

0902671 [2009] RRTA 1053 (19 November 2009)

DECISION RECORD

RRT CASE NUMBER: 0902671

DIAC REFERENCE: CLF2008/148009

COUNTRY OF REFERENCE: Pakistan

TRIBUNAL MEMBER: Deborah Morgan

DATE: 19 November 2009

PLACE OF DECISION: Adelaide

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

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

1. This is an application for review of a decision made by a delegate of the Minister for Immigration and Citizenship (the delegate) 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 Pakistan, most recently arrived in Australia [in] July 2004 and applied to the Department of Immigration and Citizenship for a Protection (Class XA) visa [in] October 2008.
3. The delegate decided to refuse to grant the visa [in] March 2009 and notified the applicant of the decision and his review rights by letter [on the same date]. 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] April 2009 for review of the delegate's decision and stated his preferred title is 'Miss'
5. For the purposes of this decision the Tribunal has referred to the applicant as a male as that is the gender stated on the applicant's passport.

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 and *Applicant S v MIMA* (2004) 217 CLR 387.
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. However the motivation need not be one of enmity, malignity or other antipathy towards the victim on the part of the persecutor.
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.
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

The primary application

19. The Tribunal has before it the Department's file relating to the applicant that includes the following claims: the applicant was born on [date deleted: s.431(2)] in Pakistan and is a citizen of Pakistan. The applicant's aliases were stated as '[Alias 1]' and '[Alias 2]'.
20. The applicant first arrived in Australia [in] July 2003 on a student visa and departed [in] June 2004 for one month, arriving back in Australia on a student Subclass 574 visa [in] July 2004.
21. The applicant's application for a protection visa included the following: he belongs to the ethnic group, Atheist and his religion is Atheist. He declared he commenced a defacto relationship in Australia in 2004. The applicant does not hold any other citizenship or nationality. The applicant stated he left Pakistan primarily to study but since arriving in Australia he decided that in this liberated society he could be himself as a transsexual. Since childhood he has always wanted to be a female but in Pakistan he did not disclose his transsexualism because his family members do not accept transsexualism and have threatened him with death/honour killing.
22. The applicant claimed that religious people of Pakistan will stone him to death in consequence of his transsexualism. He fears harm from his family, religious persons, co-workers and 'locals.' He claimed that Pakistan is 'racist' and full of extremists. To be a transsexual is worse than being gay in Pakistan as death and honour killings are the treatment transsexuals receive. For these reasons the applicant fraudulently obtained an Australian passport. He no longer has the passport on which he originally entered Australia.
23. The applicant returned to Pakistan in June 2004 for one month.
24. The applicant further claimed that the Pakistani authorities will not protect him if he returns to Pakistan because the authorities cannot protect him from 'the whole country'.
25. The applicant provided a written submission to the Department about the term 'hijra' meaning hermaphrodite in Urdu who are known in southern Asian culture as 'the third sex' and in the West as transsexuals. He submitted that hijras in Pakistan are socially marginalised as most Pakistanis view them with disgust and fear. The applicant referred to the Pakistani court case with respect to Mr Raj, a transsexual for 16 years (who had surgery to remove her breasts and uterus) and his wife, Mrs Tariq who were married according to Islamic rights and were found guilty of perjury as Mr Raj had lied about

being a man. The applicant referred to the human rights organisation, IGLHRC, which has as its mission the protection of gays, lesbians, bisexuals and transgenders. The applicant referred to Pakistan's Penal Code in relation to unnatural offences (section 377). The applicant submitted that there is no known grassroots activism among gays and transsexuals and the like in Pakistan.

26. The applicant provided a report from [doctor's name deleted: s431(2)] to the Australian Red Cross dated [in] December 2008 that included the following:

“[Alias 2] is an asylum seeker from Pakistan with gender dysphoria.

She has regarded herself as a female for more than 10 years and has been medically prescribed hormonal therapy for many years. Her body is now dependent on those hormones and she becomes unwell when she is not taking them. ...It is my sound medical opinion that she needs to remain on these medications.”

27. The applicant provided a copy of a statutory declaration dated [in] December 2008 (originally submitted to the Red Cross) to the Department that included the information he takes female hormone medication and lives with his partner in Adelaide.

28. [In] February 2009 the applicant appointed a registered migration agent.

The delegate's decision

29. The delegate's decision made [in] March 2009 found that membership of a particular social group was the essential and significant reason for the harm feared by the applicant. The delegate found the harm feared by the applicant (that he will be the victim of an honour killing and that he will not be afforded protection by the authorities under Pakistan's Sharia law) involved serious harm under the Act. The delegate referred to the applicant's registered migration agent having requested time to make a submission but none was received by the delegate.
30. The delegate found that the applicant does not have a genuine fear of harm and that there is not a real chance of persecution occurring if he were to return to Pakistan. The delegate did not provide reasons for this finding.

Further information received by the Department after the delegate's decision

31. The Department received new evidence from the representative [in] March 2009 being statements from the applicant, his boyfriend [Person 1], and his sister, some photographs and a letter from his doctor. The applicant provided detail about his life history, growing up as a Pashtun in Kohat, in the tribal area of North West Frontier Province (NWFP), a province in which extremist and fundamentalist people reside. His parents are deceased, his married sister lives in Dubai and his younger brother lives with an uncle in Kohat, Pakistan.
32. From a very early age the applicant wanted to be a girl and he has always felt like a girl trapped in a male body. He was able to behave in a feminine way until he was 9. At 9 his father told him not to behave like a girl. At school he did not make friends and he was stereotyped as a gay by his peers. If he did not participate in male sports his father would lock him in a room and not talk to him for days. Both his parents were angry about his feminine ways and they physically punished him for them. He has scars on

his upper lip and forehead where his father beat him at age 12 when he discovered some female cosmetics in his room. On that occasion his father locked him up in a store room for a whole day. In front of his uncles, his father threatened to pour petrol over him if he ever caught him in female clothing or make up. His uncle slapped him on the face for having cosmetics in his bedroom.

33. He moved to Islamabad to study at a university where he continued to lead an isolated life and felt pressured to dress like a male. He commenced taking female hormones at university but kept that a secret from everyone. He ceased taking hormones in Pakistan because he was scared of the consequences if his father found out. The applicant was only able to discuss his sexuality with his sister.
34. At university the applicant realised that Pakistan society would never accept transsexuals, no matter where he lived in Pakistan. His relatives have told him they will “get” him if he lives in Pakistan as a woman which he treats as meaning they intend an honour killing. The police would not be able to protect him.
35. In Pakistan gay people are looked down on and transsexuals lead the worst lives as beggars, sleeping on the streets without employment. He never felt safe in Pakistan as there is no protection for transsexuals as there are no laws enacted to protect them.
36. His family in Pakistan includes his father’s siblings and their children who live in adjoining houses in the same complex. The applicant stated that he is not able to seek protection from his relatives as none of them understand him.
37. In his early twenties his parents and his relatives pressured him to marry and told him that he was a disgrace to the family because of his homosexuality which they said meant no girl would marry him. His relatives warned his parents that his sexuality would mean that their children would be eliminated from marriage as the community would think all his generation is gay because of him. In front of his father and his cousins his uncle threatened to kill him because of his gay appearance which the uncle said brought shame and disgrace to the family.
38. He moved to Australia to undertake his Master’s degree where he has not been stereotyped or mocked for his feminine appearance. He started on female hormones again and living as a woman full time. He felt safe in Australia, a country where he has rights. He is considering having surgery to complete his conversion to a female.
39. He visited Pakistan in mid 2004 for his sister’s wedding. His hair was short and he still had some facial hair. By that time his breasts had grown owing to the hormonal treatment but they were not fully developed. He pretended to be a male during his time in Pakistan in 2004. During that visit he told his sister about his transsexualism. His sister advised him to keep away from their family because his life would be in danger if he faced them as a female.
40. On his return to Australia he met [Person 1]. [Person 1] proposed to him after 6 months. In April 2007 the applicant informed his father by telephone that he was living as a woman and his boyfriend wanted to marry him. His father was very angry and told him never to return to Pakistan as a transsexual and never to contact him again. Later in April 2007 the applicant’s younger brother informed him that their father had died and that the family blamed him for his death. One of the applicant’s uncles also telephoned

him and threatened him with death if he returned to Pakistan as a transsexual. His uncle told him that his family is bound to take revenge on him in consequence of his transsexualism and that if he came to Pakistan he would be easy to trace and put to death.

41. He submitted that the laws of Pakistan do not permit gender changes and his sex will always be male on his identity documents. If he tried to get employment in Pakistan his documents would state he is male and so, upon presenting as a woman he would not obtain employment.
42. He does not want to live the life of a transsexual in Pakistan which is to live as a beggar on the streets and to earn money by working in the sex industry.

The Tribunal application

43. The applicant was initially represented by a registered migration agent but since mid May 2009 he has not been represented.
44. Departmental data before the Tribunal shows that the applicant departed Australia [in] June 2004 and arrived back in Australia [in] July 2004. The last substantive visa held by the applicant was granted to him [in] May 2005 and it ceased [in] March 2007. [In] October 2008 the applicant was granted a Bridging visa E visa and since then has been granted additional bridging visas.

The Tribunal hearing

45. The applicant appeared before the Tribunal [in] June 2009 to give evidence and present arguments. The Tribunal also received oral evidence from [Person 1]. The Tribunal hearing was conducted with the assistance of an interpreter in the Urdu and English languages.
46. The applicant's sworn oral evidence to the Tribunal confirmed his previous claims as summarised above.
47. In addition, the applicant gave the following oral evidence. His family in Pakistan are practising Muslims. The Pashtun tribe to which his family belongs are fundamentalist Muslims.
48. He consulted a doctor in Pakistan about his desire to live as a female.
49. Pakistan society does not accept transsexualism or homosexuality and such persons can be victims of 'honour killings.' The law in Pakistan does not protect gays or transsexuals. He fears harm from his family and from society generally in Pakistan.
50. The Tribunal asked the applicant to comment on particular information from the Research Directorate Immigration and Refugee Board, Ottawa, 27 July 2004 on the situation of homosexuals in Pakistan. The applicant agreed with the information that gay persons from Pakistan would be unlikely to identify themselves as homosexuals despite engaging in homosexual relations and that the persons interviewed would believe homosexuality should remain illegal in Pakistan because it is against Islam. The applicant also agreed with the information that societal attitudes towards homosexuality in urban and educated people in Pakistan are increasingly accepting. The applicant

disagreed with the information that “homosexuality is most tolerated, though quietly” in NWFP “one of the most religiously conservative regions of Pakistan” In this respect the applicant stated that in his experience the population of NWFP is generally very opposed to homosexuality as the persons who live in his province are religious fundamentalists.

51. He has one more unit to complete for the award of a Master’s degree in Business management.
52. He began using his alias of ‘[Alias 2]’ in mid 2008.
53. Good behaviour bonds were imposed on him and [Person 1] for 2 years in consequence of him ‘taking over’ [Person 1’s] name and then changing that name to [Alias 2]. [Person 1] went to prison for him in consequence of allowing him to use his identity and obtain an Australian passport. [Person 1] did that for him because he wanted to save the applicant from facing persecution in Pakistan. They were caught out because [Person 1] used his brother’s name to apply for an Australian passport. He spent one month in the [remand centre deleted: s431(2)].
54. He departed Australia for one month in mid 2004 to attend his sister’s wedding. He dressed as a male for the entirety of that visit. Because he had been taking female hormones for only one year he was able to present a male image in Pakistan.
55. The Tribunal asked the applicant why he delayed making an application for a protection visa. He stated that the Department told him to obtain legal advice and gave him information about applying for a protection visa when he was located in October 2008. Before receiving the information from the Department he did not have the information about protection visas. He had originally planned to obtain a Australian degree and apply for permanent residence but then in October 2007 he took [Person 1’s] name and obtained an Australian passport so he did not need to take any further action about obtaining an Australian visa.
56. There is nowhere in Pakistan where a transsexual or gay would be able to obtain protection from those who harm them.
57. If he was forced to return to Pakistan he fears death from the community at large and from his family and he would not be given protection by the authorities. He cannot live in Pakistan as a female because his identity document states he is a male and he is legally not able to change his sexual identity.

Summary of oral evidence from [Person 1]

58. [Person 1] told the Tribunal that he first met the applicant in November 2006.
59. The Tribunal noted that [Person 1] referred to the applicant by the feminine gender while giving his evidence.
60. He calls the applicant ‘[Alias 1]’ but their other friends call the applicant ‘[Alias 2]’. He and the applicant live together and he regards the applicant as his partner.

61. [Person 1] confirmed the applicant's evidence that the applicant told his father by telephone that he is living as a transsexual in Australia. After that telephone conversation with his father the applicant was very sad, upset and angry.
62. [Person 1] allowed the applicant to take his name and obtain an Australian passport in his name to keep the applicant in Australia and for the additional reason that if the applicant had to go back to Pakistan he would be killed as a transsexual using his male name. Their scheme was exposed when [Person 1] applied for a passport using his brother's name.
63. The applicant has told him that if he returns to Pakistan he would have to live as an outcast and he may receive death threats or be killed by his family who are Muslims and do not accept his transsexualism.

Evidence from other sources

64. The US Department of State report on human rights practices for 2008 provides as follows on the application of Shari'a law in Pakistan:

Islam is the state religion, and the constitution requires that laws be consistent with Islam. According to the constitution, Shari'a can be applied to a situation deemed to be in contradiction to the Koran, and therefore citizens who are normally governed by secular law can be subject to Shari'a. Shari'a also was applied in some tribal areas. In the PATA [Provincially Administered Tribal Areas] of NWFP [Northwest Frontier Province], religious advisors assisted judges. All citizens were subject to certain provisions of Shari'a (US Department of State 2009, *Country Reports on Human Rights Practices for 2008 – Pakistan*, February, Section 2(c))
65. Section 377 of the Pakistan Penal Code sets out the punishment for “unnatural offences” as follows:

377. Unnatural offences: Whoever voluntarily has carnal intercourse against the order of nature with any man, woman or animal, shall be punished with imprisonment for life, or with imprisonment of either description for a term which shall not be less than two years nor more than ten years, and shall also be liable to fine.

Explanation: Penetration is sufficient to constitute the carnal intercourse necessary to the offence described in this section ('Pakistan Penal Code (Act XLV of 1860)' 1860, 6 October, Chapter XVI-A, p. 113).
66. A Human Rights Watch report of 2008 highlights the joint application of the Pakistan Penal Code and Islamic law. The report outlines a specific case where a male victim's rape claim was dismissed after he was deemed to be a “habitual sodomite” and therefore was not afforded “the right to refuse consent”:

Much as women's sexual histories can be manipulated to deny them protection in rape cases, the status of a “habitual sodomite” means, in effect, losing the right to refuse consent. A 1981 case from independent Pakistan is illustrative. Pakistan inherited the Indian Penal Code and retains Section 377; in the 1970s, however, the government's program of Islamizing national law also introduced the offence of zina, which among other things punishes sex between men when coupled with abduction. In Muhammad Din two men were charged with zina for raping another young man at a railway station in Lahore. The medical examination of the accuser, though, found his anus “moderately funnel shaped and he appeared to be a habitual passive agent.” Based on this, the court threw out the victim's claim. The view that he willingly participated in sex “received support from the medical evidence that he appeared to be a habitual passive agent.” The court thus refused to believe “that the complainant had been

kidnapped or abducted for the purpose of subjecting him to unnatural lust.” It dropped the charge of zina (Human Rights Watch 2008, *This Alien Legacy: The Origins of “Sodomy” Laws in British Colonialism*, December, pp. 34-35.

67. International Humanist and Ethical Union 2008 reports on homosexuality in Pakistan and describes the strength of Islamic (Shari’a) law in Pakistan with regard to lesbian, gay, bisexual and transgender (LGBT) people:

Islam is an unchallengeable entity in all spheres of life in Pakistan No laws or phenomena that contradict Islamic Law are given validation. LGBT (Lesbian, Gay, Bisexual and Transgender People) rights are not supported by any political or humanitarian party that does not value self destruction.

The Legal System in Pakistan is a conglomeration of Shari’a and secular laws: vestiges of the British colonial era. Any sexual activity outside of a heterosexual marriage is illegal. Both systems outlaw homosexuality and can be used alone or together against a defendant. For instance a person charged with homosexuality can be convicted under secular law if he/she is exonerated under the Shari’a or vice versa. Secular Law is enacted primarily against male homosexuals and the punishment consists of several years in prison. Islamic Law introduced in the early nineties penalises both male and female homosexuality and advocates up to a 100 lashes for offenders, and can even lead to execution by stoning. So far no individuals have been executed under this law but the fact that this measure exists means that it is possible for people to be tried and executed in this manner.

68. This report also identifies Pakistan as one of five Islamic nations that vetoed a UN proposal in 2003 which advocated global gay rights. Pakistan’s objection to the proposal included the following: the “resolution directly contradicts the tenets of Islam and other religions,” and its approval would be “a direct insult to the 1.2 billion Muslims around the world”” (International Humanist and Ethical Union 2008, *Homosexuality in Pakistan*, 4 February).
69. In addition, a Pakistani delegate to the UN Commission on Human Rights objected to the Special Rapporteur’s (on extrajudicial, summary or arbitrary executions) report on health in 2004, “reject[ing] the Special Rapporteur’s conclusion that discrimination on the grounds of sexual orientation was impermissible under international human rights law” and arguing that “the “easy” way for homosexuals, lesbians and transgender persons to avoid discrimination on the basis of sexual orientation was to “stop” engaging in non-heterosexual activity. In the words of the delegate, those of different sexual orientation should suppress their urges or “consult a medical doctor” and “get some medication”” (Sanders, D. 2005, ‘Human Rights and Sexual Orientation in International Law’, The International Lesbian and Gay Association (ILGA) website, 11 May).
70. The 2009 UK Home Office report on Pakistan provides the following information on legal rights under both secular and Islamic law, and government and societal attitudes towards LGBT persons and indicates that neither the Constitution of Pakistan nor Shari’a law recognise the change in gender of a person who has undergone a sex-change operation, with Shari’a law strictly forbidding such operations.

LEGAL RIGHTS

21.02 The ‘Sodomy laws’ website, last edited on 24 November 2007, reported that the penalty may also include:

“... a possible corporal punishment of a 100 lashes.” The same source added that “Islamic law was re-introduced in 1990.’ ‘Pakistani civil law punishes those who have gay sex with two years to life in prison, while Islamic law, which also can be enforced legally, calls for up to 100 lashes or death by stoning.’ [While it seems unlikely that Section 377 would apply to lesbians, it seems likely that Islamic law would] ‘Arrests and trials do not occur ... As elsewhere with unenforced sodomy prescriptions, the existence of the law is a threat - a threat conducive to blackmail. While the law is largely irrelevant to life in Pakistan, those acting in its name are not...Police recurrently take money and/or sex from those they know to be involved in same-sex sex (commercial or not). (Chapter on Pakistan by Stephen O Murray and Badruddin Khan in ‘Sociolegal Control of Homosexuality)’.” [50]

- 21.03 An IRB (Immigration and Refugee Board of Canada) report dated 29 November 2007 on gay relationships in Pakistan noted that:

“Homosexual acts are illegal in Pakistan. Under Section 377 of the country's penal code, homosexuality is not explicitly mentioned, but ‘carnal intercourse against the order of nature’ is punishable by a fine and/or imprisonment for a period of two years to life. Under the country's Sharia law, introduced in 1990, homosexual acts are punishable by corporal punishment (whipping), imprisonment, or death. Likewise, gay marriage is illegal in Pakistan. However, in October 2005, a ‘marriage’ was said to have taken place between two men in the Khyber region. A tribal council reportedly told the couple to leave the area or face death for ‘breaking religious and tribal values’. In May 2007, a married couple was imprisoned after the Lahore high court decided that the husband, who had undergone sex-change surgery, was still a woman. The couple had originally sought the court's protection against members of the bride's family who were harassing them; however, the court found the couple guilty of perjury, ruling that they had lied about the husband's gender and that their same-sex marriage was ‘un-Islamic’. One month later, following an appeal to Pakistan's Supreme Court, the couple was released on bail...” [12c]

- 21.04 Regarding the above appeal to the Supreme Court, the International Gay and Lesbian Human Rights Commission (IGLHRC) noted in their report ‘Human Rights and Transgender People in Pakistan’, published February 2008 (IGLHRC Report 2008), that:

“.. a landmark case involving transgender rights is currently unfolding in Pakistan. Nighat Saeed Khan, director of ASR Resource Centre in Lahore, Pakistan notes that, ‘Transgender individuals in Pakistan have typically faced a myriad of dangers from police, family, community, and religious authorities, and had to leave the country.’ The current case challenges this status quo. It marks an attempt by a female-to-male transgender man and his wife to have their marriage recognized, an outcome that is predicated on the court’s recognition of the right to transgender identity... the case is precedent setting... because the issue of gender identity has been sent to the Supreme Court.” However consideration of the case by the courts had been delayed by the disruption to the judiciary as result of the State of the Emergency in November 2007 and the subsequent political turmoil in early 2008. [49]

- 21.05 The Foreign and Commonwealth Office (FCO) consulted local experts on transgender and transexuals in Pakistan, including a journalist and producer from the private television station, Geo TV, who had made a documentary on the subject. Following this consultation, the FCO noted in a letter to the UK Border Agency (then the Border and

Immigration Agency), dated 6 February 2008, noted, with regard to the law on transgender persons that:

“There are two parallel legal systems in Pakistan: the constitution of Pakistan and the Federal Sharia law (religious law) of Islam. Under the Constitution of Pakistan there are only two recognized sexes i.e. male or female. The Constitution does not address the status of a person who has changed their gender through an operation. On the other hand the Sharia Law does not recognize any such operations and forbids them strictly. It is under this law that the various cases of gender operations have been arrested and charged in Paki[stan] courts. Depending on the severity [of transsexualism] various punishments have been prescribed in each case.

“.. Depending on the reasons [for undergoing a sex-change operation] that the jury/judge deduce, the transsexuals might be put in jail or prescribed lashes. In strict Sharia Law there can be worse punishments like stoning to death, but haven't been practiced by law yet. Stoning to death has been done in some rural areas where the local elders hold court to decide the matter... the constitution states that discrimination on basis of sex will not be entertained anywhere in the country. But it has failed to safeguard the rights of these people [transsexuals] too.”

...GOVERNMENT AND SOCIETAL ATTITUDES

- 21.07 The USSD Report 2008 recorded that “Homosexual intercourse is a criminal offense; in practice, however, the government rarely prosecuted cases. Homosexuals rarely revealed their sexual orientation, and there were no cases brought during the year of discrimination on the basis of sexual orientation.” [2k] (Section 5)
- 21.08 The IGLHRC Report 2008 noted that:
- “There is no known grassroots activism among lesbians, gays, bisexuals, transsexuals and transgender (zenana) communities in Pakistan. This lack of activism, the silences around sexualit(ies), and deeply closeted status of most gays and lesbians in Pakistan (many of whom live double lives to avoid revealing their sexual orientation) makes it difficult to accurately assess their living conditions and human rights situation. Anecdotal information from Pakistani gay people who have left the country describes fear, secrecy, isolation, suicides, forced marriage, family and community pressure to conform to heterosexual norms.” [49]
- 21.09 The Spartacus International Gay Guide 2008, undated, stated in the section on Pakistan that there was no gay movement or gay groups in Pakistan. The Guide noted that “Despite the strict laws of Islam regarding moral standards, gay men, transvestites and transexuals live relatively undisturbed from the police.” However, the Guide noted gay men would receive little protection from the authorities. The same source stated that “The general population and the family does not see homosexuality in a positive light at all, but is generally tolerant enough to accept the situation as long as they are not affected.” [25] (p730)
- 21.10 An IRB Response to Information Request (RIR), dated 29 November 2007 noted that “Information on the number of prosecutions against homosexuals in Pakistan and their outcomes could not be found among the sources consulted by the Research Directorate. However, Country Reports on Human Rights Practices for 2006 indicates that the government ‘rarely’ prosecutes such cases. Nevertheless, in May 2005, two gay men were publicly lashed in Pakistan’s north western Khyber region after they were caught having sex.” [12c]

21.11 On the subject of societal attitudes to homosexual activity the same source stated that:

“Although homosexuality is thought to be ‘relatively’ common in Pakistan, it is a ‘taboo’ subject that is not publicly discussed. It is reportedly rare for homosexuals to be open about their sexuality. According to a 10 May 2005 article published by the United Nations (UN) Integrated Regional Information Networks (IRIN), homosexuals in Pakistan ‘live in constant fear of being ‘outed’ in [the country’s] staunchly conservative society which is largely ignorant and intolerant of sexual minorities.’ Cited in the same article, a representative of a local non-governmental organization (NGO) stated that if an individual openly campaigned for gay rights in the country, he or she could end up being killed by religious followers. Nevertheless, several sources consulted by the Research Directorate indicate that homosexuality may, in general, be ‘silently accepted’ in Pakistan. Assaults on homosexuals are said to be ‘rare’ In the country’s North West Frontier Province (NWFP), it is apparently well known that ethnic Pashtun men take young boys as lovers which, according to IRIN, is ‘a practice now deeply embedded in the local culture’ In March 2006, a group of gay men wearing dresses participated in a festival in Lahore. The Internet is reportedly contributing to a sense of growing ‘solidarity’ amongst homosexuals in Pakistan. Online chat rooms are said to provide a ‘safe and anonymous forum for middle- and upper-class gay men’” [12c]

21.12 The same RIR continued:

“According to a 5 October 2005 British Broadcasting Corporation (BBC) article, ‘increasingly,’ same-sex couples are living together in Pakistan’s larger cities, including Karachi and Islamabad. However, a 2006 *Guardian* article states that it is ‘rare’ for homosexual couples to live together and that many gay men end up marrying women to ‘avoid scandalising their families’. Another article from IRIN notes that, while the atmosphere in larger cities such as Islamabad, Karachi and Lahore is ‘mildly’ more tolerant, in rural areas, conservatism is ‘extreme’ and homosexuals remain ‘closeted’. Two sources indicate that cultural practices in Pakistan, which permit public displays of affection between members of the same gender, make it possible for gay men to socialize without attracting attention.” [12c]

21.13 On the subject of female couples, the IGLHRC Report 2008 observed that “In Pakistan, two women can share a home, but not as intimate partners.” [49]

TRANSGENDER/TRANSEXUALITY

21.14 The FCO letter of 6 February 2008 which reported on the situation of transgender persons and transsexuals in Pakistan noted:

“Transgenders are called the ‘third form’ or ‘hijras’ in Urdu language. there [sic] are no apt words for hermaphrodites, transgenders, eunuchs, transsexuals, etc. They are all lumped together under the word Hijra. Most people just ignore them, some revere them, give them alms and clothes, men generally ridicule them. The two biggest hurdles in their peaceful life is the sexual harassment from men, including thrashings in public and verbal abuse that they have to face from everyone. They learn to live on the periphery of society showing up to beg and dance on weddings and the birth of children in exchange for some money. Currently they have no place or industry to work in because they are harassed wherever they go. Education is an impossibility for them. If they adopt children and raise them, eventually they even leave them because of society’s pressures.” [11f] (Paragraph 6) The same source stated “[that] men who behave, act, undergo operation, suffer with biological, psychological issues of gender are all termed as Hijras in Pakistan.” The letter noted

that instances of women undergoing an operation to become a man were very rare and that they would not be referred to as Hijras. [11f] (Paragraph 7)

21.15 The same source noted:

“The crime of transsexualism or undergoing sex operations essentially is translated as tampering with the Almighty's creations. That is deemed as a crime... the understanding of the various angles and approaches of this issue/subject is limited to very few due to bans and taboos on the subject. This in turn then influences the perception and final judgment meted out to ‘criminals of sexual crime’.

“There's no recorded history of such cases being tried in Sharia courts. Progressive and moderate interpretations of Islamic thought subscribe to this interpretation: 'Religious law only makes exceptions when a doctor prescribes the operation for a grown adult due to a severe and extremely dangerous health risk for the patient. Under religious law there should be absolutely no alternative for the patient and once the patient undergoes the operation, then s/he should be treated according to the new gender.' This is a quote from an Islamic scholar of the progressive school. His name is Khursheed Nadeem and he is the Country Director of an NGO called ‘Organization for Research and Education’ in Islamabad Classic and conventional Islamic interpretation prescribes to lashings and stonings - a practice that was prescribed for adultery in early Islam... stonings and lashings are carried out at the highest degree of sexual crime. So far a legal court in Pakistan has not ordered this punishment for any such criminal (...there are only a handful cases tried in courts). But when these cases are caught in rural areas, under feudal and tribal laws and customs, eunuchs and transsexuals are lashed in public. The reported incidence of this is few and far between because the transsexuals flee to areas where there communities are relatively more accepted.” [11f] (Paragraph 2) The letter further noted that if a transsexual committed a crime the treatment given out by law would be the same as other offenders. [11f] (Paragraph 9)

21.16 On obtaining ID documents, the FCO letter stated:

“In Pakistan when [transsexuals] file their papers to change their documents they have complained that the officials on duty do not change their sex on the documents. This is accompanied by ridicule, abuse, mental torture and in several instances complaints to the police for arresting the transgender They are not provided any legal counsel in case of arrests, unless they arrange for their own lawyer. [11f] (Paragraph 4)

21.17 The journalist and producer from GEO TV said that they had spoken to several transsexuals who stated that when attempting to acquire new ID cards or travel documents they had been refused. The letter noted “..Officials at these offices demand health and operation records for [transsexuals] but since the operation is illegal in Pakistan no doctor can issue a sex change certificate that supports the transsexuals' claim. Public humiliation, aggravation and bureaucracy are part and parcel of this process.... NADRA [National Database and Registration Authority] does not appear to have a clear policy on this, as such applications are seen as exceptional cases.” [11f] (Paragraph 11)

21.18 An update dated 14 August 2007 on the website of Women Living under Muslim Laws, on the court case of a married couple where the husband had undergone partial sex-realignment treatment (see also paragraph 21.02) observed that: “Legally she [Shamial Raj, the husband] can live where she likes and two 'women' can live together. They can also live together as they are but need to be very quiet about this.

If they are not married and if they are woman and man then society could have a problem.” [62]

21.19 The same source continued:

“Despite sensationalistic media reports, at no point have Shamial and Shahzina been charged or tried for ‘lesbianism’ or for the legitimacy of their marriage. The law in Pakistan is silent on such relationships and defines no penalties. The question of Shamial's gender and sexuality only arose after the couple had engaged with the legal system in order to end the harassment by Shahzina's father, who had wanted to marry her off to settle a personal debt...Charges for section 377 of the PPC [Pakistan Penal Code], goes for trial. At no point have they been charged or tried for ‘lesbianism’ and nor for their marriage... On the 28th of May [2007] the Court decided that there was insufficient evidence to charge Shahzina and Shamial under section 377 (unnatural offences) and while there were circumstances under which perjury was committed it would still give (a lesser) sentence on that charge. Yet they were given 3 years each.” [62] (UK Home Office 2009, *Country of origin information report: Pakistan*, April, Chapter 21).

71. A 2004 report produced by the Collective for Social Science Research describes the *Hijra* community in Pakistan and their involvement in the sex industry:

The *hijra* community can be considered as a caste, although its members are not related through blood. The group includes hermaphrodites, transvestites and transsexuals, i.e., those who have undergone surgery to remove their male genital organs. Historically, *hijras* claim a spiritual lineage traced back to the famed composer Amir Khusrau. During the Mughal Empire they served in royal palace/harems as royal employees. Their traditional association with begging is through receiving *Log/Bhidai* (alms given by families on the birth of a male child), but over time it has ceased to be a sufficient means to earn a living.

...*Hijras* are very concerned that society does not regard them as full human beings. Even their own families ostracize them. This attitude compels a born hermaphrodite or transsexual to join the *hijra* community. One of the respondents from this community asserted that they do not behave so differently from the rest of society. He said that the *hijras* are notorious because of their involvement in sex work, but wondered why that should attract attention when thousands of men have sex with men in every city, neighborhood and street.

...*Hijras* earn money singing, dancing, door-to-door begging and begging from markets, shops and traffic intersections.

...A small number of *hijras* were found engaged in different additional income-generating activities. For example, *hijras* in Lahore have formed dancing groups and signboards of their groups are visible in the red light area. They have rented rooms and use them as offices for their group and do embroidery work there also. They remain busy with their embroidery work in daytime and in the evening they perform in weddings and other private functions. They are experts in designing and embroidery (*zari ka kam*) for bridal wear.

The *hijra* community is heavily involved in sex work. All types of *hijras* are said to have sex as frequently as they can. Many homosexual men from mainstream society want to have sex with *hijras*, and some have permanent relationships with them One can observe *hijras* in the evening at different sidewalks and intersections in urban centres. They openly invite clients for sex. Roadside *hijras* enjoy the least respect in the *hijra* community and are called *chaloo*.

...*Hijras* are also a vulnerable group, particularly the young *hijas*. They are under pressure to become *nirbhan*, or castrated sex workers. We do not yet know at what age this operation is

considered ideal and under what conditions it is performed. Preliminary findings suggest that *hijras* secure their income and higher rank of their community after this operation, but the surgery is performed at considerable risk to the life of the individual (Collective for Social Science Research, Karachi 2004, 'A rapid assessment of bonded labour in domestic work and begging in Pakistan', International Labour Office website, March, pp. 31-39 http://www.ilo.org/sapfl/Informationresources/ILOPublications/lang--en/docName--WCMS_082030/index.htm)

72. The International Humanist and Ethical Union reports as follows in relation to *Hijras* in Pakistan:

Their origins lie in Hindu religious beliefs and it was believed in South Asia that they had supernatural powers to place curses on individuals, who displease or aggravate them. In India a Hijra's blessing is often required by some families at the birth of a son. These superstitions have faded with time and in Pakistan, most people view Hijras with derision and ridicule. It used to be the norm for a Hijra to be a castrated male; nowadays most are just homosexual men who have no other avenues open to them in an intolerant society. They live on the fringes, begging to survive. Some are booked to dance at weddings in the men's sections, since it is immoral to view dancing women, but this phenomenon is limited in its practice. Many turn to prostitution to subsist. Prostitution is illegal, and safe sex is an unfamiliar concept amongst sex workers in the country; most are from uneducated backgrounds and have scant or no knowledge regarding the spread of HIV/AIDS and others STDs (International Humanist and Ethical Union 2008, *Homosexuality in Pakistan*, 4 February).

73. A paper written for the National Institute of Psychology at Quaid-i-Azam University in Pakistan describes the composition of the *Hijra* community, in which cross-dressers are considered to be included, and indicates that Hijra is often used as a derogatory term towards effeminate males:

Hijra is a unique form of gender role expression in Pakistan where man behaves like woman; people refer to such an individual as behaving like *hijra*, but not as a woman. Term *hijra* is often attributed as an abuse to a man who is whimsical, womanly, effeminate, impotent or ineffective (Talwar, 1999 p. 23).

...**Cross-dresser or transgender** also fall under the category of *hijra* Cross-dressers are called *Zananay* and those castrated are called *Narban* (Persian word meaning 'sacrificing man') who are also taken equivalent to *Khusra*, after attaining asexuality through castration (Ali, July 2003; Riaz, 1996; Zafar, Sep 2004). They claim that female soul is enclosed in their bodies since birth (Jami & Anila, in progress) which prompts them to behave like women.

74. The paper also discusses the legal rights of *Hijras* in Pakistan and notes that they have equal legal rights in society but they do not have the right to amend their gender on legal documents, or marry a person of the same sex:

Rules are clearly set regarding the dressing/ roles of men and women in Islam. The Prophet (SAW) has cursed those men who are in similitude of women and vice versa. Prophet Muhammad (SAW) not only cursed them but also ordered their dismissal from the houses.

...Prophet Muhammad (SAW) has strongly prohibited the castration and forbade abstaining from marrying (Sahi Bukhari, 1986, p. 8). Certain companions sought permission from the Prophet (SAW) for getting them castrated to guard themselves against possible indulgence in sexual wrongs since they could not afford marriage. Prophet Muhammad (SAW) strictly forbade them by saying that it (sex) has been written in the fate of an individual and one cannot change the destined fate by getting castration, so there was no benefit in doing so (Sahi Bukhari, 1986, p. 9).

...*Hijras* are granted equal legal rights and obligations in the society. They have right to vote/ contest in elections. Aslam *Hijra* contested in the National Assembly elections against a renowned political figure and got over seven thousand votes. There is no legal restriction on *hijra* in enjoying their rights as also fulfilling their normal obligations. Only hindrances are cultural, social and attitudinal barriers in the society towards this community.

...In Pakistani law, no legal cover/ assistance is provided to transgender who wants to change identity/ legal documents in the light of reassigned sex. The identity registration at the age of 18 is based on sex written on birth certificate and cannot be changed.

There are the evidences against *hijra* (transgender) who indulge in carrying out auto-castration or castration with the help of any other *hijra* or doctor. *Hijra* who go for the castration voluntarily or cause this forcibly to any other *Hijra* indulge in causing “grievous hurt” punishable under Pakistani law, as it might cause grievous pain and might endanger the life of an individual (PPC, section 322/ 335) (Major Acts, 1987). There is no scope of same sex marriages in Pakistan. Homosexuality in men involves carnal intercourse, which comes under the category of unnatural offences (PPC, section 377, The Major Acts, 1987) punishable under the law.

75. The same paper describes the discriminatory societal attitudes towards the *Hijra* community in Pakistan, claiming that they are denied opportunities in employment and education, and that “[p]eople detest the idea of having any *hijra* in the family.” Significantly, it is stated that some members of society believe that “those who cross-dress are cursed down upon” and that those who are born *Hijras* (i.e. hermaphrodites) are more accepted than “men behaving like women” (i.e. cross-dressers):

...Like other part of the world (see Sharma, 2000; Talwar, 1999; Winter, 2002), the attitude towards *hijra* in Pakistan is also very discriminatory and biased in general. *Hijras* are denied any quota in employment on the basis of their handicap (if it is there) and also deprived of opportunities to take education because of people’s attitude towards them. More so they are also denied health and psychological/ psychotherapeutic assistance. Victims of gender identity problem carry out castrations without any medical and psychological aid. They indulge in self-remedy including hormone taking without prescription, using silicon injections and at extreme auto-castrations. No one is there to understand them and find solution to their problems.

People give away alms, it is only because of the fear to avoid their curse and get good wishes. Asexuality and also certain behavioural patterns such as cracking vulgar jokes, using obscene language and throwing vulgar gestures, induce annoyance resulting in people harbouring negative attitude towards them. By and large people do not like to interact with them... Talking about them in the family is not taken in good stead. People detest the idea of having any *hijra* in the family. Some even believe that children born with sexual deformity should be given away to the *hijra* community.

In bigger cities, since the number of *Zananas* is ever increasing, people are apprehensive and reluctant in interacting with all type of *hijras*. People blame them for homosexuality or sex business. Especially men are well aware of *Zananas*’ whereabouts living in their locality. Attitude of people towards *hijra*, on the basis of preliminary results of my research, show that people who believe that they are born *hijras* have more positive attitude towards *hijra* community than the people who believe that they are men behaving like women or both. Findings also show that women have more positive attitude than men.

...People, who know about the cross-dressers within *hijra* community, refer to the *Hadith* that those who cross-dress are cursed down upon; therefore *hijra* community is a cursed one (Jami, H. 2005, ‘Condition and Status of Hijras (Transgender, Transvestites etc.)

in Pakistan', National Institute of Psychology, Quaid-i-Azam University
<http://bangkok2005.anu.edu.au/papers/Jami.pdf>).

76. The following article further highlights the discrimination hijras face in employment - they are unable to gain employment other than in the sex industry due to their gender identity, and are unable to work or live as women:

Today, inter-gender sex-workers are mainly an issue within big cities like Karachi and fairly uncommon in rural areas. For many hijras, sex work is the only option as no one is willing to employ them because of their gender identity. Even as commercial sex-workers, hijras are the most vulnerable group. They are unable to ensure that their customers practice safe sex. According to health workers they are the main carriers of the deadly HIV virus, and one of the major factors in the spread of this disease. They are also at risk of violence both from customers and the police. Violence is almost an everyday reality for a hijra. Hijras often use public spaces like parks and toilets to entertain partners and sometimes even clients. The lack of protection or privacy afforded by their own accommodation makes them vulnerable to violence, largely by the police. At police stations, the police more often than not violate all civilized behaviour by physically, sexually and verbally assaulting hijras.

...They feel like women but being hijras cannot live, study and work like women. It is assumed by people that they can not do any constructive work except begging and dancing. Even if they want to work as maids, people do not accept them. They are not considered 'normal', and make people uncomfortable because of their differences (Sultana, N. 2008, 'City Calling: A Third View', *The News International*, 27 April
<http://jang.com.pk/thenews/apr2008-weekly/nos-27-04-2008/kol.htm#1>).

77. A journal article in the *World Press Review* describes the role of *Hijras* in Pakistani society and indicates that *Hijras* experience contradictory attitudes including acceptance, amazement, fear and hatred, and that they are often considered unclean and dangerous:

Hijras...function in society only as women, and their partners are men or other Hijras. So, what are the Hijras? Farrah, born Ahmed, around 35 years of age and a Hijra for the last 20 years, explains, "We are neither men nor women. We have men's bodies and women's souls." We are in a squalid neighborhood of Karachi, sitting in a tiny room that Farrah shares with Balli, also a Hijra. Like most Hijras, they entered the Hijra world in their youth. "We were born Hijras and felt by the age of 5 or 6 that we weren't boys," Farrah explains. They followed tradition by taking girl's names and choosing a guru or "mistress," and have ever since worn only women's clothing, long hair, and lots of makeup.

... "What difference does being of the third sex make?" I ask Farrah's longtime lover, a tall Pashtun with eyes as green as gooseberries. He laughs self-consciously and says that Hijras aren't real men—they don't have that essence. He continues, saying that many Hijras, but by no means all, had themselves castrated. This shows that many Hijras are rather like Western transsexuals, who regard themselves trapped in false bodies and are determined to become women. Whereas in the West one can adopt the desired sex through an operation, Hijras are castrated as a matter of free choice by their guru, in accordance with a long-standing tradition.

In India and Pakistan, one often hears derogatory remarks about Hijras who allegedly steal boys and forcibly castrate them. These are simply efforts to criminalize Hijras and legitimize their marginalization. All the Hijras I met in India and Pakistan who had chosen castration had done so of their own free will, just as they had chosen to join Hijra society of their own free will. But many Hijras do reject castration.

...Hijras are considered dangerous. They can bestow not only blessings but also curses. The curse of childlessness is wielded as a weapon against anyone who makes fun of them or refuses to give them money. But usually the Hijras bestow blessings, as only blessings bring them money, up to 1,000 rupees (officially worth about \$20 but actually worth about \$340 in purchasing power). The attitude of Pakistanis toward Hijras is contradictory: Some accept them, others hate them, many fear them, many are amazed by them, a few like them, many make fun of them, and no one invites them in. They are considered unclean, and only their lovers eat with them at the same table (Syed, R. 2003, 'Pakistan's Hijras', *World Press Review*, January, Vol. 50, No. 01).

Information in relation to state protection for transsexuals and homosexuals in Pakistan

78. A prominent court case regarding the marriage of a female-to-male transsexual to his cousin, a woman, is referred to in the UK Home Office report earlier indicates that a criminal investigation has begun into the "gender reassignment" operation undergone by the husband, Shumail Raj:

A couple who were married after the bridegroom underwent gender reassignment surgery were jailed for three years by a Pakistani court for lying about the husband's gender.

They were the first-known transgender couple in the country and their story shocked the conservative nation. After being found guilty of perjury they immediately appealed to President Musharraf for help.

Shumail Raj, 31, who was born female, married Shazina Tariq last year. The couple, who are also cousins, had approached the Lahore High Court for protection against harassment by Tariq's relatives. They said initially that they married to stop Tariq from being forced into marriage to pay off her family's debt. Forced marriages are quite common in Pakistan's backward rural areas. Girls are given in marriage, frequently to much older men, mostly because of poverty.

But the court sent them to jail after a medical examination proved that the husband was still a woman, despite surgery. Raj was reported to have undergone surgery twice in the past 16 years.

Ms Tariq has acknowledged that she knew her husband was a woman, and when Judge Khawaja Mohammed Sharif asked Raj, who has stubble on his face, whether he was female, he responded: "Yes, I am a woman. I had two operations but still I am a woman."

The judge told the court: "Islam and Pakistani law do not allow such marriages. A marriage of same sex is not allowed in our country."

Yesterday he ruled that the couple had lied about Raj's gender. Judge Sharif said that he was handing down a lenient sentence — the maximum is seven years — because they had apologised. They were also fined £120.

...The case is the first of its kind in Pakistan's conservative Muslim society, which considers homosexuality a sin. Radical clerics have demanded that they be given a much harsher punishment.

The court will resume hearings on June 22 on whether to annul the marriage. The bride's father wants it revoked on the ground that it was against Islam for two women to marry. The couple, however, argued that they were not homosexuals and that they had married because they were in love. The judge also ordered police to begin a criminal investigation of the surgeons who operated on Raj.

The couple urged President Musharraf to intervene in the case. “The President is talking about moderation and enlightenment. We hope he will do something for us,” they said. The defence lawyer said that the couple would appeal and hoped for an acquittal.

Human rights activists have appealed for their acquittal, saying that the couple lied because of pressure that society would not accept their marriage.

“We believe they should have been given some more leniency,” Hina Jilani, a spokeswoman for the Human Rights Commission of Pakistan, said (Hussain, Z. 2007, ‘Transsexual couple jailed for lying about husband’s gender’, *The Times*, 29 May).

79. The remaining information found regarding sexual orientation and the level of protection that may be available in Pakistan relates to homosexuality in general, rather than transsexuals specifically. The 2008 US Department of State Report on Pakistan indicates that cases relating to the criminal offence homosexual intercourse are rarely prosecuted:

Homosexual intercourse is a criminal offense; in practice, however, the government rarely prosecuted cases. Homosexuals rarely revealed their sexual orientation, and there were no cases brought during the year of discrimination on the basis of sexual orientation (US Department of State 2009, *Country Reports on Human Rights Practices for 2008 – Pakistan*, February, Section 5).

80. The International Humanist and Ethical Union report cited above similarly indicates that police corruption and acceptance of bribes is commonplace, with few arrests made for homosexuality:

The judicial system is wrought with corruption and incompetence. Homosexuality is illegal but few arrests or convictions are ever made. Police will usually blackmail a known homosexual and extort money for their own personal gain. The same is true of private citizens who discover a homosexual in their midst. This person will have no choice but to pay up to avoid prison or public embarrassment and societal exclusion at the very least.

Honour killings

81. The same report also claims that “[a] family member could resort to murdering a gay relative, proclaiming the actions of that relative to have brought shame upon the family name.” Although illegal, perpetrators of such honour killings “can get away with murder easily or receive a slap on the wrist.”

There are few options for a publicly outed gay person, who refuses to assimilate or conform. Family is the core of Pakistani society, and to be disowned by family is societal death. Ostracism means that this individual will be shunned by neighbours, friends and extended family. They will almost certainly lose their job or a place at an educational institution (if they have one: illiteracy is rampant and access to higher education is limited). Suicide would be an option in this situation, as it is in other similar cases across the world. A family member could resort to murdering a gay relative, proclaiming the actions of that relative to have brought shame upon the family name. Honour killings are illegal, but killers can get away with murder easily or receive a slap on the wrist. The practice occurs mostly in the rural areas where the bulk of the population lives and law enforcement is lax: perceived sexual crimes are usually the sole motivating factor behind honour killings. Women whose chastity comes into question make up the majority of victims. Typically, gay men from poor backgrounds will have no option but to join the Hijra subculture.

...[B]eing gay in Pakistan at present is not a desirable position to find oneself in. Gays must live in shame and fear and if they choose to act on their impulses they must deal with the highly unpleasant, if not potentially fatal, consequences of being themselves (International Humanist and Ethical Union 2008, *Homosexuality in Pakistan*, 4 February)

82. Information provided by the Immigration and Refugee Board of Canada in 2003 supports the claim that although under Shari'a law, homosexuality may be punishable by death, there have been no cases where this sentence has actually been imposed, and instead, this law is often used by the police to attract bribes:

Regarding the implementation of laws and penalties against homosexuality in Pakistan, the U. K.-based gay and lesbian website community that is part of the global Gay.com network states that although gay people can be sentenced to death under Islamic Shariah law, "no such sentence has ever been actually passed" (uk.gay.com 22 April 2003). The Independent Media Institute's AlterNet.org states that

Beyond the hijras, gay relationships are kept in the closet in Pakistan Section 377 of the Pakistani penal code says that two men practicing intercourse can be stoned to death, but the rule is rarely implemented. More often, gays are ostracized from friends and family (9 Apr. 2002).

The New York-based *The Village Voice* also says that the law against homosexual acts in Pakistan is "rarely enforced," but adds that the police use it to threaten or blackmail people (9 Oct. 2001) (Immigration and Refugee Board of Canada 2003)

83. A 2004 report from the Immigration and Refugee Board of Canada indicates that societal humiliation prevents many homosexuals from seeking state protection:

According to an article published in *Hindustan Times*, in Pakistan, gay marriages are illegal, and death by stoning is the suggested punishment for anyone found to be engaging in a homosexual act (2 July 2004; see also University of Florida 2003). Similarly, *The Boston Globe* reported in July 2004 that in Pakistan, homosexuality is a crime that carries the punishment of whipping, imprisonment or death, although no one has been "executed for sodomy in Pakistan's recent history" (11 July 2004).

...Male children accused of engaging in homosexual relations "spend long years in jail awaiting trial; their families are stigmatised and often forced to disown them," even if they were unwillingly enticed (ibid.).

Additional information on the situation of homosexuals and reports of ill-treatment by state and non-state agents against homosexuals could not be found among the sources consulted by the Research Directorate.

During his presentation, the UNHCR representative declared that "homosexuals do not seek state protection from state agents and the judiciary because this would expose them as homosexual and would result in [societal] humiliation" (27 May 2004).

Additional information on the availability of state protection to homosexuals could not be found among the sources consulted by the Research Directorate (Immigration and Refugee Board of Canada 2004).

84. No specific information was found relating to available protection for transsexuals in Pakistan. However, a 2009 report on Pakistan's rule of law in 2007-2008 from the

International Federation for Human Rights provides some general information regarding state failure in maintaining public order against the rise of religious fundamentalism, claiming that “religious fundamentalism and sectarianism...were able to prevail with the support, and even the complicity, of the state,” and highlighting in particular “targeted attacks against...all those whose way of life, liberty, or expression does not conform to the precepts dictated by religious fundamentalists.”

2 - Failures of the state in its mission to safeguard public order and the security of persons

The military power and the state are closely linked in Pakistan. The army, and the paramilitary groups associated with them, has a dominant role in conducting all of the country's affairs, political and economic. This army-state collusion is a determining factor in the analysis of power relations as well as domestic and foreign policy in Pakistan. However, there is a new rise in irregular armed groups, which are based on national and ideological claims and use violence and terror. Among these ideologies, religious fundamentalism and sectarianism are particularly threatening, and were able to prevail with the support, and even the complicity, of the state. This necessarily raises the question of the failure of state authority and its responsibility for the rise of these movements.

2.1 - Allegiance to religious fundamentalism

Since Pakistan's entry in the war on terror, religious fundamentalism has risen. Pakistan, despite its military operations, is a heaven for the Taliban operating in Afghanistan. Until recently, Pakistani society was relatively protected from attacks and intimidation, but today, as a neighbour to Afghanistan, Pakistan is experiencing a Talibanisation, namely the imposition of ideology adopted and spread by the Taliban. Pakistan lives under constant threat of widespread terrorist attacks or targeted attacks against girls' schools, women, nongovernmental organisations, journalists, and all those whose way of life, liberty, or expression does not conform to the precepts dictated by religious fundamentalists (International Federation for Human Rights 2009, 'Pakistan: a long march for democracy and the rule of law 2007-2008', FIDH website, January, Chapter III, pp. 31-32 <http://www.fidh.org/IMG/pdf/Pakistan514fr2008.pdf> - Accessed 20 January 2009).

FINDINGS AND REASON

85. The Tribunal finds that the delegate's decision is an RRT-reviewable decision under s.411(1)(c) of the Act.
86. The Tribunal finds that the applicant has made a valid application for review under s.412 of the Act.
87. The applicant claims that he is a citizen of Pakistan and he last arrived in Australia on a Pakistani passport. Accordingly, for the purposes of the Convention the Tribunal has assessed the applicant's claims against Pakistan.
88. The Tribunal is satisfied that the applicant has no right to enter and reside in any other country besides Pakistan.
89. In determining whether an applicant is entitled to protection in Australia, the Tribunal must first make findings on the claims the applicant has made. This may involve an assessment of the applicant's credibility. In assessing credibility, it is important to be sensitive to the difficulties often faced by asylum seekers. The benefit of the doubt should be given to asylum seekers who are generally credible but unable to substantiate all of their claims. However, the mere fact that a person claims fear of persecution for a

particular reason does not establish either the genuineness of the asserted fear or that it is “well founded” or that it is for the reason claimed. It remains for the applicant to satisfy the Tribunal that all of the statutory elements are made out. Although the concept of onus of proof is not appropriate to administrative inquiries and decision making, the relevant facts of the individual case will have to be supplied by the applicant himself or herself, in as much detail as is necessary to enable the examiner to establish the relevant facts. A decision maker is not required to make the applicant’s case for him or her. Nor is the Tribunal required to accept uncritically any and all the allegations made by an applicant. (*MIEA v Guo & Anor* (1997) 191 CLR 559 at 596, *Nagalingam v MILGEA* (1992) 38 FCR 191, *Prasad v MIEA* (1985) 6 FCR 155 at 169-70.)

Applicant’s claim to be a transsexual

90. For the purposes of this decision, the Tribunal has referred to the definition of ‘transsexual’ in the Concise Oxford Dictionary, Tenth Edition:

A person born with the physical characteristics of one sex who emotionally and psychologically feels that they belong to the opposite sex.
91. The applicant has claimed that since early childhood he always wanted to be a female and that in Pakistan he suppressed his femininity in consequence of societal attitudes and more particularly because of his Muslim family’s fierce opposition to his transsexualism. After spending time in Australia, the applicant claims he decided to openly express his transsexualism because he had no fear of discrimination or harassment in this country
92. The Tribunal finds that the applicant has been diagnosed in Australia as having the medical condition ‘gender dysphoria’ [a persistent unease with having the physical characteristics of one’s gender, accompanied by strong identification with the opposite gender and the desire to live as or to become a member of the opposite gender] and that he has taken hormonal medication in Australia in order to increase his femininity.

Whether applicant is a member of a particular social group

93. The applicant has claimed that he is a member of a particular social group: transsexuals in Pakistan.
94. The applicant is seeking a review of the delegate's decision to refuse his application for a protection visa on the Convention ground of his fear of being persecuted for reason of his membership of a particular social group, namely transsexuals in Pakistan.
95. The Tribunal finds on the basis of the applicant’s own evidence, and documentary material before the Tribunal, that the applicant is a transsexual. The Tribunal further accepts other personal details as supplied. The Tribunal found the applicant to have been a credible witness. The Tribunal accepts his evidence that he has experienced death threats and harassment by Pakistani people including members of his own family, and that this has been because of his transsexualism and that he now lives in constant fear of such threats and harassment.
96. The meaning of the expression ‘for reasons of ... membership of a particular social group’ was considered by the High Court in *Applicant A’s* case and also in *Applicant S*.

In *Applicant S* Gleeson CJ, Gummow and Kirby JJ gave the following summary of principles for the determination of whether a group falls within the definition of particular social group at [36]:

... First, the group must be identifiable by a characteristic or attribute common to all members of the group. Secondly, the characteristic or attribute common to all members of the group cannot be the shared fear of persecution. Thirdly, the possession of that characteristic or attribute must distinguish the group from society at large. Borrowing the language of Dawson J in *Applicant A*, a group that fulfils the first two propositions, but not the third, is merely a "social group" and not a "particular social group". ...

97. Whether a supposed group is a 'particular social group' in a society will depend upon all of the evidence including relevant information regarding legal, social, cultural and religious norms in the country. Furthermore, the Tribunal must be satisfied that the persecution feared is for reasons of membership of a particular social group, being a group that shares a common element that sets them apart from society at large.
98. The Tribunal accepts that being a transsexual in Pakistan makes the applicant a member of a particular social group under the Convention. The transsexual members of a particular society may form a 'particular social group' for the purposes of the Refugees Convention if they are perceived in that society to have characteristics or attributes that unite them as a group and distinguishes them from society as a whole (see *Applicant A*, referred to above, per McHugh J at 265). In this context the Tribunal notes that homosexuals have been consistently accepted by the Tribunal as constituting a particular social group.
99. The evidence available to this Tribunal indicates that there is an identifiable transsexual community in Pakistan which forms a cognisable social group within that country. The Tribunal notes and accepts that some members of this social group are known as 'hijras.' In particular, societal prejudice against transsexuals and hijras in Pakistan indicates that not only do they share a certain characteristic - their sexual orientation - but this element makes them a cognisable group within Pakistan society.
100. Moreover, independent information indicates that it is generally accepted that section 377 of the Pakistan Penal Code sets out the punishment for "unnatural offences" with the effect that homosexual or transsexual conduct is a criminal offence.
101. The Tribunal has considered the country information cited above. The Tribunal accepts that Pakistan law does not presently permit the applicant to change his gender for the purpose of legal documents.
102. The Tribunal accepts that the applicant's family are Muslims and that Islam is opposed to homosexuality, bi- sexuality, transsexualism and further that sexual orientation "against the order of nature" is contrary to the Pakistan Penal Code and punishable by imprisonment.
103. The Tribunal accepts the applicant's claim that there are no gay or lesbian advocacy groups operating in Pakistan and notes that country information supports that claim. The Tribunal accepts that country information indicates that in Pakistan gay relationships are kept hidden in consequence of ostracism by the community towards such persons. The Tribunal notes the International Humanist and Ethical Union 2008

report quoted above states that if a gay person in Pakistan chooses to reveal their sexuality they 'must deal with the highly unpleasant, if not potentially fatal, consequences of being themselves' and that there are few options for publicly gay persons who refuse to conform to societal norms in Pakistan.

104. It is an entrenched principle of refugee law that the Tribunal cannot impose a requirement on the applicant to be discreet about his sexual orientation if he were to return to Pakistan.
105. The Tribunal accepts that independent country information cited above indicates that open transsexuals, gays or lesbians in Pakistan are subjected to ostracism generally, that they have severely reduced opportunities in employment and may be forced to live on the streets, earning money from working in the sex industry.
106. The Tribunal accepts that the applicant fears that he will be the victim of an honour killing if he returns to Pakistan because his Muslim relatives have threatened to take his life in consequence of his sexuality.
107. The Tribunal notes the International Humanist and Ethical Union Report 2008 quoted above indicates that honour killings can occur where a family member murders a gay relative claiming the gay family member has brought shame upon the family name. This same report contains the information that while honour killings mostly occur in rural areas and are illegal, the killers can 'get away with murder easily or receive a slap on the wrist.'
108. The Tribunal is satisfied that country information indicates that Pakistan vetoed a UN proposal in 2003 which advocated global gay rights on the ground that such a resolution directly contradicts the tenets of Islam and other religions. This being so, the Tribunal finds that this situation pertains throughout Pakistan and relocation is not a reasonable option to avoid harassment and harm.
109. The Tribunal notes that although the applicant would be most at risk of harm from non-state actors, his relatives, it is satisfied on the country information before it that he would not be able to access adequate state protection according to international standards in Pakistan.
110. In the light of the above evidence and findings, the Tribunal finds that if the applicant were to return to Pakistan now or in the reasonably foreseeable future he would face a real chance of serious harm because of his membership of the particular social group and that protection from that harm is not reasonably available to him.
111. In the light of the evidence before it, the Tribunal finds that the applicant's chance of facing serious harm, possibly death by honour killing, if he returned to Pakistan now or in the reasonably foreseeable future is real and amounts to serious harm as required by s.91R(1)(c) in that it is deliberate or intentional and involves persecution for a Convention reason.

Delay with application for a protection visa

112. The Tribunal notes that the applicant lodged his claim for a protection visa in late October 2008, more than 4 years after his most recent entry to Australia in July 2004.

The Tribunal has concerns with this very substantial delay. However, the applicant gave oral evidence to the Tribunal that he was not in possession of information about the right to apply for a protection visa until the Department informed him of that right in October 2008. The Tribunal further notes the applicant's conduct of attempting to change his gender identity (well prior to lodging the protection visa application) in order to avoid returning to Pakistan as a male around the time of his last substantive visa expiring. The Tribunal takes the view that if the applicant had known he had the right to seek a protection visa he would have done so rather than enter into the passport arrangement he made with [Person 1]. Taking these matters into account the Tribunal is prepared to accept that the applicant was not aware of his right to seek a protection visa until the Department informed him in October 2008. The Tribunal notes that the applicant reacted quickly to receiving the protection visa information and lodged his protection visa application about two weeks later.

113. The Tribunal is satisfied on the evidence that the applicant's significant delay in lodging his protection visa application does not form a reason for doubting the genuineness of his claims in this case.
114. For the above reasons the Tribunal is satisfied that the applicant's fears are well founded for Convention reasons and therefore he is a refugee within the meaning of Article 1A(2) of the Convention.

CONCLUSIONS

115. For the above reasons the Tribunal is satisfied that the applicant is a person to whom Australia has protection obligations under the Refugees Convention. Therefore the applicant satisfies the criterion set out in s.36(2)(a) for a protection visa.

DECISION

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

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

Sealing Officer's I.D. prrt44