because he was a minor. The applicant stated that he was stabbed in the arm and required stitches. It should be in his junior high school record. The Tribunal asked the applicant whether he thought this was persecution of him for any of the Convention reasons. It put to him that it seemed that this might have been unpleasant bullying directed at him for personal reasons. The applicant stated that he did not know what was going on in the person's mind but apparently they thought that he could be taken down. The applicant stated that he had always gotten along well with big strong men but little people sometimes presented a problem.
48. The Tribunal expressed some doubt that what had happened to him in his schooling was Convention-related persecution. The applicant replied that he was known to be a "faggot" and every kind of terrible thing they could call him even though he did not know what that was and was not even sexual at that age. The applicant said that if you ever walked down the street in Australia all you ever heard was "faggot" and "queer". It seemed to be on everyone's mind all the time except it was not accompanied with violence in Australia. People were

protected. People knew they were not going to get away with violent behaviour here but in America people did. The applicant said that from what he saw on television it had become far worse with the culture and the violence.

49. The Tribunal asked the applicant whether he was claiming that he was gay. The applicant said that he did not like labels but had had close relationships with men and women. He stated that he enjoyed being a man.
50. The Tribunal asked the applicant whether he had had problems after he left school as well. He stated that he had had problems every day of his life. When you did not fit into the usual picture, the first question people asked was whether you were married or had kids or had been married. He would not lie. All you had to say was that you were not married and did not have a girlfriend. In the US you were violated because of it whereas in Australia you were only maybe verbally questioned. The Tribunal expressed doubt that in either Australia or America he would be subjected to persecution because he did not have a girlfriend. The applicant said that it was because they thought he was queer. If you were not married and did not have a girlfriend, they put a label on you. It happened all the time. He went through it every day of his life.
51. The Tribunal noted that the applicant had made claims about problems at school including an incident in which he had a cut on his arm. The applicant stated that he had plenty of beatings and plenty of running away before high school. That was why the counsellor was sent to his home when he was about 10 or 11.
52. The Tribunal asked what happened after school. The applicant referred to beatings and robbery and a broken jaw. He found himself in hospital from being beaten up and getting a broken jaw and robbed. The Tribunal asked the applicant how he knew that any of these things were related to people's perception of his sexuality. The applicant said that he could not read people's minds if that was the excuse they wanted to use. Maybe they just wanted to beat someone up and that was the only excuse they could think of, "Oh, that guy looks like a faggot. Let's kick his ass." The applicant stated that he always dressed a certain way. He did not dress like other teenagers. He stood out.
53. The Tribunal put to the applicant that what he had told the Tribunal was somewhat vague and expressed some doubt that he had suffered serious harm for reason of people's perception of his sexuality. It asked the applicant whether he could give an example of where he suffered serious harm because of people's perception of his sexuality. The applicant referred to the time he was beaten up and robbed and had his jaw broken in New York City. The Tribunal asked when this was. The applicant stated that he was maybe 18. He was at [hospital deleted: s.431(2)]. He dressed like a gentleman. He did not have any problem when he was any place nice. It had always been the general public. He just looked gay. He did not go out of his way to look that way. He just did not look like "Mal Meninga". He used to be very, very thin. He did theatre. All the things he was active in were all "artsy" type things.
54. The Tribunal asked about the incident in which he claimed to have been beaten up and robbed. It asked the applicant how he knew that this had anything to do with his sexuality. The applicant said that they called you a faggot and pushed you. They pushed him down a flight of steps and that was all he remembered. The Tribunal put to the applicant that the motivation might have been a criminal one to get financial gain by robbing him of his money. The applicant stated that he could not read people's minds. If someone had knocked you out and you were lying there and were wearing rings and you looked like you had some money.

The applicant said that that was on the west side of New York which was not a very flash area at that time.

55. The applicant said that he used to live on [street deleted: s.431(2)] in New York City. He referred to 3rd Avenue where a lot of famous venues were. He said a lot of fellows used to go from pub to pub. There were no gay clubs or venues because they were all outlawed. The Tribunal put to the applicant that this was no longer the case. The applicant said that he never went to gay places anyway. The applicant said that he was arrested one night while walking down the street a block and a half from his house because he looked like “one of the boys” walking down the street. He was arrested for no reason, taken to jail and released the next day. The Tribunal asked when this happened. He said that he would probably have been “twentyish” He said that he always lived in fear. It was when Wagner was mayor. He said the police were picking up gay people. They were looking for gay people who were walking to say “G’day” to someone or maybe go off together. The Tribunal put to the applicant that it understood that there was a large gay population in New York and other parts of the US. It put to him that it did not appear that they faced a real risk, for instance, of being picked up and harmed by the police. The applicant said his news was all old news. He had been in Australia for 24 years. But to him the US was a very scary place. When he looked at the news and looked at the culture and listened to the music, it was scarier than ever.
56. The applicant said he was now [age deleted: s.431(2)]. The Tribunal put to him that the claimed incident with the police had happened around 50 years ago. The applicant replied that he had not spent time in America. He spent most of his time trying to stay out of that country. He spent half of the year in Mexico. He would love to emigrate to Mexico but could not do so. He spent as much time out of America as he could, always hoping he could emigrate somewhere else. He almost emigrated to Scotland. He said no one wanted you anywhere in the world unless you fitted certain requirements. He wanted to immigrate legally to Australia but did not have the type of job skills that were required.
57. The Tribunal asked the applicant what the police said to him when they picked him up. The applicant replied that they did not explain anything. They had their night sticks and their guns. They pushed you around. They took you off to jail. The next day they all appeared before the judge and were all dismissed. The applicant stated that he did not even know what they were charged for. He said he could not imagine what they could have charged him with. He was not doing anything. The Tribunal asked how he knew it had to do with his sexuality. The applicant stated that it was well known that they were sweeping the streets trying to get all the boys off 3rd Avenue. It was the one street where people walked and met one another. It was a well-known fact. Any guy walking on his own who looked like he might be gay was just picked up. There was a meeting place.
58. The Tribunal asked the applicant whether there were any other incidents in the US, in addition to those he had given details of, that he thought the Tribunal should know about. The applicant said that there were just so many incidents. He did not keep a diary of them. It was an ongoing daily thing, something he just learned to live with.
59. The applicant cited examples from a document relating to unique and exceptional circumstances, including the length of time a person had been present in Australia. The Tribunal put to the applicant that such guidelines were not relevant to the decision the Tribunal was making. The Tribunal could consider only whether he satisfied the criteria for a protection visa. It put to the applicant that it could not look at broader humanitarian circumstances.

60. The Tribunal put to the applicant that from what he had described his claim was largely based on people's perception of his sexual orientation. The applicant stated that he did not look like a fighter. Sexual orientation was the excuse or the door opener. The applicant asked what went on in people's minds if they wanted to rob you or wanted to prove themselves superior. He said that sexual orientation was always the door opener.
61. The applicant said that he remembered another time when he was beaten up and his yellow cashmere sweater was torn off. He was punched in the face and had a broken tooth. He had a false tooth because of it.
62. The Tribunal questioned whether the applicant had been persecuted for reason of sexual orientation. It put to him that the things he had described might have been unfortunate criminal acts that were not related to any of the five Convention grounds. The applicant said that it was very obvious. Almost every day of his life someone had something to say about sexuality and he got called some kind of a "fruitcake" or a "fag", especially around young people. It was a daily occurrence even in Australia. He said that when you saw a person the first thing you did was see their colour and then deal with them accordingly.
63. The Tribunal asked the applicant what he meant by discrimination. He said that it was being publicly humiliated, insulted, beaten up, stabbed, punched in the mouth and having your tooth knocked out, and being arrested for being on the street where they decided to pick up anyone who looked like a single gay person.
64. The Tribunal asked the applicant whether he had been living in New York City before leaving America. The applicant confirmed this. He said that he had basically been living in New York City and in Florida. He said that New York City was by far the more violent. He said that in America you heard about it all the time. People would say the cops were going to be coming to this beach and clearing everybody. The Tribunal put to the applicant that he had not been to the US and that things might now be different. The applicant stated that he was sure they were worse from what he saw in the news. He listened to the news probably eight hours a day. The Tribunal put to the applicant that it had not seen much evidence to suggest that the police or the authorities targeted people for their sexuality. The applicant replied that that would not be put on the news in America. The news was very carefully edited. They would not say anything against the police.
65. The Tribunal asked the applicant what he meant by a "conflict of policies". The applicant referred to "all these wars" that they had managed to put the rest of the world in in Afghanistan and Libya. They were one of the five major producers of arms in the world. If they did not have wars, they would not make all this money selling arms. They were warmongers. They had dragged Australia into it because we needed to know they would come and stand by us. The Tribunal put to the applicant that he might disagree with that but it seemed in America he would be entitled to hold those views and to express them without facing a real chance of persecution. The Tribunal noted that independent evidence indicated that America was a democracy with freedom of speech and assembly and that people could exercise their political rights. The Tribunal asked the applicant why he would face persecution for those political issues. The applicant referred to assassinations in America. He stated that people who had spoken out against things had been shot.
66. The Tribunal noted that Freedom House, for instance, had given America the highest rating on both political freedoms and political rights and civil liberties. The applicant replied that he did not believe that. It was all PR. It was just like America was in the most tremendous debt.

They caused what they called the global financial crisis which was really the North Atlantic European financial crisis. It was a very greedy country where the powerful called all the shots.

67. The Tribunal put to the applicant that Freedom House stated that the US was an electoral democracy and an intensely competitive political environment. It stated that the federal government had a high degree of transparency and there were a high number of investigative and auditing agencies functioning independently of political influence. There was a free and constitutionally protected press, and a healthy level of intellectual freedom in the academic sphere. The applicant stated that it was all lies. The Tribunal put to him that it was reported that officials respected the right to public assembly and that there was judicial independence and a strong rule of law tradition. The Tribunal put to him that it appeared that in such an environment he could hold contrary views without facing a real chance of persecution. The applicant stated that it all depended on how much noise you made. It was if you became very active like so many people in the civil rights movement that you were eliminated. It was only when you formed a large group and became active and powerful that you became a target. If you just kept your mouth shut and complained to your next door neighbour and paid your taxes, you were no threat. The applicant stated that he had been very naïve when he came to Australia. He did not even know that it was a crime to give up your US citizenship without their permission. The Tribunal put to the applicant that it understood that he was still a US citizen. The applicant replied in the affirmative. He said that on the books he was. He was not wanted for anything. They had done extensive police checks on him and he was not wanted for anything. He had committed no crimes. The applicant stated that he had no fear of going back to America for any crimes he was trying to avoid.
68. The Tribunal put to the applicant that even Human Rights Watch stated that citizens of the US enjoyed a broad range of civil liberties and that they had recourse to a strong system with independent federal and state courts. The applicant stated that he knew the Tribunal had to go by the Convention. He said that he had lived there and knew what the country was like. He listened to the news. It was necessary to read between the lines and listen to an awful lot of news to get the facts. The media was controlled by so few people now. People like those who uncovered Watergate did not exist any more to the extent they used to. People were very afraid.
69. The Tribunal put to the applicant that his claims appeared to be based to a large extent on a fear of violence in the US. It put to him that he had related that at least in part to a perception of his sexuality. The Tribunal put to him that it would need to consider whether there was a real chance that he would be persecuted and whether that would be for one of the five Convention reasons. It put to him that, in any event, it would seem that there was protection available to people from criminal acts. It explained that the state was not required to provide a guarantee of protection and put to the applicant that it seemed that there might be an adequate level of protection, including for people who were homosexual or bisexual or perceived to be. It noted that Human Rights Watch talked about the strong system of federal and state courts. Freedom House had referred to judicial independence and had referred to the judiciary as a linchpin of the American democratic system. It had stated that there was a strong rule of law. The Tribunal noted that, if anything, the criminal justice system had been criticised on the basis that there were too many people in prison and that sentences could be excessive. It put to the applicant that it appeared that there was a state apparatus that protected people and punished people for criminal activity. The applicant said that it was expensive in America to go to court. People could not afford these things. They could not

afford to get lawyers. The applicant stated that he once had a very minor driving incident where they threw him in jail. He went through a yellow light. The cop came out and took his gun out. It was proven that then policeman was mistaken and that he overreacted. In America if they did not appear in court the case was just dropped. They would just not appear and not appear. In America if the cop did not appear the case was dropped.

70. The Tribunal put to the applicant that there appeared to be a high degree of transparency in America and that there were investigative agencies that worked outside of political influence. The applicant asked about Bernie Madoff and Phil Sullivan with City Pacific Limited, a bankrupt from South Africa who had come here and stolen 12,000 people's life savings. The Tribunal noted that there was an Office for the Victims of Crime (OVC) in America. There was a Victims of Crime Act. There were various programs providing services and protection to crime victims. State constitutions also guaranteed rights to crime victims, including the right to be reasonably protected from the accused offender. The Tribunal put to the applicant that there appeared to be a range of rights and protections. It put to the applicant that it seemed that these would be available to him if he were in fear of being physically harmed or targeted, including if that were for reason of his perceived or actual sexuality. The Tribunal expressed doubt that the applicant would be denied protection for reason of his sexuality or any other reason. The applicant stated that people were being beaten up and robbed and abused all the time in America. You could not get justice in America. The legal system was too complex and overcrowded. The jails were overcrowded. They did not have enough of anything.
71. The Tribunal put to the applicant that independent information indicated that there was a Hate Crimes Law in the US. The applicant replied that there was in Australia as well and you could not say certain things to people but people did it all the time anyway. The Tribunal noted that the Hate Crimes Law defined hate crimes in federal law to include gender, sexual orientation and sexual identity. The applicant said that you had to go to court and prove it. It was a long, complex legal system. The guilty people would have five witnesses who would swear that you were lying. The Tribunal noted that quite a few American states had hate crime legislation which protected against people being harmed for their sexual orientation. The Tribunal put to the applicant that it appeared that there appeared to be a reasonable level of protection available to people against crimes, including crimes based on sexuality. The applicant replied that this was by law but not in reality. The applicant referred to the words everyone was saying and the hate shown on the news and the music. He referred to American films that showed women being tortured and mutilated. This was acceptable. He referred to video games, saying that none of it was anything less than absolute violence and hate. He said it was being pushed down people's throats in Australia. He said that when he came to Australia people said it was 35 years behind but it was catching up because America had the power of the media.
72. The Tribunal put to the applicant that the New York City Human Rights Law made it illegal to discriminate on the basis of gender identity or sexual orientation. The applicant stated that it would be very hard to fight if someone put a knife in your back and you were lying there dead. He referred to drive by shootings. The Tribunal put to the applicant that the law applied in the areas like employment, housing and public accommodations. It put to him that there was also a New York City Commission on Human Rights to enforce that law. The applicant said that this was by law but not in reality. He stated that he listened to the news and he saw what was happening.

73. The Tribunal put to the applicant that it might doubt that there was a real chance that he would be persecuted for one of the five Convention reasons. It also put to him that there seemed to be state protection against the harm he claimed to fear and this was applied in a non-discriminatory way. The applicant asked why he would want to leave his country if he did not have a legitimate fear.
74. The Tribunal put to the applicant that it understood that he was saying that he was not in fear of being charged or prosecuted for any crime in the United States. The applicant confirmed this. He said that they had done a complete police check on him. He was not wanted for anything.
75. The Tribunal noted that the applicant had raised a number of other issues, such as being conscripted and having health problems and issues to do with his stepfathers. The Tribunal expressed doubt that these matters indicated any real chance of persecution in the future. The applicant said that in Australia they would not allow a child to live in a home like that He lived with two fathers for a number of years. The Tribunal put to the applicant that these things appeared to be in the past and did not appear relevant to what he might face in the future. The applicant stated that he thought of the misery, pain and suffering he had gone through every day of his life.
76. The Tribunal noted that the applicant had referred to the way people perceived him. It asked him whether there was any other reason he feared harm in the US. The applicant stated that it was because you were not protected in spite of all of the laws. The legal system failed you.
77. The Tribunal noted that the applicant had indicated in a letter he had written to the Tribunal that he had an appointment with [doctor deleted: s.431(2)] [in] July and that he would then be in a better position to decide on his future plans. The Tribunal asked what he meant by this. The applicant stated that it related to his health status. They were monitoring his levels. [On a previous date in] June he had an appointment and they were monitoring his medication and took blood from him. He indicated that he had an argument with them about having to wait for the results of his blood test. He said that everything was so difficult. He said that [doctor deleted: s.431(2)] was the one in charge and would tell him what he had to do. The Tribunal noted that the applicant had referred to his health and his age. It reiterated that it had to look at whether he faced a real chance of persecution for one of the five reasons in the Convention. It expressed doubt that his health and his age were relevant to that.
78. The applicant said that he did not think his agent gave him the correct information. He said that he was supposed to meet with "you people" a couple of years ago. He said that an agent prepared a history. He was on his way to a hearing. As he was walking in the door of the courthouse, he was grabbed by a policeman and arrested. They told him they could charge him with a thousand different things. They just kept stringing it out. The applicant stated that he went through many months of litigation and expense fighting those charges. His new migration agent said that he should not go all the way to Brisbane and that they would be annoyed with him for wasting their time. The applicant said that he would have had this appointment a month or two ago. He said that he had dropped this agent. The Tribunal noted that it could not deal with these issues.
79. The Tribunal asked the applicant whether there was anything else he wished to tell the Tribunal. The applicant referred to the incident when he had his sweater torn off and was verbally abused and had his tooth knocked out. He said that this happened in New York City when he was in his twenties. He said New York City was very violent and even more violent

now. The Tribunal put to the applicant that some of these incidents appeared to be criminal incidents that were not related to any of the five Convention reasons. It asked whether there was anything to make him think that this incident had anything to do with any of the five Convention reasons. It spelt out the Convention grounds. He said that people looked at you and, if they thought you were gay or were not going to defend yourself because you were gay, then you would be attacked. The Tribunal asked the applicant what made him think that those people saw him as being gay. The applicant replied that it was because most people did because he did not look like everyone else on the street. He dressed a certain way and walked a certain way. The Tribunal put to the applicant that it might have some doubt that this was related to sexuality. It asked whether there was any other reason why he thought this incident might be related to some perception about his sexuality. The applicant stated that it was just that people made judgements when they looked at you. It was human nature. The applicant stated that he knew that it was related to a perception about his sexuality. He had lived with it all his life. The Tribunal noted that there did appear to be protection available in the US against such harm. The applicant replied that it was by law but not in reality.

80. The applicant said that the three things weighing on his mind were being thrown out of Australia, selling his unit and his health.

INDEPENDENT COUNTRY INFORMATION

81. According to Human Rights Watch, citizens of the United States “enjoy a broad range of civil liberties and have recourse to a strong system of independent federal and state courts” (Human Rights Watch 2011, *World Report 2011: United States*, 24 January, \\ntssyd\REFER\Research\2011\HRW\AnnualReport\united-states.html, accessed 29 June 2011). Human Rights Watch did, however, note failures in the criminal justice system, including extreme criminal punishments and racial disparities in the criminal justice system, and in counter-terrorism law and policy.
82. Freedom House has reported that judicial independence is respected. It has observed that “most observers regard the judiciary as a linchpin of the American democratic system”. It has observed that the country “has a strong rule-of-law tradition”. In fact, the criminal justice system has been criticised on the grounds that “there are too many Americans in prison [and] that prison sentences are often excessive”. The US has the highest national incarceration rate in the world, which continues to increase, even though the national violent crime rate has decreased in recent years. (Freedom House 2010, *Freedom in the World – United States of America (2010)*, June, <http://www.freedomhouse.org/template.cfm?page=363&year=2010&country=7944> – Accessed 10 September 2010)
83. In the U.S. political system, a great deal of government responsibility rests with the 50 states. Most law enforcement matters are dealt with at the state level (ibid.).
84. According to the US Office for Victims of Crime (OVC), “[b]ecause of funding authorized under the 1984 Victims of Crime Act (VOCA), as amended [42 U.S.C. § 10601 et seq.], and the dedicated efforts of advocates, lawmakers, and crime victims, an extensive range of services and resources is available to help victims heal and obtain justice”. The OVC states, “Thousands of programs provide services and sanctuary to crime victims throughout the United States” Most US states have guarantee fundamental rights for crime victims in their constitutions. These rights typically include:

- The right to be notified of all court proceedings related to the offence.
- The right to be reasonably protected from the accused offender.
- The right to have input at sentencing (e.g., in the form of a victim impact statement).
- The right to information about the conviction, sentencing, imprisonment, and release of the offender.
- The right to an order of restitution from the convicted offender.
- The right to be notified of these rights.

(US Department of Justice Office for Victims of Crime 2010, 'What You Can Do If You Are A Victim Of Crime', Office for Victims of Crime website, April http://www.ovc.gov/publications/infores/whatyoucando_2010/WhatUCanDo_508.pdf – Accessed 2 June 2011)

85. In October 2009, US President Barack Obama signed into law the Mathew Shepard and James Byrd, Jr. Hate Crimes Prevention Act. This legislation extends the federal hate crimes statute to include sexual orientation and gender identity ("President Barack Obama signs hate crimes legislation into law" 2009, *Bay Windows*, 28 October). A large number of states also have hate crime statutory provisions relating to sexual orientation (Anti-Defamation League 2008, "Anti-Defamation League State Hate Crime Statutory Provisions", http://www.adl.org/99hatecrime/state_hate_crime_laws.pdf).
86. In New York City, it is possible to file a claim in the New York City's Human Rights Commission. The Commission aims, in part, to help people enforce their rights under the New York City Human Rights Law which makes it illegal to discriminate in the city because of gender identity or sexual orientation (Columbia Law School 2011, "Antidiscrimination", <http://www.law.columbia.edu/sexuality-gender-law-clinic/issues/antidiscrimination>, accessed 29/6/2011). According to a guide prepared by the Columbia Law School, the Law "applies in three areas: in your job, in your housing, and in what are called 'public accommodations'—places like stores and restaurants that are open to the public" The Law created the New York City Commission on Human Rights to enforce the Law and help protect people from discrimination (Columbia Law School 2008, "Defending Your Rights: A Transgender, Lesbian, Gay and Bisexual User's Guide to the New York Commission on Human Rights", January).
87. As the Tribunal put to the applicant, New York City has an extremely large gay population. Indeed, New York City has the largest number of gay, lesbian and bisexual adults (272,493) of any city in the United States (Gates, G. 2006, *Same-sex Couples and the Gay, Lesbian, Bisexual Population: New Estimates from the American Community Survey*, The Williams Institute on Sexual Orientation Law and Public Policy, UCLA School of Law, October).
88. With regard to political freedom in the United States, the Tribunal notes that Freedom House has given the United States a rating of "1" (representing the highest level of freedom) in relation to both political rights and civil liberties. Freedom House has stated that the US is an electoral democracy and has an intensely competitive political environment. According to Freedom House, the US federal government has a high degree of transparency and there are a substantial number of auditing and investigative agencies that function independently of

political influence. The United States has a free and constitutionally protected press, and a healthy level of intellectual freedom in the academic sphere. Officials respect the right to public assembly, judicial independence is respected and there is “a strong rule of law tradition” (Freedom House 2010, *Freedom in the World – United States of America (2010)*, June <http://www.freedomhouse.org/template.cfm?page=363&year=2010&country=7944> – Accessed 10 September 2010).

FINDINGS AND REASONS

89. The applicant indicated in his application that he is a citizen of the USA. He confirmed at the hearing that this remains the case. The Tribunal has assessed his claims against the USA as his country of nationality.
90. The Tribunal notes that the applicant observed at the Tribunal hearing that it was a crime to give up US citizenship without permission. Nevertheless, the applicant has indicated that he retains his US citizenship. He has indicated that he is not wanted in America for any crime. The Tribunal accepts that this is the case.
91. The applicant referred to a fear of American culture and discrimination. He claimed that he had had nothing but bad experiences in the US. He claimed that he was stabbed at school when he was a child. He was bullied and bashed and discriminated against. He had to quit high school due to his treatment. The applicant described having his flat broken into. He said that he was robbed on the street, beaten, had his jaw broken and found himself in hospital in a coma. He described an incident in which he said his tooth was knocked out and his sweater was torn.
92. The applicant claimed that he had been discriminated against from his youth as his sexuality was always questioned due to no female relationship, his love of the arts and his lack of interest and ability in sport. Essentially, the applicant’s claims are to the effect that he is perceived, due to various habits and characteristics, as being gay. He claimed that people put a label on him because he was not married and did not have a girlfriend. He claimed to have problems every day of his life. He also described sexual orientation as the “excuse” or the “door opener”.
93. However, the Tribunal had some difficulty accepting that criminal acts that the applicant described occurred for reason of his sexuality or a perception of his sexuality. When asked how he knew that incidents such as the one in which he was robbed and had his jaw broken were related to people’s perception of his sexuality, the applicant stated that he could not read people’s minds if that was the excuse they wanted to use. He stated that maybe they just wanted to beat people up and that was the only excuse they could think of. In relation to the time when he was beaten up and robbed and had his jaw broken, the applicant stated that he dressed like a gentleman and looked gay. When asked how he knew this had anything to do with his sexuality, the applicant stated that they called him a faggot and pushed him. Even if he was called a “faggot”, the Tribunal has some doubt that such an attack occurred for reason of the applicant’s sexuality or a perception of his sexuality. The applicant’s evidence indicated that he was robbed. This would suggest that the motivation for the incident was a desire for personal criminal gain rather than any view of the applicant’s sexuality. Nevertheless, the Tribunal is willing to give the applicant the benefit of the doubt and accept that the incident was motivated, at least in part, by a perception of his sexuality. It accepts that this was a serious incident and that he was hospitalised.

94. The applicant also described an incident in which he had his sweater torn off and his tooth knocked out while he was in New York City in his early twenties. When the Tribunal put to the applicant that such an incident might not be motivated by any of the five Convention grounds, the applicant stated that, if people thought you were gay or were not going to defend yourself because you were gay, then you would be attacked. He referred to the way he dressed and walked. When asked whether there was any other reason he thought this incident was related to some perception about his sexuality, the applicant stated that it was just that people made judgements about you. He said that it was human nature and he knew it was related to his sexuality. The Tribunal finds that there is little in the applicant's evidence to draw any clear link between this incident and some perception by his attacker of the applicant's sexuality. The Tribunal has some doubt that this incident was motivated by a perception of the applicant's sexuality. Nevertheless, for the purposes of this decision the Tribunal has given the applicant the benefit of the doubt and accepted that the incident may have been based, at least in part, on the applicant's actual or perceived sexuality.
95. As noted above, the applicant also described being bullied, bashed and discriminated against while at school. He described being unclean, neglected and introverted. He said that such things did not make for a very attractive child. He said that he would sit in class and wet himself. The Tribunal considers that the evidence suggests that the applicant was bullied at school based on a range of problems that he had as an individual rather than for any Convention reason. The applicant described, for instance, an incident in which he was stabbed in the arm and required stitches while at junior high school. He said that the boy wanted to fight him and they went out into the yard. When the Tribunal questioned the motivation for this, the applicant stated that he did not know what was on a person's mind but apparently they thought he could be taken down. He said that little men sometimes presented a problem. It may be that there was an unpleasant incident at school in which another student sought to fight the applicant and then stabbed him. However, even if it was the case that the applicant was called names such as "faggot" during his schooling, the Tribunal is not satisfied on the available evidence that this particular incident occurred for reason of the applicant's perceived sexuality or for any Convention reason.
96. The Tribunal has some doubt that incidents of bullying or discrimination the applicant claimed to have experienced at school were for reason of his sexuality or perceived sexuality. Nevertheless, the Tribunal is willing to give the applicant the benefit of the doubt and accept that the applicant was called names at school such as "faggot" and "queer" and that he may have experienced some bullying and harassment associated with a perception of his sexuality. The Tribunal accepts that the years of the applicant's schooling were not pleasant for him.
97. The Tribunal is willing to accept that the applicant experienced bullying while at school. It is willing to accept that the applicant experienced criminal activity in the United States in the past such as being robbed and bashed, and having his flat broken into. For reasons set out above, the Tribunal has some doubts about the applicant's claims concerning bullying and criminal acts being motivated by a perception of his sexuality. Nevertheless, it gives him the benefit of the doubt and accepts that he may have experienced some bullying and harassment associated with a perception of his sexuality. It is willing to accept that some criminal acts he experienced may have been based, at least in part, on a perception of his sexuality. In particular, the Tribunal is willing to accept that this is the case in relation to the incident in which he was robbed and bashed, and the incident in which his tooth was knocked out and he had his sweater ripped.

98. The Tribunal is willing to accept that the applicant was, on one occasion, detained overnight by the police while walking in an area frequented by gay men. However, the Tribunal notes that this occurred when the applicant was about twenty. The applicant has indicated that he is now [age deleted: s.431(2)]. As the Tribunal put to the applicant at the hearing, this incident occurred around fifty years ago. Similarly, the applicant's evidence about the incident in which his tooth was knocked out was that this occurred when he was in his twenties. The applicant's schooling in the United States is now many years in the past. The applicant's evidence is that he has not even left Australia for 24 years. The Tribunal notes the applicant's evidence that he had spent most of his time trying to stay out of America. Nevertheless, it remains the case that the applicant's experiences in America occurred many years in the past.

99. The applicant has referred to a perception of his sexuality. The applicant initially did not make clear to the Tribunal whether this reflected his actual sexuality but, when prompted about this, said that he did not like labels but had had close relationships with men and women. The Tribunal notes that Convention-related persecution may be constituted by the infliction of serious harm on the basis of *perceived* membership of a particular social group. In *Ram v MIEA* (1995) 57 FCR 565 at 568-9, Burchett J stated:

People are persecuted for something perceived about them or attributed to them by their persecutors.

...

In this area, perception is important. A social group may be identified, in a particular case, by the perceptions of its persecutors rather than by the reality. The words "persecuted for reasons of" look to their motives and attitudes, and a victim may be persecuted for reasons of race or social group, to which they think he belongs, even if in truth they are mistaken.

100. It is thus the perceptions of any persecutors or would-be persecutors that are important. The Tribunal takes the applicant's claims to be based on membership of the particular social group of "homosexuals" While it is ultimately the perception of the persecutors that counts, the Tribunal is willing to proceed on the basis that the applicant is also a member of this group in fact in the sense that he has had close relationships with men. It is willing to accept for the purposes of this decision that such a group constitutes a particular social group in the USA.

101. However, even accepting that such a group exists and that the applicant is a member of such a group, the Tribunal finds that there is adequate and effective state protection in relation to the harm that he claims to fear as a member of that group. It finds that there is adequate protection in the USA in relation to criminal activity and violence generally. It finds that this applies also in relation to criminal activity or violence directed at people for reason of their sexuality or a perception about their sexuality. For reasons detailed below, it is not satisfied that he faces a real chance of being persecuted in the USA for reason of membership of this group.

102. The Tribunal is willing to accept that the applicant fears being subjected to violence in the USA. It accepts that his fears relate, at least in part, to being targeted, attacked and discriminated against as an actual or perceived member of the particular social group constituted by "homosexuals" However, it is clear from the independent information that the state provides extensive protections both against criminal activity generally and discrimination and crimes targeted at people for reason of their sexuality. As the Tribunal has

put to the applicant, Human Rights Watch has indicated that citizens of the United States have recourse to a strong system of independent federal and state courts. Freedom House has reported that judicial independence is respected and that the country has a strong rule-of-law tradition. Most law enforcement matters are dealt with at the state level. There is a Victims of Crime Act and many programs to help victims of crimes. Most US states guarantee fundamental rights for victims of crime in their constitutions. Federal hate crimes legislation has been extended to include sexual orientation and gender identity. New York City's Human Rights Law makes it illegal to discriminate because of sexual orientation. It establishes the New York City Human Rights Commission.

103. The Tribunal notes that the applicant has claimed to have had problems with the authorities in the past such as being kept overnight after being picked up in an area frequented by gay men and being detained after going through a yellow light. However, these incidents are now many years in the past. The Tribunal accepts that the assessment that the USA has a strong rule-of-law tradition provides an accurate representation of the current situation in the USA. Far from targeting gay people, the US state and authorities in places such as New York City have now made active provision to protect gay people against discrimination and harm. The Tribunal notes that the applicant disputes the accuracy of the independent information. However, having considered the applicant's objections and his various submissions, the Tribunal is nevertheless satisfied that this information is accurate. The Tribunal notes that the applicant has referred to the complexity of the US legal system, and has claimed that the protections exist in law but not in fact. However, in the Tribunal's view, the independent information indicates that the rule of law does in fact prevail in the US. The Tribunal is satisfied that the US state does in fact provide an adequate level of protection to its citizens.
104. The Tribunal accepts that some violence and crime does occur in the US. It has had regard to the fact that the applicant has been the victim of some violence and mistreatment when he lived in the US in the past. It has accepted that some of this may have been based, at least in part, on a perception of his sexuality. However, the Tribunal finds that the US state does provide wide-ranging protection against criminal activity and violence, including violence directed at people for reason of their sexuality. In relation to such harm, the Tribunal finds that the US state meets the level of protection which citizens are entitled to expect in accordance with international standards. Similarly, the Tribunal is satisfied that the authorities in the US, including those in New York City, provide adequate and effective protection against discrimination or other harm based on a person's sexuality.
105. The Tribunal finds that the existence of such protections is of relevance, firstly, to the well-foundedness of the applicant's claimed fears in relation to his sexuality. It may be that he experienced bullying while he was at school, that he experienced some violence in the past based at least in part on sexuality and that he was picked up by the police in the past. However, the applicant has not lived in New York City or anywhere else in the United States for many years. As noted above, New York City has a very large population of gay people. While it may have been the case in the past that police engaged, for instance, in rounding up gay people, it is clear that there are now extensive protections available to gay people in the US generally and in places such as New York in particular. The Tribunal has had regard to the applicant's observations about his analysis of the news and his belief that things have become worse in the US. However, the Tribunal is satisfied that there are now extensive protective mechanisms provided by the US authorities and that these are in stark contrast to the applicant's description of the position for homosexual men fifty years ago. Having had careful regard to all of the information before it, the Tribunal is not satisfied that the

applicant's claimed fear of being persecuted for reason of membership of the particular social group of "homosexuals" is well-founded. The Tribunal has had regard to the applicant's claims about having his sexuality questioned and being called names such as "faggot" and "queer". It may be that the applicant would experience, for example, some level of name-calling on the street. It may be that he would be perceived by at least some other people as being gay and that some people would comment on his sexuality. The Tribunal is not satisfied that this would, even considered cumulatively, constitute serious harm. On the evidence before it, the Tribunal is not satisfied that there is any real chance that he would suffer harm amounting to persecution for reason of membership of the particular social group constituted by homosexuals in the United States.

106. It may be that the applicant is not in a relationship with a female, that he loves the arts and that he lack interest or ability in sport. It may be that he dresses like a gentleman. However, even having regard to such factors, the Tribunal is not satisfied on the evidence before it that he faces a real chance of persecution in the USA for any Convention reason.
107. In any event, applying the reasoning in cases such as *Applicant A* and *S152/2003*, the level of protection provided by the US state in relation to the harm feared by the applicant at the hands of private agents or groups has the effect that the applicant does not meet the Convention definition in relation to his claimed fear of discrimination and violence, including harm based on his actual or perceived sexuality. Persecution by private individuals or groups does not bring a person within the Convention unless the state either encourages or is or appears to be powerless to prevent that private persecution (*Applicant A*, per McHugh H at 257-8; see also Brennan CJ at 233). In *MIMA v Khawar (2002)* 210 CLR 1 at [18], Gleeson CJ cited with approval the following statement of Brennan CJ in *Applicant A*:

The feared 'persecution' of which Art 1A(2) speaks exhibits certain qualities. The first of these qualities relates to the source of the persecution. A person ordinarily looks to 'the country of his nationality' for protection of his fundamental rights and freedoms but, if 'a well-founded fear of being persecuted' makes a person 'unwilling to avail himself of the protection of [the country of his nationality]', that fear must be a fear of persecution by the country of the putative refugee's nationality or persecution which that country is unable or unwilling to prevent. (at 233)
108. The Chief Justice (at [19]) also cited with approval the following statement of Lord Hope of Craighead in *Horvath v Secretary of State for the Home Department* [2001] 1 AC 489 at 497-8, as reflecting the relationship between persecution as the inflicting of serious harm and the responsibility of a country as a protector of human rights:

... in the context of an allegation of persecution by non-state agents, the word 'persecution' implies a failure by the state to make protection available against the ill-treatment or violence which the person suffers at the hands of his persecutors. In a case where the allegation is of persecution by the state or its own agents the problem does not, of course, arise. There is a clear case for surrogate protection by the international community. But in the case of an allegation of persecution by non-state agents the failure of the state to provide the protection is nevertheless an essential element. It provides the bridge between persecution by the state and persecution by non-state agents which is necessary in the interests of the consistency of the whole scheme.
109. On the facts as found by the Tribunal in *MIMA v Respondents S152/2003* (2004) 222 CLR 1, Gleeson CJ, Hayne and Heydon JJ in their joint judgment reasoned that the existence of the appropriate level of state protection led to the conclusion that the applicant was not a victim

of persecution, and could not justify his unwillingness to seek the protection of his country (at [19], [21]-[23]).

110. The courts have made it clear that the state is not required to guarantee the safety of its citizens from harm caused by non-state persons. In *S152/2003*, Gleeson CJ, Hayne and Heydon JJ observed that “no country can guarantee that its citizens will at all times and in all circumstances, be safe from violence” (at [26]). Justice Kirby similarly stated that the Convention does not require or imply the elimination by the state of all risks of harm; rather it “posits a reasonable level of protection, not a perfect one” (at [117]). The joint judgment in *S152/2003* refers to the obligation of the state to take “reasonable measures” to protect the lives and safety of its citizens, including “an appropriate criminal law, and the provision of a reasonably effective and impartial police force and justice system” (at [26]), or a “reasonably effective police force and a reasonably impartial system of justice” (at [28]), indicating that the appropriate level of protection is to be determined by “international standards” (at [27]). Thus, an unwillingness to seek protection will be justified for the purposes of Article 1A(2) where the state fails to meet the level of protection which citizens are entitled to expect according to “international standards”.
111. The reasoning in *S152/2003* was applied in *Applicant VFAH v MIMIA* [2004] FCA 1018 where the Court held that:

In any event, having concluded that the state protection available to the appellant is efficient and adequate, the Tribunal was also entitled, according to the passages from *S152/2003* cited above, to conclude that the appellant was not able to justify her unwillingness to return to Sri Lanka. Thus, even if the appellant was able to demonstrate that despite the protection of the authorities she nonetheless faced a "real chance" of persecution she could not, in the light of the Tribunal's finding as to the adequacy of state protection and the majority view in *S152/2003*, meet the further criterion of a justified (that is, by reason of having a well-founded fear of persecution for a Convention reason) unwillingness to return to Sri Lanka.
112. The Tribunal finds that the US state provides adequate and effective protection against crime and violence generally, and against violence, discrimination and other harm directed at people for reason of their sexuality. The Tribunal is not satisfied that the applicant has a well-founded fear of being persecuted by the state itself, for reason of his actual or perceived sexuality or any other reason. It may be that he experienced some difficulties with the police when he was in the US. However, these matters are now many years in the past. Looking to the reasonably foreseeable future, the Tribunal does not accept that there is any real chance that the applicant would be targeted or harmed by the police or other state authorities for reason of his sexuality or any other Convention ground.
113. The applicant referred at the hearing to a “conflict of political policies” When asked what he meant by this, he referred to the involvement of the US in wars, including those in Afghanistan and Libya. He described the role of the US as an arms producer and described the country as warmongers. The applicant also expressed various other objections to American culture or policy. He referred, for instance, to violent games and movies, and criticised the legal system. He expressed a general disaffection with the USA as a country. The Tribunal is willing to accept that the applicant holds strong political views that are at odds with those of the US government and contrary to the prevailing culture.
114. However, as noted above, Freedom House has given the United States a rating of “1” (representing the highest level of freedom) in relation to both political rights and civil

liberties. Freedom House has stated that the US is an electoral democracy and has an intensely competitive political environment. According to Freedom House, the US federal government has a high degree of transparency and there are a substantial number of auditing and investigative agencies that function independently of political influence. The United States has a free and constitutionally protected press, and a healthy level of intellectual freedom in the academic sphere. Officials respect the right to public assembly, judicial independence is respected and there is “a strong rule of law tradition” (Freedom House 2010, Freedom in the World – United States of America (2010), June <http://www.freedomhouse.org/template.cfm?page=363&year=2010&country=7944> – Accessed 10 September 2010). The applicant has disputed the accuracy of the independent information, claiming that it is all lies. However, the Tribunal accepts the information from Freedom House, for instance, as accurate. The Tribunal finds that the independent information indicates that the USA is a democratic country where a person can hold and express views contrary to those of the state or the prevailing culture without facing a real chance of persecution. Looking to the reasonably foreseeable future, the Tribunal is not satisfied that there is any real chance that the applicant would be persecuted for reason of his political opinion. It finds that the chance of this occurring would be remote even if the applicant were to openly express his political views.

115. The applicant referred also to a number of matters that occurred some time in the past. For instance, he referred to having been conscripted into the military, having had health issues related to this and having been granted an honourable discharge. He said that it was not until years later that he had realised that there was a method to what they were doing. The Tribunal finds that these matters occurred many years in the past. Indeed, it was the applicant’s own evidence that he had not left Australia since 1987. It may be that the applicant is unhappy with issues to do with his conscription, the effects of military service on his health and his discharge from the military. However, the Tribunal is not satisfied on the evidence before it that these matters give rise to any real chance that the applicant would be persecuted in the USA for a Convention ground in the reasonably foreseeable future.
116. Similarly, the applicant has raised issues to do with the family environment in which he grew up. He described, for instance, having a number of stepfathers. He referred to being stinky and filthy. He indicated that a counsellor came and recommended him for placement. He said that in Australia they would not allow a child to live in a home like that. It may be that the applicant had an unhappy and neglected childhood. However, the applicant told the Tribunal that he is now [age deleted: s.431(2)]. The Tribunal is not satisfied that these matters are indicative of a real chance that the applicant would be persecuted in the USA for a Convention reason in the reasonably foreseeable future.
117. The Tribunal notes that the applicant is an older person and that his health is poor. The applicant has not claimed that he would be discriminated against or persecuted for these reasons. The Tribunal is not satisfied on the evidence before it that these factors give rise to any real chance that he would suffer Convention-related persecution in the USA. The Tribunal accepts that the evidence indicates that the applicant is HIV positive and that he has been receiving treatment for this in Australia. It has taken account of this in making its findings. It is nevertheless not satisfied on the evidence before it that the applicant faces a real chance of being persecuted in the USA for reason of his actual or perceived sexuality or any other Convention reason. Even if it were accepted that HIV positive persons constitute a particular social group in the USA, the Tribunal is not satisfied on the evidence before it that

there is any real chance that the applicant would be persecuted for reason of membership of this group. As noted above, the applicant has not made any claims specifically on this basis.

118. The applicant referred to matters concerning his circumstances in Australia, including financial issues, his difficulties selling his apartment, his treatment by the authorities and his conditions in prison. However, as the Tribunal explained to the applicant at the hearing, the Tribunal's role is to consider whether he is a person to whom Australia has protection obligations. The Tribunal has considered carefully the applicant's claims and circumstances. It has considered all of the applicant's claims, both individually and cumulatively, but is not satisfied that he has a well-founded fear of Convention-related persecution in the USA.
119. Looking to the reasonably foreseeable future, the Tribunal is not satisfied that the applicant has a well-founded fear of being persecuted in the USA for any Convention reason.

CONCLUSIONS

120. 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

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