

071494945 [2007] RRTA 276 (19 September 2007)

DECISION RECORD

RRT CASE NUMBER: 071 494 945

COUNTRY OF REFERENCE: India

TRIBUNAL MEMBER: Danica Buljan

DATE DECISION SIGNED: 19 September 2007

PLACE OF DECISION: Melbourne

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

**STATEMENT OF DECISION AND REASONS
APPLICATION FOR REVIEW**

1. This is an application for review of a decision made by a delegate of the Minister for Immigration and Citizenship (the delegate) to refuse to grant the applicant a Protection (Class XA) visa under section 65 of the *Migration Act* 1958 (the Act).
2. The applicant, who claims to be a citizen of India, arrived in Australia. He lodged with the Department of Immigration and Citizenship (the Department) an application for a Protection (Class XA) visa. The delegate refused to grant the applicant a Protection visa and notified the applicant of the decision and his review rights by letter posted on the same date.
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 Refugee Review Tribunal (the Tribunal) for review of the delegate's decision.
5. The Tribunal finds that the delegate's decision is an RRT-reviewable decision under subsection 411(1)(c) of the Act. The Tribunal finds that the applicant has made a valid application for review under section 412 of the Act.

RELEVANT LAW

6. Under subsection 65(1) of the Act 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. Subsection 36(2) of the Act relevantly provides that a criterion for a Protection (Class XA) visa is that the applicant for the visa is a non-citizen in Australia to whom the Minister is satisfied Australia has protection obligations under the Refugees Convention as amended by the Refugees Protocol. The 'Refugees Convention' and 'Refugees Protocol' are defined to mean the 1951 Convention Relating to the Status of Refugees and the 1967 Protocol relating to the Status of Refugees respectively: subsection 5(1) of the Act. Further criteria for the grant of a Protection (Class XA) visa are set out in Parts 785 and 866 of Schedule 2 to the *Migration Regulations* 1994 (the Regulations).

Definition of 'Refugee'

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

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.

9. The High Court has considered this definition in a number of cases, notably *Chan Yee Kin v MIEA* [1989] HCA 62; (1989) 169 CLR 379, *Applicant A v MIEA* [1997] HCA 4; (1997) 190 CLR 225, *MIEA v Guo* [1997] HCA 22; (1997) 191 CLR 559, *Chen Shi Hai v MIMA* [2000] HCA 19; (2000) 201 CLR 293, *MIMA v Haji Ibrahim* [2000] HCA 55; (2000) 204 CLR 1, *MIMA v Khawar* [2002] HCA 14; (2002) 210 CLR 1, *MIMA v Respondents S152/2003* [2004] HCA 18; (2004) 205 ALR 487 and *Applicant S v MIMA* [2004] HCA 25; (2004) 217 CLR 387.

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

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

12. Second, an applicant must fear persecution. Under subsection 91R(1) of the Act persecution must involve "serious harm" to the applicant (subsection 91R(1)(b)), and systematic and discriminatory conduct (subsection 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: subsection 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.

13. 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.

14. 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: subsection 91R(1)(a) of the Act.

15. 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.

16. 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.

17. 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

18. The Tribunal has had regard to the following material:

[Information about the applicant's files deleted in accordance with s.431 as it may identify the applicant].

D1 - Departmental file.

19. The Departmental file relating to the applicant includes both the Protection visa application and the delegate's decision record.

The Protection Visa Application

20. According to information provided in the Protection visa application, the applicant was born in Town X, Union I, India. In his application the applicant stated that he belongs to the Sikh ethnic group and that his religion is Sikh. The applicant also stated that he lived in the Indian State A for several months. He also stated that he lived in the Indian State B for several years in the late 1990s, early 2000s. In addition, the applicant indicated that a few years later he returned to the Indian State A and lived at different addresses with the last before his departure being in District 1, State A.

21. Further, the applicant stated in his Protection visa application that he received a number of years of education. The applicant also indicated that he had been employed in Australia for several weeks.

22. The applicant also stated in his Protection visa application that he travelled to Australia as the holder of an Indian passport.

23. In support of his application the applicant submitted a typed, but undated and unsigned, statement in which he set out his claims to be a refugee. He stated that he came from a conservative Sikh family, consisting of his parents and one sibling and that his parent was employed by a government organisation. The applicant stated that he commenced his early education in his local area and then moved to different schools, not only to continue his studies, but because his family wanted him to avoid association with boys that believed in same sex relationships. The applicant stated that whilst a teenager in a school in State B, India, he formed a relationship with a senior student his first partner, and became less attentive in his studies, the result of which was that he had to repeat his year.

24. The applicant stated that he was shy and attracted to boys and, as a result, when he was a teenager, he initially entered in to a friendship with a senior student and after a few months he had his first homosexual encounter with this student, his first partner. The applicant stated that initially he did not like his first partner's approach and felt forced into sexual activities with him, but later he came to enjoy the time he spent with his first partner and became increasingly attracted to him.

25. However, the applicant stated that other members of the community, including his first partner's parents and his own, learned of the relationship

and the applicant was blamed for the relationship that had developed. The applicant's parents were threatened by the first partner's family and in the early 2000s the first partner's parents transferred him to another school, which left the applicant depressed such that he received treatment from a medical practitioner for a few months.

26. The applicant also stated that the cultural prohibitions in a Sikh dominated society meant that he did not have the opportunity to have relationships with girls his age and this contributed to his homosexual tendencies at a young age. The applicant stated that when he was a teenager he entered into a relationship with another older student at his school, his second partner. Initially, they formed a friendship, but over time their feelings deepened and they started to attract adverse attention from their families and the local community. In particular, the applicant's family was approached to prevent the applicant from engaging in homosexual activities and, although his second partner's family asked him to cease associating with the applicant, they continued with their relationship, which angered his second partner's parents and other members of the community.

27. In addition, the applicant stated that almost a couple of years before the review application was lodged members of the local community physically assaulted the applicant's parent as the parent was returning home and had to be taken to hospital for treatment (the first attack). Similarly, the applicant stated that a few weeks after the first attack, while returning home, he was physically assaulted and left injured (the second attack). A stranger took him to hospital and after a few days he was allowed to go home, at which time his parent advised him to stay confined to their house for his personal safety. Although his second partner's parent continued to threaten the applicant's parent, the applicant continued to maintain his homosexual activities with his second partner, ignoring his parent's advice.

28. The applicant stated that because of his relationship with his second partner he chose to live a homosexual lifestyle and was known in the community as a gay and was therefore a victim of hatred. He stated that his local community took the matter to the court, which delivered a verdict that his activities were anti-religious and anti-social. As a result, the applicant's family was ostracized and his parents became fearful, telling him to leave home. The applicant stated that at the time he was suffering from a medical condition and he found it intolerable being separated from his second partner, which resulted in another several months' treatment from a medical practitioner.

29. The applicant stated that he was the victim of systematic harassment, intimidation and physical harm and that his family felt it was not safe for him in his own area and made arrangements for him to come to Australia for his personal safety. However, the applicant stated that once in Australia his experience of persecution made it difficult for him to successfully concentrate upon his studies and he was warned by his education provider that he would be reported to the Department for failing to meet course requirements.

30. Further, the applicant stated that since arriving in Australia he had maintained his homosexual lifestyle by “visiting gay society” and attending the Sydney Mardi-gras. He stated that there was no chance of reconciliation with his former second partner, given the socio-religious environment in India, and the fact that his second partner does not have any civil liberties in India. The applicant stated that he could not return to India because he feared persecution. He stated that his homosexual activities would not be accepted anywhere because they are legally unlawful. As a result, the applicant stated that it is not possible to maintain his relationship by living in another location because he would encounter the same experience everywhere and the authorities are unable to protect him.

The Primary Decision

31. The delegate refused the Protection visa application. After referring to the United Kingdom country report on India (April 2006) and advice from the Australian Department of Foreign Affairs and Trade (DFAT), the delegate found that homosexuals constituted a particular social group in India. However, the delegate was not satisfied that the applicant faced a real chance of persecution in India because, whilst “the treatment of homosexuals varies from region to region, larger cities such as New Delhi and Mumbai have quite active gay and lesbian communities and homosexuality in these cities is generally tolerated”.

32. The delegate noted that the applicant’s parent was employed as an official in a government organisation and the applicant had been able to complete his education. The delegate found that there was no medical evidence to substantiate the applicant’s claims to have been the victim of a physical assault because of his homosexuality. Although the delegate had taken into account the fact that Indian laws do not recognise homosexual couples or protect them, the delegate also found there was no independent evidence to suggest that rights under the general law are not available to them. In particular, the delegate referred to an article dated 22 March 2006 in *The Pink News* that a number of Indian celebrities have been moved to speak out about attitudes towards gay people. The delegate found that homosexuality is not uncommon in India, that there is an emerging gay movement in India with gay support groups and gay friendly venues in many of the larger towns in India. The delegate also found that as a single and educated man with no significant political or public profile the applicant could reasonably relocate within India.

33. In addition, the delegate took into account the fact that the applicant did not lodge his protection visa application for almost a year after his arrival in Australia and, although the applicant did hold a valid visa, the delegate did not accept that the applicant would fail to apply for full protection if he genuinely believed he faced the harm he claimed. Further, the delegate took into account that the applicant’s valid visa had been cancelled for non-compliance with his visa conditions and therefore the delay in the lodgement of the protection visa application detracted from the applicant’s claim to genuinely fear persecution in India.

34. Accordingly, the delegate was not satisfied that the applicant had a well-founded fear of persecution on return to India.

The Review Application

35. The review applicant applied to the Tribunal for review of the delegate's decision. The matter was constituted to the Presiding Member.

36. The Tribunal wrote to the applicant advising that it had considered all the material before it relating to his application, but it was unable to make a favourable decision on that information alone. Accordingly, the applicant was invited to appear before the Tribunal to give oral evidence and present arguments in support of his claims.

37. The Tribunal received a lengthy submission from the applicant's representative, which detailed the applicant's background and summarised his claims as follows:

[Information about the applicant's representative's submission amended in accordance with s.431 as it may identify the applicant].

- The applicant feared persecution in India on the basis of his membership of the social group consisting of homosexuals in India;
- The persecution feared is systemic and discriminatory in that the applicant fears being deliberately targeted as an individual because of his homosexuality;
- The applicant was unable to avail himself of effective protection from serious harm directed towards him as a homosexual in India because homosexuality is proscribed in India and therefore the applicant cannot expect protection from a reasonably impartial system of justice. In addition, the representative submitted that country information indicates that the police abuse the law and are implicated in violence and harassment against homosexuals in India. As a result, she argued that the State both perpetuates discrimination and violence against homosexuals through its laws and agents and fails to make protection available against ill-treatment and violence directed towards homosexuals; and
- It was not reasonable to expect the applicant to relocate within India because homosexuality is proscribed throughout India and pervasive societal discrimination makes safe relocation questionable. In addition, given the applicant's age, limited education, lack of qualifications, work experience, family support and any association with any of the cities where more progressive attitudes prevail, together with the issue of distance from his home and different local languages to that spoken by the applicant, relocation was not an option for him in India.

38. In addition, the applicant's representative referred to the *2006 US Department of State Country Report on Human Practices in India* (6 March 2007), the *Human Rights Watch Report on India* (11 January 2006) and a report from the *International Gay and Lesbian Human Rights Watch Commission* (31 January 2005) that the State itself discriminates against

homosexuals by proscribing homosexuality as a criminal offence. She submitted that the recent endorsement of these laws in India indicated that no change could be expected. As a result, the representative argued that the State has perpetuated and legitimised abuse, discrimination and violence against homosexuals, including by the police and the community.

39. The applicant's representative also made the following submissions in relation to the delegate's findings:

[Information about the applicant's representative's submission amended in accordance with s.431 as it may identify the applicant].

...is submitted that evidence that a gay movement may be 'emerging' in India and that gay support groups and gay friendly venues exist in India does not displace the evidence of systematic discrimination and persecution of homosexuals in India.

...information indicates that while a gay movement may be 'emerging', homosexuality remains proscribed in India through the Penal Code and the State recently indicated that no change would take place following a legal challenge to the laws. Pervasive discrimination still exists and homosexuals are subjected to targeted attacks by both local communities and police.

...mere existence of isolated gay friendly venues across the country or NGOs or other organisations supporting gay rights does not mean that the applicant can find effective protection as a practising homosexual in India. information indicates that even in the larger cities that the delegate suggested were safe and reasonable relocation options for the applicant, homosexuals are subjected to targeted violence and discrimination on account of their homosexuality. The US State Department report states that homosexuals were targeted by police in Lucknow and that police in Mumbai extorted money from gay men.

...delegate found that in India there is no recognition of homosexual couples in the law or any legislation to protect them. However the delegate found "no independent evidence to suggest that rights under the general law are not available to them". It is submitted that the delegate's finding in this regard is questionable. Given that homosexuality is proscribed in India this has engendered discrimination and abuse of the law including by agents of the state, such as police. The US State Department report states,

...and lesbians faced discrimination in all areas of society, including family, work, and education. Activists reported that in most cases, homosexuals who do not hide their orientation were fired from their jobs. Homosexuals also faced physical attacks, rape, and blackmail. Police committed crimes against homosexuals and used the threat of Section 377 to coerce victims into not reporting the incidents. Section 377 allowed police to arrest gays and lesbians virtually at will. [Representative's emphasis]

...is submitted that the above evidence supports a finding that rights under the general law, including protection from non-discrimination and from violence are not available

to homosexuals contrary to the Delegate's finding, for the essential reason of their homosexuality.

...evidence when assessed against the applicant's experiences of discrimination and violence supports a finding that there is a real chance the applicant will be persecuted if returned to India....

...applicant was unaware of the protection visa process until it was explained to him by an Indian male with whom the applicant had a relationship after travelling to Sydney many months after he arrived in Australia for the Mardi Gras.

...informed of the process, the applicant returned to Melbourne and submitted his application without delay... without legal advice.

...is submitted that in the circumstances, the applicant's failure to apply for protection until approximately one year after arriving in Australia does not indicate that he does not have a well founded fear of persecution in India.

40. The following additional evidence was also submitted in support of the review application:

- A statutory declaration from the applicant, in which he stated, in part, the following:

[Information relating to the applicant's submission has been amended in accordance with s.431 of the Migration Act as this information could identify the applicant.]

1. I make this supplementary declaration in support of my application for a Protection visa. I refer to and adopt the contents of my previous Statement of Claims that I submitted to the Department ...
2. In my previous statement, I stated that my parent is employed in a government organisation. My parent is employed as part of a government organisation, but actually works as a government officer.
3. I was born in Town X in India. Town X is a small town with very strong conservative community values and strong adherence to Sikh religious values and ethics. I was therefore raised in a very traditional Sikh household and attended Sikh religious and social celebrations including Gurupurab, Holamohala and Vaisakhi.
6. As a teenager I commenced a relationship with my first partner.
7. My first partner's parents were ashamed of our relationship and my first partner's father felt that it was causing him to lose face in the community as homosexuality is considered to be against the community's values and contrary to the Sikh religion. My first partner's parents came to our house in the early 2000s. They confronted my parents about our relationship and told them that I had spoilt their son by involving him in homosexual activities. My first partner's parent then assaulted me. My parent made him stop and I left the room, then my parent and my first partner's parent talked for a further period. Afterwards, my parents told me to stop seeing my first partner and I had no further contact with him. In the early 2000s, my first partner's parent took my first partner to another school and I developed a medical condition. I cannot

recall the medical practitioner my parents took me to during this period as I was very young.

8. Some months later my parents moved me to a Public School in District 1, State A. My parent's employer was persuaded by my parent to transfer my parent to District 1 so that I could be removed from the school where I had been involved with my first partner. They believed that this would discourage me from future same sex relationships.

9. When I was a year older, I began a relationship with an older boy at the school, my second partner.

10. Several months into our relationship, my second partner's parent found out about it. My second partner's parent was very influential in District 1. When my second partner's parent found out my second partner's parent was furious and went to see my parents. I was in another room and I could not hear what was said. My parents did not say anything about what was discussed and I did not stop seeing my second partner.

11. A few months later a group of community leaders came to our house. I was again in a different room and could not hear what was said. However, I believe that they told my parents to stop me from doing activities which are against our values and our religion or it will corrupt the whole community. They talked for a while and left. My parents again did not talk to me about what was discussed however, my parent looked afraid and angry. My parent told me to stop seeing my second partner or I would be beaten if I saw my second partner again. However, I did not stop seeing my second partner as I was in love with him.

12. After the community members came to our house, my parent told me that he continued to receive phone calls from my second partner's parent. I did not hear the contents of these phone calls. My parent kept telling me to stop my activities with my second partner as they were offensive to the community because they do not accept those types of relationships and to our religion. The Sikh religion says that men have to marry women. The community believes that homosexual relationships are not natural and that they are against traditional community values. However, I did not stop seeing my second partner.

13. I began to feel very stressed and anxious. I could not bring myself to stop seeing my second partner and yet I knew the trouble was escalating as a result of our relationship. I was constantly stressed and worried about what would happen. I had difficulty sleeping. My parents arranged for me to see another medical practitioner. The medical practitioner was in another town not far away. My parent took me to see him frequently for about several months. He asked me questions about my feelings and about my relationship with my second partner including why I say that I cannot live without my second partner and why I do not stop seeing him.

14. In the early 2000s, a group of community leaders took the matter of my relationship with my second partner to the court. My parents and my second partner's parent were at the hearing. My second partner's parent told the court that I had corrupted my second partner and the leader decided that my activities were anti-religious and against our community values. A number of people heard the verdict. As a result, my family became outcasts from the community and were unable to participate in community religious and social activities. I was not at the court, but my parent told me about what happened.

15. Despite the verdict, my second partner and I continued our relationship. My second partner's parent continued to call my parent and sent letters that I saw but never read. My parent told me many times to stop seeing my second partner or he would beat me. On two occasions my parent beat me with his hands.

16. The first attack occurred when my parent and I were coming home from the market in the late afternoon. We had shopping bags and I was riding behind my parent on our motorbike. A group of men signalled for my parent to stop the bike. They said 'get the boy'. My parent went over to try to stop them but they started fighting my parent. My parent was yelling 'go, go' to me and I got on the motorbike... and drove off. One person chased after me, but could not catch me... My parent was very scared for my safety and therefore arranged for me to take alternate transport to my relative's house in a town many kilometres away.

17. I lived with my relative from this time on. Several months before the first attack, I finished a year level of schooling. A few months before the first attack, I started to go to a Public school in District 1 to study the next level of schooling. I travelled from my relative's house to school each day.

18. After the first attack I talked to my second partner a few times on the telephone but we did not meet in person. My second partner was not at my Public school.

The second attack occurred while I was walking home to my relative's house in the late afternoon when several of my second partner's relatives approached me. I was not far from my relative's house. I knew they were my second partner's relatives as I had seen them with my second partner before and my second partner had told me they were his relatives. My second partner's relatives were young. I saw that some of them had certain weapons and others had different weapons and I was scared. They talked to me very rudely demanding why I continued to see my second partner even when I had been told to stop. I became angry and frightened and started arguing with them. They started to physically assault me. They did not use the weapons. I became unconscious and they must have run away. When I awoke I was in a hospital. I had various injuries. My parents were there. They told me that some people had found me and taken me to hospital. I stayed for a few days in the hospital.

20. Neither my attack nor my parent's attack was reported to the police. Police in India are generally corrupt and target homosexuals for arrests and beatings. My parent and I would have received no assistance or protection from the police.

21. Several months after the attack on my parent, I went to the Hospital and saw my parent. My parent had sustained various injuries to various parts of the body in the first attack. My parent was initially in another hospital, but my parent told me that they were unable to continue to treat my parent and my parent was transferred to the hospital he was validly in. My parent told me 'you know why this has happened. It is because of you. Because you continued your relationship with your second partner this happened'.

22. I stayed with my relative... until I left India for my protection. It was not safe for me to attend school after my attack because I would have to walk

alone and I was therefore only able to complete a few months' study in my valid year level. My relative persuaded my parent to urgently send me to another country for my protection. In my previous statement I called my relative a 'friend' as I did not have any assistance in preparing that statement and I did not know the English words to describe the relationship of my relative to my parents.

23. My relative knew an agent who sends people to Australia. He told me it was difficult to get a certain visa because I was young but that it was easier to get another type of visa. My family could not afford to arrange the visa, however, my relative paid for it. I am unsure whether my family contributed money to the visa. Due to the risk to my safety, my relative arranged everything very quickly and within a matter of months I was in Australia. I saw my parents for the last time at the airport. My parent had not yet fully recovered from all this. I was very upset to have to leave my family and my home in India. I was scared about how I would cope on my own in Australia.

24. I arrived in Australia several months after the second attack. I believed that I could apply for permanent residency after I satisfied the conditions of my valid visa. I was completely unaware of the protection visa process as I had never received any legal advice and my valid visa at that time was hurriedly arranged by my relative.

25. After my arrival in Australia I experienced difficulties settling in, had no family or friends here and no support... I developed a medical condition. I could not sleep and had nightmares about being attacked and about my parents being attacked. I worried constantly about my family in India and I missed my second partner.

26. I could not concentrate, my mind was everywhere. I could not afford to get treatment in Australia for my medical condition. I did not tell anyone at the organisation about my situation as I did not know them and I did not feel that I could trust them.

27. As a result, I was unable to satisfy the conditions of my then valid visa. I left the organisation several months after my arrival in Australia and have lived with people I have met in Australia since that time. I believe the organisation called immigration to tell them that my then valid circumstances.

28. From the time I have arrived in Australia I have continued to live as an openly homosexual man. Several months after I arrived in Australia, I went to Sydney to see the Mardi Gras. I stayed there for a few weeks with an Indian boy that I met up there. I told this boy about my fear of returning to India and he told me about applying for a protection visa.

29. I returned to Melbourne and went to the Department...to apply for a protection visa. When I presented, the lady told me that my then valid visa had been cancelled. I told her that I did not know that my visa had been cancelled and it was discovered that the letter had been sent to the wrong address. They said I could apply for a protection visa....

I do not believe that I could go back to India and live there safely as an openly homosexual man. It is not safe for me to go back to District 1 to live with my parents where the community is intent on targeting me for my homosexuality. My other family lives in Town X, which is not far from District 1 and is a town of only a few thousand people. It would not be safe for me to live in Town X as the community there is very conservative with traditional Sikh values. Homosexuality is not tolerated in Town X.

32. As a result of the harm I faced in India, I was unable to complete my schooling. If I tried to relocate within India, I would face significant hardship and difficulty. I have no relatives or friends with whom I could safely reside in India. I am only young. I would have no home, no job and no money. I have very limited education and no qualifications. The only job I have ever held is a job I had for several weeks in Australia.

I do not believe that relocation to a large city in India is a reasonable or safe option for me. As a homosexual, I was a disgrace to my community and I believe that I would be targeted by whatever community I reside in if returned to India. I have never resided in any of the large cities mentioned in the Departmental decision as allegedly more tolerant of homosexuality in India.. I have never even heard of some of the places. The cities I have heard of are far from my home, many of them are more than a thousand kilometres away. I would have no home or support there of any kind. In most of the cities, the community would speak a different language. I do not believe I could reasonably or safely find protection within India as being an openly homosexual man would not be tolerated anywhere in India.

- A report from a medical practitioner confirming admission of the applicant's parent to Hospital in the latter months of 2005 in relation to a couple of injuries; and
- A copy of a train ticket issued to the applicant several months after he arrived in Australia for travel from Sydney to Melbourne).

41. By facsimile transmission, the Tribunal received the following additional evidence in support of the review application:

- A certified copy of extracts from the applicant's passport;
- A certificate from a medical practitioner at a Hospital in District 1, stating that the applicant had been admitted to the hospital for a few days after the second attack for an injury he had sustained and that he had been advised to rest;
- A certificate from a medical practitioner at a Hospital in District 1, stating that the applicant had been treated by the medical practitioner for several months during the year preceding the first attack. The medical practitioner saw the applicant frequently for treatment in relation to his medical condition; and
- Several faxed photographs said to be photographs of the applicant's parent and the injuries sustained. Some of these photographs depict a person with various injuries to parts of the body.

42. The Tribunal received hard copies of the extracts from the applicant's passport and the photographs of the applicant's parent. The photographs depict a person with bandages on parts of the body and marks of an injury to another part of the body.

The Tribunal Hearing

43. A hearing was held and the applicant gave oral evidence. The applicant's representative represented him at the Tribunal hearing. A summary of the evidence at the Tribunal hearing follows.

The Applicant's Personal and Visa Application Details:

44. The applicant confirmed in his evidence his name and that he was born in Union I, India. In relation to his family composition, the applicant stated that he was single and that his family consisted of his parents and a sibling. He stated that he his parents and sibling brother lived in District 1, State A, India during the two years preceding the Tribunal hearing. The applicant informed the Tribunal that he does not have any family or friends living outside India, or in Australia.

45. The applicant stated that between the late 1990s and early 2000s he lived in District 1, State A and State B for several years. The applicant told the Tribunal that a few years prior to his arrival in Australia he returned to live in District 1, State A, where he lived until he departed India for Australia. He informed the Tribunal that Hindi, Punjabi and English are spoken in State A and that Urdu and Hindi are spoken in State B. He explained that English is not spoken in State B because the population there is generally illiterate.

46. The applicant gave evidence that his country of nationality is India and that he is not a citizen of any other country, apart from India. In addition, the applicant stated that he is of Sikh ethnicity and that he is a Sikh.

47. The applicant informed the Tribunal that he received several years of education. He stated that he had been educated in the Hindi and Punjabi languages; when the Tribunal noted that the applicant also spoke English he added that he had also been educated in English. The applicant also gave evidence that he knows how to use the internet and that he had been using it for some years; he stated that he uses it regularly in Australia.

48. In relation to his employment, the applicant stated that he had never been employed, not even on a casual basis. The Tribunal noted that he had stated in his statutory declaration that he had been employed for a couple of months a few months after his arrival in Australia; the applicant confirmed that he had held such a position. The Tribunal asked the applicant what occupation he would like to pursue if given an opportunity to do so; he responded that he would like to work in a particular occupation.

49. The applicant gave evidence that he had no difficulties in obtaining an Indian passport, which he said was issued to him on. He stated that he had never travelled overseas prior to coming to Australia and that he had been granted a visa to enter Australia. The applicant confirmed that he departed India several months after the second attack, travelling alone to Australia, before arriving in Australia. The applicant informed the Tribunal that his then

valid visa was cancelled by the Department several months after his arrival in Australia.

50. The applicant confirmed that he lodged his application for a Protection visa many months after his arrival in Australia. He explained that he had not lodged his application earlier because he did not know how to apply for a Protection visa until he met someone in an Australian city who informed him how to do so. The applicant stated that he had completed the Protection visa application form himself, without any assistance from anyone else, legal or otherwise, and that he had also personally written the statement of claims that accompanied his application.

The Applicant's Claims:

51. The applicant gave evidence that he first realised he might be gay in the early 2000s. He stated that when he was a teenager he had his first gay relationship with his first partner. The Tribunal observed that in his original statement of claims he had stated that he did not like his first partner's sexual advances. The Tribunal asked the applicant why, in the circumstances, he had continued to associate with his first partner. The applicant responded that he liked his first partner. The Tribunal also noted that in his statement the applicant had indicated that his first partner's parents blamed him for the relationship that had developed between the two of them, yet the applicant had been the younger of the two boys. The applicant replied that this was because he had visited his first partner's home on a daily basis. He told the Tribunal that his first partner's parent came and spoke to his parent about the relationship. In relation to his parent's reaction to this approach from his first partner's parent and the accusation that the applicant was to blame for the relationship, despite the fact that he was the younger of the two boys, the applicant stated that his parent asked him to stop what he was doing. The applicant gave evidence that his parent then asked him to go and see a medical practitioner because the applicant's behaviour had changed, as he was longer speaking to his parents. The Tribunal noted that it seemed odd for the parents of an adolescent boy to send their son to a medical practitioner merely because he was not speaking to them, unless they had some other reason. The applicant responded that he did not know if his parents had any other reasons for sending him to see a medical practitioner, but he saw the medical practitioner for several months.

52. The applicant gave evidence that he was only involved in two homosexual relationships in India and that the second began in the early 2000s, when the applicant was a year older and his second partner was a year older than him. The applicant stated that he saw his second partner on a daily basis. He stated that his second partner's parent learned of the pair's relationship by listening to their telephone conversations. As a result, a few months after the commencement of the relationship, his second partner's parent came to the applicant's home and spoke to his parent about the relationship. The applicant told the Tribunal that his second partner's parent did not speak to him and he did not know what his second partner's parent had said to his parent. However, without explaining to the applicant what had been

said during this meeting, his parent asked the applicant to stop the relationship with his second partner? The applicant told the Tribunal that, notwithstanding this request, he continued his relationship with his second partner and several days later his second partner's parent returned to the applicant's home and met with his parent, leaving the latter angry and afraid. The Tribunal asked the applicant what had happened or been said at that meeting to leave his parent angry and afraid. The applicant responded that he did not know what had been discussed, but he could tell by looking at this parent that the latter was afraid and angry and he believed his parent had been threatened. The applicant said that his parent threatened to give him a beating if he continued his relationship with his second partner, but the applicant continued with the relationship and he was not beaten by his parent. The applicant gave evidence that he continued to see his second partner until several months before the first attack, after which he did not see his second partner. However, he stated that they continued to telephone each other regularly thereafter. The applicant informed the Tribunal that after several months before the first attack his parent did not receive any further visits from his second partner's parent. In addition, the applicant told the Tribunal that his continued telephone contact with his second partner did not lead to any other problems with anyone.

53. The applicant gave evidence that he feared persecution in India because people do not like homosexuals in India and there are not many there; he stated that people in India kill homosexuals. He stated that there were a few people in India who had learned he was gay and they treated him differently and would not talk to him. However, the applicant stated that he had not suffered any other instances of harm because of his sexual orientation because he did not tell people he was gay and very few people knew he was gay. Notwithstanding, the applicant informed the Tribunal that several weeks the first attack, his second partner's relatives beat him with weapons because they did not like the fact that he had been in a relationship with his second partner, even though he had not seen his second partner in the prior several months. The applicant stated that he was beaten and sustained several injuries. In response to a direct question from the Tribunal the applicant also stated that no other parts of his body had been injured. However, when the Tribunal asked the applicant why his medical certificate from the medical practitioner stated that he had sustained a further injury, the applicant responded that he had forgotten to mention this to the Tribunal.

54. The applicant informed the Tribunal that his parent had been psychically assaulted in the first attack because the applicant had failed to cease his homosexual relationship with his second partner. He stated that he and his parent were returning home from the markets when they were approached by several people, one of whom indicated that they wished to get a hold of the applicant. As a result, the applicant's parent approached the people and they began to beat his parent, whilst the latter told the applicant to flee the scene. The applicant informed the Tribunal that his parent had sustained multiple injuries to various parts of his body that meant he was not discharged from hospital until some months later. The applicant stated that the photographs submitted to the Tribunal depicted his parent's injuries. He also

gave evidence that these photographs had been taken just prior to the Tribunal hearing.

55. The Tribunal asked the applicant if either of the assaults he had referred to had been reported to the police. The applicant responded that they had not been because his parent knew that nothing would be done, as his second partner's parent would simply bribe the police to do nothing. The Tribunal asked the applicant why it should conclude, given the limited medical evidence before it, that the photographs he had submitted were evidence of the motive for the assault upon his parent. The applicant responded that his parent had not sustained the injuries depicted in the photographs in some other accident and that these injuries were motivated by the visa applicant's sexual orientation. The Tribunal asked the applicant how his family had survived financially, given that his parent had been hospitalised for several months. He replied that the family had some land of its own and his parent continued to receive a salary whilst in hospital.

56. The applicant gave evidence that following these events a hearing was held and a decision was taken, based on information provided by his second partner's parent, to exclude the applicant's family from any cultural or religious activities within the local community. The applicant stated that although his parent had previously been well respected within the local community, his parent lost this respect because of the applicant's sexual orientation and the applicant's parent was no longer issued with invitations to cultural and religious activities.

57. In relation to his family's attitude towards his homosexuality, the applicant stated that his parents did not ask him directly to leave home, although they wanted him to do so. He gave evidence that his parents continued to meet his living expenses in India, but they never told him if they supported his choice to be gay. The applicant stated that his sibling did not know anything about the applicant's sexual orientation. He told the Tribunal that his family did not wish to explain the real circumstances underlying the assault on the applicant's parent to his sibling because the latter did not know what a homosexual was. Instead, the applicant's family told his sibling that their parent, as a government official, had been doing their job and this was why he had been assaulted. The applicant informed the Tribunal that his family decided to send him to Australia. He stated that initially his family had wanted to obtain a particular type of visa to Australia, but instead they applied for a different visa for the applicant. The applicant told the Tribunal that his parents provided him with some money when he went to Australia, but have not provided him with any financial support since then. The applicant stated that he obtained a visa to Australia because, after the assaults upon both his parent and himself, he had to get away.

58. In relation to the treatment of homosexuals in India, in response to a question from the Tribunal regarding the laws in India regarding homosexuality, the applicant stated that he did not know what the law was in India on homosexuality or how it might help homosexuals; he stated that as far as he was aware the police will not help homosexuals. In response to a direct

question from the Tribunal, the applicant stated that he did not know what Article 377 of the Indian Penal Code said. Similarly, he did not know what, if anything was being done by homosexual groups in India to change the law or community attitudes in India regarding homosexuality. In addition, he stated that although he had heard of one gay activist group in India, he could not name it or any others. Nor had he ever heard of any gay magazines, including *Bombay Dost*, in India. The applicant stated that he had not accessed any gay websites in India because he did not have ready access to a computer there. He gave evidence that he had not accessed Indian gay websites since his arrival in Australia, although he had accessed the "GLCS" website in Australia.

59. The Tribunal noted that there was independent country information before it that indicated that there was greater tolerance towards homosexuality in the larger Indian cities. The applicant responded that these cities are too far away from where his family is located in State A; and it was still quite a distance away. The applicant also stated that the information that had been placed on the internet did not reflect the true state of affairs for homosexuals in India.

60. The applicant gave evidence that since his arrival in Australia he has not had any contact with either of his previous gay partners; he stated that he last spoke to his second partner several weeks after his arrival in Australia because he did not have the money to maintain telephone contact. The applicant informed the Tribunal that he had been receiving assistance from the two friends he was living with, neither of whom was gay. He stated that he had not told them that he was gay, but from his behaviour, in terms of how he kissed, hugged and slept with them he thought they suspected he might be. The applicant clarified this evidence for the Tribunal by explaining that there was only one bed that he and his friends shared, but they had never had sexual relations.

61. The applicant told the Tribunal that he had chosen and decided to have a homosexual lifestyle in Australia. He stated that he was aware that there were gay clubs in Melbourne, like The Peel Hotel and the PHD Bar, but he did not really go to these because there were gays who sometimes took drugs there and he did not want to mix with them. The applicant stated that although he had been looking, he had not had any homosexual partners in Melbourne because he had not found anyone. He stated that he had not told his friends he was gay, although there was an "old man" and another in Sydney who knew he was gay, and he had met a third on the train the day before the Tribunal hearing who had asked him if he was gay. The applicant told the Tribunal that he had attended the gay Sydney Mardi-gras, but he did not know if there was something similar in Melbourne. He stated that he does not read any newspapers because he does not like to read and the only gay group he was aware of was the GLCS. The Tribunal noted that the applicant did not appear to know much about the gay scene in Melbourne, even though he claimed to want to pursue this lifestyle in Australia. The applicant responded that he did not have any friends that could tell him about the gay scene in Melbourne. He also stated that he had been highly stressed by what had happened to him in the past. In addition, the applicant stated that he had not been attracted to the

kinds of gay people who had approached him. He stated that he had joined the GLCS several months after his arrival in Australia so that he could meet homosexual friends. The Tribunal noted that it appeared odd that he had still not made any homosexual friends in the circumstances. The applicant did not directly respond to this observation.

62. In relation to the issue of relocation, the applicant said that even if a homosexual moves to City 11, people do not like homosexuals and they will kill a homosexual for money, if nothing else. In fact, the applicant stated that this would happen wherever he returned in India, even in places like City 9. The applicant stated that he would face language difficulties if he returned to India, he would not have family support in one of the larger cities in India and, given his lack of education and qualifications, he would be unable to find work. The Tribunal noted that English is widely spoken in India. However, the applicant responded that although he reads, writes and speaks Hindi, he would have difficulty communicating with those who do not speak English. The Tribunal observed that the applicant had arrived in Australia without friends or family in Australia and, if the Tribunal accepted his evidence, without financial assistance from his family, and yet he had managed to survive in Australia. The applicant responded that he had been fortunate to meet people in Australia who were willing to help him, which would not happen in India. He also stated that he felt safer in Australia because the police were not corrupt. The applicant stated that even those with educational qualifications in India had difficulty in finding work there and that this was why so many were applying to migrate to Australia. He stated that as a person who had barely passed his last completed year of schooling he would find it very difficult to find work in India. In addition, the applicant stated that there were religious differences in City 11, which was largely Muslim, and there were also very few Punjabis or lower caste persons living in City 11.

63. As regards the delay in the lodgement of his Protection visa application, the Tribunal asked the applicant why it should not conclude that this had been done because he had been placed on notice that his student visa was about to be cancelled. The applicant denied this was the case. He stated that he had lodged his application several months after he arrived in Australia prior to the cancellation of his then valid visa. The applicant stated that he had informed the Department voluntarily that he no longer wanted to continue with the conditions of his then valid visa and that was when they decided to cancel his visa.

The Representative's Oral Submissions:

64. At the conclusion of the Tribunal hearing the applicant's representative referred to her previous submission. She submitted that the Tribunal's line of questioning regarding the applicant's homosexual activities in Australia was dangerous because it was a question of what the applicant was entitled to do and his sexual identity and not a question of whether or not he had chose to exercise his freedoms to do so. In relation to the issue of relocation within India, the applicant's representative submitted that it would be wrong to expect the applicant to disappear into one of the larger cities in India that

tolerated homosexuality without considering the practical realities associated with the issue of relocation; otherwise this amounted to requiring the applicant to pursue a “discrete existence”.

65. The applicant’s representative argued that the applicant had given evidence that he was not aware of the situation for homosexuals in other cities, but that he was aware that he had been targeted in his local town as a homosexual and that he could not return there. As a result, she stated the applicant had a well-founded fear of persecution because of the harm both he and his family had experienced in the past due to his sexual orientation. She contended that Article 377 of the Indian Penal Code applies throughout India and the country information indicated significant abuse of homosexuals in India, even in the larger cities, and including by the police, who are meant to protect citizens. As a result, the representative submitted that the applicant cannot access effective State protection to avoid the harm he fears in his home village and it was not a question of whether or not he could avoid persecution by moving elsewhere. She argued that despite an emerging gay movement in parts of India, this did not displace the evidence of systematic harassment and violence against the applicant that was based solely on his homosexuality. The representative contended that relocation presented language difficulties for the applicant, and together with his lack of education and resourcefulness it was not reasonable to expect him to relocate within India.

Post Hearing Evidence

66. The Tribunal received a notarised affidavit from the applicant’s parents stating the following:

[Information relating to the applicant’s parents affidavit has been amended in accordance with s. 431 of the Migration Act as this information could identify the applicant.]

That our son have [sic] sexual relationship with his second partner. Which are not acceptable in our religion and in our social system. However we tried to do our best to resist him from this relationship but he continued to make with his second partner. His second partner’s parent Antagonistic [sic] with my family aria they attack on our son and us. Both two occasions [sic] the first attack for our son and the second attack for us on different time of period. We safe [sic] our son’s life and we send him to Australia.

When our son is a teenager. He was attacked by Hooligans and was severally beaten and admitted to the Hospital for Treatment.

When he was a teenager. He have a medical condition he taken to medical practitioner and after a few months of treatment he was cured.

That we are still receiving threats from my son’s second partner’s parent

The Independent Country Information before the Tribunal

67. In assessing the applicant’s claims against the Convention grounds, the Tribunal considered information from external sources regarding the treatment of homosexuals in India.

The Acceptance of and Attitudes towards Homosexuals in India Generally:

68. The independent country information before the Tribunal indicates that homosexuals are generally shunned, ostracised, harassed or suppressed in India, regardless of their religious or ethnic origin although some sections of certain cities appear to be becoming more tolerant.

69. According to a *US State Department Country Report on Human Rights Practices in India in 2005* (Released by the Bureau of Democracy, Human Rights and Labor, 8 March 2006), section 377 of the Penal Code criminalises homosexual practices. The report also indicates that:

and lesbians faced discrimination in all areas of society, including family, work and education. Activists reported that in most cases, homosexuals who do not hide their orientation were fired from their jobs. Homosexuals also faced physical attacks, rape and blackmail. Police committed crimes against homosexuals and used the threat of section 377 to coerce victims into not reporting the incidents. The overarching nature of section 377 allowed police to arrest gays and lesbians virtually at will.

70. The United Kingdom Home Office Country of Origin Information Report: India, April 2006 reports that:

...to a BBC news article dated 29 May 2001, homosexual relationships are not unheard of in India, but they generally exist in the country's larger cities where people can be more open about their sexuality. According to the People's Union for Civil Liberties – Karnataka (February 2001), a number of cities and larger towns, such as Delhi, Mumbai, Calcutta, Bangalore, Hyderabad, Pune, Chennai, Patna, Lucknow, Akola, Trichi and Gulbarga, had a number of resources for gays, lesbians and transgender communities that include – help-lines, publications/newsletters, health resources, social spaces and drop-in centres.

71. According to a BBC news report dated 29 June 2003, cities such as Bombay and Bangalore have become centres for gay culture. In an earlier report the BBC reported on 19 June 2003 that there are regular gay parties in bars and pubs. There are other gay clubs in cities such as Delhi and Bangalore. It was also reported by the BBC on 29 June 2003 that up to 100 people marched in a gay rights parade in Calcutta.

72. The Tribunal observes that Charu Chandrasekhar in his article on “the emergence of the gay and lesbian movement in India” stated,

...emergence in India of a formalized gay and lesbian movement constitutes one of the most recent significant transformations within Indian culture. Homosexuality has undoubtedly existed in every era of Indian history, but formal and institutional expressions of homosexuality have emerged in India only in the past decade....

...sexual activity is a particularly difficult and complicated issue: Section 377 of the Indian Penal Code criminalizes sodomy, yet refers to no other forms of same-sex sexual activity. Same-sex marriage does not enjoy status as a legal right nor does it have a place in social debates.....

...the past decade, however, the invisibility of the Indian lesbian and gay presence has started to dissolve. The early 1990s witnessed the emergence of gay and lesbian social institutions and forms of cultural expression. *Bombay Dost*, India's first lesbian and gay publication, debuted in 1990; *Pravartak* magazine now serves the Calcutta gay and lesbian community. Gay and lesbian organizations continue to grow in number and prominence: there currently exist gay groups in New Delhi, Calcutta, Cochin, and Secunderabad. Networking with Asian and international lesbian and gay organizations has strengthened the work of these India-based organizations, specifically on the subject of HIV/AIDS....

...most significant shortcoming of the current Indian lesbian and gay movement may be the absence of a lesbian presence that matches that of gay men. Gay men dominate the bulk of the activity and discussion undertaken by these institutions.... Most importantly, Indian society has yet to transform such that the lesbian and gay existence is respected as an acceptable alternative to heterosexuality (Chandrasekhar, C. 1997, 'Queer in Bharat: The emergence of the gay and lesbian movement in India', *Discourses*, Spring http://www.yale.edu/discourses/images/dis_1.pdf - pages 14-18- Accessed 8 August 2007).

73. Advice from DFAT which is particularly relevant is provided in another cable, dated 31 July 2003, addressing the treatment of homosexuals generally. It states:

A.4 It is true that homosexuality is more tolerated in large cities than it is in other areas of India. In those cities (particularly Mumbai and Delhi, but also in other cities such as Bangalore and Kolkata) it is possible for gay men and lesbian women to live in a publicly acknowledged homosexual relationship. The likelihood of a person being open about their homosexuality is much greater among the more affluent and educated sections of society (these sections of society are often more accepting or tolerant of lifestyles and behaviour that do not conform to traditional or conservative Indian custom). Some of the NGO representatives with whom we spoke told us that while it might be possible to live in a publicly acknowledged homosexual relationship, it certainly is not easy. For these reasons the majority of gay people prefer to keep their sexuality a private matter...

A.5 There is an emerging gay movement in India, restricted largely to urban areas. Mumbai and Delhi appear to be the cities with a more active and open gay culture. While there are no 'gay' nightclubs, there are some clubs (one in Delhi and perhaps 2 in Mumbai) which have gay and lesbian nights one night per week. These clubs are currently operating without police harassment. Large parties advertised on websites such as gay Delhi are held each month in Delhi and Mumbai at private venues. They generally operate free from police harassment, though this is not always the case. In 2002 a party in Mumbai was raided by the police. No parties were held for approximately 6 months after that raid due to fears of further police harassment (Departmental country information service 2003, *country information report no. 106/03 – India: treatment of homosexual people*, (sourced from DFAT advice of 31 July 2003).

74. The statement that "homosexuality is more tolerated in large cities than it is in other areas of India" appears to be confirmed by other media reports,

which mention Kolkata (Calcutta), Mumbai (Bombay) and Bangalore (DIMIA Country Information Services 2003 , *Country Information Report No. 106/03 – India: Treatment of Homosexual People* , (sourced from DFAT advice of 31 July 2003)

75. In an advice dated 29 July 2005, DFAT reported, relying on Rahul Singh, a representative of the Naz Foundation, the following in relation to the attitude towards homosexuality in India:

... The overwhelming prejudice faced by sexual minorities meant that it is likely that there have been no or very few cases brought against the police for harassment

...as a society that did not recognise the concept of homosexuality as a valid lifestyle choice, treatment of homosexuals in India was similar, whether the person had lived overseas or not ... Should a returnee attempt to live as an openly gay person in India, they face the prospect of harassment by the State and ostracisation from their family

... as homosexuality is illegal throughout the country, attitudes towards homosexuals were fairly uniform. No state or states treated homosexuals in a worse fashion than was standard...

...due to the high level of harassment sexual minorities suffered at the hands of the police, individuals in general did not/not feel able to lodge a complaint the police. The fact that the complaint would require discussion of their sexual preference also created the possibility that the complainant would be charged under section 377 [of the Indian Penal Code]

(DIMIA Country Information Services, *Country Information Report No. 05/46 – India: Treatment of Sexual Minorities*, (sourced from DFAT advice of 29 July 2005))

76. More recently, on 26 July 2007 DFAT confirmed that its advice dated 29 July 2005 remained current, although it noted that section 377 of the Indian Penal Code has not to date been reportedly applied to lesbians, unlike homosexual men, and therefore women were more likely to report abuse based on sexuality to the police as they have less fear of persecution: *DFAT Report 674*, 26 July 2007.

The Legality of Homosexuality in India

77. The Tribunal notes that the constitutionality of Section 377 of the Indian Penal Code was challenged by the Naz Foundation in 2001, which asked the Court to declare it should no longer apply to consenting adults. However, the Delhi High Court dismissed it on the ground of technicality in 2004 and the subsequent special review petition was also dismissed before the Supreme Court. In 2006 the Indian Supreme Court returned the petition to the High Court for disposal on merits, saying that it is a matter related to public interest.

78. The Tribunal notes that Siddharth Narrain of *Frontline* gives details of the Naz Foundation's challenge as follows:

In 2001, the Naz Foundation, a non-governmental organisation (NGO) involved in HIV/AIDS prevention, filed a petition in the Delhi High Court (*Naz Foundation vs Government of NCT, Delhi and others*) asking for Section 377 to be read down, in order to decriminalise private consensual sexual activity...

In September 2004, a two-Judge Bench of the Delhi High Court, consisting of Chief Justice B.C. Patel and Justice Badar Durrez Ahmed, dismissed the petition on the grounds that there was no cause of action in the petition since there was no prosecution pending against the petitioner. The court said that an academic challenge to the constitutionality of a legislative provision cannot be entertained...

The petitioners filed a review petition before the High Court pointing out that the homosexual community in India, on account of Section 377, is a socially disadvantaged group which is unable to approach the court directly for fear of being identified and subject to harassment by the police...

The High Court dismissed the review petition as well, upon which the petitioners filed a special leave petition (SLP) before the Supreme Court on the limited question of whether the High Court could dismiss the petition on the grounds that there was no cause of action. The SLP was heard by Justices Y.K. Sabharwal and P.P. Naolekar. The court, while issuing notice to the Central government to be represented before it in the next hearing, said that the petition did not deal with an academic question and that this was a public interest issue that was being debated all over the world. The Judges observed that the High Court could refuse to entertain such an issue only on the grounds that it was merely academic and that there was no personal injury to any party (Narain, Siddharth, 'A battle for sexual rights', *Frontline*, vol 22, 7-20 May 2005 issue, May <http://www.flonnet.com/fl2210/stories/20050520002410400.htm> - Accessed 12 July 2007).

79. The International Gay and Lesbian Human Rights Commission notes that:

recent attempt by Indian advocates to challenge the constitutionality of Section 377 was rejected by the Delhi High Court on September 2, 2004. The Court claimed that the deletion of Section 377 from the Indian Penal Code would "open flood gates of delinquent behaviour and be misconstrued as providing unbridled license to such behaviour." An affidavit submitted by the government in support of the law claimed that Section 377 was necessary "to provide a healthy environment in the society by criminalizing unnatural sexual activities." (International Gay and Lesbian Human Rights Commission, 'IGLHRC Responds to Reports of Gay Man in India Beheaded After Sex', 31 January 2005 <http://www.iglhrc.org/site/iglhrc/section.php?id=5&pos=0&print=1&detail=551> - Accessed 7 August 2007).

80. Referring to the case, the US Department of State report (March 2007) stated:

In November 2005 the government declined to change provisions of Section 377 outlawing homosexuality. In a response to a Supreme Court case, the government

stated, “public opinion and the current societal context in India does not favor the deletion of the said offense from the statute book.”

...In September 2004 the Delhi High Court dismissed a legal challenge to Section 377. Plaintiffs filed the case in 2001 after police arrested four gay and lesbian rights workers at the NAZ Foundation International and National Aids Control Office premises in Lucknow, Uttar Pradesh. .. The court dismissed the case, ruling that the validity of the law could not be challenged by anyone “not affected by it,” as the defendants had not been charged with a sex act prohibited by law. In April 2005 despite the September 2004 challenge of Section 377 by two gay and lesbian NGOs, the NAZ Foundation International, and the National Aids Control Office, the government submitted a petition to the Supreme Court reaffirming the validity of Section 377. In February the Supreme Court ruled that the Delhi High Court should not have dismissed the case because the NGO was not a directly affected party to the case. The Supreme Court referred it to the Delhi High Court, which has not reexamined the case.

In July the National AIDS Control Organization (NACO) filed an affidavit in the Delhi High Court supporting the demand to scrap Section 377 of IPC that declares homosexuality an offense. This affidavit supports the petition filed by the NAZ Foundation. The affidavit was filed after NACO conducted a survey that reported 8 percent of the estimated 2.5 million homosexual population of the country was affected with HIV/AIDS as compared to 1 percent of the general population affected by the disease. A high-profile campaign to overturn Section 377, led by writers Vikram Seth and Amartya Sen, continued at year’s end (US Department of State, *Country Reports on Human Rights Practices – India*, 6 March 2007, <http://www.state.gov/g/drl/rls/hrrpt/2006/78871.htm>)

The prevailing attitudes towards and/or treatment of Sikh homosexuals in India generally:

81. Followers of the Sikh and Hindu religions comprise more than 82% of the Indian population today. The country information before the Tribunal indicates that, although the majority of Sikhs appear to oppose homosexuality Sikhism itself takes rather ambivalent or divided attitudes towards homosexuals. Similarly, Hinduism has taken divergent attitudes, ranging from full acceptance to severe punishment.

82. In particular, the Tribunal notes that the *Ethnicity Online* website states that:

Sikhism is a very tolerant religion and seeks to find the truth rather than adhere rigidly to rules. Homosexuality is not specifically banned in any of the writings of the Gurus, but they do stress that God has intended people to live as man and wife, or to be celibate, with no deviation from this design. This ambivalence allows most Sikhs to be very tolerant of homosexuality and accept a homosexual individual while still regarding the practice as against God’s design” (‘Sikhs: Sexual Health’ 2003 - 2005, *Ethnicity Online* website http://www.ethnicityonline.net/sikh_sexual_health.htm - Accessed 9 July 2007)

83. In addition, the *Religion Facts* website comments that:

The Sikh sacred text, the Guru Granth Sahib, is the highest authority in Sikhism. It is silent on the subject of homosexuality. However, there are parts of the Guru Granth Sahib that have been interpreted to mean that homosexuality is wrong.

There are five vices outlined in the Guru Granth Sahib that are to be avoided by Sikhs. These vices are called the Five Thieves. They are Pride (a'Hankar), Anger (Kr'odh), Greed (Lob'H), Attachment (Mo'H), and Lust (K'haam). Many Sikhs believe that homosexual thoughts and behaviour are just manifestations of lust, and that it is therefore forbidden.

However, other Sikhs believe that Guru Nanak's emphasis on universal equality and brotherhood is fundamentally in support of gay rights. This view is held by a minority of Sikhs, many of whom have been born/raised in countries that are more tolerant towards homosexuality. Some Sikhs have even gone so far as to describe homosexuals as "the new Untouchables" in reference to Sikhism's rejection of the Indian caste system

.... One of Sikhism underlying values is family living. Sikhs are expected to live in a family environment in order to conceive and nurture their children in order to perpetuate God's creation. Any alternative manner of living is prohibited specifically a celibate lifestyle. Most Sikhs assume this means homosexuality, which cannot result in procreation, is unnatural and against God's will ('Homosexuality and Sikhism' (undated), *Religion Facts* <http://www.religionfacts.com/homosexuality/sikhism.htm> - Accessed 6 July 2007).

84. Further, the Tribunal observes that another Sikh website notes that:

Homosexuality is not addressed in scripture [Guru Granth Sahib or Sri Guru Granth Sahib – The Holy Book of Sikhism], but one source indicated that it is considered as part of one's karma, and subjects the person to psychic imbalance between female and male energies, which could lead to self-destructive behaviors. Gender equality is a stated position and is emphasized in practice. ('Welcome to eSikhs.com' (undated), eSikhs.com website http://www.esikhs.com/index_2.asp - Accessed 10 July 2007).

85. In considering this issue the Tribunal notes that, during his meeting with the visiting Canadian Sikh MPs on 29 March 2005, Giani Joginder Singh Vedanti, the highest Sikh authority, stated that homosexuality is "against the Sikh religion and the Sikh code of conduct and totally against the laws of nature," He called on Sikhs to support laws against gay marriage ('World Sikh group against gay marriage bill', *CBC News*, 29 March 2005 <http://www.cbc.ca/canada/story/2005/03/28/sikhguy-050328.html> - Accessed 4 July 2007) He also denounced same-sex marriage and urged the Sikh assembly not to allow such ceremonies in a Sikh place of worship. According to him, "the Sikh code of conduct does not allow such marriages" (Laghi, Brian, 'Sikh leader in India denounces same-sex marriage', *Globe and Mail*, 18 January 2005 <http://pewforum.org/news/display.php?NewsID=4287> – Accessed 9 July 2007).

86. On the other hand, the Tribunal notes that Hinduism, whose believers comprise 80.5% of the Indian population today (See '2001 census', CIA Factbook: India, 19 June 2007 <https://www.cia.gov/library/publications/the-world-factbook/geos/in.html> - Accessed 10 July 2007) has taken divergent attitudes towards homosexuality, ranging from full acceptance to severe punishment. The country information before the Tribunal indicates that currently homosexuality is most likely not viewed as correct, but tolerated. In addition, there is some evidence that younger generations growing up in India are adopting many Western ideas and are therefore generally more tolerant towards homosexuality (see Gay & Lesbian Counselling Service of NSW, *Religions And Their Attitudes To Homosexuality*, Information Pack Document # 11, p 4, 10 August 2006 http://www.glcnsnw.org.au/documents/Infopack/11_religions.pdf - Accessed 10 July 2007).

The Homosexual groups currently most active in India in promoting homosexual rights:

87. The Tribunal observes that Indian homosexual sites, such as *gaybombay.com*, claim that Bombay is very tolerant and has a very vibrant gay scene. This particular website lists nearly 30 gay, lesbian and bisexual organisations and support organisations in India. The *gaydelhi* website advertises gay social events at public venues and advertises various Delhi based support groups (<http://www.gaybombay.com/bombay/index.html> - Accessed 8 August 2007) and <http://members.tripod.com/gaydelhi> - Accessed 8 August 2007). The Tribunal also notes that the gay website *Global Gays* lists the following homosexual rights groups in each of the large cities in India as follows:

Delhi

<http://www.globalgayz.com/www.nazindia.org>Humrahi Trust--Forum for Gay Men
The Naz Foundation Trust
National AIDS Control Organization
PRISM E-mail : prism_delhi@yahoo.co.in
Human Rights Law Network
E-mail : hrindel@vsnl.net

Calcutta

SAATHII Calicutta
E-mail : saathii@yahoo.com
Human Rights Law Network
New Alipore Praajak Development Society
SWIKRITI
E-mail: swikriti2003@hotmail.com
The Praajak GenderTrust
E-mail : pratyaygendertrust@yahoo.co.in
Dumdum Swikriti Society
(E-mail: swikriti2003@hotmail.com)

Durbar Mahila Samanwaya Committee
Gokale Road Bandhan
E-mail : ranjitbandhan@rediffmail.com

Bombay(Mumbai)
Humsafar Trust Aanchal Trust for Women (mostly straight and western)
The Sakhi Char Chowghi Trust
(E-mail: sakhicharchowghi@yahoo.com)
Dai Welfare Society
(E-mail: daiwelfaresociety@gmail.com)

Bangalore
Sangama Swabhava Trust <http://www.sacw.net/SexualityMinorities/sangama.html>
Alternative Law Forum
(E-mail: alforum@vsnl.net)
Gelaya Trust
E-mail: gelayaa2000@yahoo.co.in
Good as You Jagruthi
(E-mail: snehadaan@yahoo.com)
Vividha
(E-mail: vividhabangalore@hotmail.com)

Pune
Sampathik Trust

Chennai (Madras)
SAATHII - Chennai Sahodaran (website under reconstruction)
Social Welfare Association for Men (SWAM)
(E-mail only: sekar_swam@rediffmail.com)
Thamilnadu Aravanigal Association (THAA)
(E-mail: aashaathaa@yahoo.co.in)
South India AIDS Action Programme
APSACS (Andhra Pradesh AIDS Control) Society
SWAM Chennai

Hyderabad
Saathi
<http://members.tripod.com/gaydelhi/Page7.htm><http://www.west-london.freemove.co.uk/gaysia/links.html>
Mithrudu (E-mail: mithrudu@yahoo.com)

Goa
<http://members.tripod.com/gaydelhi/Page7.htm><http://www.west-london.freemove.co.uk/gaysia/links.html>
Humsafar Goa

(‘Links for Gay India’ (undated), *Global Gays*, <http://www.globalgayz.com/g-india.html> - Accessed 10 July 2007).

88. In addition, the Tribunal notes that other homosexual rights groups found in India include the following:

- Men Community Development Society (MCDS), ‘the first ever gay-club in Chennai’, India (‘Chennai gets first gay-club in India’, *New Kerala*, 19 March 2006
<http://www.newkerala.com/news2b.php?action=fullnews&id=27779> – Accessed 10 May 2006);
- Indian Network for Sexual Minorities (<http://www.infosem.org/>- Accessed 10 July 2007); and
- The Gay and Lesbian Vaishnava Association, Inc (<http://www.galva108.org/index.html> - Accessed 10 July 2007).

FINDINGS AND REASONS

What is the Applicant’s Country of Nationality and is he outside it?

89. The applicant claims to be a national of India and arrived in Australia on an Indian passport. The Tribunal accepts that the applicant is an Indian national and, for the purposes of the Convention, has therefore assessed his claims against India as his country of nationality.

Does the Applicant have a well-founded fear of persecution for a Convention related reason?

90. The Tribunal observes that 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 he satisfies all of the required statutory elements. 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] HCA 22; (1997) 191 CLR 559 at 596, *Nagalingam v MILGEA* [1992] FCA 470; (1992) 38 FCR 191, *Prasad v MIEA* [1985] FCA 47; (1985) 6 FCR 155 at 169-70.)

91. In determining whether an applicant is entitled to protection in Australia the Tribunal must first make findings of fact on the claims he or she has made. This may involve an assessment of the applicant’s credibility and, in doing so, the Tribunal is aware of the need and importance of being sensitive to the difficulties asylum seekers often face. Accordingly, the Tribunal notes that the benefit of the doubt should be given to asylum seekers who are generally credible, but unable to substantiate all of their claims.

92. On the other hand, the Tribunal is not required to accept uncritically any or all allegations made by an applicant. In addition, the Tribunal is not required to have rebutting evidence available to it before it can find that a

particular factual assertion by an applicant has not been established. Nor is the Tribunal is obliged to accept claims that are inconsistent with the independent evidence regarding the situation in the applicant's country of nationality (See *Randhawa v MILGEO* (1994) 52 FCR 437 at 451, per Beaumont J; *Selvadurai v MIEA & Anor* [1994] FCA unrep6786; (1994) 34 ALD 347 at 348 per Heerey J and *Kopalapillai v MIMA* (1998) 86 FCR 547). If the Tribunal makes an adverse finding in relation to a material claim made by an applicant but is unable to make that finding with confidence, it must proceed to assess the claim on the basis that the claim might possibly be true (See *MIMA v Rajalingam* [1999] FCA 719; (1999) 93 FCR 220).

93. The Tribunal accepts that the applicant is of Sikh ethnicity and that he was born in Town X, Union I, India. The applicant claimed that he is homosexual and that he fears persecution in India on the basis of his membership of a particular social group, namely, homosexuals in India. The applicant has not suggested that he faced discrimination in employment or before the law for any other Convention related reason.

94. The Tribunal observes that the independent country information before it indicates that the law in India actively prohibits sexual acts between men. In addition, this evidence indicates that homosexuals in India can face discrimination and, in some cases, serious harm because of their sexual orientation. Accordingly, the Tribunal accepts that sexual relations between men in India are illegal and that homosexuals face discrimination in employment and before the law. Accordingly, the Tribunal accepts that homosexual men are a particular social group in India.

95. However, for the reasons set out below, the Tribunal did not find the applicant to be a credible witness and therefore does not accept he is a witness of truth.

A. The Applicant's Claims of Persecution as a Homosexual in India:

96. The applicant claims to be homosexual and to have been involved in two homosexual relationships in consecutive years when he was a teenager. He also claims to be from a strict and traditional Sikh family. However, the applicant gave evidence that upon learning of his homosexual activities with two different partners, although his parent asked him to stop his activities, his parent also accepted that the applicant was to blame for the relationship, even though in both cases he was the younger partner in the relationship. Nor did the applicant's parent inform him of the conversations he had held with the applicant's respective partner's parents. Similarly, the applicant stated that his parent had warned him to cease his activities or a beating would be the consequence, but the applicant gave evidence that he ignored his parent's request and was not beaten. The Tribunal does not consider it necessary for the applicant to demonstrate that his parents beat him upon hearing that he was a homosexual in order for him to establish this claim as a matter of fact. However, the Tribunal does consider it relevant to take this matter into account having regard to *all* the evidence before it.

97. In doing so, the Tribunal has had regard to the applicant's evidence that, although he felt his parents wanted him to leave home, they did not ask him to do so directly and continued to meet his living expenses. When asked by the Tribunal why his parents had referred him to a medical practitioner when he was a teenager, the applicant responded that it was merely because he was not speaking to them. After the Tribunal put to the applicant that this appeared to be a strange course of action for the parents of a teenage boy to take, given that it is not unusual for teenagers to be uncommunicative with their parents, unless there was some other reason, the applicant responded that he did not know if they had any other reasons. In particular, the Tribunal notes that in their affidavit the applicant's parents stated that after several months of treatment by a medical practitioner the applicant was cured of his medical condition. Accordingly, whilst the Tribunal has taken into account the evidence that the applicant received medical treatment from a medical practitioner for several months during the year preceding the first attack for a medical condition, the Tribunal is not persuaded that this necessarily amounts to evidence that the applicant's parents referred him to a medical practitioner for treatment because he was a homosexual or for medical issues related to his alleged sexual orientation.

98. In addition, the Tribunal notes that no one within the applicant's immediate family informed his sibling of the applicant's sexual orientation. The Tribunal has had regard to the explanation that this was because they did not wish the applicant's sibling to know anything about the applicant's homosexuality. However, whilst taking care not to over-generalise the cultural environment that might prevail in a conservative Sikh family in India, the Tribunal has some difficulty accepting that in such a traditional Sikh family, as has been claimed by the applicant, that there would not have been a stronger reaction to the revelation that the eldest son was homosexual. In addition, the Tribunal does not find it particularly plausible that, given the applicant's perception that his parents would have liked him to leave home, that the resultant tension and the underlying reason would not have been communicated to the applicant's sibling, either directly by the applicant as a sibling, or indirectly from the conduct of the applicant's parents.

99. The Tribunal further notes that there are other matters that detract from the applicant's factual claim that he is a homosexual. The Tribunal has had regard to the affidavit from the applicant's parents that he had a sexual relationship with his second partner. However, the Tribunal observes that this affidavit is cast in quite general terms and gives little detail. Nor does it mention that the applicant had previously been involved in a sexual relationship with his first partner. As a result, the Tribunal gives this evidence less weight in its assessment of the relevant issues before it.

100. In addition, the applicant gave evidence before the Tribunal that he ceased his second homosexual relationship with his second partner a year before his arrival in Australia. He stated that although he continued to maintain telephone contact with his second partner his parent did not receive any further visits from his second partner's parent and that these telephone conversations with his second partner did not lead to any other problems with

anyone. The applicant then went on to give evidence regarding the first and second attacks upon both himself and his parent and a local arbitration decision, which appears to contradict his earlier evidence. The Tribunal notes that the applicant's evidence in respect of these matters did not particularly improve the credibility of his claims.

101. The applicant gave evidence that in the second attack he was attacked by relatives of his second partner. He stated that he sustained injuries, which left him in hospital, but he did not have any broken bones. The Tribunal notes that, in response to a direct question from the Tribunal, the applicant stated that he had not sustained any other injuries to any other part of his body. However, when the Tribunal observed that the medical certificate he had submitted to the Tribunal indicated that he had sustained a further injury, the applicant then stated that he had forgotten this. Given that the applicant had also claimed at the Tribunal hearing that his experience of persecution in India made it difficult for him to successfully concentrate upon his studies in Australia, the Tribunal does not find the applicant's explanation for not mentioning his further injury to the Tribunal to be particularly persuasive.

102. As regards the first attack upon the applicant's parent, the Tribunal has had regard to the medical evidence before it that the applicant's parent was admitted to hospital for several months after the first attack with injuries to two areas of his body. At the Tribunal hearing the applicant gave evidence that his parent sustained injuries to three areas of his body, some of which varied from the injuries previously stated in the medical evidence. In support of this claim the applicant submitted to the Tribunal photographs of a person whom he claimed to be his parent showing various injuries. The applicant informed the Tribunal that these photographs were taken just prior to the hearing. Although there is no evidence before the Tribunal that the person in these photographs is, in fact, the applicant's parent, the Tribunal is prepared to proceed upon the basis that he is. Nevertheless, even on this basis, the injuries depicted in the photographs do not appear to be consistent with a person who sustained multiple injuries as a result of a physical assault a few years prior to the Tribunal hearing. In any event, even if the Tribunal accepts that the applicant's parent was attacked such that he required hospital treatment over several months, the Tribunal is not satisfied that the evidence before it indicates the motive for the attack upon the applicant's parent. The Tribunal notes that the applicant gave evidence that his sibling was told that their parent sustained injuries while he was doing his job as a government official. The Tribunal considers that the applicant's evidence on this matter does not sit particularly well with his claim that his parent was a government officer, rather than a government official. It also raises doubts regarding the motive for the attack upon the applicant's parent. In addition, it does little to reinforce the applicant's claim that his traditional Sikh family would have preferred him to leave home because, had his parents informed his sibling that the motive for the assault was the applicant's homosexuality, this may well have facilitated his departure from home, if this was what his parents would have preferred.

103. Further, the Tribunal observes that neither the applicant nor his parent reported either of the first or second attacks. The applicant gave evidence at

the Tribunal hearing that they did not do so because his parent recognised the futility of doing so, given the influence his second partner's parent had in their village. However, having regard to the whole of the evidence before it, the Tribunal is not satisfied that the attackers in either of the first or second attacks were motivated to act because of the applicant's alleged sexual orientation. Similarly, the Tribunal notes that in his statutory declaration the applicant claimed that in the early 2000s a group of community leaders took the issue of his homosexuality to the court and that there was a verdict declaring his activities anti-religious. However, at the Tribunal hearing the applicant gave evidence that he had not had any problems with anyone after he ceased his second homosexual relationship a year before his arrival in Australia and he also stated that very few people knew he was gay. In assessing the applicant's claims the Tribunal has also taken into account the affidavit from the applicant's parents. The Tribunal notes that, apart from generally confirming that homosexuality is not acceptable to Sikhs, that the applicant was physically assaulted as a teenager and admitted to hospital, that he received some medical treatment and that his parents continued to receive threats, this affidavit is lacking in detail. In particular the Tribunal observes that whilst this affidavit refers to ongoing threats from the applicant's second partner's parent, it does not make any mention of the alleged court verdict. Nor does it detail the nature of the threats the family was receiving from the applicant's second partner's parent or any other harassment or discrimination they have suffered because of the applicant's alleged homosexuality. As a result, the Tribunal gives this affidavit less weight in its consideration of the issues. Accordingly, have regard to all the evidence before it the Tribunal is not satisfied that the applicant was the subject of a court verdict regarding his homosexuality as claimed.

B. The Applicant's Knowledge of the Treatment of Homosexuals in India:

104. In assessing the credibility of the applicant's claims to be a homosexual, the Tribunal observes that the applicant demonstrated at the hearing very little knowledge of the legality of homosexuality in India; at one point during the Tribunal hearing he stated that he was unaware how the law in India might help homosexuals. In particular, the Tribunal notes that the applicant was unaware of the specific prohibition imposed by Article 377 of the Indian Penal Code. In addition, the applicant had no knowledge of what was being done by gay and lesbian activist groups in India to change community attitudes towards homosexuality and the treatment of homosexuals. Although the applicant stated at the Tribunal hearing that he had heard of one gay activist group in India, he could not name it; the Tribunal notes that the Naz Foundation is the major gay group in India. Nor had he heard of any gay magazines in India, including *Bombay Dost*, India's first lesbian and gay publication. Similarly, the applicant had no knowledge of any gay websites in India, even though he claimed to have accessed the internet during the 3 years immediately before the Tribunal hearing. On the other hand, the Tribunal observes that all this information is easily available on the internet and in the press. The Tribunal has had regard to the applicant's explanation that he did not have ready access to the internet in India, but it is

not satisfied that this adequately explains his lack of knowledge or interest in these matters.

105. The Tribunal notes that care needs to be taken in terms of the extent to which an applicant could reasonably be required to have knowledge of all the gay activist groups, magazines, websites that might exist in India as well as a detailed knowledge of the specific provisions of the Indian Penal Code, particularly given the applicant's age at the time he claims to have discovered he had homosexual tendencies. On the other hand, the applicant's apparent lack of curiosity in respect of some, if not all, of these matters, raises doubts for the Tribunal regarding the genuineness of his claims to be a homosexual. As a result, these doubts, together with the other evidence before it, do not assist the Tribunal to reach a positive state of satisfaction regarding the applicant's claims to be a homosexual.

C. The Applicant's Pursuit of a Homosexual Lifestyle in Australia:

106. The applicant gave evidence at the Tribunal hearing that he had decided to have a homosexual lifestyle in Australia. However, the applicant's evidence at the Tribunal hearing indicated that he has done very little to express his sexual orientation since he arrived in Australia; nor do his actions in Australia indicate that he has pursued an interest in a gay lifestyle in Australia as claimed.

107. The applicant gave evidence that has not had any contact with either of his former homosexual partners in India because he lacks the funds to pay for the overseas telephone calls. He also gave evidence that, apart from his two previous homosexual relationships in India, he has not any homosexual partners in Australia, although he said he was looking for a partner, but had not found someone he was attracted to. The applicant claimed to have joined the "GLCS" several months after his arrival in Australia, which according to research conducted by the Tribunal is either the *Gay and Lesbian Community Services Perth* or the *Gay and Lesbian Counselling Service of New South Wales*. The applicant stated that he joined the GLCS so that he could make homosexual friends in Australia. However, quite apart from the fact that the applicant did not submit any evidence to the Tribunal verify his claim that he had in fact joined such a gay organisation in Australia, at the time of the Tribunal hearing the applicant stated that he had not made any homosexual friends in Australia. The applicant informed the Tribunal that he lives with two male heterosexuals, but that he has not informed them that he is a homosexual. He stated that he presumed they knew he was a homosexual because of the nature of his physical contact with them in the bed that they shared, although he also stated that they did not engage in sexual relations. As a result, the applicant was unable to name anyone who knew or recognised him to be gay, other than a person in Sydney and another on a train platform. Whilst there is no requirement for a homosexual person to necessarily be in a homosexual relationship, to have had homosexual partners regardless of the attraction to the other person or to have formed homosexual friendships to establish, as a matter of fact, his homosexuality, the Tribunal does consider these matters to be relevant considerations in assessing this particular issue.

108. In addition, the Tribunal has taken into account the claim that the applicant attended the Sydney Mardi Gras as well as the supporting evidence that the applicant was in Sydney several months after he arrived in Australia. On the other hand, the Tribunal notes that this is a well-publicised event, attended by both homosexuals and heterosexuals. Accordingly, the Tribunal gives this matter less weight in its assessment as to the applicant's sexual identity. The Tribunal observes that the applicant demonstrated at the Tribunal hearing that he had a very limited knowledge of the homosexual scene in Melbourne. When asked to indicate whether or not Melbourne had an equivalent gay festival, namely the Mid-Summer Festival, the applicant was unable to do so. He was also unable to name any gay publications circulating in Melbourne, stating that he does not read newspapers. Similarly, the applicant was only able to name two gay entertainment venues in Melbourne, the PhD bar and the Peel Hotel. In respect of the PhD Bar the Tribunal was unable confirm its status as a gay venue, but it does not place any significant weight on this issue. As regards the Peel Hotel, the Tribunal observes that this particular establishment recently attracted a great deal of media attention in Melbourne because it had obtained a ruling from the Victorian Civil and Administrative Tribunal allowing it to exclude heterosexuals from its premises. The applicant told the Tribunal that he did not attend these venues because there was drug-taking in such establishments. Again, whilst the Tribunal accepts that not all homosexuals will wish to attend such establishments, the Tribunal also notes that the homosexual scene in Melbourne is diverse. Despite this, the applicant was unable to name any gay establishments in which he would feel comfortable. When the Tribunal observed at the hearing that the applicant seemed to know very little about the gay scene in Melbourne, he responded that he did not have any friends that could tell him about the gay scene in Melbourne. The Tribunal has taken this explanation into account and does not dismiss this as a possibility. Nor is it the Tribunal's expectation that a homosexual man from India should necessarily pursue a gay lifestyle in precisely the same manner as someone born and raised in Australia might do. However, there is little in the applicant's conduct upon which the Tribunal positively conclude that he has taken an active interest to pursue his stated decision to have a homosexual lifestyle in Australia.

109. The Tribunal has had regard to the submission from the applicant's representative that the Tribunal's focus should be on the applicant's sexual identity and what he is entitled to do in Australia, rather than whether he chose to exercise his freedoms to do so. However, the Tribunal notes, as stated previously, that it is not required to accept uncritically any or all the applicant's claims to be a homosexual. As a result, in assessing the applicant's sexual identity, the Tribunal considers it appropriate to have regard to the applicant's conduct in this regard, given his claims that he cannot pursue a homosexual lifestyle in India and wishes to do so in Australia. In particular, the Tribunal notes that in the recent High Court decision in *SZATV v Minister for Immigration and Citizenship* [2007] HCA 40 (30 August 2007) His Honour, Justice Kirby, after referring to the decision in *Appellant S395/2002 v Minister for Immigration and Multicultural Affairs* [2003] HCA 71; (2003) 216 CLR 473, stated the following:

The holding in S395: It was a common theme of the two joint reasons in S395 that the Tribunal, in that case, had committed jurisdictional error by superimposing an hypothesis that the applicants would continue to “act discreetly”, on the basis that this was the reasonable way of avoiding persecution as homosexuals in Bangladesh. The error in that case lay in classifying members of the “social group” in question as between those who would act “discreetly” and those who might not. Moreover, the error lay in failing to consider how the applicants in that case would *in fact* act and whether such conduct would involve a real chance of persecution on one or more of the Refugees Convention grounds.

The importance of the Tribunal’s addressing its attention to the way in which the particular applicant would act in fact, if returned to the country of nationality, was emphasised in both of the joint reasons in S395. Thus, McHugh J and I said:

... notion that it is reasonable for a person to take action that will avoid persecutory harm invariably leads a tribunal of fact into a failure to consider properly whether there is a real chance of persecution if the person is returned to the country of nationality. This is particularly so where the actions of the persecutors have already caused the person affected to modify his or her conduct by hiding his or her religious beliefs, political opinions, racial origins, country of nationality or membership of a particular social group. In cases where the applicant has modified his or her conduct, there is a natural tendency for the tribunal of fact to reason that, because the applicant has not been persecuted in the past, he or she will not be persecuted in the future. The fallacy underlying this approach is the assumption that the conduct of the applicant is uninfluenced by the conduct of the persecutor and that the relevant persecutory conduct is the harm that will be inflicted. In many ... cases, however, the applicant has acted in the way that he or she did only because of the threat of harm ... To determine the issue of real chance without determining whether the modified conduct was influenced by the threat of harm is to fail to consider the issue properly ... The central question is always whether *this individual applicant* has a ‘well-founded fear of being persecuted for reason of ... membership of a particular social group’”.

110. In the case currently before it, the Tribunal observes that the applicant claims to have pursued as a young teen two homosexual relationships in India, despite opposition from both his family, members of his former partners’ families and the local community. In other words, the applicant did not necessarily modify his conduct in India because of the actions of his alleged persecutors. Nevertheless, the applicant appears to have done so in Australia, given that he has done little to pursue a homosexual lifestyle in Australia, where he has far greater freedom to do so, uninfluenced by the conduct of his alleged persecutors. The Tribunal has taken into account the applicant’s claim that he had been highly stressed by his prior experiences in India as well as his evidence of his constrained financial circumstances. However, the Tribunal is not satisfied that these factors adequately explain his lack of knowledge or interest in these matters.

D. The Timing of the Lodgement of the Protection Visa Application:

111. The applicant claims that he did not lodge his application for a Protection visa until several months after he arrived in Australia because he

did not know how to apply for one and he did not learn this until he attended the Gay Mardi Gras in Sydney.

112. When the Tribunal asked the applicant at the Tribunal hearing why it should conclude that he had not lodged his application for a Protection visa because he had been placed on notice that his then valid visa was about to be cancelled, he responded that he had voluntarily informed the Department that he no longer wished to continue fulfilling the conditions of that visa. The Tribunal observes that this oral evidence conflicts with the applicant's statutory declaration, which was submitted to the Tribunal in support of the review application. Although the applicant stated in this statutory declaration that he did not know his then valid visa had been cancelled (which the Tribunal notes would have been automatically cancelled by operation of law, he also stated in this statutory declaration that he was aware that he had not fulfilled one of the conditions of his then valid visa. He further stated in the same statutory declaration that, despite a request to do so, he declined to rectify the situation by trying to satisfy the visa condition nine months after his arrival in Australia. In addition, the applicant stated in this statutory declaration that he left this organisation nine months after his arrival in Australia and that he believed that the organisation had informed the Department of his valid circumstances.

113. Accordingly, the Tribunal is satisfied, despite the applicant's claims to the contrary, that he was on notice that there was a real prospect that after nine months after his arrival in Australia that the Department had been informed that he had not satisfied the conditions of his then valid visa and that his then valid visa was at risk of cancellation, notwithstanding the fact that the relevant notice regarding the cancellation may have been sent to the wrong residential address for the applicant.

Is the Applicant's Fear of Persecution Well-Founded?

114. Given the totality of the evidence before it, the Tribunal is satisfied that the applicant is not a witness of truth. The discrepancies in the evidence regarding the events the applicant alleges took place in India, his lack of knowledge regarding both the situation for homosexuals in India and the homosexual scene in Australia, as well as the absence of anyone who can corroborate his claim that he is gay, leads the Tribunal to the conclusion that he is not homosexual. Although taken alone some of the irregularities in the evidence would not be sufficient to raise doubts about the applicant's sexual identity, on a cumulative basis the Tribunal is not satisfied that the applicant is a homosexual. Therefore, the Tribunal finds that the applicant is not a homosexual and it does not accept his claim that he wants to live as a homosexual man.

115. The Tribunal is satisfied that the applicant fabricated the claim that he is homosexual, as well as the related claims regarding his alleged difficulties in India because of his sexual orientation, to enhance his Protection visa application. It does not accept as credible his claim that he is at risk of harm in India because he is homosexual and it does not accept as credible the

applicant's related claims that he had difficulties with his parents and others in India because he is homosexual.

116. Accordingly, as the Tribunal is not satisfied that the applicant is a witness of truth, it does not accept that the applicant was involved in a homosexual relationship with either his first partner or with his second partner. In addition, the Tribunal does not accept that the assaults that were alleged to have taken place were motivated by the applicant's alleged persecutors because he is a homosexual. Nor does the Tribunal accept that the applicant was the subject of a court verdict regarding his homosexuality that would subject him to a real risk of persecution if he were returned to India.

117. Accordingly, and taking into account all of the above and considering the applicant's claims on both an individual and cumulative basis, on balance, the Tribunal is not satisfied that the applicant faces a real chance of persecution for reasons of his membership of a particular social group as homosexual, or for any other Convention reason, if he were to return to India now or in the foreseeable future. Therefore, the Tribunal is not satisfied that the applicant has a well founded fear of Convention-related persecution, now or in the reasonably foreseeable future, if he returns to India. He is not a refugee.

CONCLUSION

118. On the basis of having considered the evidence as a whole, the Tribunal is not satisfied that the applicant faces a real chance of facing persecution in India for any Convention-related reason. Looking to the reasonably foreseeable future, the Tribunal is not satisfied that the applicant has a well-founded fear of persecution in India on a Convention-related ground. Accordingly, the Tribunal is not satisfied that the applicant is a person to whom Australia has protection obligations under the Refugees Convention as amended by the Refugees Protocol. Therefore the applicant does not satisfy the criterion set out in subsection 36(2) of the Act for a protection visa.

DECISION

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