

## **DECISION RECORD**

**RRT CASE NUMBER:** 1011325

**DIAC REFERENCE(S):** CLF2010/130448

**COUNTRY OF REFERENCE:** Kenya

**TRIBUNAL MEMBER:** Tony Caravella

**DATE:** 10 March 2011

**PLACE OF DECISION:** Perth

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

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

1. This is an application for review of a decision made by a delegate of the Minister for Immigration and Citizenship to refuse to grant the applicant a Protection (Class XA) visa under [s.65](#) of the *Migration Act 1958* (the Act).
2. The applicant, who claims to be a citizen of Kenya, arrived in Australia on [date deleted under [s.431\(2\)](#) of the *Migration Act 1958* as this information may identify the applicant] February 2004 and applied to the Department of Immigration and Citizenship (the Department) for a Protection (Class XA) visa [in] September 2010. The delegate decided to refuse to grant the visa [in] December 2010 and notified the applicant of the decision and his review rights by letter [on the same date].
3. The delegate refused the visa application on the basis that the applicant is not a person to whom Australia has protection obligations under the Refugees Convention.
4. The applicant applied to the Tribunal [in] December 2010 for review of the delegate's decision.
5. The Tribunal finds that 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**

6. Under [s.65\(1\)](#) a visa may be granted only if the decision maker is satisfied that the prescribed criteria for the visa have been satisfied. In general, the relevant criteria for the grant of a protection visa are those in force when the visa application was lodged although some statutory qualifications enacted since then may also be relevant.
7. [Section 36\(2\)\(a\)](#) of the Act provides that a criterion for a protection visa is that the applicant for the visa is a non-citizen in Australia to whom the Minister is satisfied Australia has protection obligations under the 1951 Convention Relating to the Status

of Refugees as amended by the 1967 Protocol Relating to the Status of Refugees (together, the Refugees Convention, or the Convention).

8. Further criteria for the grant of a Protection (Class XA) visa are set out in [Part 866](#) of Schedule 2 to the [Migration Regulations 1994](#).

#### Definition of ‘refugee’

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

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

10. The High Court has considered this definition in a number of cases, notably *Chan Yee Kin v MIEA* [\(1989\) 169 CLR 379](#), *Applicant A v MIEA* (1997) 190 CLR 225, *MIEA v Guo* [\(1997\) 191 CLR 559](#), *Chen Shi Hai v MIMA* [\[2000\] HCA 19](#); [\(2000\) 201 CLR 293](#), *MIMA v Haji Ibrahim* [\[2000\] HCA 55](#); [\(2000\) 204 CLR 1](#), *MIMA v Khawar* [\(2002\) 210 CLR 1](#), *MIMA v Respondents S152/2003* (2004) 222 CLR 1 and *Applicant S v MIMA* [\[2004\] HCA 25](#); [\(2004\) 217 CLR 387](#).

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

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

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

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

15. Third, the persecution which the applicant fears must be for one or more of the reasons enumerated in the Convention definition - race, religion, nationality, membership of a particular social group or political opinion. The phrase “for reasons of” serves to identify the motivation for the infliction of the persecution. The persecution feared need not be *solely* attributable to a Convention reason. However,

persecution for multiple motivations will not satisfy the relevant test unless a Convention reason or reasons constitute at least the essential and significant motivation for the persecution feared: s.91R(1)(a) of the Act.

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

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

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

## **CLAIMS AND EVIDENCE**

19. 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's claims**

20. In his application for a Protection Visa form (Form 866C) lodged with the Department [in] September 2010, the applicant claims that he is bisexual but that has tried to hide it while he lived in Kenya as it was dangerous because homosexuality and bisexuality is against the law there. He claims he is [age deleted], from the Kikuyu ethnic group and a Christian. He claims he "has always known" he was bisexual and as he grew up it became harder to conceal his sexuality. He claims he decided to leave Kenya and applied for a student visa to come to Australia and he feels freer to disclose his sexuality in Australia.

21. He claims that in 2007 someone he knew in Australia by the name of [Mr A] returned to Kenya and told his parents about his bisexuality. He claims that he has been texted by his sister who told him he has embarrassed the family and he should not return home as the family don't want to have anything to do with him. He claims he slipped into depression and then stopped going to classes and his student visa was cancelled and became unlawful non-citizen.

22. He claims he wants to return home but it is too dangerous and he does not know what else [Mr A] has told anyone. He claims he fears that if he returns to Kenya he will be put in prison. He claims that in Kenya he can be put in prison if someone accuses him of being bisexual. He claims that his family knows about his bisexuality but he does not know who else knows about it.

23. The applicant claims he fears mob violence in Kenya because rumours of one being gay will prompt a group of people to attack the victim. He claims it is useless

going to the police as they will do nothing to help and that they might in fact participate in violence against the applicant because of his bisexuality.

24. The applicant claims that people in Kenya will harm him, whether it is mob violence or individuals who will attack him and the police will not protect him because if they become involved they will arrest him. He claims that gays and bisexuals in Kenya are a particular social group and are persecuted due to their sexuality. Many people in Kenya think that being gay is “against African values” and the government makes it illegal to be gay.

25. The applicant claims that the authorities will not protect him because it is against the law and this means that the authorities have a free rein to ignore or to even participate in violence against those who are accused of being gay or bisexual.

### **The delegate’s decision**

26. The delegate decided to refuse to grant the applicant a Protection visa. The delegate’s reasons for refusing the visa are set out in the Decision Record dated [in] December 2010. The Tribunal summarises the key findings and reasoning of that decision as follows:

- Country information available to the delegate confirms that bisexuals in Kenya are vulnerable to abuse by the community. This is not, however, evidence *per se* that the applicant will be refused protection by state authorities;
- Country information also indicates that Kenyan laws prohibit unnatural carnal acts which is understood to include bisexuality, however few people have been prosecuted;
- The applicant provided limited details to his sexual identity or any restrictions he may have experienced since discovering his sexuality at the age of 17;
- The applicant claimed that his last long term relationship was with a man, between January and August 2009 and that he met him in a nightclub in [suburb deleted], however the applicant did not provide any evidence in support of this claimed relationship;
- The applicant was not able to provide further information regarding his past relationship, only stating that he had about 20 sexually active relationships. The delegate writes that it strains credibility that someone who recognised their bisexuality at 17 could not have provided further information regarding their bisexual experiences and was unable to provide any evidence such as photos, emails or any other form of correspondence for previous partners;
- On all the information before the delegate, the delegate did not believe that the applicant is bisexual;
- The Delegate found that the applicant first arrived in Australia [in] February 2004 and became an unlawful non-citizen in June 2007. The applicant claimed he was fearful of approaching the Department and it was not until September 2010, six years after first arriving in Australia, that the applicant sought assistance in making an application for a Protection visa, that is, once he was in immigration detention. The delegate found that the delay in submitting a Protection visa application raises serious concerns about the immediacy, gravity, and credibility of his claims to fear persecution in Kenya;

- The applicant could relocate to Nairobi, Mombasa, or any other urban city where country information suggests that there is a growing community of gay people;
- There is no evidence to show that the applicant sought protection from the Kenyan authorities as a result of his fears for his safety or that he was denied protection.

### **The application for review**

27. The applicant lodged an application for review of the delegate's decision [in] December 2010.

28. [In] January 2011 the Tribunal received a detailed submission from the applicant's representative. The Tribunal summarises the submission as follows:

- The applicant is likely to be persecuted due to his membership of a social group;
- There is nothing the applicant can do to minimise the risk other than remaining discreet about his membership of a social group however this is not possible firstly because his family in Kenya have found out about his sexuality and he has received threats from family, and secondly it is unreasonable to expect the applicant to live discreetly as this would constitute a form of persecution;
- It is not possible for the applicant to relocate to another part of Kenya and find safety;
- The main reason for the delegate's refusal of a protection visa was because she did not find the applicant's claim that he is a bisexual plausible, however, given all the evidence before the delegate indicating otherwise and the opportunity to test the applicant's credibility, it is submitted the delegate came to an erroneous conclusion;
- The submission states that the delegate acknowledge the Lesbian, Gay, Bisexual and Transgender (LGBT) persons in Kenya are vulnerable to abuse by the community but failed to consider the abuse by local enforcement officers;
- The sole reason the applicant claims for protection is due to his membership of a social group. The delegate accepted that bisexual persons were capable of constituting membership of a social group; however the delegate did not view the applicant as a credible member of such a group. It is submitted that it was unreasonable of the delegate to reject the applicant's credibility as a bisexual person even though he provided a detailed account of his sexuality;
- It is submitted that the focus should be on the risk to the applicant arising from the fact that many in Kenya, including his family, now believe him to be gay. This points to the reality that he is at risk, whether or not he is actually gay, and the law is well established that membership of the social group can be in the perceptions of the persecutor;
- It is submitted that the applicant is unwilling and unable to avail himself of protection by the Kenyan authorities as country reports point to an element of state complicity in the abuse of LGBT persons in Kenya and that police continue to arbitrarily detain people accused of being homosexuals. The submission refers to contact made with [Mr B] of the Gay and Lesbian

Coalition of Kenya by the applicant's representative, and of the information he has provided;

- On the delay by the applicant in making an application for a Protection visa, it is submitted that the applicant had extenuating circumstances that make it unreasonable to draw adverse inferences from the fact that he delayed lodging his application. A friend of the applicant returned to Kenya in 2007 and told his family about his sexuality, this was followed by the applicant becoming depressed and having his student visa cancelled and this was in the context of the applicant not knowing that he could apply for a Protection visa. It is submitted that rather than undermining the veracity of the applicant's fears, his actions are understandable and further evidence that he in fact holds the requisite fear of persecution.

### **The Tribunal hearing**

29. The applicant appeared before the Tribunal [in] January 2011 and [in] February 2011 to give evidence and present arguments. The Tribunal also received oral evidence from another two witnesses who appeared before the Tribunal [in] January 2011 and [in] February 2011 respectively. The Tribunal also heard evidence from [Mr B] who spoke to the Tribunal by telephone from Kenya.

30. The applicant was represented in relation to the review by his registered migration agent.

#### *First hearing held [in] January 2011*

#### **The applicant's oral evidence**

31. The applicant began his oral evidence by telling the Tribunal that he was born in [village deleted] which he described as being located approximately 8 hours' drive from Nairobi. He said that his mother is a practising Christian however his father is not. He said he has three siblings, namely one brother and two sisters. He explained how he attended boarding school and while he was there he missed a father figure.

32. The applicant told the Tribunal that upon reflecting on it now when he was in primary school he felt that he was bisexual. He said he was confused about it at the time. He said that when he was in Form 2 (the Australian equivalent of year 10) he had his first "fling" and started going out with males. He said he was 17 or 18 years of age at the time. He said he was having these relationships until he finished Form 4 around which time he moved to Nairobi. He claimed that while in Nairobi he was living with his uncle who is a business man there. He said that in Nairobi he used to meet men but he kept his relationships with men a secret.

33. The applicant told the Tribunal that he travelled to Australia in 2004. He said he found that in Australia most of the Kenyan community here do not accept his bisexuality, although he added some do accept it. He added that he tends not to have long term relationships and also that African women do not like going out with him because of his bisexuality. He told the Tribunal that a condition of a relationship he enters is that he is to have freedom to go out with anyone he likes.

34. The Tribunal asked the applicant for details of the relationship with a woman with whom he claims (in his written submissions) he had a child. He told the Tribunal that her name is [Ms D]. When asked for her surname, the applicant could not recall what it is. He said that she is from Sudan and that she is approximately [age deleted].

He said that he met her at a party in Perth in 2009. He said that his relationship with [Ms D] was just a fling and she became pregnant. He told the Tribunal that a son, [name deleted], was born of that relationship around [month and year deleted]. He told the Tribunal that [Ms D] moved to Melbourne and had the baby there and that she does not want the applicant to see [name deleted]. He said that he has not actually seen the child since he was born. He said he found out about her pregnancy and the birth of the child from [Ms D]'s brothers. He told the Tribunal that he did not live with [Ms D] and that he is not giving her money to support the child. The applicant told the Tribunal that [Ms D] discovered the applicant is bisexual.

35. The Tribunal asked the applicant to provide details where he claims that a person named [Mr A] (full name provided) told the applicant's family that the applicant is bisexual. He said that he and [Mr A] knew each other in Kenya by virtue of being family friends. He said that they shared a house in a suburb of Perth for about a year-and-a-half. He said that they had a falling out over the usual problems that come from living together and that because of this [Mr A] reported to his family that the applicant is bisexual. The applicant said that he learned through his sister in Kenya that [Mr A] had told the applicant's parents that he is bisexual. The applicant provided a copy of a message posted on a Facebook "wall" which the applicant claims reveals the applicant's bisexuality to anyone who has access to that. The Tribunal asked the applicant how [Mr A] determined that the applicant is bisexual; the applicant replied that as a result of his close community it is very hard to keep something like that quiet. He added that he and [Mr A] did not have a discussion about the applicant's bisexuality and furthermore the applicant never brought anyone back to the house they were sharing.

36. The Tribunal asked the applicant whether his parents might have initially been shocked by the information but subsequently have forgiven and accepted his bisexuality. The applicant replied that it is a cultural thing and that his parents would not forgive him. He said that his parents will not let him live with them if he returns to Kenya and he does not know what else they might do. He added that life is cheap in Kenya and that his parents consider the claim that he is bisexual to be the biggest shame to the family. He said his parents have [business interests]. The applicant indicated that they might organise someone to harm or to kill him.

37. The Tribunal asked the applicant to explain his claim that his parents ceased providing him financial support. He explained that his parents used to send money to him however when he began working in Australia he did not need their money and so they did not send money then.

38. The Tribunal referred to country information which indicated that there are locations within Kenya that are more tolerant towards homosexuality than other areas. The applicant was invited to comment on this. The applicant replied that the reports on more tolerant locations within Kenya are not true and that such reports are motivated by Kenya's desire to maintain foreign aid. The applicant told the Tribunal that the Kenyan Prime Minister has been reported as saying that all gay people should be caught and put into gaol. The applicant said that gay people are used as a political tool.

39. The Tribunal invited the applicant to comment on the time delay in his lodging an application for a Protection visa and his arrival in Australia in 2004 and then between the claimed disclosure to his parents by [Mr A] and the lodgement of the Protection visa application. The applicant said that he did not know that there was any help available in Australia when he first arrived and had he known he would have applied sooner. He added that he was afraid for his life and thought that the Department would put him on a plane and send him home. He added that life is very

hard for an illegal immigrant. He went on to say that since 2006 he has had no money and that he was homeless for periods of time.

*Oral evidence by Mr L (full name provided).*

40. Mr L told the Tribunal that he lives in [suburb deleted] and that he is [vocation deleted]. He told the Tribunal that he has known the applicant for about 5 or 6 years and that he met the applicant through another mutual friend in Australia.

41. The Tribunal asked Mr L to explain what he knows of the applicant's sexual orientation. Mr L replied that he knows the applicant as being gay. He said that he has never seen the applicant with a girlfriend or with women. He went on to say that he observed that the applicant was not comfortable when they went to clubs together. Asked how well he knows the applicant or how often he has contact with the applicant, Mr L replied that he does not see him that often, perhaps once in a few months.

42. Mr L explained that he organised a [event deleted] and that people involved in that commented that the applicant was interested or involved only because he is gay. Mr L explained that the [event deleted] was a cultural show involving male modelling. He said that rumours started where people said that the show was not a "straight" men's show.

43. Mr L told the Tribunal that where they come from people do not openly admit to being gay or bisexual and that he understood how the applicant would be reluctant to tell others about being bisexual.

44. Mr L told the Tribunal that he has recently returned to Australia after a trip to Kenya and commented on an engagement between two gay men in Mtwapa which attracted media attention.

*Oral evidence by [Mr B]*

45. The Tribunal spoke to [Mr B] via telephone. [Mr B] said he was in Nairobi at the time. He introduced himself as being the [position deleted] of the Gay & Lesbian Coalition of Kenya.

46. [Mr B] said that he is unable to give a blanket statement that everyone who is gay will be maltreated and that it is a case by case situation. He said that there are cases of hostility towards gays in Kenya. He said that there are gangs (the Mungiki – described as a politico-religious group and a banned criminal organization in Kenya) who harass and harm gay people.

47. [Mr B] told the Tribunal that he does not know the applicant personally or about the applicant's particular situation. He said that the situation and treatment of gay people varies from place to place. He said that Nairobi is more accepting; however the coastal areas are less tolerant.

48. [Mr B] referred to the Kenyan law which makes homosexual acts a criminal offence. He said that the police are generally very hostile towards gay people and that while prosecutions are rare because people essentially have to be caught "red handed" this does not mean that people are not harassed. He added that police would detain gays who they believe offended the law. He added that police would rarely protect someone who is gay.

49. The Tribunal referred [Mr B] to country information which indicated that the city of Mtwapa is more tolerant towards gay people. He replied that in February 2010 there was an incident there where a man was wearing a T shirt which indicated support



for gay people. The man was doused with petrol and was about to be set on fire when other parties came to his rescue. He added that the only protection is to pretend that one is not gay.

*Submissions by the applicant's representative*

50. The applicant's representative, [Ms C], told the Tribunal that the determination of whether a person is bisexual is a difficult assessment to make. She said that the applicant also wished to provide another witness, a Mr T (full name provided) with whom the applicant had been in a relationship. [Ms C] requested the Tribunal consider scheduling a further hearing where Mr T could attend and provide evidence of that relationship.

51. [Ms C] told the Tribunal that the applicant comes from a culture where it is dangerous to talk about homosexuality. She said the applicant has a very unusual lifestyle which others may not understand. She submitted the applicant claims to have been homeless for almost 5 years although he comes from a family which is relatively well off and this suggests that there must be some other reason why the applicant does not want to go back to join his family.

52. [Ms C] told the Tribunal that the applicant is fearful of the action his father might take if he returns to Kenya. She said that the family considers the applicant is a shame on the family whether the claim as to his bisexuality is true or not, and having brought shame on the family the family has a prerogative to take action.

53. [Ms C] submitted that a central issue in this case is whether the applicant is perceived to be bisexual within the community and that there is evidence to suggest that he is.

*Second hearing held [in] February 2011*

54. The Tribunal reconvened its hearing [in] February 2011 at the request of the applicant to enable an additional witness to provide oral evidence to the Tribunal.

55. Before taking evidence from W2 (full named provided) the Tribunal asked the applicant whether his siblings are aware of his sexuality. He replied that they found out after [Mr A] told his parents and the information appeared on the Facebook posting he referred to previously. He added that his siblings did not want to believe that he is bisexual because of the attitudes towards gays and bisexuals in Kenya. He said that the consequences of being found to be bisexual or gay are severe so he would not display his sexuality.

56. The Tribunal asked the applicant whether he had experienced any trouble in Kenya or whether he suffered any harm because of his sexuality. He replied that he had not and added that he had not because he hid the true nature of his sexuality.

57. The Tribunal asked the applicant whether he would confirm the finding in the delegate's decision whereby the delegate wrote that prior to experiencing his first sexual experience with a man the applicant claimed that at the age of 9 or 10 he encountered his first sexual experience with a woman. The Tribunal explained that this appears to be a very early age for a sexual experience and the Tribunal would like clarification on the accuracy of this because if it was not accurate, and if it was not an error in the delegate's decision, then the Tribunal might conclude that it was an intentional misstatement and that might reflect on the credibility of the applicant. After some discussion and clarification, the applicant replied that what he meant by this reference in the interview with the Department was that he played with girls and while

there might have been a sexual aspect to it there was no sexual intercourse. The Tribunal subsequently listened the recording of applicant's interview with the Department where he made the claim as to his first sexual experience and notes that there is a reference to play.

58. The Tribunal asked the applicant whether he visited particular websites associated with his sexuality. He replied that he is not into websites and does not use dating sites.

59. Asked whether he goes to any particular clubs in Perth, the applicant told the Tribunal that he used to go clubbing and used to go to [clubs deleted] but he has not gone for a long time because he has no money.

60. Asked if on his Facebook page he has reference to male partners, the applicant told the Tribunal that he does not.

61. In respect to W2, and while W2 was outside of the hearing room, the Tribunal asked the applicant to provide some background about W2. The applicant said that he met W2 almost 5 years ago and they met at a neighbour's ([names deleted]) place. He told the Tribunal that they had a homosexual relationship involving homosexual intercourse. He told the Tribunal that W2 used to go to [names deleted] place for parties and then the applicant began going to W2's place and then they began going out and sleeping together. He said that they had a sexual relationship some two or three months after they first met.

62. The Tribunal asked the applicant what other things he and W2 did together while in the claimed relationship. He said they would hang out together and they used to go clubbing. He said that their idea of fun was having a few drinks and sleeping together. The Tribunal asked the applicant why the relationship with W2 ended. He replied that they are still friends but they are not in a homosexual relationship any longer.

63. W2 was then admitted into the hearing room and introduced himself by giving his full name and date of birth. He was born in [year deleted].

64. W2 told the Tribunal that he was living in [suburb deleted] and met the applicant through his neighbours at that time. He said that they hit it off and it went from there. W2 said that they had sexual encounters but there was not a lot else to the relationship. He said that it was not a "full on" relationship. He told the Tribunal that they did not go out as a couple but they would get together at the neighbour's barbeques.

65. W2 told the Tribunal that his relationship with the applicant was not a monogamous one because they were "flinging around" Asked to explain what this meant, W2 explained that people would be "slutting and whoreing around". He added that they had casual sex together four or five times. He said he moved out of the area about two and a half years ago.

66. The Tribunal asked W2 whether other people knew about the homosexual relationship between him and the applicant. W2 replied that [name deleted] and close friends knew about it.

67. The applicant's representative made a further oral submission. She submitted that the claim by the applicant that he fears his family would harm him is a part of his fear. The larger part is his fear is the fear of mob violence towards him. The representative added that his family have not been in contact with the applicant to inquire about his welfare and that indicates that they have dissociated themselves from him due to his bisexuality. She submitted that the applicant attempted to present another witness to give oral evidence to the Tribunal. That other witness is a person (name supplied) who is also Kenyan and with whom the applicant had a homosexual

relationship. That person indicated he would appear at the first hearing but then did not show up and since then he has not answered or returned calls asking him to attend and give evidence before the Tribunal. The representative submitted that may indicate that the witness is being evasive because of the fear of being identified as gay in the Kenyan community.

### **Post hearing submission**

68. [On a further date in] February 2011, the Tribunal received a further submission from the applicant's representative. The submission addresses the question of relocation within Kenya. It submits that asking the applicant to relocate would essentially require him to live discreetly and that the High Court has rejected the proposition that applicants should avoid persecution by living discreetly. The submission argues that significant weight should be given to the evidence of [Mr B] on this matter as he is presently in Kenya and works with the homosexual community on a daily basis. It is submitted that it is unreasonable to expect the applicant could return to the more affluent areas of Nairobi where there might be some tolerance of homosexuals because he is in dire financial circumstances and he cannot rely on support from his parents.

### **Independent Country Information**

*Background information on the bisexual and homosexual community in Kenya, including estimates of proportion / population.*

69. While no information was found on the bisexual community, it appears that almost all of the information on the homosexual community could be applied to them. The scarcity of information on the background of the homosexual community, including its size, is likely due to the community being largely underground. Members of the community mention that they must live double lives and remain largely invisible.

70. The Kenyan public held several misconceptions about the homosexual community in Kenya. This included a perceived link between a gay lifestyle, the growth in the male sex trade and the idea that gay men want to convert others and "grow their number". The gay community refutes this arguing that "Gay life is also about love and many gay men stick on one partner and that is it".<sup>[1]</sup> The homosexual community is also characterised by its victimhood due to attacks and hate-mongering combined with government inaction, according to Human Rights Watch (HRW).<sup>[2]</sup>

71. Due to attacks and hate-mongering, the homosexual community in Kenya is largely underground. HRW states that "several people have gone into hiding; others are preparing to flee their homes at a moment's notice".<sup>[3]</sup> BBC News reported in 2006 that "a secretive gay scene had developed in certain pubs and clubs in Nairobi" as a result of sex between men being punishable by long prison sentences.<sup>[4]</sup> A July 2010 article quotes a gay man who states that there are not many places to meet gay people saying "It's more like gay death, not gay life in Nairobi". The coordinator of a local gay and lesbian rights organisation adds that "People live double lives here. There's a life you live with your straight friends and the life you live as a gay person... We are vulnerable, we are neglected, and we don't have any visibility". The discussion was held in a Nairobi hamburger bar which was considered to be more "gay-friendly".<sup>[5]</sup>

72. No information was found on estimates of the proportions or size of the homosexual population in Kenya. There is nothing to suggest that the proportion of homosexuals in Kenya's population is any different from that of other countries.

*Current laws on bisexuality and homosexuality in Kenya, including whether it is illegal to be bisexual or homosexual and the penalty for conviction of an offence under the relevant laws.*

73. Homosexuality is illegal under the Kenyan penal code. However, sources indicate that individuals are rarely prosecuted for committing homosexual acts. While the relevant sections of the code do not mention bisexuals specifically, the laws can be taken to apply to them in terms of any homosexual acts they may commit as bisexuals.

74. The US Department of State Report on Human Rights Practices in Kenya states unequivocally that "[t]he law criminalizes homosexual activity".<sup>[6]</sup> The sections of the penal code that criminalise homosexuality are as follows:

162. Any person who:

(a) has carnal knowledge of any person against the order of nature; or

...(c) permits a male person to have carnal knowledge of him or her against the order of nature, is guilty of a felony and is liable to imprisonment for fourteen years:

Provided that, in the case of an offence under paragraph (a), the offender shall be liable to imprisonment for twenty-one years if -

(i) the offence was committed without the consent of the person who was carnally known; or

(ii) the offence was committed with that person's consent but the consent was obtained by force or by means of threats or intimidation of some kind, or by fear of bodily harm, or by means of false representations as to the nature of the act.

163. Any person who attempts to commit any of the offences specified in section 162 is guilty of a felony and is liable to imprisonment for seven years, with or without corporal punishment.

165. Any male person who, whether in public or private commits any act of gross indecency with another male person, or procures another male person to commit any act of gross indecency with him, or attempts to procure the commission of any such act by any male person with himself or with another male person, whether in public or private, is guilty of a felony and is liable to imprisonment for five years, with or without corporal punishment.<sup>[7]</sup>

The US DOS report states that section 162 is interpreted to prohibit homosexual activity and specifies a maximum penalty of 14 years imprisonment, and that article 165 carries a maximum penalty of 21 years imprisonment.<sup>[8]</sup>

75. Despite the provisions under the penal code criminalising homosexuality, the laws are "rarely enforced"<sup>[9]</sup> with the US DOS noting that there were no reported prosecutions of individuals for sexual orientation or homosexual activity in 2009.<sup>[10]</sup> A July 2010 article noted that with anti-privacy laws preventing police from entering

an individual's house, "most of Kenya's gay community can avoid conviction, as long as they stay out of the public eye".[\[11\]](#)

76. The Tribunal requested advice from DFAT on this matter on 1 October 2010; a response was received on 4 November. In relation to the legality of homosexuality in Kenya, DFAT advised the following:

Post spoke to a Senior Magistrate from the Thika Law Courts, who advised that homosexuality is not illegal in Kenya, and one cannot be charged with this offence. The only time it is used in court is in a divorce case, but even then the accuser has to be able to prove it of the accused.[\[12\]](#)

77. Articles 162-165 of the Kenyan criminal code as outlined above would appear to contradict the advice of the Senior Magistrate consulted by Post. The Magistrate may have been guided by the absence of prosecutions of homosexuals.[\[13\]](#) Also, the Magistrate may have been referring to the condition of homosexuality which is technically not illegal, rather than homosexual acts, which are.[\[14\]](#) Treatment of female homosexuals under these provisions is less clear, however; Kenyan law does not specifically mention sexual activities between women.[\[15\]](#) Article 162 (a) may, however, be applicable here. Further, the 2006 *Sexual Offences Act* makes no mention of same-sex relations.[\[16\]](#)

78. An article published on African gay advocacy website *African Veil* in May 2008 notes that while rarely enforced, articles "162 and 165 are an effective threat hanging over the gay community".[\[17\]](#)

*Information on treatment of, and attitude toward homosexuals by general society in Kenya, including traditional attitudes.*

79. A number of sources were located that indicate that society's treatment of and attitude toward homosexuals is characterised by discrimination, stigmatisation and misinformation. Advice received from DFAT on 4 November 2010 advised the following in relation to treatment of homosexuals in Kenya:

Post advises that homosexuality is not acceptable to the majority of Kenyans and a homosexual would likely suffer from harassment, discrimination and public rejection. This is true of both male and female homosexuals, but most particularly of males.[\[18\]](#)

80. The Tribunal also received advice from Richard Vokes, a senior lecturer in anthropology at the University of Canterbury, New Zealand and Research Associate of the Institute of Social and Cultural Anthropology at the University of Oxford, UK. Mr Vokes advised that social treatment of homosexuals in Kenya is "the African norm"; that is "intolerant public, scolding and accusatory media. No public space allowed".[\[19\]](#)

81. The US Department of State notes that while no prosecutions of Kenyan citizens for sexual orientation or homosexual activity were reported to have occurred in 2009, there was frequent and widespread societal discrimination based on sexual orientation.[\[20\]](#) A July 2010 article from a South African news service discussed homosexuals with a Christian member of the Kenyan public. He is quoted as saying "I hate them...It's no wonder they hide, otherwise they would be beaten. If my son was gay, he would be my enemy for life". When asked about whether as a Christian he thinks this is at odds with the tenets of love and understanding inherent in the faith, he

is said to have shrugged, “defiantly flip[ped] his palms skywards” and said “It’s just not in our culture”.[\[21\]](#)

82. Religion plays a major role in shaping public opinion toward homosexuality, especially in rural areas. Influential religious leaders and groups are particularly vocal in their denunciation of homosexuality in Kenya. Gay advocacy website *African Veil* notes that:

Kenya is a country of faithful people and religion plays a defining role in homophobia in Kenya. Seventy percent of the country is Christian and there is a sizeable Muslim and Hindu population...More traditional denominations in Africa are also conservative.[\[22\]](#)

83. Groups such as the Council of Imams and Preachers of Kenya have strongly condemned homosexuality and argued against the legalisation of gay marriage. [\[23\]](#) In Islam, the Qur’an is said to forbid homosexual acts.[\[24\]](#) The US DOS reports that a group in Mombasa has recently formed a Muslim Youth Pressure Group to oppose homosexuality.[\[25\]](#)

84. The Catholic and Protestant churches in Kenya, including Anglicans, “condemn homosexuality as sinful”.[\[26\]](#) A Preacher at Parklands Pentecostal Church, for example, is quoted by *African Veil* as referring to homosexuality as “an abomination that is totally unacceptable by God who formed us not to function in that way”.[\[27\]](#) Western evangelical Christian groups are also reported to be involved in spreading anti-gay sentiment and misinformation about homosexuality within Kenya. US-based Christian “ex-gay” organisation, *Homosexuals Anonymous Fellowship Services* (HAFS) is reported to have conducted visits to Kenya in 2009 and 2010 to educate communities about the “curing” of homosexuality through prayer and therapy.[\[28\]](#) HAFS Director, Doug McIntyre, is reported to have spoken to nearly 10,000 students and educators in Kenya in November 2009 and planned to return in March 2010 to conduct more seminars.[\[29\]](#) Independent media website *Alternet* reported in March 2010 that US-based anti-gay organisations were working with evangelical Christian groups in Kenya, distributing images of prominent gay and lesbian rights activists in the country with their contact information and “Not Wanted” printed on posters.[\[30\]](#)

85. Homosexuality is thought to be un-African. Former Kenyan president Daniel Arap Moi once said “Homosexuality is against African norms and traditions, even in religion it is considered a great sin” In some traditional beliefs, homosexuals are said to be cursed or bewitched.[\[31\]](#) Richard Vokes noted that “overt persecution is unusual, although families will often seek spiritual assistance to try to purge anyone suspected of homosexuality of their ‘disease’”.[\[32\]](#) On 25 October 2010, John Idriss Lahai, a University of New England PhD candidate in Peace Studies was contacted for advice on the treatment of homosexuals in Kenya. Mr Lahai’s advice states that the overwhelming majority of Kenyans view homosexuality as a Western practice that compromises Kenyan identity, and one that must be rejected and eradicated.[\[33\]](#)

86. Prevailing public attitudes toward homosexuality in Kenya are characterised by misinformation and stigmatisation that is encouraged and propagated by the mainstream media. An article published in popular Kenyan newspaper the *Daily Nation* in August 2010, for example, illustrates the bias toward and lack of understanding of homosexuality in Kenya.[\[34\]](#) The article reports on “increasing lesbianism among schoolgirls” which is attributed to “lack of training in managing...sexuality” and lack of self-control. The article quotes the views of a clinical psychologist who states that homosexuality and lesbianism are “learned



behaviours” which can be “unlearned”. The article compares homosexuality to drug and alcohol abuse and claims that rehabilitation is necessary.[\[35\]](#)

*On whether community attitudes towards homosexuality is changing in Kenya*

87. Reports on social attitudes towards homosexuality in Kenya contained conflicting information about whether public sentiment is slowly liberalising, or hardening.

88. *BBC News* reported in June 2010 that since anti-gay violence erupted in the town of Mtwapa in February 2010 (to be discussed in Question 6), attitudes toward homosexuality have hardened and “are driving gays and lesbians underground”.[\[36\]](#) Mtwapa is an area traditionally considered more liberal and open-minded than the rest of the country; however the town currently has a district commissioner pushing for Kenya to follow Uganda’s example, where an MP has introduced a private member’s bill calling for life sentences, and death in some cases, as punishment for homosexual acts.[\[37\]](#)

89. A *Time* magazine article from November 2009 notes that Kenyan attitudes towards homosexuals are considered more liberal than the rest of sub-Saharan Africa (outside South Africa); nevertheless homosexuals “still face overwhelming hostility in the country”.[\[38\]](#) The reaction to the highly publicised marriage of two Kenyan men in Britain in 2009 was illustrative of these attitudes; the men were widely reported in Kenyan media sources as being a shame to the country and their parents were harassed in public.[\[39\]](#) In the same month a 2009 report by the Canadian Immigration and Refugee Board (IRB) noted that:

Many homosexuals in Kenya believe they must hide their sexual orientation for fear of arrest, discrimination and rejection even from their own families. Many Kenyan homosexuals lead double lives, marrying partners of the opposite sex and having children in order to blend in to society.[\[40\]](#)

90. An article published in the *Hindustan Times* in April 2007 further confirms the difficulties of being openly gay, noting that “there can be no talk of a visible gay community in Kenya. There are neither bars nor clubs hoisting the rainbow flag...Even gay activist[s] do not talk to their families about their sexuality”.[\[41\]](#)

*Information on whether there is mob-violence, as described by the applicant, whereby groups of the public attack bisexuals or homosexuals.*

91. There were reported incidents of mob-violence at least one of which, as described by the applicant, was started by rumours. Human Rights Watch discussed mobs killing not only those suspected of being gay but also those defending the human rights of gays.[\[42\]](#) In February 2010 anti-gay protests and mob-violence broke out in the coastal town of Mtwapa.[\[43\]](#) The violence followed unsubstantiated rumours about a gay wedding that were picked up by local and national media. Several Imams and Muftis instructed their congregations to expose homosexuals in Mtwapa. Sheikh Ali Hussein of the Council of Imams and Preachers of Kenya and Bishop Lawrence Chai of the National Council of Churches of Kenya held a news conference in which they demanded an investigation into the Kenya Medical Research Institute (KEMRI), a government health centre in Mtwapa that provides community HIV/AIDS services. The religious leaders criticised the government for providing counselling services to

“criminals” and demanded that the centre be shut down. They also promised to “flush out gays” Subsequently, KEMRI was surrounded by an armed mob of 200-300 people. [44] People were dragged out from the waiting room of the clinic and beaten. [45] A number of staff members, volunteers, clients and suspected homosexuals were taken into police custody. Witnesses claimed that police were attempting to protect them from violence by detaining them; however news reports said the men were asked to submit to forensic examinations to determine if they were homosexual. [46]

92. The following reports were located of Kenyan homosexuals being subjected to violent behaviour in their communities due to their sexual orientation:

- An article on activist Ann Njogu published in the *Huffington Post* in March 2010 reports that her organisation’s work in “taboo areas” including sexuality and the rights of homosexuals, has resulted in arrest, beatings, sexual assault by police, and threats from politicians; [47]
- Lesbian Gay Bisexual Transgender (LGBT) advocacy website *LGBT Asylum News* reported in March 2010 on continuing threats to homosexuals in Kenyan coastal areas related to the KEMRI health centre in Mtwapa; [48] [49]
- South African publication *Mail and Guardian* reported in February 2010 that homosexuals are regularly beaten and male sex workers are harassed for bribes by council officials; [50]
- Gay advocacy website *Behind the Mask* reported in October 2009 that an employee of a Christian gay activist organisation had been attacked by neighbours; [51]
- *ABC News* reported in May 2008 that openly gay men are more likely to be beaten by homophobic Kenyans than arrested; [52]
- African gay advocacy website *Behind the veil* reported in May 2008 on the commonness of beatings of openly gay men and notes that most victims are too afraid to report such incidents to the police. [53]

*Information on the treatment of homosexuals and bisexuals by the state authorities, particularly the police, in Kenya*

93. Treatment of homosexuals by state authorities has been milder than that by society at large. Despite this, country information indicates that mistreatment does occur. As noted above, despite the criminalisation of homosexuality under the penal code, no prosecutions for homosexual activity are reported to have occurred in recent years. [54] A Canadian Immigration and Refugee Board response on Kenyan homosexuals from 2009 includes correspondence with the Manager of the Gay and Lesbian Coalition of Kenya (GALCK), who observed that:

...the current president has not commented on matters relating to homosexuality so there is no clear governmental direction on the issue, resulting in some government sections “being cautiously accepting” while others, such as the police, being more “aggressive” in their dealings with the gay community. [55]

94. While Human Rights Watch alleged that “government is sitting silent while mobs try to kill human rights defenders and assault people they suspect are gay” [56] the GALCK Manager is quoted as noting that:

...it has to be said the police have on numerous occasions rescued individuals who faced imminent danger of public lynching because of their real or presumed sexual orientation. [57]



95. Advice received by the Tribunal from John Idriss Lahai of the University of New England in October 2010 states that “politicians have been in the forefront [sic] to combat homosexuality in the country”. Mr Lahai also advised that the relevant sections of the penal code that criminalise homosexual activity are used to extort and blackmail suspected homosexuals, using the threat of arrest and or imprisonment to extract bribes.<sup>[58]</sup> The use of blackmail and extortion by authorities to target suspected homosexuals is also noted by gay advocacy groups.<sup>[59]</sup>

96. Richard Vokes advised the Tribunal in November 2010 that the authorities in Kenya have “complete intolerance” of homosexuality, and notes that there is no legal protection for homosexuals from mistreatment or persecution. While the new constitution does include human rights-based provisions that could be used to protect homosexuals, there is not yet legislation to enforce the provisions.<sup>[60]</sup> The new constitution was signed into law by President Mwai Kibaki in August 2010. Gay advocacy websites report that the gay community celebrated stipulations in the new Constitution that the state shall not directly or indirectly discriminate against minorities and marginalised groups.<sup>[61]</sup> What constitutes a minority or marginalised group under Kenyan law is not specified, however.<sup>[62]</sup> In an interview with *LGBT Asylum News* in October 2010, GALCK Director David Kuria states:

I do not think Kenya has changed very much. Yes we have recently enacted a new constitution that has a rather expanded Bill of Rights and has various mechanisms for redress when rights are violated, but it still does not mention sexual orientation or gender identity as protected grounds for non-discrimination. In fact many were of the view that if the draft had attempted to do that it would have been shot down.<sup>[63]</sup>

97. Treatment of homosexuality by Kenyan authorities appears to have relaxed incrementally in recent years, from outright denial of the existence of homosexuality to acknowledgement (though not acceptance). In November 2009, for example, *Time* magazine reported that the Kenyan government intended to launch a survey of gay attitudes and behaviours in its three biggest cities in 2010. The survey is reported to be focused on addressing the high rate of HIV infection in the country (7%), and will involve a series of behavioural questions to men who have sex with men, as well as male and female sex workers and intravenous drug users.<sup>[64]</sup>

98. Harassment of suspected homosexuals by Kenyan authorities is reported to occur regularly. In September 2010, aid organisation *Action Canada for Population and Development* (ACPD) made a statement at the 15th Session of the Kenyan Human Rights Council in conjunction with Kenyan NGOs Minority Women in Action and the Coalition of African Lesbians and Pan Africa ILGA. The statement expresses “disappointment that the Kenyan government has rejected recommendations to take measures to provide for the protection and equal treatment of lesbian, gay, bisexual, transgender and intersex persons” and states that “The criminalisation of consensual same-sex conduct encoded in Sections 162 and 165 of the Penal Code fuels stigma, discrimination and violence against sexual minorities”. ACPD goes on to note that LGBT Kenyans are “repeatedly discriminated against and continue to face threats and violence as well as torture, ill-treatment and harassment at the hands of public authorities”.<sup>[65]</sup>

99. The authorities permit lesbian, gay, bisexual, and transgender advocacy organizations to register and conduct activities.<sup>[66]</sup> Gay advocacy websites have reported on the intention of David Kuria, General Manager of GALCK, to run for the position of Senator in 2012 in Kiambu County, which indicates an expansion in the

public space allowed for gay citizens. Kuria is the first openly gay Kenyan to attempt to enter politics.[\[67\]](#) It may be of note, however, that his official website and campaign blog make no mention of his sexual orientation, of the rights of homosexuals, or even of his current position as Director of Kenya's largest gay advocacy organisation.[\[68\]](#)

100. Official responses to pro-gay attitudes within the political ranks were illustrated in October 2010 when government Minister Esther Murugi who called for greater acceptance of gays by society. Murugi was widely criticised by the public and influential religious leaders and accused of promoting "un-African" acts and asked to resign. More than 74 churches are reported to have petitioned the President to sack Murugi, calls echoed by Muslim leaders, the national media and politicians.[\[69\]](#)

*Information on support services for homosexuals and bisexuals in Kenya.*

101. Information was found on the following lesbian, gay, bisexual, and transgender advocacy organisations: Gay and Lesbian Coalition of Kenya (an umbrella group comprising Gay Kenya, Minority Women in Action (MWA), TOMIK, Ishtar MSM, Artists For Recognition and Acceptance (AFRA-Kenya) and Transgender Education and Advocacy (TEA)), and Galebitra. Authorities permitted these organisations to register and conduct activities. [\[70\]](#)

*On whether there are any areas within Kenya where there is greater tolerance in the treatment of homosexuals or bisexuals*

102. Information found suggests that what little tolerance there is for homosexuals or bisexuals in Kenya, is found in the more urban areas. The coastal town of Mtwapa is known for having a relatively "open-minded and liberal atmosphere" when it comes to homosexuality. Many gay men are said to have moved there as a result. A gay Kenyan was cited in an article stating "For a long time, gay people have been coming into the area openly and going to their own bars and night clubs without problem". The aforementioned violence and the increasingly vocal and mobilised anti-gay campaign have, however, overshadowed this in the last year. This was partly the result of the bars and clubs in Mtwapa having been upsetting some locals and being made into a campaign issue in local elections.[\[71\]](#)

103. The capital Nairobi is also described as "far more tolerant than the rest of the country" While there are no openly gay bars in Nairobi one club in town is said to have a balcony designated for the gay community. Also certain nights, such as Sundays, are specifically aimed at gays.[\[72\]](#) The UK Home Office described there being a "gay scene in certain pubs and clubs in Nairobi", albeit a secretive one.[\[73\]](#)

*Information / reports on the treatment of children (irrespective of age) by parents who learn that the child is gay or bisexual.*

104. No reports were found that that any parent in Kenya had harmed or killed their child upon learning that they were gay. The country information on the relevant legislation on this suggests that any such action would render the individual subject to the provisions of the Kenyan Penal Code.

105. Some reports found implied that for a child who declared themselves to be gay or lesbian or bisexual it would inevitably follow that they would be ostracised or disowned by family, friends or other associates. For example in one recent news

article which includes interview comments with a woman who discovered her partner was bisexual she commented that

“Apparently Will has known he is gay for years but can’t come to terms with it. To his family and friends he’s a ladies’ man – it’s all about his macho image. He told me if he disclosed his sexual orientation, his whole family would turn their back on him.”[\[74\]](#) [\[75\]](#)

Other reports indicate many families could have difficulty in accepting something which was not widely socially accepted and they would suffer accordingly. [\[76\]](#)

106. A Reuters article published in 2006 similarly included comments by people interviewed for the article to the effect that their names could not be published because of potential ‘family and work problems.’ One interviewee said he did not want his parents to know about this part of his life because he did not want his parents ‘to know something that will end up hurting them.’[\[77\]](#)

107. Another gay man in his late 30s told his family of his sexuality eight years before when he was blackmailed in order not that the predicament never be repeated. That situation had improved as he believed no Kenyan court would convict anyone for being gay. His family’s reaction to his disclosure is not recorded.[\[78\]](#)

108. In a highly publicised gay wedding in 2009 between two Kenyan men in London journalists attempted to interview the parents of one of the couple to obtain their reaction which led to one of the men asking the media to leave his family alone as it was a private matter.[\[79\]](#) No further information was found on their reaction.

109. In a 2007 article published by *The Nation*, a 20 year old lesbian student described her family’s reaction to discovering her sexuality which was initially of shock but then of acceptance, including by her siblings;

She first informed her mother, a staunch Christian who expressed surprise and informed her father.

"My mother was very bitter saying she could not accept the fact. She said it was against Christianity and unAfrican. She however said despite that I was still her daughter. My father was a bit open-minded saying homosexuality existed and that a son of his friend had confessed to be a gay. My siblings also understand me," she said.

Ms Ngunjiri, who went to Kenya High school before moving to Makini, said her closest friends at university also knew she was a lesbian.

Unlike in other homosexual relationships where those involved assigned themselves roles of husband and wife, Ms Ngunjiri said she and her partner regarded themselves as equals.[\[80\]](#)

110. In 2006, the BBC reported the comments of a 32 year old Kenyan man of Christian religion who had informed his mother two years before that he was gay and had also since told his brother He was greatly relieved that they had accepted it. He also planned to tell the rest of his family that year.[\[81\]](#)

## **FINDINGS AND REASONS**

### **Country of Reference.**

111. The Tribunal accepts the applicant's claim that he was born in Kenya and that he is a citizen of Kenya. While the Department's file does not in this case appear to contain a copy of the applicant's passport, this is understandable because the applicant has explained to the Department that he lost his travel documents. The Tribunal accepts the finding of the delegate in regard to the applicant having lost his travel documents and that he was making arrangements to have his passport replaced by the Kenyan Consulate. No evidence is before the Tribunal to suggest that the applicant has a right to enter or reside temporarily or permanently in any country other than Kenya. The Tribunal therefore assesses the applicant's claims for protection against Kenya with that country as the country of reference

### **Consideration of Claims, Country Information and Credibility Issues**

112. The Tribunal accepts that the mere fact that a person claims fear of persecution for a particular reason does not establish either the genuineness of the asserted fear or that it is "well-founded" or that it is for the reason claimed. It remains for the applicant to satisfy the Tribunal that he or she satisfies all of the required statutory elements. Although the concept of onus of proof is not appropriate to administrative inquiries and decision-making, the relevant facts of the individual case will have to be supplied by the applicant himself or herself, in as much detail as is necessary to enable the Tribunal to establish the relevant facts. A decision-maker is not required to make the applicant's case for him or her. Nor is the Tribunal required to accept uncritically any and all the allegations made by an applicant. (*MIEA v Guo & Anor* [\[1997\] 191 CLR 559](#) at 596, *Nagalingam v MILGEA* [\[1992\] FCA 470](#); [\(1992\) 38 FCR 191](#), *Prasad v MIEA* [\[1985\] FCA 47](#); [\(1985\) 6 FCR 155](#) at 169 70.)

113. In determining whether an applicant is entitled to protection in Australia the Tribunal must first make findings of fact on the applicant's claims. This may involve an assessment of the applicant's credibility and, in doing so, the Tribunal is aware of the need and importance of being sensitive to the difficulties asylum seekers often face. Accordingly, the Tribunal notes that the benefit of the doubt should be given to asylum seekers who are generally credible, but unable to substantiate all of their claims. In this case, the Tribunal is satisfied that the applicant gave plausible and consistent evidence which is corroborated by both of his witnesses. The Tribunal accepts the applicant's evidence as credible. The Tribunal found the witnesses Mr L and W2 gave genuine, open, and direct answers to the Tribunal's questions. The Tribunal found these witnesses' evidence to be credible. The Tribunal finds in the case of W2, that he and the applicant have had a homosexual relationship. The Tribunal also accepts the evidence of [Mr B] to be objective, reliable, and credible.

114. The Tribunal is not required to accept uncritically any or all allegations made by an applicant. In addition, the Tribunal is not required to have rebutting evidence available to it before it can find that a particular factual assertion by an applicant has not been established. Nor is the Tribunal obliged to accept claims that are inconsistent with the independent evidence regarding the situation in the applicant's country of nationality (See *Randhawa v MILGEA* [\[1994\] FCA 1253](#); [\(1994\) 52 FCR 437](#) at 451, per Beaumont J; *Selvadurai v MIEA & Anor* [\[1994\] FCA 1105](#); [\(1994\) 34 ALD 347](#) at 348 per Heerey J and *Kopalapillai v MIMA* [\[1998\] FCA 1126](#); [\(1998\) 86 FCR 547](#)). On the other hand, if the Tribunal makes an adverse finding in relation to a material claim made by an applicant, but is unable to make that finding with confidence, it must proceed to assess the claim on the basis that the claim might possibly be true (See *MIMA v Rajalingam* [\[1999\] FCA 719](#); [\(1999\) 93 FCR 220](#)).

115. The applicant claims to be fearful of persecution on the basis that he is bisexual. Accordingly, the applicant's bisexual orientation is a threshold fact to be determined prior to an assessment of the position of bisexuals in Kenya and whether the applicant is exposed to a real chance of persecution by reason of his bisexuality. Claims of a fear of persecution by virtue of bisexuality, as with homosexuality, present decision-makers, including the Tribunal, with a particularly difficult task. Whereas decision-makers are more readily able to test the evidence of claims of persecution for reasons of, for example, religious beliefs or political opinion by questioning the applicant about those beliefs or opinion it is particularly difficult to assess whether the applicant's claim to be homosexual or bisexual is genuine or merely contrived for migration purposes. It would be unfair to assess the applicant against a benchmark of stereotypical attributes and, as with other refugee claims, unreasonable to expect an applicant to produce witnesses to their bisexuality or homosexuality. If an applicant volunteers to present witnesses, as was the case in this present application, then it is a matter for the Tribunal to assess the relevance of the potential witness, the credibility of the evidence, and the weight to be given to it.

116. The Tribunal has the considerable benefit of having questioned the applicant who gave sworn evidence at two hearings. The Tribunal has also had the benefit of the sworn oral evidence of two witnesses who know the applicant personally, one of whom the Tribunal accepts has been in a homosexual relationship with the applicant. Based on this evidence, the Tribunal finds the applicant's evidence about his bisexuality and his account of his life as a bisexual as plausible and credible. The Tribunal is therefore satisfied that the applicant is bisexual.

117. The next question for the Tribunal is whether there is a real chance of the applicant suffering harm as a bisexual person in the reasonably foreseeable future if he were to return to Kenya.

118. The Tribunal understands the applicant's case to be that he would, if returned to Kenya, be forced to either live discreetly or incite violence and serious harm towards himself by living an openly bisexual lifestyle. The Tribunal accepts that being forced to live discreetly is a form of persecution where the "discreet" behaviour is motivated by a fear of harm and shame that might result in living an openly homosexual lifestyle.

119. The Tribunal is satisfied that country information available to the Tribunal, including the country information provided by the witness [Mr B], indicates that bisexuals and homosexuals are vulnerable to treatment amounting to persecution in Kenya. The Tribunal finds that the country information indicates that bisexuals in Kenya may suffer serious harm of the kind prescribed in [s.91R\(1\(b\)\)](#) and [s.91R\(2\)](#) of the [Migration Act 1958](#). The Tribunal is satisfied that the country information indicates that homosexuals in Kenya cannot avail themselves of police protection from acts of violence by members of their family or the community hostile to bisexuals and homosexuals without risk of detention and inhuman or degrading treatment.

120. Having regard to the applicant's evidence in relation to the disclosure by his friend [Mr A] of the applicant's bisexuality to the applicant's parents and to the wider community by the Facebook vehicle and the evidence from the sources of country information cited above about the situation for bisexuals in Kenya, the Tribunal accepts that, if he were not discreet in the future, there is a real chance that he would face treatment amounting to persecution because he is bisexual.

121. As indicated above in the discussion of the relevant law, the persecution which the applicant fears must be for one or more of the reasons enumerated in the Convention definition, that is 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. In this case the applicant claims that he is a member of a particular social group, namely bisexuals in Kenya, and it is his membership of that particular social group that is the essential and significant reason for the persecution which he fears. The Tribunal must therefore consider whether there is a relevant social group of which the applicant is a member; and whether the persecution feared is for reasons of membership of the group. Justice McHugh in *Applicant S* summarised the issue by the statement: “To qualify as a particular social group, it is enough that objectively there is an identifiable group of persons with a social presence in a country, set apart from other members of that society, and united by a common characteristic, attribute, activity, belief, interest, goal, aim or principle.” [Applicant S v MIMA [\[2004\] HCA 25](#); [\(2004\) 217 CLR 387](#) at [\[69\]](#) per McHugh J]. *Applicant S* also establishes that there is no requirement of a recognition or perception *within the relevant society* that a collection of individuals is a group that is set apart from the rest of the community.

122. Having regard to all the country information before it, the Tribunal accepts that being gay or bisexual in Kenya makes the applicant a member of a particular social group under the Convention. Homosexual and bisexual members of a particular society may form a ‘particular social group’ for the purposes of the Refugees Convention if they are perceived in that society to have characteristics or attributes that unite them as a group and distinguish them from society as a whole (see *Applicant A & Anor v Minister for Immigration and Ethnic Affairs & Anor* (1997) 190 CLR 225 per McHugh J at 265; *Applicant S v Minister for Immigration And Multicultural Affairs* [\[2004\] HCA 25](#); [\(2004\) 217 CLR 387](#) at [\[36\]](#)). The independent evidence available to the Tribunal, set out above, indicates that there is an identifiable homosexual and bisexual community in Kenya which forms a cognisable social group within that country. In particular, the societal prejudice against homosexuals and bisexuals in Kenya indicates that not only do they share a certain characteristic – their sexual orientation – but this element makes them a cognisable group within Kenya society. Moreover, the independent evidence indicates that the Kenyan criminal code contains provisions that recognise and criminalise homosexual conduct. Having regard to all the evidence the Tribunal finds that bisexuals in Kenya do constitute a particular social group and that the applicant is a member of that particular social group. Further, the Tribunal finds that the applicant’s membership of that particular social group is the essential and significant reason for the harm which he has a real chance of suffering if he returns to Kenya now or in the reasonably foreseeable future.

123. The Tribunal accepts that if a person has suffered past persecution that past experience may be relevant in making an assessment of whether the person stands a real chance of suffering persecution in the reasonably foreseeable future. On the other hand, an absence of past persecution does not necessarily indicate that there is not a real chance of future harm. In this case the applicant told the Tribunal that he has managed to avoid serious harm linked with his bisexuality because he did not express his sexuality openly in Kenya. He did not express his sexuality openly for the reason that he feared being subject to serious harm in the form of harassment, discrimination or beatings at the hands of family or individuals or groups in the community, or detention and mistreatment and prosecution at the hands of the police. The Tribunal finds that the applicant has not suffered serious harm in the past and in the sense of [s.91R\(1\)\(b\)](#) and [s.91R\(2\)](#) of the [Migration Act 1958](#), however, the Tribunal also finds that the absence of past harm in this case is not adverse to the applicant’s claim and does not mitigate against the real chance that the applicant is likely to face serious

harm in the reasonably foreseeable future for reasons of his membership of the particular social group as found by this Tribunal.

124. The Tribunal is satisfied that if the applicant were to return to Kenya, there is a real chance that he would suffer serious harm amounting to persecution in the reasonably foreseeable future. The Tribunal is satisfied that the serious harm relates to his membership of a particular social group, namely, homosexuals and bisexuals in Kenya.

125. The Tribunal accepts that the applicant was involved in bisexual relationships in Australia because of his sexual identity. The Tribunal finds that the applicant felt able to express his sexuality openly in Australia and without fear of discrimination or harm, and that this is something he has been unable to do in Kenya. The Tribunal is satisfied that the applicant is not involved in bisexual relationships solely for the purpose of strengthening his refugee claims. The Tribunal is therefore not disregarding the applicant's conduct in Australia for the purposes of [s.91R\(3\)](#) as the evidence before the Tribunal satisfies the Tribunal that for the purposes of [s.91R\(3\)\(b\)](#) of the [Migration Act 1958](#) the applicant engaged in the relevant conduct other than for the purposes of creating a *sur place* claim or the strengthening his protection claim.

126. The Tribunal is satisfied on the country information before it, including the oral evidence provided by [Mr B], that the persecution of members of the particular social group identified by this Tribunal is systematic and discriminatory as there are deep rooted cultural and social influences that motivate individuals and groups to harm bisexuals and homosexuals in Kenya. The Tribunal therefore finds that the applicant's claim satisfies [s.91R\(1\)\(c\)](#) of the [Migration Act 1958](#).

127. The Tribunal had regard to the delay between the applicant arriving in Australia in 2004 and his applying for a Protection visa in 2010. In this case, the Tribunal does not draw any adverse conclusion from the fact that the applicant delayed lodging his protection visa application. The Tribunal accepts the applicant's explanation that it was only in 2007 when [Mr A] informed his parents of his bisexuality, and then subsequently posted onto Facebook, the risk of serious harm to the applicant should he return to Kenya was heightened. The Tribunal also accepts the applicant's claims that upon having his student visa cancelled and then becoming an unlawful non-citizen he was fearful of approaching the immigration authorities as he feared being deported back to Kenya. Furthermore, the Tribunal accepts that the applicant was not aware of his options for a protection visa. The Tribunal therefore finds that the applicant's delay in applying for protection visa does not diminish his claimed fear of harm if he returns to Kenya.

128. The Tribunal considered whether the applicant might be able to find protection if he were to relocate within Kenya. The "internal relocation principle" was accepted by the Full Federal Court in 1994, on the basis that "[t]he focus of the Convention definition is not upon the protection that the country of nationality might be able to provide in some particular region, but upon a more general notion of protection by that country" [*Randhawa v MILGEA* [\[1994\] FCA 1253](#); [\(1994\) 52 FCR 437](#) at 440-1.] The Chief Justice reasoned that "If it were otherwise, the anomalous situation would exist that the international community would be under an obligation to provide protection outside the borders of the country of nationality even though real protection could be found within those borders [ [\[1994\] FCA 1253](#); [\(1994\) 52 FCR 437](#) at 441]. The High Court has now confirmed as a general proposition that, depending on the circumstances of the particular case, it may be reasonable for an applicant to relocate in their country to a region where, objectively, there is no appreciable risk of the

occurrence of the feared persecution. [*SZATV v MIAC* (2007) 233 CLR 18; *SZFDV v MIAC* [2007] HCA 41; (2007) 233 CLR 51].

129. While there is some evidence to suggest that there is some greater degree of tolerance in Nairobi there is also evidence that homosexual and bisexuals are forced to remain discreet and underground to avoid harassment and discrimination. The evidence given to the Tribunal by [Mr B] is especially informative in this regard. Taking all that evidence into account, on balance, the Tribunal is not satisfied that the applicant would find adequate safety or protection by relocation to another part of Kenya.

130. The Tribunal is satisfied that if the applicant were to return to Kenya he would be unable to express his sexuality in the manner he has done in Australia. On the basis of the evidence before it the Tribunal cannot exclude as remote and insubstantial, the chance that he would face serious harm as a consequence of being a bisexual and practising his sexuality in Kenya.

131. In other words the Tribunal is satisfied that there is a real chance that he would face significant harassment or serious physical harm in Kenya. These acts could be committed by members of the public or the authorities. The Tribunal is not satisfied that the applicant could avoid the persecution he fears by internally relocating within Kenya.

132. The Tribunal finds that the harm which the applicant fears amounts to persecution involving 'serious harm' as required by paragraph 91R(1)(b) of the Act in that it involves at least significant physical harassment or ill-treatment. The Tribunal finds that his membership of the 'particular social group' of homosexuals in Kenya is the essential and significant reason for the persecution which he fears, as required by paragraph 91R(1)(a) of the Act. The Tribunal finds that the persecution which the applicant fears involves systematic and discriminatory conduct, as required by paragraph 91R(1)(c), in that it is deliberate or intentional and involves his selective harassment for a Convention reason.

133. The country information cited above indicates that Kenyan law prohibits having homosexual and bisexual relations and therefore the state itself in effect is the agent for persecution of homosexuals and bisexuals through the operation of the relevant laws. Based on all this evidence the Tribunal is satisfied that the applicant does not have adequate and effective state protection available to him in Kenya.

134. For the reasons set out above the Tribunal finds that the applicant has a well-founded fear of persecution for a Convention reason.

## CONCLUSIONS

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

## DECISION

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

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