

060813394 [2006] RRTA 188 (21 November 2006)

DECISION RECORD

RRT CASE NUMBER: 060813394
DIMA REFERENCE(S): CLF2000/56241
COUNTRY OF REFERENCE: India
TRIBUNAL MEMBER: Shahyar Roushan
DATE DECISION SIGNED: 21 November 2006
PLACE OF DECISION: Sydney

DECISION: The Tribunal remits the matter for reconsideration with the direction that the applicant is 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 Multicultural Affairs 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 Department of Immigration and Multicultural 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. 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 applicant sought review of the delegate's decision. The matter is now before the Tribunal.

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, in this case 6 November 2000, although some statutory qualifications enacted since then may also be relevant.

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

Definition of 'refugee'

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

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

The High Court has considered this definition in a number of cases, notably *Chan Yee Kin v MIEA* (1989) 169 CLR 379, *Applicant A v MIEA* (1997) 190 CLR 225, *MIEA v Guo* (1997) 191 CLR 559, *Chen Shi Hai v MIMA* (2000) 201 CLR 293, *MIMA v Haji Ibrahim* (2000) 204 CLR 1, *MIMA v Khawar* (2002) 210 CLR 1, *MIMA v Respondents S152/2003* (2004) 222 CLR 1 and *Applicant S v MIMA* (2004) 217 CLR 387.

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

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 file relating to the applicant. The Tribunal also has had regard to the material referred to in the delegate's decision, and other material available to it from a range of sources.

The applicant appeared before the Tribunal to give evidence and present arguments. The applicant was represented in relation to the review by his registered migration agent.

First Hearing

[Specific details of the first hearing deleted in accordance with s431 of the Migration Act]

The Tribunal received a submission from the applicant's adviser regarding the facts of the case and the applicable law. The submission was accompanied by a large number of reports, press articles and other material from various sources regarding the situation of homosexuals in India. Also attached to the submission was a statutory declaration from a Person A. In his declaration Person A states that he was granted a protection visa by the Department on the basis of his fear of persecution in India. He states that he met the applicant after arriving in Australia through a mutual friend with whom he was living at the time. Person A and the applicant struck a friendship and he became aware that the applicant was also gay. He states that he leads a quiet life in Australia and is aware that the applicant has also led a similarly quiet life not wanting other Indian friends, except very close friends, to know about his situation. He states that life in India is intolerable as a homosexual and he believes that the applicant would face the same problems he had in the past.

Second Hearing

The applicant confirmed the accuracy of the information contained in his application for a protection visa and the statement he had submitted in support of that application.

The applicant was asked about his places of residence in India. He said he had lived most of his life at his family home in Location B. In the mid 1990s he went to Delhi in order to study at a college. Following his expulsion from the college, he returned to his home in Location B where he remained until his departure. He said that his parents and two sisters continue to live at the same house.

The applicant was asked about his education. He said he completed 12 years of education in his home town before going to Delhi to further his education at a college. He was expelled from that college and was unable to get admission elsewhere. He was asked about the languages he speaks. He said speaks, reads and writes Hindi; speaks Punjabi and rated his language competency in English as "70%".

The applicant was asked about his work history. He said he had worked briefly in one job, but had been unable to secure any other jobs in India. In Australia, he has worked in a variety of different jobs.

The applicant was asked about his sexual orientation. He said he is homosexual because he likes boys and not girls. He said he has not been in a long term relationship in Australia, but has had a number of casual relationships. He meets men by frequenting gay establishments. He was able to name a few and describe one. He said he also meets men online, but has not been to any gay websites that require joining fees.

He was asked about his relationship with Person C. He said the relationship had begun when they were both about 18. During school breaks they spend a lot of time together. Person C did not like girls either. When spending time together they watched adult films at the applicant's house. They began experimenting sexually and eventually had sex. He said he had never had sex with a girl or anyone else. What he felt for Person C was more than sexual attraction. The kind of relationship he had with Person C was not common and he did not think that there are "gay" men out there that he could have relationships with.

He was asked how his relationship with Person C was discovered. He said the relationship was exposed when Person C's mother found them having sex at the applicant's place. He explained that his family were away that day and Person C had spent the whole day with him. Person C's mother came looking for him. She had knocked on the door, but the applicant and Person C were in his bedroom. She was shocked and upset after entering the house and finding them in the applicant's bedroom. She grabbed Person C and took him with her. After taking him away, she made the mistake of hitting him which led to the neighbours coming out and asking what had happened. Person C's mother was very angry and she told the neighbours what she had seen. Once the matter was disclosed to others, the applicant was cursed and stones were thrown at their house. People gave him and his family a hard time by saying bad things about his father and his sister was teased at school. A week later he was detained by the police for several days. He was released without charge only after his father, having consulted with a few people, guaranteed that the episode would not be repeated and that applicant will terminate his relationship with Person C.

The applicant was asked how his own family had reacted after the incident. He said his father was very angry, but said that human beings make mistakes.

After the incident the applicant went to Delhi to attend college, but discovered that Person C was attending the same college. He was asked why Person C's father had sent him to the same college. He said Person C's father did not know that the applicant was at the same college. He said they resumed their relationship at the college, meeting at the hostel room where the applicant was staying. The relationship was discovered by a fellow student who informed others. The college administration came to know about the incident and informed Person C's parents. The applicant was consequently expelled from the college. Person C's parents were very angry and falsely accused him of having stolen items at the hostel. He was arrested and detained for several days. During this period he was severely beaten by the police. No charges were laid against and he was released after his relative bailed him out. When he tried to enrol himself in a different college, he was told that he had a bad record and could not enrol. The Tribunal put to him that this could have been because he had bad marks. He said his marks had been good.

He was asked about the stabbing incident he had referred to at the first hearing. He said after returning to his hometown in a particular year, he was on a shopping trip to the grocery store when he was approached by three boys who asked him if his name was a specific name (the applicant's nickname) and if he lived at the house they were pointing at. When he replied yes, he was stabbed. He was asked if he knew his assailants. He said no. He was asked why he was stabbed. He said there was no other reason than his sexuality. He did not appear to have money on him and the boys did not ask for money.

The Tribunal noted that he had returned home and lived there for several years and asked him, given his previous experiences, why he had returned to his home town. He said he had no other choice. He had no money, was unable to find a job and could not survive in Delhi.

So he decided to return to his hometown and help his father on the land. He said after returning home, his father's crops were burned and irrigation water was either blocked or the land was deliberately flooded. He was asked if he had suffered any harm personally. He said he was not harmed, but Person C's father said that he should not live in the area.

The applicant was asked if he was involved in any other relationships in India. He said no. He was asked if he has told his friends in Australia about his sexual orientation. He said no, because he does not trust them.

The Tribunal put to him that he appears to be a shy and private person by choice and asked him why he would be unable to relocate to one of India's bigger cities where he is unlikely to be noticed. He said how people change could not be known. If he were to find someone in Australia with whom he could form a relationship, then he would lead a normal life without fear. In India that kind of life is not possible for him. He would never feel free to express his sexuality in India.

The Tribunal asked him what he believed would happen to him if he were to return to India. He said people remember what happened before and he could get killed. He does not want to destroy his parent's peace of life.

It was put to him that he did not appear to have suffered much harm when he returned to his hometown. He said people there can do anything and they can make it very difficult for him.

Evidence from other Sources

Homosexuality per se is not illegal in India. Article 377 of the *Indian Penal Code* criminalises unnatural offences which includes sodomy. The most recent arrests under Article 377 occurred in January 2006 in Lucknow, Meerut and Hyderabad. While Article 377 cases rarely make it to court, it is used by police, with impunity, to harass homosexuals. The Naz Foundation has challenged the validity of Article 377 in the Delhi High Court. The present Tribunal is not aware of any outcome of this case at this time.

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> – accessed 17 May 2006)

According to the US Department of State, Article 377 punishes acts of sodomy, buggery and bestiality and “is commonly used to target, harass and punish lesbian, gay, bisexual and transgender persons” (US Department of State 2006, *Country Reports on Human Rights Practices 2005 – India*, 8 March, Section 5 Other Societal Abuses and Discrimination).

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 that Article 377 is a cognisable offence:

[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).

The most recent arrests under Article 377 occurred in January 2006 in Lucknow, Meerut and Hyderabad. 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 cases rarely make it to court, however, Article 377 “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; Manjunath, Chinmayee 2003, ‘Homosexuality in India, where tradition still rules’, Great Reporter website, 8 June; 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; and UK Home Office 2006, *Country of Origin Information Report India*, April, Section 6.513).

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).

In December 2001, the Delhi High Court admitted a petition by the Naz Foundation which challenges the Constitutional validity of Article 377 of the *Indian Penal Code* on the grounds that it “criminalises homosexual acts” even between two consenting adults. According to the Naz Foundation, Article 377 violates Articles 14, 15, 19 and 21 of the Constitution. The petition states 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...Section 377 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.” The Court issued notices to the respondents, including the Union government, the Delhi government, the Commissioner of Police and NACO, and seeks replies by 28 January 2002 (‘ 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 argues 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). In November 2004, the Delhi High Court dismissed a review petition filed by the Naz Foundation (‘Homosexuality is punishable: HC’ 2004, *The Times of India* , 3 November). The Naz Foundation appealed to the Supreme Court, who in February 2006, sent back the Special Leave Petition to the Delhi High Court saying that Section 377 is “a matter related to public interest” (Bhatt, Sheela 2006, ‘ Gay rights is matter of public interest: SC’, rediff.com website, 3 February). In April 2006, the Delhi High Court issued notice to NACO and the Delhi government, seeking replies by 19 July 2006 (‘ Court issues notice to NACO, Delhi government on gay issue’ 2006, *Indo Asian News Service* , 3 April, *Daily India* website).

In 2003 the Naz Foundation reported that “even the most well off in society is vulnerable to state sponsored and supported oppression of gay men in India.” The legal representative of the Naz Foundation is reasonably well off, educated and established as a lawyer but still faces police harassment. He also reports that he is the lawyer for a couple who had been living in an openly gay relationship for three years when they were arrested and tortured by state agents. He notes that one of the couple is from a very wealthy business family while the other is a professional drawing a salary drawn by the top 5% of professionals in India (Naz Foundation 2003, *Response to Questions on Treatment of Homosexual People in India*, January, Paras 25 & 26; and Chinmayee 2003, ‘Homosexuality in India, where tradition still rules’, Great Reporter website, 8 June).

Societal Attitude

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). According to the US Department of State, gays in India “faced discrimination in all areas of society, including family, work, and education. Activists reported that in most cases, homosexuals who do not hide their orientation were fired from their jobs.” According to human rights groups in India, “ gay and

lesbian rights were not considered legitimate human rights” (US Department of State 2006, *Country Reports on Human Rights Practices 2005 – India* , 8 March, Section 5 Other Societal Abuses and Discrimination).

According to the People’s Union for Civil Liberties, “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).

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).

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 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).

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).

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).

According to the Naz Foundation, “the majority of Indian families would not accept homosexuality and instead pressured the individuals involved to...see a doctor for treatment” (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 second year medical student Ravichandran, “many if not most Indian medical educators, including practising doctors, are homophobic and believe that homosexuality is a mental deviation that needs treatment.” While teaching medical students on the effects of HIV/AIDS on the health of Indians, his professor declared, “In Western countries, it primarily spreads among homosexuals. Of course, in our country, we don’t have homosexuals.” When Ravichandran protested that homosexuality was prevalent in India, the professor “was indifferent and my colleagues were annoyed.” Ravichandran approached his professor after class and asked him what he thought about homosexuals. The professor said there is no such thing, that it was a US invention. Ravichandran spoke with a couple of other professors and with the exception of one psychiatrist, “the response was similar”:

Generations of doctors in India grow up believing that any alternative to strict heterosexual vaginal intercourse is abnormal. Although attitudes do seem to be changing (a psychiatrist told one close friend that homosexuality was normal), it is disturbing that medical education does little to alleviate such social stigma.

...During the conference [December 2004] I brought up the issue of Section 377 and the role of AIDS in the oppression of homosexuals in India. Although the panel enthusiastically discussed it, one medical student stood up and said, “You are discussing homosexuality as normal behaviour. For their disgusting lifestyle, they deserve punishment, and that’s one reason I feel why no cure must be found for AIDS.” This was greeted with low grade applause, much to the shock of the expert panel. What is worse, my own colleagues now view me

with remarkably less respect, and a few people have severed ties with me (Ravichandran, Balaji 2005, 'India: no homosexuals here', *British Medical Journal*, Vol 331, No 7507, 2 July, p.57).

According to the US Department of State, homosexuals in India were detained in clinics against their will and subjected to treatment including shock therapy aimed at curing them. The Naz Foundation filed a petition with the National Human Rights Commission (NHRC) on behalf of a man who was subjected to shock therapy. The case was declined as gay and lesbian rights were not under the purview of the NHRC (US Department of State 2006, *Country Reports on Human Rights Practices 2005 – India*, 8 March, Section 5 Other Societal Abuses and Discrimination).

According to Vinay Chandran, Executive Director of Indian NGO Swabhava Trust, "a self-identified homosexual in India gets used to being judged and condemned through three morality-tinted glasses: religion, law and medicine." Vinay asks why medicine in India is so obsessed with "curing" homosexuality. Vinay reports that health professionals in many places still offer behavioural therapy including electric shock treatment as well as psychiatric drugs and hormones in order to "cure" patients of homosexual desire. Vinay reports that a couple of psychiatrists in Bangalore mentioned that there were possibilities of discovering which gene determines sexual preference and scientifically suppressing it:

When homosexuals visit mental health professionals bearing the burden of a society that refuses to acknowledge their desires, their distress is not settled with reassurance and empathy. Instead, there is a reaffirmation of social morals from the counsellors. One response by a Bangalore-based psychiatrist represents the attitude that most counsellors display in such a setting. When asked why a cure for homosexuality was being offered, he responded that it was not his job to tell his patient that it was okay to be gay, and that a homosexual who came to him with distress over his identity obviously needed his help (Chandran, Vinay 2006, 'Ain't no cure for love', *India Together*, 6 April).

Hindu Fundamentalists

Homosexuality continues to be seen in India as a threat to religious beliefs in India (Manjunath, Chinmayee 2003, 'Homosexuality in India, where tradition still rules', Great Reporter website, 8 June).

Hindu fundamentalists vehemently oppose homosexuality believing it is against Indian culture. According to Navin Sinha, an official with the Hindu rightwing Bharatiya Janata Party, "[The gay movement] is an abysmal, absurd thing...For one thousand years in our culture, those two things you mentioned – I don't even want to say the words [homosexuality and lesbianism] – they have not been there." According to Vishnu Hari Dalmiya, President of the Hindu nationalist Vishwa Hindu Parishad party, "Making homosexuality legal will be an attack on Indian society...For Hindus, this kind of behaviour is not just against nature, it is against our culture" (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 17; McPhate, Mike 2004, 'Gay in India', *The Gully*, 18 October; and Williams, Mark 2005, 'A movie and a legal battle challenge India's notion of gays', SF Gate website, 14 May).

New Delhi

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.

The applicant’s claims are based on the Convention ground of being a member of a particular social group. His case is essentially that he is a practising homosexual and fears persecution by the authorities and the general population if he were to return to India.

At the hearing before the Tribunal the applicant gave his evidence in a straightforward and unembellished manner. Whilst there were some minor discrepancies between his written and oral claims, overall the Tribunal found him to be a reliable witness and is not prepared to attach significance to these discrepancies.

Based on the applicant's evidence at the hearing, the Tribunal accepts that he is a practising homosexual. In *Applicant S* Gleeson CJ, Gummow and Kirby JJ gave the following summary of principles for the determination of whether a group falls within the definition of particular social group at [36]:

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

The country information before the Tribunal indicates that the homosexuals in India possess characteristics and attributes that make them distinguishable from the rest of the society and based on the prevailing social and cultural norms in India they constitute a particular social group within the Convention meaning. The Tribunal accepts, therefore, that homosexuals form a particular social group in India for the purposes of the Convention.

The Tribunal accepts that after his relationship with Person C was discovered, the applicant was subjected to harassment and verbal abuse by the people in his area. The Tribunal appreciates that regular and petty acts of discrimination, such as name-calling and abusive language, are unpleasant and undesirable. However, whilst persecution involves discrimination that results in harm to an individual, not all discrimination will amount to persecution (see *Haji Ibrahim* (2000) 204 CLR 1 at 18-19, per McHugh J). Without wishing to understate the unpleasant nature of the applicant's experiences, the Tribunal is not satisfied that the treatment he was subjected to reaches the standard of persecution within the meaning of the Convention as outlined earlier in this decision.

The Tribunal is also not satisfied that the burning of his father's crop or manipulating water resources to his disadvantage amounted to serious harm. The applicant did not claim and there was no evidence before the Tribunal to suggest that the ensuing damage to his father's crops caused the family significant economic hardship that threatened their capacity to subsist. Similarly, whilst the Tribunal accepts that the applicant was expelled from his college in New Delhi and found it difficult to gain admission to another college for the reasons he has outlined, the Tribunal is not satisfied that his lack of access to higher education amounted to persecution within the meaning of the Convention.

The Tribunal has also considered the applicants' claim that he was stabbed by three boys in his hometown because of his sexual orientation. The Tribunal, however, cannot be satisfied that the stabbing was essentially and significantly for the reason of his membership of a particular social group or any other Convention reason. Whilst the applicant stated that his assailants' motive could not have been robbery, he did not know his attackers and his evidence did not point to anything else that indicated that the attack was essentially and significantly for the reason he has provided.

That said, the Tribunal accepts that he was arrested on two separate occasions at the instigation of Person C's parents and, at least on one of these occasions, seriously mistreated. The Tribunal is satisfied that this treatment was serious enough to amount to persecution within the meaning of the Convention. The Tribunal is of the view that this treatment was inflicted on the applicant essentially and significantly for the reason of his sexual orientation.

According to the independent sources consulted by the Tribunal, it is clear that homosexuality is viewed very negatively in Indian society. The evidence indicates that homosexuals in India, regardless of their social class, face discrimination in all areas of society, including family, work, and education. The acute social stigma attached to sexual minorities makes them frequent targets of harassment, violence, extortion, and physical and sexual abuse, including rape, from relations, acquaintances, professional hoodlums, petty criminals and hustlers. Homosexuals are subjected to “widespread” and “endemic” harassment by the police and other law enforcement agencies and fear of facing prosecution makes homosexuals fearful of registering complaints of police harassment with the police.

The evidence before the Tribunal suggests that it is possible to practise homosexuality by being discreet. However, the Tribunal cannot require a protection visa applicant to take steps to avoid persecution (*Appellant S395/2002 v MIMA* (2003) 216 CLR 473). The applicant had acted discreetly in the past because of threat of harm. As noted by the High Court, in these cases it is the threat of serious harm with its menacing implications that constitutes the persecutory conduct (*Appellant S395/2002 v Minister for Immigration and Multicultural Affairs*, per McHugh and Kirby JJ at [43]).

Apart from his relationship with Person C, the applicant lived a quiet life in India and did not practise his sexuality in any other way. At the hearing, he struck the Tribunal as a shy, reserved and quiet person. He indicated that he has not been in any long term relationships in Australia and had not disclosed his sexual identity to many of his friends, including Australian friends. Nevertheless, living in Australia has given him the opportunity to give some expression to his sexuality by going to gay clubs and being involved in a number of casual relationships. The Tribunal is satisfied that, having become accustomed to the freedom he has experienced in Australia, he would seek to continue to express his sexuality in the manner he has over the last few years. The Tribunal is satisfied that if the applicant were to do so in India, there is a real chance that he would face serious physical and psychological harm by the police and or the general population. The Tribunal is satisfied that such treatment would amount to persecution within section 91R(1)(b) of the Act. The Tribunal is satisfied that the essential and significant reason for the persecution feared is his membership of a particular social group, namely homosexuals in India.

Having regard to the independent information cited above, the Tribunal is of the view that the Indian authorities would not protect the applicant if they were approached by him. Indeed, the Tribunal is of the view that the state itself provides avenues for persecution of homosexuals through the operation of Article 377 of the *Indian Penal Code*. Based on the evidence before it, the Tribunal is satisfied that the applicant does not have adequate and effective state protection available to him such that his fear of persecution is well-founded.

The Tribunal has considered whether the applicant could avoid the persecution he fears by internally relocating within India. The country information cited above suggests that homosexuality is more tolerated in large cities than it is in other areas of India. Whilst in those cities it is possible for gay men to live in a publicly acknowledged homosexual relationship, it is not easy to do so. According to DFAT the likelihood of a person being open about their homosexuality is much greater among the more affluent and educated sections of society. However, the majority of gay people prefer to keep their sexuality a private matter for fear of harassment (see 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). The applicant is neither affluent nor educated. Although his natural shyness and general reservedness could shroud him under a low profile,

the Tribunal is unable to confidently rule out the possibility that he could avoid facing harm if he were to relocate to a larger city in India. The Tribunal is not satisfied that the applicant could avoid the persecution he fears by internally relocating within India. The Tribunal, therefore, is satisfied that the applicant has a well-founded fear of persecution for a Convention reason. He is a refugee.

CONCLUSIONS

The Tribunal is satisfied that the applicant is a person to whom Australia has protection obligations under the Refugees Convention as amended by the Refugees Protocol. Therefore the applicant 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 is a person to whom Australia has protection obligations under the Refugees Convention.

<p>I certify that this decision contains no information which might identify the applicant or any relative or dependant of the applicant or that is the subject of a direction pursuant to section 440 of the <i>Migration Act 1958</i>. PRRRNM</p>
--