

071543400 [2007] RRTA 214 (17 September 2007)

DECISION RECORD

RRT CASE NUMBER: 071543400

DIAC REFERENCE(S): CLF2004/28708

COUNTRY OF REFERENCE: India

TRIBUNAL MEMBER: Phillipa Wearne

DATE DECISION SIGNED: 17 September 2007

PLACE OF DECISION: Sydney

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

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

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

The applicant, who claims to be a citizen of India, arrived in Australia and applied to the then Department of Immigration and Multicultural and Indigenous Affairs for a Protection (Class XA) visa. The delegate decided to refuse to grant the visa and notified the applicant of the decision and his review rights.

[Information deleted: s.431]

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

The matter is now before the Tribunal for review.

RELEVANT LAW

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

Section 36(2)(a) of the Act provides that a criterion for a protection visa is that the applicant for the visa is a non-citizen in Australia to whom the Minister is satisfied Australia has protection obligations under 1951 Convention Relating to the Status of Refugees as amended by the 1967 Protocol Relating to the Status of Refugees (together, the Refugees Convention, or the Convention).

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

Definition of 'refugee'

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

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

The High Court has considered this definition in a number of cases, notably *Chan Yee Kin v MIEA* [1989] 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) 222 CLR 1 and *Applicant S v MIMA* [2004] HCA 25; (2004) 217 CLR 387.

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

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

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

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

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

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

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

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

CLAIMS AND EVIDENCE

The Tribunal has before it the Department’s case file CLF2004/28708 and the Tribunal files relating to the applicant. The Tribunal also has had regard to the material referred to in the delegate's decision, and other material available to it from a range of sources.

The applicant claims fear of persecution in India for the Convention-related reason of membership of a particular social group.

Application for visa to enter Australia

According to Department records the applicant arrived in Australia on a valid visa. The visa was issued in City A in India.

Protection visa application (PVA)

According to his protection visa application, the applicant is a stated age. He was born in City A, India. He is not married. He speaks, writes and reads Hindi, English and Punjabi. He describes his religion as Sikh. His passport was issued in City A on a stated date. He has had a stated number of years of formal education. He lists one residential address in City A, India but does not indicate the dates in which he lived there. The applicant indicates that his parents live in India. On the PVA the applicant states that Person P, born in India on a stated date, is his partner. The applicant indicates that he has never been convicted of a criminal offence, and that he is not charged with any offence that is currently awaiting legal action. He does not list any past employment.

The applicant attached a statement to the PVA which is set out below, with minor editorial changes made as indicated:

I , [the applicant] of [address] do hereby state that I was born in [City A], India on [date]. I am a Shikh [sic] by birth. My father is a businessman and it is known in the community. He is related with the social, religious and cultural organisations in our locality. He is respected by all in the society. I was educated in [name of] school at [a location in City A], India.

I wish to apply for [a] protection visa as a victim of persecution, as one of the members of [the] homosexual community and also for my homosexual relationship with another man of the same community. I wish to indicate that I have left my country of residence, India, a situation which forced me to leave as a result of my relationship with a man. I have legitimate fears if I am forced to go back [to] that country. There is a well-founded fear of persecution on my return back to India. It is relevant to note that social and national views against homosexuals in India are very severe. I have experienced a very uncertain living due to great turbulent and antagonistic behaviours of community members and also the law enforcement authority. I do seek to apply for the refugee status because I believe my case has adequate merit to be considered. In India I am placed in what can be regarded as [a] unique position and compelling nature. I believe that my specific circumstances are worthy of sympathetic appraisal.

I am a young person of [stated] age. I [grew] up in a strict social and religious environment. I started my school at the age of [stated age]. Co-education system prevails in that school. I have to associate with boys due to social restrictions. I was a very shy boy by nature. I completed my primary education in [year 1].

I was admitted in year six in [year 2] and it was the beginning of my high school year. Since then I felt comfortable to establish friendship with boys senior to me. I used to think myself as passive homosexual. I was different to the other boys in the class in behaviour and lifestyle. This attracted the attention of senior boys in the school and I found that one of them had shown interest [in] me. He used to take special care of me in any school event and also in the playground. It would give me pleasure. I lost my attention to my studies and this caused [me] to repeat [a year].

I was about [age] and was a student [in] [stated year]. In the year [year 3], the school was celebrating a national day on [date]. It was a big gathering. In the evening when everyone was busy with that program, [name of] one [senior] student took me and he involved me in some sort of sexual activities. My shy nature prevented me to escape

from the situation. I was so scared to avoid that situation. After a while I was feeling very good, enjoyed the moment. It was a totally new experience in my life.

I started to feel excitement out of that night. This opens a new horizon in my life. I found enormous change in my thinking, attitude, behaviour and lifestyle. I started thinking to choose a lifestyle like [a] girl. I felt that I am attractive to other boys. I was very keen to establish [a] relationship with the person of [the] same-sex. [The senior student] became very close to me and I established friendship with him. Gradually our relationship went further and further. We became very intimate to each other. We loved each other. We started to meet each other at different places. We used to go to [the] cinema, watched drama and [sometimes] past many hours together. As time went on we attracted the attention of the members of the community. People started to whisper about us. [The senior student's] father came to know about our relationship. He became very furious and asked him not to associate with me. My parents were reported against me. My father warned me to abstain from [these] sort[s] of activities that are very offensive in the eyes of society and also religion. However I ignored all [this] advice and threat[s]. Our relationshi[p] [has] been continuing. Both our parents were cautious if it spreads out in our locality. If it happens this would be very disgraceful for our families. It would even prevent the establishment of any kind of marital relationship with siblings of this family. At one stage [the senior student's] father did not allow him to come to school and later on he was admitted to another school. At one stage [the senior student] started to avoid me and told that it is a wrongdoing. As such our relationship came to an end.

I was totally devastated with that occurrence. I was stressed and I failed to cope with the whole situation. It was very difficult for me to attend my classes attentively. It was a big shock to me. I suffered from mental problems. I failed to appear [at] my annual examination in [a stated year]. I was under the treatment of a [medical specialist] for [period of time]. Gradually my situation improved and I started my school again in [year 4]. The state of mind and not allow me to continue my studies and I left school in [year 5] when I was a student of [stated year].

My lifestyle changed. I had a very unstable mind and I could hardly concentrate on anything. With a view to increasing my confidence my father would take me with him in his office from where he manages his [description of] business. Every afternoon I would spend a few hours in that place. The [workers and other employees] used to take [a] rest after completing their [work]. I became acquainted with them. As [I was the] son of the owner they were very cordial to me. It came to my attention that one of the [employees] named [Person P] was very enthusiastic to gossip with me and take me for tea/lunch in [the] absence of my father. One day he offered me an expensive gift [description of gift] during our festive time. Initially I was hesitant to accept his gifts. Finally [Person P's] repeated requests convinced me to accept that gift.

[Person P] was living in the vicinity of my neighbourhood. He is a [description of employment] and employed in our company. He wanted to be close to me. Gradually an intimacy developed between us without being noticed. His personality and caring attitude impressed me very much. I realised that he fell in love with me and I felt happiness. I started to feel relax[ed] and I was getting my confidence back. I sighted the dream of living with [Person P] though I know that it may not be possible in our society and the Indian law would be against the relationship of same sex. The law is a great impediment to our relationship. Since I met him I started to be reluctant in my

personal life. I started to spend enormous time with [Person P] beyond the knowledge of my family and friends. I was very keen to get the company of [Person P].

I have come from an affluent family. [Person P] became inattentive to his job. I use[d] to spend money lavishly for him. We became good intimate friends. I also presented him [with] gifts on different social and religious festivals. We [c]ouldn't spend a day without seeing each other. Our relationship is genuine in continuing. We used to go to witness movies, social and religious programme[s] together and also to go to distant places to stay overnight. We fell in deep love.

We realised that our relationship should be everlasting, as we would not be able to live being separated from each other. We have a good understanding. We have common liking and disliking. We decided to live together like [a] happy couple. We had to think twice to proceed with this decision as we have had to go against the social and religious environment. However we did not give up and looking for the opportunity.

At one stage the people of my localities came to know of our relationship and declared it completely illicit and against the religion. I became known as gay in our community. Both of us should be severely punished if we continue our relationship. The community leaders approached my parents and told that this kind of relationship is great stigma. It must be halted to prevent the downfall of the society.

In the meantime the community raised the matter to my father and he warned and threatened me to break the relationship. I protested and denied their proposal. I was adamant [in] my decision to continue the relationship.

It was my birthday on [a date in year 6] and [Person P] took me [out to Place V] named [name of place V]. We sat in a corner of [Place V] and were talking [to] each other. Suddenly a group of people surrounded us and beat us severely. At that time some people came forward and saved us. The incident was reported to the police on the same day. [The] police took no action. Instead [the] police threatened [to take us] into custody and branded our relationship as illegal under Indian law. We had to pay [a sum of money] to the police on demand to come out of police station. Since then we started to meet in secret places carefully [so that] community people [were] not aware of our matters. We promised to continue our relationship under any circumstances. It is quite unthinkable to en[d] our relationship. Eventually we failed to avoid the members of the community. When they came to know that our relationship [was] still continuing they became more aggressive. They warned my parents that if this illegal relationship continues the whole family would face the consequences. In [year 7] our family was ostracised because they failed to stop me from homosexual relationship. My family was harassed and I was banned to enter into our place of worship. People made derogatory comments in the street to my partner and me. The harassment has been increasingly cumulatively. I was discriminated in every [walk] of life.

In [early year 7], the community people took the issue to local arbitration court consisting of religious and local leaders. They came up with a verdict that we should face severe punishment as our activities are completely illegal under Section 377 of the Indian Penal Code. The punishment for homosexual activities is ten years

imprisonment. They unanimously decided to refer this matter to law enforcement authorities.

Finally the community leaders took this matter to court. The court [summoned] our presence in the court. My parents stood beside me for my safety. My parents were afraid and told me to go away from home. I went on hiding here and there. I was not aware of whereabouts of [Person P] prior to my departure from India. In the mean time my father arranged a [class of] visa for myself and my mother. My mother accompanied me to Australia and we arrived on [a date in year 7]. After my departure, the community people are not making any problems to my parents and they are living a happy life. My family will also experience severe problems on [my] return to India. I have been suffering from severe trauma. Currently I have been suffering from post-traumatic mental disorder. I cannot sleep at night and I have also been suffering mental and psychological problems. The separation from my partner is a great set back in my life and it is intolerable pain to me. It is causing great damage to my physical and mental health.

I believe that I have a real chance of being persecuted on my return back to India and also to my locality. I shall not be safe to move to another place and I will experience the same problems. [The] [p]ossible protection of moving to another area in India is delusive. Continuation of our relationship is impossible wherever we go. I believe I have no future in India.

My partner's life is in jeopardy in India. He has been living a captive life in his own land. He does not have any civil liberty. If he is detected he will face jail for at least ten years. There is no chance of reconciliation in an existing socio-religious environment in India. As it is not possible for me to change my lifestyle and break my current relationship, I shall be prosecuted and persecuted on my return back to India. I urge you to give sympathetic consideration to approve me [a] Protection Visa in Australia that would save my life and give me the opportunity for reconciliation with my partner.

The applicant has been represented in regard to the PVA and review by a migration agent. He continues to be represented by the migration agent.

Documents submitted by the applicant during the course of review

Following the first Tribunal hearing the applicant was invited to provide further information to support the claim made during the hearing that he had been attacked "outside his community" and also to comment on certain country information which was "both favourable and prejudicial" to claims for protection. In response the applicant submitted the following documents:

- A letter from Political Party Q State B. It is on letterhead under the authority of a religious management committee, Committee D. The translation provided by the applicant does not include the date of the letter. It states as follows, with editorial changes indicated:

of applicant, father's name and address] He do very disgusting thing for community. For that reason [the applicant] has been kick[ed] out from his community/society. Our

government and Sikh society does not like this type of person. He does not live anymore in our society

- An un-dated copy of the applicant's "statement in police station" Location M, City A and an unsigned typed English translation of it written in capital letters. The translation states as follows, with editorial changes indicated:

[Name of applicant, name of his father, and family home address]He stated: "I live at the above address with my family and [I am] unemployed. Today I am in [Place W] at [Location M] with my friend [Person P]. After finish[ing] our work when we both sitting in [Place W] some beaten us very badly because of our relationship and threat [en]us if they see us again here they will kill us. Then we ran from there to save our lives".

- An undated letter from the applicant's mother and an unsigned translation. It is translated as follows, with editorial changes indicated:
are all right here, I hope you [are] also good. I miss you so much. I tell you keep in good society but you not listen [to] me. That day when people beat you and [Person P] in [the] [Place W]...[D]on't come back to India you are not safe here. You give so much [tension] to me. Your father [is] also in [tension]. Now we have no fear of anyone. [Person P] asking about you. [D]on't worry about us we are happy here. Take care. Your mother.

Before the second hearing the applicant made a submission to the Tribunal to which he attached four exhibits. Part of that submission is set out below, with minor editorial changes as indicated:

...delegate of the Minister for Immigration...was more concerned about the political situation of India rather than my personal problems I experienced prior to my arrival in Australia...

...have come from Sikh religious background. Homosexuality is forbidden in [the] society I lived, in the religion I belie[v]e in, and in the country I have come from, under the [law] in India. I was persecuted prior to leav[ing] the country and was a victim [for] homosexual relationship. I had also every chance of being prosecuted under Section 377 of Indian Penal code. It is evident from article (Exhibit 1) that the same sex marriage is denounced by a Sikh leader and urged the Sikh assembl[y] not to allow the holding of such ceremonies in a Sikh place of worship.

clearly [portrays in] exhibit 2 that four men were arrested on charges of homosexual conduct under section 377 of the Indian Penal Code (IPC) and this Section of the Act violates the basic human right to privacy and freedom of express one's views. I shall be one of the victims of persecution on my return back under this [A]ct and I shall be deprived of my personal freedom.

...relationship is not socially accepted. If any one engaged in such relationship the members of the society harm him physically and emotionally. The religious and social leaders try to prosecute those persons in accordance with local law. I was one of the victims of such situation prior to depart India for safety of my life. It is very clear from Exhibit 3 [that] people involved in homosexual relationship become [victims] of persecution in India under [the] social and religious system.

is illegal in India and public reaction to the sensational murder this month of a gay project officer with an international aid agency has exposed the limited social acceptability in India for alternative sexual preferences" (Exhibit 4). Homosexual relationship is a crime in India as it is against the order of nature.

...was physically harmed for my homosexual relationship; as such [a] relationship is not acceptable socially and religiously. I was discriminated in every sphere of my life. The members of the society harassed me systematically. My family was the victim of harassment. I was banned to enter into our place of worship. People used to make derogatory comments in the street to me. The local leaders determined that I should be punished under IPC 377 and refer this matter to law enforcing authority. Finally I left India for safety of my life and avoid persecution.

...delegate has acknowledged, "Gay sex is illegal in India. Article 377 of the Indian Penal Code forbids "carnal intercourse against the order of nature with men, women or animals"."

...is evident that I will be prosecuted under Section 377 of the Penal Code and I will face imprisonment for at least 10 years under the Act for my relationship with another man, which is completely illegal in India.

...is not possible for me to avoid persecution if I relocate to another part of India.

...is fact that where ever I go my relationship will exist. People of any part of India will consider this matter as illicit as it is not accepted by religion, society and legal system. We shall be treated in the same manner wherever we go. Apart from this it is physically impossible for a person like me to be relocated from my permanent place of residence to any other part of India. The socio-economic and cultural perspective prevents people to migrate from one district to another in India. Whoever migrates he is easily identifiable at that area and the resident of that area are inquisitive regarding his arrival. He is always being regarded as alien and will be deprived of dignity and normal social life. It is also very difficult to survive in an area different from my usual residence because of limited employment opportunity. Internal flight is not also viable due to pervasive family and religious network through country.

...assessing officer has taken the verdict of "local arbitrary court" very lightly. I have experienced direct persecution including serious physical violence as a result of my homosexual relationship. I now suffer great trauma as a result of this persecution and is genuinely fearful for my safety if required to return, a fear, which I submit, is well founded having regard to my previous experiences. My opponents and persecutors are very powerful in my area. My life will be under jeopardy on my return back to India. note that I have provided herewith some documents including a letter from [Political Party Q] [State B] in support of my claim for Protection visa...

The applicant submitted an accredited translation of another letter from Political Party Q State B. The original in Hindi was not included. The letter is dated and is on letterhead under the authority of the religious management committee, Committee D. The letter is signed by the General Secretary. The translator states that Political Party Q is "one of the factions of a Sikh Organization in India" and a word in the title of the

religious management committee, Committee D, refers to a Sikh Temple. The letter states as follows, with editorial changes indicated:

...of applicant, father's] has in the area belongs to a good family. Because of [the applicant's] wrong actions, we cannot keep [him] in our society. The relationship between man and man will have bad influence in our society.

The exhibits that were referred to above were attached to the applicant's submission. They are set out below. The exhibits were apparently downloaded from the Internet. They are listed below with the website address where they can be currently found:

- Exhibit 1: *Sikh Leader in India Denounces Same Sex Marriage* January 18, 2005. By Brian Laghi, The Globe and Mail, Religion News, The Pew Forum on Religion & Public Life <http://pewforum.org/news/display.php?NewsID=4287> (Accessed 21 August 2007).
- Exhibit 2: *Letter to Indian Prime Minister Singh - on the arrest of four men on charges of homosexual conduct in Lucknow* Human Rights Watch, 1 October 2006 <http://hrw.org/english/docs/2006/01/11/india12399.htm> (-Accessed 21 August 2007).
- Exhibit 3: *India's gays Awaken to Bad dream. Homosexuals have to fight centuries of social stigma* Mike McPhate October 10, 2004 <http://sfgate.com/cgi-bin/article.cgi?file=/chronicle/archive/2004/10/10/ING7M94V1U1.DTL> (Accessed 21 August 2007)
- Exhibit 4: *Gays in India and an Antiquated Law Sodomy laws* Todayonline.com August 26, 2004 By Ranjit Devraj, Inter Press Service <http://www.sodomylaws.org/world/india/innews049.htm> (-Accessed 21 August 2007).

HEARINGS

The applicant appeared at earlier Tribunal hearings. The Tribunal has given regard to the applicant's evidence in the course of those hearings.

Final Hearing

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

The Tribunal hearing was conducted with the assistance of an interpreter in the Hindi (Indian) language, who at the applicant's request from time to time translated the Tribunal's questions into Hindi. The applicant responded in English throughout the hearing, with occasional assistance from the interpreter.

The applicant's migration agent did not attend the hearing. The applicant did not bring his passport to the hearing. He offered to bring it to the Tribunal later that day. However, as copies of the relevant pages of his passport are held on file his offer was considered not necessary.

The applicant said that since arriving in Australia, he has lived at various addresses. He currently shares a unit with an Indian friend and an Indian family. He has his own bedroom. He has little to do with the family. The unit is divided into three separate living areas. He was introduced to the family through friends at Sikh Temple T which he regularly attends.

The applicant's religious activities in Australia

The Tribunal asked the applicant about the Temple (*Gurdwara*) he attends. He said the name of the Temple, Temple T and where it is located. He said he attends there regularly. He attends on weekends. He goes to worship, be with others in prayer, and to participate in the activities that they have after prayer. Sometimes the Temple runs social programs which he attends. He has also been to another Temple, Temple U. He prefers Temple T as it is closer. Although he has been attending Temple T for some years, he said that he is private about his homosexuality. It is not an issue for the other worshippers at the Temple. He said that perhaps there would be a few of his friends who attend there who are aware of his sexual orientation.

The applicant's knowledge of Sikhism

The Tribunal asked the applicant about Sikhism. He said that the strict adherents did not drink alcohol or eat meat and they do not cut their hair. Although he identified as Sikh, he was not strict about his religion and he “did a little” of eating meat and drinking alcohol.

The applicant knew the name of the Guru who had founded Sikhism, but he incorrectly thought that he had been born in the 18th century, rather than the 15th century. He was able to name seven of the 10 Gurus. He could name the Sikh religious holidays and he could describe the “5 K's” (see below, page 17). He said that in general, homosexuality was forbidden in the religion.

Employment

The applicant told the Tribunal that he had worked at a place in Suburb R and stated when that was. He said that he had become tired of the part-time work there, and he had come to the conclusion that he could make more money elsewhere. He is currently working in different employment through the week at a place in Suburb S. He described the nature of his work.

The applicant said that he did not work in India because there was no need to. He said that his parents had provided for him.

Activities in Australia

The applicant said that in weekends he goes out to a particular area with his friends. There are the several clubs which he goes to and he named one club. He said that his closest friends are “Indian” with the exception of one who is “Australian”. Some of these Indian friends are Hindu, some are Sikh. They come from different parts of India.

He attends the Sikh Temple at least weekly, and has some close friends who also attend.

The applicant said that he has a few close friends but no long-term partner. The applicant said that he has not had a “good strong relationship” since he left India.

The applicant says that he attends a group which he named and he described their activities.

His family in India

The applicant said that his mother accompanied him to Australia on a previous occasion. She stayed for a brief period before returning to India. His mother and father live together in City A. He has no siblings.

The applicant's father had worked in varied occupations and in about year 0 or year 00 his father started a business. This business had become quite successful servicing the private sector as well as in government contracts.

He speaks to his mother about once a week. He is reasonably close to her but she does not understand or accept his homosexuality and this is a cause of tension between them. She wants him to “come back to India and be a good boy.”

The applicant’s father has not spoken to him for a long time. He rang his father when he first arrived in Australia, but it became clear to him that his father did not want to speak to him. His mother confirmed that this was correct and told him that it was best not to try and contact his father. His father could not forgive him for being a homosexual.

His father had become increasingly angry with the applicant following the events of year 6. There was so much anger and tension in the house that the applicant had to move out in early year 7. His father would switch off the television while the applicant was watching it. He told the applicant's mother not to give him any food. He cut off the applicant's supply of "pocket money" although the applicant said that his mother continued to quietly supply him with enough money to live on. The applicant moved from his family home into a relative’s home for a while. His relative knew of his homosexuality. He did not approve of the applicant’s lifestyle and sexual orientation, but allowed the applicant to stay with him on the understanding that it was temporary and that he did it to assist the applicant's parents.

The applicant’s schooling

The applicant attended a named school which was identified by its name. The Tribunal asked what that identity stood for. The applicant said what it was. The school was a mixed religious denominational, co-educational school which were separated into primary and secondary.

The applicant confirmed what he had written in his statements that he had to repeat one year after becoming distracted by the attention of some senior boys. He said that

it was at this time he realised that he was different from the other boys. The other boys “liked to look at and talk to the girls”.

The applicant said that his first physical experience as a homosexual was with a senior student when he was in his early teens. The senior student was at the same school. He said that he and the senior student had become very close. They had thought that they loved each other. They spent a lot of time together at the cinema, and watching plays and concerts. He said that as they spent more time together people began to “whisper about us”.

Someone reported their relationship to the senior student’s father. He was furious. Then someone told his parents. They were angry and very concerned that other people in the community would find out about their son’s sexuality and the family would be disgraced. They wanted him to marry and they were concerned that if people knew about his homosexual conduct, he would not be able to get married.

The Tribunal asked the applicant about his statement in which he said that if everyone became aware of his relationship with the senior student “it would even prevent the establishment of any kind of marital relationship with [a] sibling of this family”. The Tribunal said that this appeared to be in conflict with what he had said earlier in the hearing that he was an only child. The applicant confirmed that he was an only child. He said that this was a mistake and should not have been included in the statement.

The applicant said that that the senior student’s father had beaten the senior student because of their homosexual relationship. Then the senior student’s father removed him from the school. The applicant lost contact with the senior student from this time. The applicant's said that his own father had been very angry with him but he had never physically harmed him.

After the senior student left the school the applicant was devastated. He had no friends. He was alienated. He could not concentrate. He had headaches. He could not sleep. His parents arranged for him to see a medical specialist. He saw one several times over the period of the year. The applicant said that he could not submit a report to the Tribunal because there was no report made of his condition. The medical specialist encouraged him not to think about things that distressed him, to try and see comedies, and to get outside in the parks. The applicant said that the issue of his homosexuality was discussed in terms of “why” was he a homosexual. Although the applicant was very distressed at this time he did not attempt to harm himself. He said that he returned to school in year 4. However, he found study and concentration very difficult and so he left school around mid year 5 when he was in senior high school.

The applicant's relationship with Person P

After leaving school, the applicant spent time at his father's business regularly during the week. That is where he met and later commenced a relationship with Person P, who was an employee in his father's business. Gradually, an intimacy developed between the applicant and Person P. They were initially careful not to come to other people's attention. The applicant said that he had become very “private” after the distressing events with people finding out about his relationship with the senior student.

He said that he and Person P had thought about setting up a home together but it was never more than a wish. They never had the opportunity to do anything about doing it.

Person P was fired by the applicant's father in year 6 after he heard about the incident in Place W. The applicant told the Tribunal that he has lost contact with Person P. He does not know where he is now. When the applicant came to Australia he rang Person P in year 7, and soon after again in year 7. That was the last time he spoke to him.

Incident at Place V in Year 6

The Tribunal asked the applicant about the incident which occurred in Place V in year 6. Place V was about “two or three suburbs” away from the applicant's home. They did not like to go to similar places closer to his home as they would be seen by people whom they knew.

The applicant said that he and Person P were in a corner of Place V. A group of a few men spotted them from the street and came into Place V. The applicant knew the name of one of them and thought that he recognized another who had been a “senior” at his school. The other boys lived in the next suburb away from his home. The group started to taunt them. They called them names. These labelled them as homosexuals. The applicant said that the names are words which are always used a derogatory fashion. The men started to hit the applicant and Person P with their fists. The owner of Place V called the police but by the time the police arrived the attackers had moved on. The applicant was bleeding. One of the attackers had a bangle on his hand and this had cut the applicant. He did not require hospitalisation. Neither did Person P. The applicant said that Person P was not bleeding. The applicant said that he was many years older and was taller than the applicant, so he was better able to defend himself. The applicant said what his height is now, but at the time of attack he was only a teenager and he was smaller. The attack was unprovoked, unexpected and had been frightening. He was not able to defend himself as ably as Person P had defended himself.

When the police officers arrived they took the applicant and Person P outside. They asked for their names, and how the attack had started. The applicant told the police that they were in a homosexual relationship. The police did not approve of their homosexuality and became upset with them. They told them to accompany them to the police station for further questioning.

The applicant told the Tribunal did not give the police the name of the attacker whom he knew because he assumed that there would be more trouble and violence from that person. He said that he could “become more of an enemy” if he reported him to the police.

Person P told the police that they did not want to go to the police station. He gave them some money so that they did not have to go to the police station. The applicant told the Tribunal that amount was not a lot of money but gave the example that it could “buy three hamburgers at McDonald's”.

Incident in Place W later in Year 6

The Tribunal asked the applicant about the incident at Place W which had occurred in year 6 and about which the applicant had spoken of in the previous Tribunal hearings. The Tribunal asked the applicant why he had not included the description of this incident in the statement attached to the PVA. The applicant said: "I didn't think about it." The Tribunal asked if it had in fact happened. The applicant emphatically said that it had.

It had occurred after the incident at Place V. He thought it had been later in year 6. He said that he and Person P were sitting in Place W on a weekday one afternoon after Person P had finished work. There had been no one else around. Place W was surrounded by bushes and they were out of sight of passers-by. The applicant said that he and Person P had sexual relations and then they re-dressed. They moved and sat in another part of Place W, X, with their arms around each other. X was adjacent to a games area. The applicant drew a diagram of Place W to indicate where the bushes and X were located. The applicant said that a group of several men arrived at X. They became menacing. The applicant was hit with a piece of wood before the men ran away. The applicant said he was not hurt significantly nor was Person P but they had been very frightened about what might happen to them with no one else around to help them. They thought that the men may be waiting for them.

He and Person P rang the police. Police officers attended and took a statement from the applicant. One of the police officers told the applicant that he knew the applicant had been involved in the incident at Place V previously in year 6. He said "you're the homosexual aren't you?" The police did not request them to attend the police station this time. But one of the police officers rang the applicant's father from Place W, told him what had happened, and told him to come to Place W and pick up his son. His father came. He was very angry. Person P was fired shortly after this incident.

The Tribunal asked about whether the applicant and Person P had often had sexual relations in Place W. He said that they had not done so before. They tried to be as private as possible. Sometimes they had been together at his father's work place. Other times they had been in the business office when the others were not around. He said that had been difficult for them because he lived with his parents, as did Person P.

Not long after this, the applicant's home was pelted with stones one night. The only damage was some broken glass but he assumed that it related to community intolerance to his homosexual relationship.

The local arbitration committee

The Tribunal asked the applicant about the local arbitration committee which he claimed had met to discuss his relationship with Person P. The applicant said that local arbitration committee was a community organisation where the oldest people in the community from the two or three local suburbs got together to discuss issues they perceived to affect the local area. There are other leaders, not just Sikh leaders on the committee. He said that the local arbitration committee met in year 7 to discuss his behaviour with Person P. They decided that they could not tolerate their behaviour.

The applicant was asked to attend this local arbitration committee hearing. Someone went around to his parent's house and left a message that he should go. Neither of his parents went. He did not attend either. His parents were very angry with him.

The matter never got to court. He was not charged and does not have charges pending. He said that his statement attached to the PVA was incorrect on this point. The matter only went to the local arbitration committee. They did not approve of his homosexual conduct and they decided that he should not be allowed to go into the Temple or any other sacred place and that local area.

The applicant confirmed that there were two letters from Political Party Q, State B. One is undated (but apparently written in year 7) and it and the applicant's translation of it are on file. The other is dated with a date in year 7 and an accredited translation of it (but not the letter itself) is on file. The Tribunal requested that the applicant submit this letter, which he did after the hearing. It is held on file. The applicant said that he had been discriminated in every sphere of his life. He was not tolerated at home. He was not tolerated in the community. He was not thought of as a normal man. He was thought of as a lower member of society. He was not allowed to enter sacred places or go to community festivals. People pointed him out and abused him. He had been bashed and would be bashed again. He would not be protected by the police.

The Tribunal asked about him relocating in another place in India. He said that City A was very different from any Australian city. He said no homosexual activity could be done openly. He said that he would expect more harm in the city.

The Tribunal asked him if he considered that there was any difference in the way that the Sikh community treated homosexuality compared to the Hindu community. He said that homosexuality was treated with disdain and not allowed by either group. He said that the Sikh community was usually "strict" and there was a lot of discrimination against homosexuals.

Independent information

...following is taken from the website on Sikhism from the website *Religion Facts*.

...word "Sikhism" derives from "Sikh," which means a strong and able disciple. There are about 23 million Sikhs worldwide, making Sikhism the 5th largest religion in the world. Approximately 19 million Sikhs live in India, primarily in the state of Punjab.

...

emerged in 16th-century India in an environment heavily permeated with conflicts between the Hindu and Muslim religions. It was somewhat influenced by reform movements in Hinduism (e.g. Bhakti, monism, Vedic metaphysics, guru ideal, and bhajans) as well as some Sufi Muslim influences. While Sikhism reflects its cultural context, it certainly developed into a movement unique in India. Sikhs regard their faith as an authentic new divine revelation.

...was founded by Guru Nanak Dev, who was born in 1469 to a Hindu family. After four epic journeys (north to Tibet, south to Sri Lanka, east to Bengal and west to Mecca and Baghdad), Guru Nanak preached to Hindus, Muslims and others, and in

the process attracted a following of Sikhs (disciples). Religion, he taught, was a way to unite people, but in practice he found that it set men against one another..

...the Hindu doctrine of the transmigration of souls, together with its corollary, the law of karma, Guru Nanak advised his followers to end the cycle of reincarnation by living a disciplined life – that is, by moderating egoism and sensuous delights, to live in a balanced worldly manner, and by accepting ultimate reality. Thus, by the grace of Guru (Gurprasad) the cycle of reincarnation can be broken, and the Sikh can remain in the abode of the Love of God. Guru Nanak taught that salvation does not mean entering paradise after a last judgment, but a union and absorption into God, the True Name. Sikhs do not believe in a heaven or hell. Sikhs also reject the Hindu belief in incarnations (avatars) of God, believing instead that God makes his will known through the Gurus.

...most easily observable Sikh practices are the wearing of the turban and the Five Ks. Sikhs also pray regularly and meditate by repeating God's name, often with the aid of rosary beads. Sikhism rejects the Hindu notion of the four stages of life, teaching instead that the householder is the ideal for all people. A Sikh aims to live a life that balances work, worship and charity. Community is emphasized, and the Sikh temple (gurdwara) is the center of Sikh communal life. <http://www.religionfacts.com/sikhism/index.htm> - Accessed 12 August 2007).

“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’ (undated), Ethnicity Online website http://www.ethnicityonline.net/sikh_sexual_health.htm – Accessed 2 August 2007).

According to Jasvinder Singh, the ex-president of the local Gurdwara, homosexuality is not talked about in the scriptures or in the lives of the ten Gurus. According to Jasvinder, homosexual marriage is not an issue to Sikhs because marriage is between a man and woman (‘Faith Alive: Faith and homosexuality’ 2004, *BBC News*, June)

The Country of Origin Information Report, India, 11 May 2007 UK Home Office Border and Immigration Agency states the following:

The USSD International Religious Freedom report for 2006 stated:

...to the 2001 Government census, Hindus constituted 80.5 percent of the population, Muslims 13.4 percent, Christians 2.3 percent, Sikhs 1.8 percent, and others, including Buddhists, Jains, Parsis (Zoroastrians), Jews, and Baha’is, 1.1 percent. ...Sikhs were a majority in the state of Punjab.” [2b] (Section I, Religious Demography)...

Religion and Historical Background

As stated in the US Department of State International Religious Freedom Report 2006 (USIRF), according to the latest Government estimates (2001) Sikhs constitute 1.8 per cent of the population. [2b] (Section I. Religious Demography)

As noted in a background paper published in 1990 by the Immigration and Refugee Board of Canada, the Sikh religion was founded by Guru Nanak (1469-1539), a high caste Hindu who denounced social and State oppression. He took monotheism from Islam, but rejected Ramadan, polygamy and pilgrimages to Mecca. He also rejected Hindu polytheism, the caste system and sati (sacrificing a widow on her husband's funeral pyre). Nine gurus succeeded Nanak. The Sikh commandments include certain prohibitions, notably against alcohol and tobacco. For men the Sikh religion requires observance of the "5 Ks": Kes (uncut hair and beard); Kacch (breeches); Kirpan (a double-edged sword); Kangha (a steel comb); and Kara (an iron bangle). [4a] (p7-8)... BBC News reported on 16 March 2005 in an article entitled "The fading of Sikh militancy", over two decades after the militancy period began in Punjab, the divide between Sikhs and Hindus has been bridged and the antagonism with the Congress party largely disappeared. "The elevation last year of Manmohan Singh as India's first Sikh prime minister was the culmination in the changing relations. 'The alienation between the Sikhs and Congress is a distant memory now. The ground realities are very different now,' according to analyst Mahesh Rangarajan. In the 1999 general elections the Congress led in Punjab over its rivals the Akali Dal. Two years ago, the Congress convincingly won the state elections in Punjab, dislodging the Akali Dal from power. The state continues to have a Congress-led government." [32dm]...

Gay, Bisexual and Transgender Persons

rights

Foreign and Commonwealth Office correspondence dated 1996, noted that homosexuality as such is not illegal in India. Section 377 of the Indian Penal Code (1860) proscribes "unnatural offences", which are defined as penetrative intercourse "against the order of nature" with man, woman or animal. Certain practices might therefore be deemed illegal in India. However the scope of the definition has not been much tested in the courts and cases under section 377 are rare. [7b] According to a report for the Swedish Embassy by a Delhi law firm in 1997, "It is punishable with ten years' imprisonment and a fine; however no-one so far, is known to have been awarded a ten year sentence for having been found guilty of this offence. The maximum punishment reported is two years." [48] (p2) Arvind Narrain of the Alternative Law Forum, in an article entitled "Homosexuality in India, Where Tradition Still Rules", published 8 June 2003, is quoted as saying, "Section 377 is used to criminalise and prosecute homosexuals. It actually legitimises the abuse of homosexuals." [75] (p1)

attitudes

As noted in a Request for Information Response, by the Immigration and Refugee Board of Canada, dated 13 May 2004:

...respect to the government of India's attitude toward homosexuality, the government has declared that homosexuality is 'not tolerated in Indian society'; however, it also has 'no objection to homosexuality if it is practised in private by consenting adults

despite a law [Section 377] banning such relationships' (DPA 14 Sept. 2003). The statements were made in an affidavit after the Naz Foundation, a New Delhi-based, non-governmental HIV/AIDS organization, lobbied the government for the legalization of homosexuality." [4k]

The same source noted "[that] According to the government of India, Section 377 is rarely applied except when child abuse or rape is alleged...the Indian higher courts have heard only 30 cases relating to Section 377 between 1860 and 1992 and that the majority of defendants were prosecuted for 'non-consensual acts of sodomy (including sexual assault of minors')." [4k]

As reported in an article on the International Gay and Lesbian Human Rights Commission (IGLHRC) website, dated 31 January 2005:

...to IGLHRC, India is one of 79 countries that maintain laws directed at or used to outlaw sex between people of the same sex... India's law, Indian Penal code Section 377, criminalizes 'voluntary carnal intercourse against the order of nature'. Although it bans these acts committed by anyone, the law is commonly used to target, harass and punish sexual minorities. In a 2001 report, 'Human Rights violations against Sexual Minorities in India', the People's Union for Civil Liberties - Karnataka documented widespread police harassment, abuse and extortion against LGBT people and other sexual minorities in India... The report also documents in detail the impact of local media and popular psychology instilling fear and creating a hostile climate for LGBT people." [92]

As noted in the same report:

...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'." [92]

Human Rights Watch (HRW) reported in an article published on 24 June 2005 entitled 'Hang our Heads in Shame' "In January 2005, Lucknow police arrested four men on charges of operating a 'gay racket' on the Internet, as well as of engaging in 'unnatural' sex. Undercover agents, posing as gay men on an Internet website, entrapped one man, then forced him to call others and arrange a meeting where they were arrested." Charges are still pending. [50]

and economic rights

As reported in the US State Department Country Report 2006:

377 of the Penal Code punishes acts of sodomy, buggery and bestiality; however, the law was often used to target, harass, and punish lesbian, gay, bisexual, and transgender persons. Human rights groups argued that gay and lesbian rights were not addressed along with other human rights concerns in the country. . .Gays 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 are fired from their jobs. Homosexuals also faced physical attacks, rape and blackmail.” [2c] (Section 5)

As reported in 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. [32ae] The Indian Network for Sexual Minorities (INFOSEM), accessed 16 January 2007, listed 26 organisations throughout India offering counselling and support to sexual minorities in the country. [74]...

India’s gay community has begun to assert itself in recent years. According to a BBC News report dated 29 June 2003, cities such as Bombay and Bangalore have become centres for gay culture. [32bd] 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. [32be] It was reported by the BBC on 29 June 2003 that up to 100 people marched in a gay rights parade in Calcutta. [32bd]

ill-treatment or discrimination

As reported on IBN Live, on 22 March 2006, homosexuals in Chennai have formed the first gay club to be officially registered. The group’s aim is to alleviate social stigma attached to homosexuality and to help the gay community in cases of injustice and to speak out against the “ambiguous” Section 377 of the Indian Penal Code. The group is called The Men Community Development Society. The report notes that the gay movement in India has been active but at a discreet and subtle level as homosexuality as a phenomenon is frowned upon by Indian society. [22] Rediff.com reported on 16 March 2006 that The Men Community Development Society formed by the anti-AIDS non-governmental organisation Indian Community Welfare Organisation to address violations of homosexuals’ human rights is a milestone in Chennai. [81c]

Country of Origin Information Report, India, 2007 UK Home Office Border and Immigration Agency) 11 May
http://www.homeoffice.gov.uk/rds/country_reports.html#countries –Assessed 20 August 2007).

Article 377 of the *Indian Penal Code* states:

Whoever voluntarily has carnal intercourse against the order of nature with any man, woman or animal, shall be punished with imprisonment for life, or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

Explanation – Penetration is sufficient to constitute the carnal intercourse necessary to the offence described in this section (*Indian Penal Code* (Act No 45 of 1860), IndiaLawInfo website <http://www.indialawinfo.com/bareacts/ipc.html> – Last accessed 17 May 2006)

While Article 377 cases rarely make it to court, arrests under Article 377 occurred in January 2006 in Lucknow, Meerut and Hyderabad. The Article is used by police to harass homosexuals and it “continues to be a potent tool of oppression” and “is more often that not used for purposes of intimidation.” (‘Human rights violations against

sexuality minorities in India: A PUCL-K fact-finding report about Bangalore' 2001, People's Union for Civil Liberties website, February, p.12).

The Naz Foundation notes that the "order of nature" is not defined but that judicial pronouncements have extended Article 377 to cover oral sex, anal sex, thigh sex and mutual masturbation, so that all forms of sexual expression between men are criminalised (Naz Foundation 2003, *Response to Questions on Treatment of Homosexual People in India*, January, Para 10; and Bondyopadhyay, Aditya 2004, *A perspective from India: Homosexuality stands criminalized because of a mid 19th century colonial law*, speech at the UN International Panel Discussion: Breaking the "cultural" straitjacket: why sexual orientation and gender identity are issues on the global south's agenda, 13 April, International Lesbian and Gay Association website).

The Naz Foundation reports:

[If a] police officer...is apprehensive that the criminal act as described by section 377 or its expanded scope as given by the courts is likely to take place, can take all necessary actions to stop the crime. This effectively means that the privacy of a person who is identified/suspected as gay or is openly gay can be violated by a police officer at any time without any warrant, and his house, possessions etc can be searched in order to either establish the crime or to 'prevent' the crime from taking place (Naz Foundation 2003, *Response to Questions on Treatment of Homosexual People in India*, January, Para 11).

On 4 January 2006, four men were arrested in Lucknow for operating a "gay racket" on the Internet and engaging in unnatural sex. The Lucknow police claim to have seized the four men while they were having a picnic in a public place. Human Rights Watch received reports which indicate that "undercover police, posing as gay on the website, entrapped one man, then forced him to call others and arrange a meeting where they were arrested." The police and administration in Lucknow have refused to release the men. According to Alok Sinha, the principal Home Secretary, "The law of the land is against homosexuality, so the action taken by our police was absolutely valid". Pandey also reports that the police "have traced at least 50 more in their list of local contacts, but have not proceeded against them so far." Police also arrested a number of gay men in the Meerut region ('Cops refuse to release 4 gays' 2006, *Khaleej Times*, 12 January; and Townley, Ben 2006, 'India feels heat over gay rights', *Gay.com UK website*, 12 January). A police taskforce in Hyderabad "busted the first-ever male prostitute racket" and arrested three people under Section 377 for indulging in "unnatural sex" ('Cops expose 'gay abandon' 2006, *The Times of India*, 1 February).

Article 377 is used by the police and other law enforcement agencies to harass homosexuals. Harassment takes many forms including blackmail, extortion, theft of personal belongings, extraction of favours, illegal detention, physical abuse, verbal abuse, sexual abuse, rape and outing. The harassment occurs in parks and other public places where homosexuals congregate, all over India. The harassment has been described as "widespread" and "endemic" with homosexuals viewed as "easy targets" (Human rights violations against sexuality minorities in India: A PUCL-K fact-finding report about Bangalore' 2001, People's Union for Civil Liberties website, February, pp.13-14; Human Rights Watch 2002, *World Report 2002 - India*;

Overdorf, Jason 2002, 'Closet Drama', *Far Eastern Economic Review*, 3 October; Naz Foundation 2003, *Response to Questions on Treatment of Homosexual People in India*, January, Paras 6 & 24; Manjunath, Chinmayee 2003, 'Homosexuality in India, where tradition still rules', Great Reporter website, 8 June; DIMIA Country Information Services 2003, *Country Information Report No. 106/03 – India: Treatment of Homosexual People*, (sourced from DFAT advice of 31 July 2003), 31 July, A6 & A7; Bondyopadhyay, Aditya 2004, *A perspective from India: Homosexuality stands criminalized because of a mid 19th century colonial law*, speech at the UN International Panel Discussion: Breaking the “cultural” straitjacket: why sexual orientation and gender identity are issues on the global south’s agenda, 13 April, International Lesbian and Gay Association website; CX131993, DIMIA Country Information Services 2005, *Country Information Report No. 05/46 – India: Treatment of Sexual Minorities*; and US Department of State 2006, *Country Reports on Human Rights Practices 2005 – India*, 8 March, Section 5 Other Societal Abuses and Discrimination).

Homosexuals are afraid to register complaints of police harassment with the police for fear of prosecution under Article 377, being outed and/or further harassment. Police harassment of homosexuals continues with impunity despite awareness of the situation by the National AIDS Control Organisation (NACO), the Ministry of Home, the Ministry of Health and Family Welfare and many other government departments. None or very few cases of complaints registered with the police were found and no evidence of any charges laid against the police for harassment was found (Human rights violations against sexuality minorities in India: A PUCL-K fact-finding report about Bangalore’ 2001, People’s Union for Civil Liberties website, February, p.14; Overdorf, Jason 2002, 'Closet Drama', *Far Eastern Economic Review*, 3 October; Naz Foundation 2003, *Response to Questions on Treatment of Homosexual People in India*, January, Para 5, 24 & 25; DIMIA Country Information Services 2003, *Country Information Report No. 106/03 – India: Treatment of Homosexual People*, (sourced from DFAT advice of 31 July 2003), 31 July, A8; Bondyopadhyay, Aditya 2004, *A perspective from India: Homosexuality stands criminalized because of a mid 19th century colonial law*, speech at the UN International Panel Discussion: Breaking the “cultural” straitjacket: why sexual orientation and gender identity are issues on the global south’s agenda, 13 April, International Lesbian and Gay Association website; CX131993, DIMIA Country Information Services 2005, *Country Information Report No. 05/46 – India: Treatment of Sexual Minorities* (sourced from DFAT advice dated 29 July 2005), 22 August, A6; and US Department of State 2006, *Country Reports on Human Rights Practices 2005 – India*, 8 March, Section 5 Other Societal Abuses and Discrimination).

The 2001, petition by the Naz Foundation in the Delhi High Court challenged the Constitutional validity of Article 377 on the grounds that it “criminalises homosexual acts” even between two consenting adults. According to the Naz Foundation, Article 377 violated Articles 14, 15, 19 and 21 of the Constitution. The petition stated that, “Section 377 creates an arbitrary and unreasonable classification between natural (penile–vaginal) and unnatural (penile–non vaginal) sexual acts that violates Article 14’s guarantee of equal protection before and under the law...[it] imposes traditional stereotypes concerning the “natural” sexual roles for men and women upon the sexual minorities. It also provides moral and legal sanction for the continued social

discrimination of sexual minorities.” (‘Gay activists get court to examine Article 377’ 2001, *Hindustan Times*, 8 December).

Two years later, the government filed its response. According to the government, “Indian society is intolerant to the practice of homosexuality/lesbianism”. The government said that society’s disapproval of homosexuality was “strong enough to justify it being treated as a criminal offence even where the adults indulge in private.” The government argued that “deletion of the said section can well open flood gates of delinquent behaviour and be misconstrued as providing unbridled licence for the same” (‘Life Sentences Necessary “To Control Homosexuality” India Says’ 2003, 365 *Gay*, 9 September and Bondyopadhyay, Aditya 2004, *A perspective from India: Homosexuality stands criminalized because of a mid 19th century colonial law*, speech at the UN International Panel Discussion: Breaking the “cultural” straitjacket: why sexual orientation and gender identity are issues on the global south’s agenda, 13 April, International Lesbian and Gay Association website).

In September 2004, the Delhi High Court dismissed the legal petition, ruling that the validity of Article 377 cannot be challenged by anyone who is “not affected by it”. It is unclear what exactly “not affected by it” means, with some lawyers arguing that the petition should be filed by the affected people rather than the organisations representing them (Sen, Ayanjit 2004, ‘India court rejects gay petition’, *BBC News*, 2 September).

According to the Naz Foundation, “no ‘out’ gay person can live a normal life in India devoid of the threat of state oppression, and or state inaction in the face of oppression and hatred/violence by non-state parties” (Naz Foundation 2003, *Response to Questions on Treatment of Homosexual People in India*, January).

Various descriptions of Indian society’s attitude towards homosexuality follow:

- “Gay men in Chennai have formed the first ever gay-club, which can be described as a bold step in the Indian society where homosexuals are shunned and homosexuality is a criminal offence” (‘Chennai gets first gay-club in India’ 2006, *New Kerala*, 19 March);
- “Same sex relationships are still looked down upon in India, yet there are a few who have the courage to rebel against this societal prejudice even in a small place like Chhindwada, a town in Madhya Pradesh” (‘Lesbian couple rebel to live together in India’ 2005, *Asian Sex Gazette*, 9 November);
- “Spurned by society and criminalized by the law, thousands of gay men in this burgeoning economy are going online to meet other people, voice their opinions or simply be themselves” (Tusing, David 2005, ‘Gay men find refuge on the Net’, *CNN*, 4 October);
- “Singh [Naz Foundation] said that, 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. Having experienced the ability to live openly as a homosexual in a western country may make it more difficult for the individual to return to a lifestyle where their sexual preference needed to be hidden. 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” (DIMIA Country

Information Services 2005, *Country Information Report No. 05/46 – India: Treatment of Sexual Minorities* (sourced from DFAT advice dated 29 July 2005), 22 August, A2);

- Media coverage of the murder of Pushkin Chandra and Vishal alias Kuldeep highlighted the men's supposed sexuality with headlines such as "Forced gay sex: The two unidentified men could have been coerced to have sex with Pushkin and Vishal. This might have enraged them leading to murder", "Blackmail: Large number of gay photographs and amateur pornographic movies strewn across the room", "Sado-masochist: Police suspect it was S&M sex, which went horribly wrong" and "Double murder outs Delhi's gay culture." The article reports that "many in the gay and lesbian community have strongly objected to reportage on the murders" ('Media coverage of double murder angers India's gay community' 2004, Fridae website, 17 August);

- "Still, prejudice remains strong. "My Brother Nikhil" omits any display of physical intimacy between Nikhil and his boyfriend, avoiding the kind of violent demonstrations that plagued earlier films like "Fire," a 1997 art-house release that included lesbian sex scenes" (Williams, Mark 2005, 'A movie and a legal battle challenge India's notion of gays', SF Gate website, 14 May);

- "The powerful social stigma that has long kept the country's homosexual minority in hiding is not only enforced by family and neighbours, but even the local police" (McPhate, Mike 2004, 'Gay in India', *The Gully*, 18 October);

- "Marriage-conscious society mostly frowns, but homosexuals are finding a club here and a movie there that accepts them" (Gezari, Vanessa 2003, 'India's gays see small improvement in cultural outlets', *Chicago Tribune*, 10 September, AIDS Education Global Information System (AEGIS) website);

- Vinay Chandran concludes: "Until societal spaces are safer, people will not admit they are homosexual, but such spaces cannot be created until they do" (Manjunath, Chinmayee 2003, 'Homosexuality in India, where tradition still rules', Great Reporter website, 8 June);

- "That it is usually the argument of most of the rightwing and Hindu fundamentalist political alignment in power today in India, that homosexuality is against Indian Culture. ...Their homophobia taps into public sentiment and they use it to garner votes" (Naz Foundation 2003, *Response to Questions on Treatment of Homosexual People in India*, January, Para 17);

- "Caught between harsh laws and cultural conservativeness, Indian gays often lead lives of frightened secrecy. ...But modern Hindu fundamentalists and Indian society at large vehemently oppose homosexuality" (Overdorf, Jason 2002, 'Closet Drama', *Far Eastern Economic Review*, 3 October); and

- "Underpinning intimidation by organs of the state is an insidious and pervasive culture of silence and intolerance practiced by different sections and institutions of society. Many people deny the existence of sexuality minorities in India, dismissing same-sex behaviour as a Western, upper-class phenomenon. Many others label it as a disease to be cured, an abnormality to be set right or a crime to be punished. While there are no organized hate groups in India as in the West, the persecution of sexuality minorities in India is more insidious. Often, sexuality minorities themselves don't want to admit

the fact of persecution because it intensifies their fear, guilt and shame. Social stigma casts a pall of invisibility over the life of sexuality minorities, which makes them frequent targets of harassment, violence, extortion, and often, sexual abuse from relations, acquaintances, hustlers, *goondas*, and the police” (Human rights violations against sexuality minorities in India: A PUCL-K fact-finding report about Bangalore’ 2001, People’s Union for Civil Liberties website, February, p.18).

- An article dated 22 March 2006 in *The Pink News* reports that a number of Indian celebrities have been moved to speak out about attitudes towards gay people. Male supermodel Dino Morea said that “on many occasions gays can make great friends.” According to actor Zayed Khan, “who are we to judge whether they are right or wrong? In my view sexuality of a person hardly matters. I believe that we should accept it like many other aspects of life and treat it as normal.” Film star Koena Mitra said, “I believe Indian society needs to change its attitude towards gays and lesbians. Why should they be treated any different from others?” (Knowles, Katherine 2006, ‘India’s celebrities speak up for gay rights’, *Pink News*, 22 March).

Some homosexuals come out to their family and others are outed. While some family’s are accepting, others disown, discriminate against, ostracise and react violently to the news (‘Human rights violations against sexuality minorities in India: A PUCL-K fact-finding report about Bangalore’ 2001, People’s Union for Civil Liberties website, February, pp.18-19; Gezari, Vanessa 2003, ‘India’s gays see small improvement in cultural outlets’, *Chicago Tribune*, 10 September, AIDS Education Global Information System (AEGIS) website; McPhate, Mike 2004, ‘Gay in India’, *The Gully*, 18 October; Country Information Report No. 05/46 – India: Treatment of Sexual Minorities (sourced from DFAT advice dated 29 July 2005), 22 August; Verma, Varuna 2006, ‘Love and let love’, *The Telegraph*, 5 March; and US Department of State 2006, *Country Reports on Human Rights Practices 2005 – India*, 8 March, Section 5 Other Societal Abuses and Discrimination).

Goondas or professional hoodlums, petty criminals and hustlers also harass homosexuals. Harassment takes the form of extortion, blackmail, physical abuse and rape (‘Human rights violations against sexuality minorities in India: A PUCL-K fact-finding report about Bangalore’ 2001, People’s Union for Civil Liberties website, February, pp.13-14; Overdorf, Jason 2002, ‘Closet Drama’, *Far Eastern Economic Review*, 3 October; Sangwan, Soni 2004, ‘Homosexuals are soft targets’, *Hindustan Times*, 15 August, Gay Bombay website; Williams, Mark 2005, ‘A movie and a legal battle challenge India’s notion of gays’, SF Gate website, 14 May; ‘Gang Targeting Gay Men Busted’ 2006, *365 Gay*, 3 January; and US Department of State 2006, *Country Reports on Human Rights Practices 2005 – India*, 8 March, Section 5 Other Societal Abuses and Discrimination).

An article dated 3 January 2006 in *365 Gay* reports that police in Vadodara have arrested a four member gang that preyed on gay men. According to police the gang would target gays in a park used for cruising, robbing and blackmailing them. The police note that gay victims never came forward out of fear of being outed (‘Gang Targeting Gay Men Busted’ 2006, *365 Gay*, 3 January). However, an article dated 15 August 2004 in *The Hindustan Times* reports that a homosexual from Simla who was being blackmailed, lodged a complaint with police who tracked down the blackmailer

and arrested him (Sangwan, Soni 2004, 'Homosexuals are soft targets', *Hindustan Times*, 15 August, Gay Bombay website).

According to advice provided by the Naz Foundation on 29 July 2005, attitudes towards homosexuals were fairly uniform throughout India:

No state or states treated homosexuals in a worse fashion than was standard (CX131993, DIMIA Country Information Services 2005, *Country Information Report No. 05/46 – India: Treatment of Sexual Minorities* (sourced from DFAT advice dated 29 July 2005), 22 August).

According to advice provided by the Department of Foreign Affairs and Trade (DFAT) on 31 July 2003, homosexuality is more tolerated in large cities, particularly Delhi, where it is possible for gay men to live in a publicly acknowledged homosexual relationship. The advice notes that while it might be possible, some NGO representatives report that it is not easy (DIMIA Country Information Services 2003, *Country Information Report No. 106/03 – India: Treatment of Homosexual People*, (sourced from DFAT advice of 31 July 2003), 31 July, A4 & A5). An article posted on the Great Reporter website on 8 June 2003 notes that in India's "bigger cities, homosexuality is hidden away more efficiently than in smaller villages where individuals are sometimes tormented because they are forced to live double lives or face being ostracised" (Manjunath, Chinmayee 2003, 'Homosexuality in India, where tradition still rules', Great Reporter website, 8 June).

An article dated 15 August 2004 in *The Times of India* reports that homosexuals in New Delhi "might still raise a few eyebrows, but gradually, they seem to be gaining wider acceptance." The article notes that the cruising areas in New Delhi are Nehru Park, Palika Bazaar, Jahanpanah Forest, Dhaula Kuan bus stand and India Gate lawns. According to Rajiv Singh, Delhi is the gay capital of India (Kaul, Vividha 2004, 'Homosexuality comes out of the closet', *The Times of India*, 15 August).

An article dated 4 October 2005 by *CNN* reports that private parties are organised on a regular basis in Delhi. Such parties are made possible by establishing contacts through the Internet. The article notes that the parties will have at least 100 people in attendance which is "a decent number, considering that many gay men still prefer the anonymity of an online identity" (Tusing, David 2005, 'Gay men find refuge on the Net', *CNN*, 4 October). An article dated 18 October 2004 in *The Gully* reports that gay websites and hang-outs have proliferated in New Delhi. The article notes that several bars in New Delhi hold gay nights "though they are often not publicized for fear of attacks" (McPhate, Mike 2004, 'Gay in India', *The Gully*, 18 October). An article dated 10 September 2003 in *The Chicago Tribune* reports that that once a week on Tuesdays a gay dance session is held at Pegs N' Pints in New Delhi. According to Shaleen Rakesh of the Naz Foundation, changes in Indian society, even in Delhi, over the past four or five years has meant it is easier to talk about sexuality and being gay (Gezari, Vanessa 2003, 'India's gays see small improvement in cultural outlets', *Chicago Tribune*, 10 September, AIDS Education Global Information System (AEGIS) website). DFAT advice dated 31 July 2003 reports that there is one club in New Delhi which has a gay and lesbian night once a week. The advice notes that the club currently operates without police harassment. The advice reports that large parties advertised on websites such as Gay Delhi are held each month in Delhi at

private venues. These generally operate free from police harassment as well although this is not always the case (CX83082, DIMIA Country Information Services 2003, *Country Information Report No. 106/03 – India: Treatment of Homosexual People*, (sourced from DFAT advice of 31 July 2003), 31 July, A5). An article dated 3 October 2002 in the *Far Eastern Economic Review* provides information on a police raid of a homosexual party on the outskirts of New Delhi. The organisers “are used to dealing with the authorities, but tonight they are especially worried.” The article notes that the police are normally satisfied with a “nominal bribe, sometimes as little as a bottle or two of booze.” However, “tonight someone has spread the word via anonymous text-messages that there is to be a raid by media and police.” By 2am, the police arrive and one of the organisers cuts the generator so that revelers can slip away in the dark “running and hiding like the criminals that they are under India’s law” (Overdorf, Jason 2002, ‘Closet Drama’, *Far Eastern Economic Review*, 3 October).

An article dated 14 January 2006 in *The Daily Times* reports that about two dozen gay activists in New Delhi held a rare and noisy protest demanding the release of four men arrested for homosexuality (‘Protests mount in India over arrest of gay men’ 2006, *Daily Times*, 14 January).

An article dated 16 August 2004 in *The Times of India* reports on what could be the first hate crime against gays in Delhi, the murder of Pushkin Chandra and friend (‘Gay crime rocks Capital’ 2004, *The Times of India*, 16 August). An article posted on the rediff.com website on 28 August 2004 reports that the Delhi police have claimed to have solved the murder of two homosexuals, Pushkin Chandra and his friend Kuldeep (‘Delhi police crack gay murder case’ 2004, rediff.com website, 28 August).

According to Bombay Dost, Sangama and Swabhava there are eight organisations working on issues relating to homosexuality in New Delhi: AIDS Bhedbhav Virodhi Andolan (ABVA), Humrahi, Lawyers Collective HIV/AIDS Unit, The Milan Project, Naz Foundation India Trust, People for Rights of Indian Sexuality Minorities (PRISM), Sidhartha Gautam Trust and Talk About Reproductive and Sexual Health Issues (TARSHI) (‘Support Groups’ (undated), Bombay Dost website; ‘Links’ (undated), Sangama website; and ‘Links’ (undated), Swabhava website). According to a report dated February 2001 by the People’s Union for Civil Liberties (PUCL) in Karnataka, Alternative Law Forum (ALF), Manasa and People’s Democratic Forum (PDF) there are organisations, help lines, publications/newsletters, health resources, social spaces and drop-in centres for homosexuals in Delhi however “the support structures provided are painfully inadequate” and “many of the newly emerging organizations die out silently while even the more established ones have been able to reach out in concrete terms only to a small section of the sexuality minority population due to lack of resources, personnel, government support and extreme societal/state discrimination” (‘Human rights violations against sexuality minorities in India: A PUCL-K fact-finding report about Bangalore’ 2001, People’s Union for Civil Liberties website, February, p.8).

FINDINGS AND REASONS

The Tribunal accepts that the applicant is a national of India. His passport was issued in City A in year 7.

Although the Tribunal considers that there has been some embellishment of the claim of what transpired in Place W in year 6, the Tribunal considered the applicant overall to be a credible witness.

Based on all the evidence available and in particular the evidence of the applicant at the hearing, the Tribunal accepts that the applicant is a homosexual man. It accepts that he was engaged in homosexual conduct in India from his early teens, and that he continues to identify as a homosexual man in Australia.

The Tribunal will consider the applicant's fear of persecution on the basis of his membership of a particular social group.

The meaning of the expression "for reasons of ...membership of a particular social group" was considered by the High Court in *Applicant S*, where the following summary was made of the principles for the determination of whether a group falls within a particular social group:

the group must be identifiable by a characteristic or attribute common to all members of the group. Secondly, the characteristic or attribute common to all members of the group cannot be the shared fear of persecution. Thirdly, the possession of that characteristic or attribute must distinguish the group from society at large. Borrowing the language of Dawson J in *Applicant A*, [*Applicant A & Anor v MIEA & Anor* [1997] HCA 4; (1997) 190 CLR 225] per Dawson J at 242, a group that fulfils the first two propositions, but not the third, is merely a "social group" and not a "particular social group". (*Applicant S v MIMA* [2004] HCA 25; (2004) 217 CLR 387 at [36] per Gleeson CJ, Gummow & Kirby JJ.)

The first question for the Tribunal to determine is whether there is a relevant social group of which the applicant is a member. If so, the next question for the Tribunal is whether the persecution that the applicant fears is for reasons of membership of the group.

The definition of "particular social group" is wide and flexible. In the 1992 Federal Court case *Morato v MILGRA*, Justice Lockhart stated:

interpretation of the expression "particular social group" calls for no narrow definition, since it is an expression designed to accommodate a wide variety of groups of various descriptions in many countries of the world which, human behaviour being as it is, will necessarily change from time to time. The expression is a flexible one intended to apply whenever persecution is found directed at a group or section of a society that is not necessarily persecuted for racial, religious, national or political reasons....

...my opinion for a person to be a member of a "particular social group" within the meaning of the Convention and Protocol what is required is that he or she belongs to or is identified with a recognizable or cognizable group within a society that shares some interest or experience in common. I do not think it wise, necessary or desirable to further define the expression. ((1992) [1992] FCA 637; 39 FCR 401 at 416.)

Although widely drawn, the concept of persecution is not to be used in defining “particular social group.” Justice McHugh stated in the *Applicant A* case:

...concept of persecution can have no place in defining the term “a particular social group”. ... Allowing persecutory conduct of itself to define a particular social group would, in substance, permit the “particular social group” ground to take on the character of a safety-net. It would impermissibly weaken, if it did not destroy, the cumulative requirements of “fear of persecution”, “for reasons of” and “membership of a particular social group” in the definition of “refugee.” (*Applicant A & Anor v MIEA & Anor [1997] HCA 4*; (1997) 190 CLR 225 at 242 per McHugh J.)

However, Justice McHugh considered that the actions of the persecutors may serve to identify or cause the creation of a particular social group in society:

...persecutory conduct cannot define the social group, the actions of the persecutors may serve to identify or even cause the creation of a particular social group in society. Left-handed men are not a particular social group. But, if they were persecuted because they were left-handed, they would no doubt quickly become recognisable in their society as a particular social group. Their persecution for being left-handed would create a public perception that they were a particular social group. But it would be the attribute of being left-handed and not the persecutory acts that would identify them as a particular social group. (*Applicant A & Anor v MIEA & Anor [1997] HCA 4*; (1997) 190 CLR 225 at 264 per McHugh J.)

The question of whether or not a particular social group shares a unifying characteristic that makes them “cognisable in society” must be considered separately from whether or not its members share persecution in common. The issue is whether there is something other than persecution which makes the group cognisable as a particular social group.

Further, it is not sufficient that a person be a member of a particular social group and also have a well-founded fear of persecution. The persecution must be feared for reason of the membership of the particular social group.

The Tribunal will now consider the applicant’s position in the present case. Whether the group to which an applicant claims to belong is a “particular social group” for the purposes of the Convention is a question of fact for the Tribunal to determine. The Tribunal considers that the applicant could be a member of particular social group which is: *homosexual men in India*. He could also be a member of another particular social group: *homosexual Sikh men in India*. However, the Tribunal notes that the applicant claimed that being a homosexual man was the reason for which he feared persecution, rather than his religion. The shared fear of persecution is not the attribute common to all the members of any of these groups. The common attribute is of the members of both groups is their shared sexual preference.

Considering the legal, social, cultural and religious norms referred to above in the independent information, these groups are distinguishable from society at large. The family is an important part of Indian culture. Individuals are expected to marry and have children. In this context there is little space for homosexual relationships. Only a minority of homosexuals in Indian express their sexuality openly, most are compelled

by their family to marry and raise children ('Human rights violations against sexuality minorities in India: A PUCL-K fact-finding report about Bangalore' 2001, People's Union for Civil Liberties website, February, pp.18-19; Overdorf, Jason 2002, 'Closet Drama', *Far Eastern Economic Review*, 3 October; Manjunath, Chinmayee 2003, 'Homosexuality in India, where tradition still rules', Great Reporter website, 8 June; Gezari, Vanessa 2003, 'India's gays see small improvement in cultural outlets', *Chicago Tribune*, 10 September, AIDS Education Global Information System (AEGIS) website; McPhate, Mike 2004, 'Gay in India', *The Gully*, 18 October Williams, Mark 2005, 'A movie and a legal battle challenge India's notion of gays', SF Gate website, 14 May –and DIMIA Country Information Services 2005, *Country Information Report No. 05/46 – India: Treatment of Sexual Minorities* (sourced from DFAT advice dated 29 July 2005), 22 August). A homosexual in the family is a source of "great shame" and embarrassment (Gezari, Vanessa 2003, *India's gays see small improvement in cultural outlets*, *Chicago Tribune*, 10 September, AIDS Education Global Information System (AEGIS) website; and CX131993, DIMIA Country Information Services 2005, *Country Information Report No. 05/46 – India: Treatment of Sexual Minorities* (sourced from DFAT advice dated 29 July 2005), 22 August). The Tribunal considers that both social groups identified (*homosexual men in India* and *homosexual Sikh men in India*) are recognizable within society.

As noted above the Tribunal accepts that the applicant has engaged in homosexual conduct since he was in his early teens and that he has continued from that time to identify and live as a homosexual man. The Tribunal accepts the evidence that his homosexual conduct as an adolescent came to the adverse attention of his parents, school and the local community. The events that followed the exposure of his relationship with the senior student led to the ending of that relationship, and alienation from his parents and fellow students. The severity of the "mental problems" he experience at this time resulted in him having a year off school subsequently and his eventual leaving school some time after that.

The Tribunal accepts that the applicant was "labelled" a homosexual within the local community.

The Tribunal accepts that the year 6 attack in Place V occurred as the applicant has claimed and that the "provocation" for the attack was his homosexuality. The Tribunal also accepts the applicant's claim about the unfavourable attitude of the police regarding their homosexuality and that money was paid to the police to avoid going to the police station.

Because of some inconsistencies in evidence given to the Tribunal over the course of all the hearings, the Tribunal considers that there has been some embellishment of the incident in Place W in year 6. Any embellishment is unfortunate because it creates the danger of casting a shadow on other claims. However, as noted above the Tribunal has accepted all the other claims made by the applicant.

The Tribunal accepts that as both the applicant and Person P lived in their respective family homes, they had limited opportunity for intimate contact, and they engaged in sexual contact in Place W and in the business office. The Tribunal accepts that this activity, particularly in Place W, would have made the applicant vulnerable to attack

from anti-homosexual groups. It also accepts that the applicant was threatened and feared harm from a gang in Place W on one occasion.

The next question for the Tribunal is whether what the applicant fears gives rise to a well-founded fear of persecution for a Convention reason. This involves an inquiry as to whether the applicant faces a real chance of serious harm for the essential and significant reason of belonging to any of the particular social groups which the Tribunal has identified (*homosexual men in India* or *homosexual Sikh men in India*). The Tribunal has accepted that the attack in Place V took place. It accepts that the applicant was at least threatened in Place W. The Tribunal considers that this is because of “systematic and discriminatory” conduct by anti homosexual groups and was combined with inaction by the Indian authorities.

The Tribunal accepts that the essential and significant reason for the attacks and the inaction by the authorities would be that he is a member of a particular social group of *homosexual men in India* or *homosexual Sikh men in India*. The Tribunal therefore accepts that any harm which might result if he were to return to India would be for the essential and significant reason of the applicant’s membership of a particular social group.

The Tribunal notes for the sake of completeness that it is satisfied for the purposes of subsection 91R(3) of the Act that his conduct as a homosexual man in Australia has been engaged in otherwise than for the purpose of strengthening his claim to be a refugee.

The applicant’s claims with regard to what happened to him in India as a result of his homosexuality are consistent with the independent evidence available to the Tribunal, which is referred to above.

The Tribunal accepts that if the applicant returns to India now or in the reasonably foreseeable future he will wish to continue living his life as a homosexual man. As referred to above, s 377 of the Indian Penal Code is still operative, and the harassment and repression of homosexual men continues to those who are not prepared to practise their sexuality in complete secrecy.

The Tribunal accepts that if the applicant were to return to India now or in the reasonably foreseeable future there is a real chance that he would be attacked by anti-homosexual groups and he would not be protected by the Indian authorities. The Tribunal considers that the persecution which the applicant fears clearly involves “serious harm” as required by s. 91R(1)(b) of the *Migration Act* in that it involves a threat to his life or liberty or significant physical harassment or ill-treatment. The Tribunal considers that the applicant’s membership of a particular social group (*homosexual men in India* or *homosexual Sikh men in India*) is the essential and significant reason for the persecution which he fears, as required by s. 91R(1)(a). The Tribunal further considers that the persecution which the applicant fears involves systematic and discriminatory conduct, as required by s. 91R(1)(c), in that it is deliberate or intentional and involves his selective harassment for a Convention reason, namely membership of a particular social group.

The Tribunal finds that the applicant is outside his country of nationality, India. For reasons given above, the Tribunal finds that he has a well-founded fear of being persecuted for reasons of his membership of a particular social group if he returns to India now or in the reasonably foreseeable future. The Tribunal finds that the applicant is unwilling or unable, owing to his fear of persecution, to avail himself of the protection of the Government of India.

As referred to above, the independent information indicates that homosexuals in some cities are gaining acceptance. Also, according to advice provided by DFAT on 31 July 2003, homosexuality is more tolerated in large cities, particularly City A, where it is possible for homosexual men to live in a publicly acknowledged homosexual relationship. However this alone does not satisfy the Tribunal that all homosexual men in City A are able to live in openly homosexual relationships without fear of harm. Also, the applicant's fear of harm comes in part from his experience of not receiving protection from the authorities. The Tribunal cannot be satisfied that the applicant could avoid the persecution that he fears by internally relocating in India.

There is nothing in the evidence before the Tribunal to suggest that the applicant has a legally enforceable right to enter and reside in any country other than his country of nationality, India. The Tribunal therefore finds that the applicant is not excluded from Australia's protection by subsection 36(3) of the Act.

CONCLUSIONS

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

DECISION

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