

**071204626 [2007] RRTA 146 (13 August 2007)**

**DECISION RECORD**

**RRT CASE NUMBER:** 071204626

**DIMA REFERENCE(S):** CLF2006/140220

**COUNTRY OF REFERENCE:** India

**TRIBUNAL MEMBER:** Angela Cranston

**DATE DECISION SIGNED:** 13 August 2007

**PLACE OF DECISION:** Sydney

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

## **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 applicants a Protection (Class XA) visa under s.65 of the *Migration Act 1958* (the Act).

The applicants, who claim to be citizens of India, arrived in Australia and applied to the Department of Immigration and Citizenship for a Protection (Class XA) visa. The delegate refused to grant the visas and notified the applicants of the decision and their review rights by letter.

The delegate refused the visa applications as the applicants were not persons to whom Australia has protection obligations under the Refugees Convention.

The applicants applied to the Tribunal for review of the delegate's decision.

The Tribunal finds the delegate's decision is an RRT-reviewable decision under s.411(1)(c) of the Act. The Tribunal finds that the applicant has made a valid application for review under s.412 of the Act.

### **RELEVANT LAW**

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) 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) 205 ALR 487 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 applicants. In his application, the applicant stated the following:

I am a homosexual man. I used to be bullied, tormented in the society, abused by the police and my family was disgusted as a result of my sexual identity. My family always insisted me to change my sexual orientation, although I could never do it naturally. At times, I thought of committing suicide as a result of my sexual identity which is so much conflicting with the Indian society.

I was forced to get married to my wife against my desperate protest. The marriage was arranged by the local neighbours, the police and my family members. No one cared about my life and the life of the girl involved. Everyone was concerned about society's traditional norm and family's prestige.

Since my marriage, I was forced into a lifestyle which caused me serious psychological harm, identity crisis and self hatred. I could not leave my wife, nor could I live a life of my own choice. I was forced to drag into a system where the real me was not present.

Within the traditionally conservative Indian society, I did not have any opportunity to express myself as a homosexual and at the same time, as a human being who could be respected by the society and loved by everyone. Rather, as a homosexual, my position, like any homosexual in India, was humiliatingly inhumane. I had to live with a wife who was never happy with a husband that likes to sleep with men, and without committing any crime or even any mistake by herself, became a victim of a cruel injustice imposed by the society against which no one has any protection, neither socially nor from the State.

I, on the other hand, lived a double standards life where I could not stop having sex with men while being married, used to be abused and once back to home, had to see a wife, crying in pain for a husband whom she could not satisfy. We could not also be separated or divorced. How could we do that. I did not know where my wife would go if I divorce her. In the mean time, we already got a child in the family. After child's birth, our life now is more difficult. While we still face the persecution in our everyday life, we now have an additional trauma of questions. Who is the father of this child? The future of that child sometimes scares me.

I do not what mistake I done by being a homosexual by nature. But I had to take a move for life. I decided to leave a country in which the society does not accept me as human, persecuted me and the state does not offer any kind of protection.

The applicant wife claimed a homosexual man was forced to marry her and since then, she had been the subject of bullying, sexual assaults and harassment.

The Department interviewed the applicant and applicant wife and a copy of that interview tape is on the Departmental file.

The Department rejected the applicant's and applicant wife's case.

The applicant was sent by the Tribunal an invitation to attend a hearing and the interpreter was told to leave after 35 minutes. The applicant arrived after that time.

The Tribunal sent a further invitation to attend a hearing and asked for an explanation as to why they had arrived late at the previous hearing.

The applicant appeared before the Tribunal. The applicant's adviser was present but left before evidence was given.

The applicant stated the adviser helped him with his protection visa application. He stated he gave the adviser the details and he filled out the forms, it was read back to him, the applicant spoke Gujarati, the adviser knew a little bit of Gujarati and whatever he did not understand was explained in English. The applicant also stated he read his statement in English only and understood it. When asked how good his English was, he stated through reading he understood 80%.

The applicant stated he lived in Sydney suburb with an Indian friend Mr A and his wife. He stated he knew them because in India they lived nearby, and they knew his relative. He stated he paid rent each fortnight and for groceries. He stated to cover the costs; he worked as a male sex worker and had an advertisement in the local paper. He stated he also worked as a cleaner.

The applicant stated in India, he lived at Address A for couple of years. Before that he lived at Address B. When he was asked where he was between moving from Address B and coming to Australia he stated at Address A. When he was asked did he live there for longer period, he stated it was his mistake, he was there for a few years, and before that, he was at Address C. He stated he made a mistake because he stated he calculated a few years before he came to Australia, and it was a slip of the tongue.

The applicant stated he was staying at Address C and before that from birth he stayed at Address D. He stated at Address A he stayed with his relatives. He stated at Address B they all were together, even his sister. He stated at Address D he stayed with his parents, himself and his sister and his brothers. When asked did anyone else stay there, he stated another relative did. He was then asked who was living there when he moved. He stated his whole family. When he was asked was the applicant wife there also, he stated when he was married and at that time she came over there.

When it was put to him the applicant wife did not include that address in her application and he did not mention her name until the Tribunal had mentioned her, he stated everyone can forget things.

When asked why she had not mentioned the address in her application, the applicant stated she came to the house after they got married, but because of his personal problems, she never stayed with him at Address D until a few years later. She came to the house for a few days then she went back and after a few months she would come back. He stated she spent more time with her parents than with him.

The applicant stated her parents lived at Address E which was some distance away.

The applicant stated he had not seen his tourist visa application and neither had the applicant wife.

The applicant stated he could not go back to India because of his problems, because of his activities. He stated his parents knew since childhood. He then stated when he was young he was doing things with the neighbour's son, at first they did not take it seriously, then when it

was repeated, they went to his parents and talked about it. He stated when it stopped there, he started with school friends.

When it was put to him he had told the Department at interview his neighbours had reported him to his parents when he was teenager, he stated it was a problem since childhood. He stated he had not studied the Departmental tape.

The applicant stated when he was teenager he was taken to a college where he did things with some of the boys and he was paid money. He stated he was doing this because of his nature; he did not know he could get paid. He stated after that his friends knew and started giving information to people. When he was asked did he get clients from anywhere else, he stated whoever knew about his nature arranged it for him. When asked who knew, he stated his neighbours, his school friends, and his family. When asked how he contacted people, he stated people who used him gave his address to others. He stated he did not give his phone number. When he went out of the house, if someone was looking for him, people would give him the information. He compared the situation with a migration agent, saying he was pointed out by people.

When asked who were these, where did they live, he stated they were in the surrounding area. The applicant stated they lived there, sometimes they would arrange for a hotel or other house. When asked did he have other clients, he stated he sometimes went to work in other cities. Once he went to the City A for 1 month, he stayed in a guest house and once in the City B. He stated he was in his mid 30s, he did not know how many clients he had, he had never made a list.

It was put to him at the Department interview he had stated he got clients from a particular place, but had not mentioned that place at hearing, he stated in that tape he said he had gone to a hotel once and the police were involved. They had called his father and advised him that the applicant should not do this. When asked how many times he went to that hotel, he stated a few times. He stated the address was Address F.

The applicant stated in the hotel there were many rooms, few boys had called him, they had sex. He stated it happened few times and another boy contacted the police.

When asked did anything else happen to him, he stated the police arrested him, called his father, and advised him to stop or to get him married.

When again asked were there any incidents with the police, he stated lots of things had happened.

When he was asked how old he was when the hotel incident occurred, he stated when he was in his 20s. The applicant stated the police had not previously arrested him but he had been previously warned.

The applicant stated there were no more problems with police after the hotel incident because he got married.

When it was put to him he would have been married a few years later, he stated there was a couple of months engagement period.

The applicant stated his family knew the applicant wife's family because a relative had lived nearby.

The applicant stated his parents approached her parents. When asked why it took some time to get married, he stated when his father approached the applicant wife's parents, they said their daughter was too young and they needed money for the dowry.

When he was asked why it was they had not heard anything about his situation, he stated he only stayed in that town once a year and only his close relatives knew.

When asked when the applicant wife first knew, he stated over a month after their marriage and she told him she knew at that time.

The applicant stated his child was born in hospital. He stated before his child was born, the applicant wife was in hospital for a period of time after birth, she went to a relative's place for few months.

When it was put to him at the Departmental interview he stated she had the baby at her relative's house and after one year she came back, he stated she was coming and going from his house.

The applicant wife stated she lived at a Sydney suburb and in India, she had last lived at Address A for a few years. Before that she lived at the Address C for more then a year. Before that she lived for a few years at Address D. Before that she lived at Address G. She stated when her child was born she lived at Address H with her relatives and the applicant. She lived there for over a year. She stated her child was born at her relative's house and she lived with them for a couple of months after birth. When it was put to her that address was not in her protection visa application and the applicant had not disclosed that address at hearing, she stated she did not know, she did not know what to say. She stated she knew the applicant worked as a sex-worker within a week of marriage and told him a few days after she knew. When it was put to her he stated over a month, she stated she was so confused she did not know what to say.

When asked had she slept under the same roof as the applicant since they got married, she stated she stayed with him at all the places but she would go to her parents when she felt painful. She stated her problems started a few months after marriage. She stated she was harassed, when she went out, gents said when your husband is not coming to you, come to us. When it was put to her she told the Department she was harassed after she got pregnant and after her child was born, she stated the harassment got worse.

The applicant was given an invitation by hand to attend a hearing and a copy of the invitation was sent to the adviser.

The adviser wrote to the Tribunal stating he wished to attend the further hearing and requested that the date be changed.

A further hearing was held. The adviser did not attend.

When it was put to the visa applicant that at the previous hearing, the applicant wife had stated she was living somewhere else at the time of their child's birth, the visa applicant stated he was surprised the applicant wife said she was living somewhere else. He stated the address was new and they had never been to the address.

The applicant stated after they were married, he had no major problems in India, but the problems that were there were increased. When asked what he meant, he stated before the marriage, it was torture from his parents, after marriage it was torture from the applicant wife. He stated there were no specific problems outside the family once he got married, but he was worried his parents in law would come to know.

The applicant stated he only liked men. He stated he had not had a sexual relationship with the applicant wife. He then stated it had been a long time since they had had sexual relations. He stated before their child's birth, she had forced him to have sex a few times, they had not had sex after their child's birth. When it was put to him if he did not want to have sex with the applicant wife how was it plausible she had made him have sex, he stated she forced him a lot, she cried and said he had spoiled her life. He stated one day he could not bear to see her crying, she forced him a few times. He stated he couldn't stop himself. When asked what he

meant, he stated she forced him, he told her he did not like it, she said they were married and he had spoiled her life. He stated whatever happened, he did not know how he did it. He stated he currently saw the applicant wife as a friend and as a person whose life he had spoiled. He stated he was trying to help her and he was staying with her at this time. When asked why he stayed with her, he stated he did not like her, he had told her she had her own life, and he had tried to go somewhere else alone but it had not succeeded. He stated when he came to Australia he did not want her to come, but she wanted to come and he came to know he could get the visa for both of them so he brought her. She told him that the day he left, she would do something to herself and because of that fear, he brought her with him.

When it was put to him they had been married for some time, his family knew about his situation and he was in mid 30s, then why had he not made a decision to separate from her, he stated there was a difference between Indian culture and outside culture. In Indian culture they could not hurt anyone's feelings. He stated his family forced him to marry the applicant wife and not to hurt their feelings he stayed with her.

When it was put to the visa applicant he had been married, they had a child, they had come to Sydney together, they lived in Sydney together which may lead the Tribunal to conclude he was not homosexual, he stated a third person would never think he was homosexual, however during the number of years of marriage, he had not stayed with her for one year. He stated whenever she came, he left the house early and came back late at night. He stated it was a compromise, he wanted to keep his parent's reputation and feelings. He stated because of his parents he married her and he wanted her to be happy. He stated her medical problems were because of him. He stated he did not want to spoil her life because she had not spoiled his. He stated they had been in Australia for a couple of months and she did not ask him where he had been, what he had done. He stated she stayed with him so that their child could be given a good education and a good life.

The applicant stated he contacted men in Australia via an advertisement in the newspaper. He got many phone calls and had many clients. He stated he had proof of their phone numbers and records, but because of the Privacy Act he did not want to offend their privacy. He stated his adviser had told him about the Privacy Act.

The applicant stated he had advertised in the paper a few times. He stated he had advertised because he had read such advertisements in the Newspaper. He stated he advertised in the local newspaper and people who called him gave his number to others. He did not contact men any other way. When asked if he had been with men other than for paid work, he stated no, wherever he went, he got paid, although some of his clients only wanted massage.

The applicant stated the last time he was with a man and got paid was when he went to a person at a Sydney suburb. He had since stopped because of a medical problem. He stated before that was every second or third day.

When asked when the first time he advertised was, he stated he did not remember the date, he thought it was more than a month after he arrived. When it was put to him the Tribunal only had an advertisement dated a couple of months later, he stated he should have an earlier receipt. It was again put to him the Tribunal wanted to see the earlier advertisement.

The applicant stated he read men's magazines, he had one with him. He stated he did not know the titles of the men's magazines, but some of the male sex workers named Mr X, Mr Y and Mr W had their own booklets and sometimes he saw those. When again asked if he could recall any of the titles of the magazines, he said he had not purchased a magazine, he went to somebody's house and it was their magazines he had read.



The applicant stated a homosexual man gets erect towards another man, not a woman and the activities one liked to do with a woman, he liked to do with a man. He stated homosexuals were people who were not attracted to women. When asked what it meant to him, he stated he was willing to do what people asked him not to do and that was important for him.

The applicant stated the photos on the Tribunal file were taken in a Sydney suburb with a person named Mr Z. He stated they were in Mr Z's house. The applicant then stated when he was interviewed by Immigration he did not have proof he was a sex worker and his lawyer told him he needed evidence. He needed to take some photographs. The applicant stated he had told Mr Z he needed evidence.

The applicant stated Mr Z lived alone. He stated there was a person in a Sydney suburb named Mr Q, he had answered his advertisement, and he took him to see Mr Z. He stated that Mr Q told him this man has many clients, he will give you money and clients also.

The applicant stated Mr Z gave him money. He stated Mr Z paid him for sex, he did not pay for sex with the applicant; he paid him for sex with another person. When asked did he have sex with Mr Z for free, he stated he had sex with Mr Z's client, he did not clarify how much he was charging, after the client went, Mr Z had sex with him too and Mr Z paid him money.

The applicant stated when he went to Mr Z's house there were a few people, one was the client, there was another one and Mr Z was there. When asked if his adviser had told him anything about Mr Z, he said no. When asked was the only part the adviser played to receive the photos, he stated his lawyer had said he needed evidence, he had said he is not going to give such evidence, but the adviser had said without evidence the court would not believe him.

When it was put to him there were a number of other cases before the Tribunal where other photos included what appeared to be the same bed, the same television, which lead the Tribunal to believe it was the same room and the same cap and tan lines which lead the Tribunal to believe it was the same partner, and the other cases had the same adviser, the applicant stated the conclusion was 100% true. The applicant stated Mr Z was a professional person who paid to perform sex. He stated Mr Z allowed the photos because he was a professional. When it was put to the applicant the Tribunal may find he had the same partner and it was the same room and the same adviser as in a few other cases before the Tribunal, even though the applicant had stated the adviser had nothing to do with his meeting Mr Z, the applicant stated maybe the lawyer put the wrong case or maybe the applicant was lying. He then stated Mr Z was a professional, many people must go to him. He did not know how he was involved in the other cases. He also stated he had the mobile numbers of other clients.

When it was put to him if Mr Z was a professional why he would have sex with the applicant, who was also a sex worker, he stated Mr Z had already paid him, he was a sex worker. When asked why a sex worker would pay, he stated Mr Z had not paid him for him, he had paid for the other person. When asked why a sex worker would have sex with him for no payment, he stated he did not know how to explain, as a sex worker he needed to get comfortable with the surroundings. As a sex worker, what ever were the requirements he had to do that, he could not object, he had already been paid. When it was put to him was it the case he did not know why Mr Z had sex with him, he did not answer. When asked did he pay Mr Z, he stated no. He stated you would not know when a person needed sex or liked to have it. The applicant stated when Mr Z wanted to have sex with him, he couldn't stop because Mr Z gave him clients.

The applicant then stated the purpose in coming from a high society family was because of the social problems. He stated he had come here because of his child's life because he and the

applicant wife's life was already ruined and they had health problems. When it was put to him the Tribunal had to think about whether he would suffer serious harm if he went back to India, he stated anyone of them would commit suicide, or his child would not become a doctor or an engineer but he would become a killer. He then stated the applicant wife may commit suicide. He stated if the police harassed him, or if her parents came to know, he feared this. He stated when his child grew, he would not be able to raise his head and he would not be a good person and people would continue to point at his child's mother and father.

When it was put to the applicant what he told the Department concerning when his parents found out about his sexuality appeared to be different to what he told the Tribunal, and that the applicant wife had stated she and he had lived at a different address when their child was born, he stated it was not different, he had talked about before and after the delivery, before delivery she went to her relative's place for one year and she was going and coming back and after delivery she came after one year when his child was a couple of months old when his parents wanted to see him, that was why she came and then she went back. He then stated if the applicant wife was coming and going, there would be a difference in their answers because they did not keep a written record.

The applicant wife stated she and the visa applicant had had sex a few times. She stated two years of marriage had passed before the first time. She stated the second time, she got pregnant. She stated there was not a third time.

The applicant stated if the adviser had made two other stories up, the applicant did not know about it.

Following the hearing, the Tribunal sent the following 424A letter:

### **Where you lived in India**

At hearing, you stated you lived at Address A for two years. Before that you lived at the Address B and before that, you lived at the Address D from birth. You stated at Address A you stayed with your brother and parents. You stated at Address B you were altogether, even your sister. You stated at Address D you stayed with your parents, and you sister and brothers. When asked did anyone else stay there, you stated his father's mother. When asked who was living there when you moved, you stated his whole family. When you were asked was your wife there also, you stated you were married in late 90s and at that time she came over there.

When it was put to you your wife did not include that address in her application and you did not mention her name until the Tribunal had mentioned her, you stated everyone can forget things.

At hearing you stated your child was born in civil hospital. You stated before the child was born, your wife was in hospital for about a month and after the birth, she went to her relative's place for a few months.

At hearing, your wife stated when her child was born she lived at the Address H with you and her in-laws. She lived there for over a year. She stated her child was born at her relative's house, and she lived with them for couple of months after birth. When it was put to her that

address was not in her application and you had not disclosed that address at hearing, she stated she did not know what to say.

At Departmental interview it is recorded by tape you stated your wife had the baby at her family's house and after one year she came back.

This is relevant because it may be open to the Tribunal to find that at hearing, you and your wife gave inconsistent information in relation to where you and she were living, particularly in relation to where you were living at the time of the birth of your child. In addition, the Tribunal may find your evidence at hearing in relation to where your wife was living after the birth of your child is inconsistent with your statement at Departmental interview. This may lead the Tribunal to conclude you have not lived together for the periods claimed. This may also lead the Tribunal to conclude you and your wife are not credible.

### **When your wife was harassed**

At hearing you wife stated her problems started few months after marriage. She stated she was harassed, when she went out, gents said when your husband is not coming to you, come to us. When it was put to her she told the Department she was harassed after she got pregnant and after her child was born, she stated the harassment got worse.

At Departmental interview, it is recorded by tape your wife stated she was first sexually harassed after her pregnancy.

This is relevant because it may lead the Tribunal to conclude that your wife's answers at hearing as to when she was first sexually harassed and your wife's answers to the Department as to when she was first sexually harassed are inconsistent. This may lead the Tribunal to conclude she has not consistently stated when the alleged harassment first occurred. This may lead the Tribunal to conclude she cannot recall something the Tribunal would expect her be able to recall if the alleged harassment occurred. This may lead the Tribunal to conclude she is not telling the truth. This, combined with a potential finding that your wife did not live with you at the time of the birth of your child may also lead the Tribunal to conclude the alleged harassment did not occur. This may lead the Tribunal to conclude she has not been harassed because of her relationship with you as you and she have claimed.

### **When your parents first knew about your sexuality**

At hearing, you stated when you were young you were doing things with the neighbour's son, at first they did not take it seriously, then when it was repeated, they went to your parents and talked about it. You stated when it stopped there, you started with school friends.

When it was put to you that you had told the Department at interview your neighbours had reported you to your parents when you were a teenager, you stated it was a problem since childhood. You stated you had not studied the tape. You stated you had this problem.

At Departmental interview it is recorded by tape that the Department asked you when your parents found out about your situation and you stated your neighbours had reported you to them when you were teenager.

This is relevant because it may lead the Tribunal to conclude your answer at hearing as to when your parents found out about your situation is different to your answer you gave the Department. This may lead the Tribunal to conclude you are not telling the truth.

### **When your wife first knew about your situation**

At hearing you stated your wife first knew about your situation over a month after marriage and she told you when she knew. You stated she said why did you spoil my life?

At hearing your wife stated she knew you worked as a sex-worker within a week of marriage and told you a few days after she knew. When it was put to her you stated over a month, she stated she was so confused she did not know what to say.

This may lead the Tribunal to conclude you and your wife's answers at hearing as to when your wife knew about your situation are inconsistent. This may lead the Tribunal to conclude that you and your wife are not truthful witnesses.

### **Whether you are homosexual**

#### **Men's magazines**

At hearing, you stated you read men's magazines, you had one with him. When you were asked what were the title of the magazines you read, you stated you did not know their exact names, but some of the male sex workers named Mr X, Mr Y and Mr W had their own booklets and sometimes you saw that. When again asked if you could tell the Tribunal any of the titles of the magazines, you stated had not purchased a magazine, you went to somebodies and it was their magazines you had read.

This is relevant because the Tribunal may find that your inability to name any men's magazines means you have not read any such magazines and you have deliberately misled the Tribunal when you initially stated you had read men's magazines. It may also lead the Tribunal to find that you are not credible.

When it was put to you that you had been married for long time, your family knew about your situation and you were in mid 30s, and you were not separated from your wife, you stated there was a difference between Indian culture and outside culture and in Indian culture you could not hurt anyone's feelings. When it was put to you hadn't you hurt your family's feelings already by your activities, you stated your family forced you to marry your wife and not to hurt their feelings you stayed with her. You also stated during the number of years of marriage, you had not stayed with her for one year and that whenever she came, you left.

This is relevant because the Tribunal may find that your marriage for long time, your child, that you have come to Sydney together as husband and wife, that you have applied for the protection visa as husband and wife and you have continued to live in Sydney together as husband and wife is not behaviour that is consistent with your alleged homosexuality. This combined with possible findings that you have not been consistent with your previous evidence in relation to when your parent's found out about your homosexuality, you and your wife have not been consistent about when your wife first knew and your wife has not been consistent about when she was first harassed because of your sexuality, combined with your vague explanation about what homosexuality means to you and your vague evidence at hearing in relation to your alleged homosexual activities in India and how you got clients (at hearing you stated you did not give your phone number, when you went out of the house, if someone was looking for you, people would give you the information and these clients lived in the surrounding area, however it is recorded by tape you told the Department of Immigration you got clients from the hotel, may lead the Tribunal to conclude you are not homosexual.

## Activities in Australia

At hearing you stated you had advertised in the paper twice. When asked when the first time you advertised was, you stated you did not remember the date. When asked the month, you stated you thought it was over a month after you arrived. When it was put to you the Tribunal only had an advertisement dated a couple of months after your arrival, you stated you should have an earlier receipt. It was again put to you the Tribunal wanted to see the earlier advertisement.

This is relevant because the Tribunal may find there is evidence before it that you only advertised once. The Tribunal may find that if you did advertise your services as a sex worker and you relied on that work as claimed, then you would have been able to tell the Tribunal when you placed the advertisements. The Tribunal may find your inability at hearing to recall when you advertised is not consistent with someone who was relying upon those advertisements for work. This may lead the Tribunal to conclude you have not worked as a sex worker in Australia. This may lead the Tribunal to conclude you have not worked as a sex worker. This may also lead the Tribunal to conclude that this evidence has been orchestrated for the purposes of this claim. This and a potential finding that you are not homosexual may lead the Tribunal to find that it is not satisfied that you have engaged in the conduct otherwise than for the purpose of strengthening the persons claim to be a refugee.

At hearing, when asked if you had been with men other than for paid work, you stated no, wherever you went, you got paid, although some of your clients only wanted massage. You then stated the last time you had sex and got paid was when you went to a person at Sydney suburb. You had stopped since because of a medical problem.

You stated the photos on the Tribunal file were taken in Sydney suburb with a person named Mr Z. When asked did Mr Z pay you, you stated Mr Z gave you money. When asked did Mr Z pay for sex, you said yes, he did not pay for sex with you; he paid you for sex with another person. When asked did you have sex with Mr Z for free, you stated when you went to him, you had sex with Mr Z's client, he did not clarify how much he was charging, and after the client went, Mr Z had sex with you too and Mr Z paid you money.

You stated when you went to Mr Z's house there were a few people, one was the client and another one and Mr Z was there. When you were asked if your adviser had told you anything about Mr Z, you said no. You stated the only part the adviser played was to receive the photos. When it was put to you there were a number of other cases before the Tribunal with other photos that appeared to have the same bed and the same television, which lead the Tribunal to believe it was the same room, and there were also the same cap and tan lines which lead the Tribunal to believe it was the same partner, and the other cases had the same adviser, you stated the conclusion was 100% true.

This is relevant because the Tribunal may find you have the same room and partner and the same adviser as two other cases before the Tribunal. The Tribunal may also find that Mr Z is a professional sex worker who is paid for sex. The Tribunal may find the most plausible explanation as to why a few separate cases before the Tribunal have the same room and partner is because in all cases, the same adviser has arranged for you to go to the same sex worker. This may lead the Tribunal to reject your statement at hearing that your adviser did not introduce you to Mr Z and his only part was to receive the photos. The Tribunal may also find that given Mr Z is a professional, it is not plausible he would not perform sex for no payment. This may lead the Tribunal to reject your testimony at hearing that Mr Z had sex

with you not because you paid him, but because Mr Z wanted to have sex with you and you couldn't stop him because Mr Z gave you clients.

This may lead the Tribunal to conclude that this evidence has been orchestrated for the purposes of this claim. This and a potential finding that you are not homosexual may lead the Tribunal to find that it is not satisfied that you have engaged in the conduct otherwise than for the purpose of strengthening the persons claim to be a refugee.

The Tribunal also requested the newspaper advertisement indicating you advertised as a sex worker earlier than one provided.

The Tribunal also sent a separate letter to the applicant wife pursuant to section 424A as follows:

### **Where you lived in India**

At hearing, the applicant stated he lived at Address A for two years. Before that he lived at the Address B and before that, he lived at Address D from birth. He stated at Address A he stayed with his brother and parents. He stated at Address B he was altogether, even his sister. He stated at the Address D he stayed with his parents, and his sister and brothers. When asked did anyone else stay there, he stated his father's mother. When asked who was living there when he moved, he stated his whole family. When asked was his wife there also, he stated you were married in late 90s and at that time you came over there.

When it was put to him you did not include that address in your application and he did not mention your name until the Tribunal had mentioned you, he stated everyone can forget things.

At hearing the applicant stated his child was born in civil hospital. He stated before the child was born, you were in hospital for a month and after the birth, you went to your relative's place for few months.

At hearing, you stated when your child was born you lived at Address H with the applicant and your in-laws. You lived there for over a year. You stated your child was born at your parent's house, and you lived with them for a couple of months after birth. When it was put to you that address was not in your application and the applicant had not disclosed that address at hearing, you stated you did not know what to say.

At Departmental interview it is recorded by tape the applicant stated you had the baby at your relative's house and after one year you came back.

This is relevant because it may be open to the Tribunal to find that at hearing, you and the applicant gave inconsistent information in relation to where you and he were living, particularly in relation to where you were living at the time of the birth of your child. In addition, the Tribunal may find the evidence the applicant gave at hearing in relation to where you were living after the birth of your child is inconsistent with his statement at Departmental interview. This may lead the Tribunal to conclude you have not lived together for the periods claimed. This may also lead the Tribunal to conclude you and the applicant are not credible.

### **When you were harassed**

At hearing you stated your problems started few months after marriage. You stated you were harassed, when you went out, gents said when your husband is not coming to you, come to us. When it was put to you that you told the Department you were harassed after you got pregnant and after your child was born, you stated the harassment got worse.

At Departmental interview, it is recorded by tape you stated you were first sexually harassed after your pregnancy.

This is relevant because it may lead the Tribunal to conclude that your answers at hearing as to when you were first sexually harassed and your answers to the Department as to when you were first sexually harassed are inconsistent. This may lead the Tribunal to conclude you have not consistently stated when the alleged harassment first occurred. This may lead the Tribunal to conclude you cannot recall something the Tribunal would expect you to be able to recall if the alleged harassment occurred. This may lead the Tribunal to conclude you are not telling the truth. This, combined with a potential finding that you did not live with the applicant at the time of the birth of your child may also lead the Tribunal to conclude the alleged harassment did not occur. This may lead the Tribunal to conclude you have not been harassed because of your relationship with the applicant as claimed.

#### **When the applicant's parents first knew about your sexuality**

At hearing, the applicant stated when he was young he was doing things with the neighbour's son, at first they did not take it seriously, then when it was repeated, they went to his parents and talked about it. He stated when it stopped there, he started with school friends.

When it was put to him that he had told the Department at interview his neighbours had reported him to his parents when he was teenager, he stated it was a problem since childhood.

At Departmental interview it is recorded by tape that the Department asked the applicant when his parents found out about his situation and he stated his neighbours had reported him to them when he was teenager.

This is relevant because it may lead the Tribunal to conclude the applicant's answer at hearing as to when his parents found out about his situation is different to the answer he gave the Department. This may lead the Tribunal to conclude he is not telling the truth.

#### **When your wife first knew about the applicant**

At hearing the applicant stated you first knew about his situation over a month after marriage and you told him when you knew.

At hearing you stated you knew the applicant worked as a sex-worker within a week of marriage and told him a few days after she knew. When it was put to you he had stated over a month, you stated you were so confused you did not know what to say.

This may lead the Tribunal to conclude you and the applicant's answers at hearing as to when you knew about the applicant's situation are inconsistent. This may lead the Tribunal to conclude that you and the applicant are not truthful witnesses.

#### **Whether the applicant is homosexual**

##### **Men's magazines**

At hearing, the applicant stated he read men's magazines, he had one with him. When he was asked what were the titles of the magazines he read, he stated he did not know their exact

names, he stated he had not purchased a magazine, he went to somebodies and it was their magazines he had read.

This is relevant because the Tribunal may find that the applicant inability to name any men's magazines means he has not read any such magazines and he has deliberately misled the Tribunal when he initially stated he had read men's magazines. It may also lead the Tribunal to find he is not credible.

When it was put to the applicant that he had been married for a long time, his family knew about his situation and he was in his mid 30s, and he was not separated from his wife, he stated there was a difference between Indian culture and outside culture and in Indian culture he could not hurt anyone's feelings. He also stated during a number of years of marriage, he had not stayed with you for one year and that whenever you came, he left.

This is relevant because the Tribunal may find that your marriage, your child, that you have come to Sydney together as husband and wife, that you have applied for the protection visa as husband and wife and you have continued to live in Sydney together as husband and wife is not behaviour that is consistent with the applicant's alleged homosexuality. This combined with possible findings that the applicant has not been consistent with his previous evidence in relation to when his parent's found out about his homosexuality, you and he have not been consistent about when you first knew and you have not been consistent about when you were first harassed because of his sexuality, combined with the applicant's vague explanation about what homosexuality meant to him and his vague evidence at hearing in relation to his alleged homosexual activities in India and how he got clients (at hearing he stated he did not give his phone number, when he went out of the house, if someone was looking for him, people would give him the information and these clients lived in the surrounding area, however it is recorded by tape he told the Department of Immigration he got clients from the youth hostel, may lead the Tribunal to conclude the applicant is not homosexual.

This may lead the Tribunal to conclude that harm, let alone harm amounting to persecution, has befallen you in the past for a Convention reason and the chance that such harm will befall you in the reasonably foreseeable future is remote.

The Tribunal also wrote to the visa applicant wife.

The parties failed to provide comments within the prescribed time frame.

The Tribunal sent another letter to the visa applicant pursuant to section 424A as follows:

In his submission, your adviser stated at page 18 as follows:

In the present matter, the applicant speaks only Gujarati, completed only couple of years of formal education without any specific skills. The only work he did was driving trucks, and once again, it is a profession which would put him at risk of being exposed to those who might identify him as a homosexual.

This is relevant because it may be inconsistent with your evidence to the Department of Immigration at interview and your evidence at the RRT hearing which was that you were a sex worker. This submission also appears to be in the same terms as a submission that has been put in another matter before the Tribunal that involves the same adviser. This may lead the Tribunal to conclude that you have not been driving



trucks and that this submission applies to another case. This may lead the Tribunal to conclude the submission is not relevant to your case.

The applicants failed to provide comments within the prescribed time frame.

The applicant's adviser sent a letter stating that he agreed that his submission concerning the person related to another case and was not relevant to this application.

He also stated he had contacted Dr S an academic of a University who had commented that it would be extremely difficult for someone from India to get involved with same sex intercourse without being gay because of the existing homophobia in the culture and that he would provide a written opinion from Dr S very shortly. He stated he would also provide a psychiatric assessment on the applicant's sexual behaviour. The adviser also stated that the applicant grew up in an 'extreme homophobic society and if any of the photographs were staged, his homophobic would have rebelled'.

## **FINDINGS AND REASONS**

Given that the Tribunal has provided what it considers to be a reasonable opportunity for the applicant and applicant wife to put their case and in the absence of any reason as to why comments or information have not been provided earlier, the Tribunal has proceeded to decision without taking further steps to obtain comments or further information from the applicants.

In the absence of evidence to the contrary, the Tribunal accepts that the applicant and the applicant wife are Indian nationals. It is claimed in the applicant's Protection Visa application that he fears harm in India because of his homosexuality. The applicant wife has claimed she was forced to marry the applicant and this has made her the subject of bullying, sexual assaults and harassments.

At hearing, the parties did not present as credible. The Tribunal is satisfied the applicant and applicant wife are not witnesses of truth and to the extent that the Tribunal has not expressly done so, it rejects their material claims.

### **Where the parties lived in India**

The Tribunal finds at hearing, the applicant and applicant wife gave inconsistent information in relation to where they were living, particularly in relation to where they were living at the time of their child's birth. In addition, the Tribunal finds the applicant's evidence at hearing in relation to where the applicant wife was living after the birth of their child is inconsistent with his statement at Departmental interview. This leads the Tribunal to find they are not credible and they have not lived together for the periods claimed.

### **When the applicant wife was harassed**

The Tribunal finds the applicant wife's answers at hearing as to when she was first sexually harassed and the applicant wife's answers to the Department as to when she was first sexually harassed are inconsistent. This leads the Tribunal to conclude she has not consistently stated when the alleged harassment first occurred. This leads the Tribunal to conclude she cannot recall something the Tribunal would expect her to be able to recall if the alleged harassment occurred. This leads the Tribunal to conclude she is not telling the truth. This, combined with the finding that the applicant and applicant wife have given inconsistent evidence in relation to where the applicant wife was living after the birth of their child, leads the Tribunal to

conclude the alleged harassment did not occur. This leads the Tribunal to find the applicant wife has not been harassed because of her relationship with the applicant as claimed.

**When the applicant's parents first knew about the applicant's sexuality**

The Tribunal finds the applicant's answer at hearing as to when his parents found out about his sexuality is inconsistent to the answer he gave the Department. This leads the Tribunal to conclude he is not telling the truth.

**When the applicant wife first knew about the applicant's sexuality**

The Tribunal finds the applicant's and the applicant wife's answers at hearing as to when the applicant wife knew about the applicant's sexuality are inconsistent.

This and the other stated inconsistencies leads the Tribunal to conclude the applicant and applicant wife are not truthful witnesses.

**The applicant's homosexuality**

The Tribunal finds that the applicant's inability to name any men's magazines means he has not read any such magazines and he has deliberately misled the Tribunal when he initially stated he had read them. It also leads the Tribunal to find he is not credible.

The Tribunal finds that the applicant's marriage, his child, that he and the applicant wife came to Sydney together as husband and wife, that they have applied for the protection visa as husband and wife and have continued to live in Sydney together as husband and wife is not behaviour that is consistent with the applicant's alleged homosexuality. The applicant has submitted there is a difference between Indian culture and outside culture and he stayed with the applicant wife so as to not hurt his family's feelings. The Tribunal has considered this submission however it does not accept it. That is because the Tribunal has also considered its findings that the applicant has not been consistent with his previous evidence in relation to when his parents found out about his homosexuality, he and the applicant wife have not been consistent about when the applicant wife first knew and the applicant wife has not been consistent about when she was first harassed because of his sexuality. This, combined with the applicant's vague explanation at hearing about what homosexuality meant to him and his vague evidence at hearing in relation to his alleged homosexual activities in India and how he got clients, leads the Tribunal to conclude the applicant has not undertaken homosexual activities in India. This also leads the Tribunal to conclude he has not worked as a sex worker in India.

**Photos on file**

The Tribunal finds the applicant's photographs have the same room and partner and the same adviser as other cases before the Tribunal. The Tribunal also finds Mr Z is a professional sex worker who is paid for sex. The Tribunal finds the most plausible explanation as to why other separate cases before the Tribunal have photos of the same room and partner is because in all cases, the same adviser has arranged for the applicants to go to the same sex worker. This means the Tribunal rejects the applicant's statement at hearing that his adviser did not introduce him to Mr Z. It also rejects the applicant's evidence that the adviser's only part was to receive the photos. The Tribunal also finds that given Mr Z is a professional, it is not plausible he would perform sex for no payment as claimed. This leads the Tribunal to reject the applicant's evidence that Mr Z had sex with him not because the applicant paid him, but because Mr Z wanted to have sex with him and he couldn't stop him because Mr Z gave him clients. This leads the Tribunal to find the photos have been orchestrated.

The adviser has submitted that the applicant grew up in an extreme homophobic society and if any of the photographs were staged, his 'homophobic would have rebelled'. The Tribunal assumes the adviser means his homophobia would have rebelled. The Tribunal finds that this is the adviser's mere unsupported opinion. The Tribunal has considered the photos on the Tribunal file however gives them no weight in relation to the applicant's claims to be homosexual and on the basis of all of the other mentioned evidence, the Tribunal concludes the applicant is not homosexual. The applicant's employment

In his submission, the applicant's adviser stated the applicant had only worked driving trucks, and it was a profession which would put him at risk of being exposed to those who might identify him as a homosexual. The Tribunal finds this is inconsistent with the applicant's evidence to the Department of Immigration at interview and his evidence at the RRT hearing which was that he was a sex worker. The Tribunal also finds that this appears to be in the same terms as a submission the same adviser put in another matter before the Tribunal. This and the applicant's adviser's comments in his letter leads the Tribunal to conclude that the applicant has not been employed in his stated profession and that the submission applies to another case and is not relevant to this case.

#### Activities in Australia

The Tribunal finds there is evidence before it that the applicant only advertised only once. The Tribunal finds if the applicant relied on sex work as claimed, then he would have been able to tell the Tribunal when he placed the advertisement. The Tribunal finds the applicant's inability at hearing to recall when he advertised is not consistent with someone who was relying upon those advertisements for work. This leads the Tribunal to conclude the applicant has not worked as a sex worker in Australia. This also leads the Tribunal to conclude that this evidence has been orchestrated for the purposes of his refugee claim. This and the finding that the applicant is not a homosexual leads the Tribunal to find it is not satisfied the applicant has placed the advertisement otherwise than for the purpose of strengthening the applicant's claim to be a refugee. Pursuant to section 91R(3), the Tribunal disregards the conduct.

The Tribunal has found that the photos have been orchestrated. The Tribunal also finds that they have been orchestrated for the purposes of this claim. The finding that the photos have been orchestrated for the purposes of this claim and the finding that the applicant is not homosexual leads the Tribunal to find it is not satisfied he has engaged in the conduct otherwise than for the purpose of strengthening his claim to be a refugee. Pursuant to section 91R(3), the Tribunal disregards the conduct.

In conclusion, the Tribunal has found the applicant is not homosexual. The Tribunal is also not satisfied that harm, let alone harm amounting to persecution, has befallen him in the past. Given the Tribunal has found the applicant is not homosexual, the Tribunal is also not satisfied that there is a real chance that harm amounting to persecution will befall him for a Convention reason either now or in the reasonably foreseeable future if he returns to India and therefore, the applicant does not have a well founded fear of persecution for a Convention reason.

#### **Applicant wife**

The applicant wife has included a statement of claims in the protection visa application, and accordingly, the applicant wife also gave evidence.

The Tribunal notes that the applicant wife's claims largely rely upon the applicant's homosexuality. The Tribunal has found that the applicant is not homosexual. The Tribunal has also found that at hearing, the applicant wife and applicant gave inconsistent information in relation to where they were living, particularly in relation to where they were living at the time of the birth of their child. The Tribunal has also found the evidence the applicant gave at hearing in relation to where the applicant wife was living after the birth of their child is inconsistent with his statement at Departmental interview. The Tribunal has found the parties have not lived together for the periods claimed. The Tribunal has found the applicant wife's answers at hearing and to the Department as to when she was first sexually harassed are inconsistent and that she has not consistently stated when the alleged harassment first occurred. The Tribunal has found she cannot recall something the Tribunal would expect her to be able to recall if the alleged harassment occurred. This, combined with the finding that the parties have provided inconsistent evidence in relation to where they lived and particularly where they were living at the time of their child's birth has lead the Tribunal to conclude the applicant wife's alleged harassment because of her relationship with the applicant did not occur.

**IN CONCLUSION, THE TRIBUNAL IS NOT SATISFIED THAT HARM, LET ALONE HARM AMOUNTING TO PERSECUTION, HAS BEFALLEN THE APPLICANT WIFE IN THE PAST. GIVEN THE TRIBUNAL HAS FOUND THE APPLICANT IS NOT HOMOSEXUAL, THE TRIBUNAL IS ALSO NOT SATISFIED THAT THERE IS A REAL CHANCE THAT HARM FOR A CONVENTION REASON BASED ON HER RELATIONSHIP WITH THE APPLICANT WILL BEFALL HER IN THE REASONABLY FORESEEABLE FUTURE. THEREFORE THE TRIBUNAL IS NOT SATISFIED SHE HAS A WELL FOUNDED FEAR OF PERSECUTION FOR A CONVENTION REASON. CONCLUSIONS**

Having considered the evidence as a whole, the Tribunal is not satisfied that the applicant or applicant wife is a person to whom Australia has protection obligations under the Refugees Convention as amended by the Refugees Protocol. Therefore the applicant and applicant wife do not satisfy the criterion set out in s.36(2) for a protection visa.

## **DECISION**

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

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 400 of the *Migration Act 1958*.

Sealing Officer's I.D. prrt44