IMMIGRATION AND PROTECTION TRIBUNAL NEW ZEALAND **[2018] NZIPT 801305**

AT AUCKLAND

Appellant:	**FU (India)**
Before:	A N Molloy (Member)
Counsel for the Appellant:	J Tresidder
Counsel for the Respondent:	No Appearance
Date of Hearing:	26 June 2018
Date of Decision:	30 October 2018

DECISION

[1] The appellant is a national of India. He appeals against the decision of a refugee and protection officer of the Refugee Status Branch (RSB) declining to recognise him as a refugee or protected person under the Immigration Act 2009 (the Act).

INTRODUCTION

[2] The appellant claims that if he were to be returned to India he will be seriously harmed at the hands of his family, because of his sexuality. He also claims that he will not be able to call upon the protection of the Indian state from that harm and nor can he access meaningful state protection elsewhere in India.

[3] In order to address the statutory issues common to such appeals, the Tribunal will first outline the appellant's account. It will then assess the credibility of his evidence before making findings of fact. The Tribunal will then outline the relevant law before setting out the basis upon which the appeal is to be assessed.

THE APPELLANT'S CASE

[4] The appellant is the youngest of three children and the only son born into a Hindu family. His parents moved from a neighbouring state to New Delhi shortly after the appellant's birth. He lived there in the family home for most of his life. He is now in his early thirties.

[5] The appellant's father is now retired, having been a successful businessman. His mother has been a housewife throughout his life. His older sisters are both married with children of their own.

[6] The father's success in business has afforded the appellant and his family a good standard of living. The appellant was educated at a private school and later graduated with a tertiary qualification. However, the father has a ruthless streak and, for as long as the appellant can remember, subjected the appellant, his mother and his sisters to regular physical violence. This has been an accepted part of the appellant's life. He has always felt that he has failed to meet his father's high expectations.

[7] The local employment market in New Delhi was intensely competitive and it took some time for the appellant to find work after he graduated. Obtaining employment is as much a matter of having contacts as it is of merit because employers have so many prospective employees to choose from. On one occasion, his father sought a position for him and was told that he would have to pay the equivalent of NZ$20,000. In the event, the appellant eventually obtained a position with a call centre in Delhi, providing technical support to software clients in the United States and Canada. The work conditions were good and, before long, he earned a good salary. He remained with that employer for approximately two years until he came to New Zealand in 2015.

[8] The appellant's desire to study in New Zealand was, in part, borne of a desire to improve his academic record and employment prospects. However, he also had other reasons for wanting to leave the family home.

[9] The appellant had long believed himself to be different in some way and, during his early teens, began to realise that he was attracted to his own sex. He did not dare disclose this to anyone because it had been apparent to him from an early age that this was frowned upon both within his religion and within his parents' social group. He described an early insight into the stigma associated with being gay. When he was 12 or 13, the appellant developed a urinary tract infection. It was

standard practice among doctors when dealing with such infections to also check HIV status. The appellant was subjected to counselling and required to take blood tests even though he was then young, naïve, and sexually inactive. The degree of panic and shame manifested by his mother at the very suggestion of infection (later shown to be unnecessary) made it clear to the appellant that there was much stigma attached to same-sex attraction.

[10] It was not until the appellant was about sixteen that he began to understand his sexuality. One evening, while taking a shortcut home from a family celebration, he passed a group of men who were talking in a local park. Without being able to articulate why, he realised that they were like him. That group became a sanctuary for him over the next six or seven years. The park was open to the public for exercise and recreation until about 9.00 pm and the men could meet under a socially acceptable guise. Some met for sexual liaisons. Others, including the appellant, were content simply to socialise.

[11] This was not without its risks. The men were vulnerable to police demands for money, mobile phones or sex. This happened to the appellant twice. On the first occasion in 2008, two policemen threatened to arrest the appellant and an associate and to tell their parents why they had been arrested. They were harassed and sexually assaulted. A similar thing happened again in 2014. The appellant found the incidents degrading but knew that he was powerless to do anything about it. Anyone who complained would be labelled and the idea of outing himself was untenable.

[12] Within that group, the appellant became good friends with a man called AA. Eventually, their relationship developed into an affair. Like the other men who met at the park, AA did not openly acknowledge his sexuality and, eventually, he succumbed to family pressure to marry. His marital relationship was not without its difficulties. Early on, his wife moved out of their apartment and returned to her family home because she did not wish to live with him. However, their two families met and brokered a compromise. They reconciled and eventually had a child.

[13] AA was unhappy but could not consider ending his marriage and living openly as a gay man. In the meantime, the fact that AA's wife spent much of her time with her own family after the birth of their child, afforded the appellant and AA the privacy of his apartment without the risk of being discovered.

[14] The appellant's father, unaware of AA's sexuality, regarded him as a good influence on the appellant. He had always been strict about the appellant's social

life, and ordinarily imposed a curfew of 9pm. However, he was happy for the appellant to be in the company of AA, who was a little older than the appellant, was of the same caste and had a good job.

[15] Over time the appellant came to realise that there was no future in the relationship. This upset him. He also knew that he could not marry. He did not wish to deceive a young woman and perhaps ruin her life by allowing her to believe he was something he is not, as AA had, knowing that the truth would eventually become apparent.

[16] The older the appellant grew, the more sharply focussed this dilemma became, as his parents began to talk more of marriage. The expectation that he marry, and his realisation that he would not be able to sustain a lie as his friend had, led him to look abroad for an opportunity to escape. He investigated possibilities in Canada before the opportunity arose to travel to New Zealand. He arrived here in late 2015 and enrolled in a Level 7 NZQA course, hoping to obtain qualifications that would enable him to seek work and residence through the normal channels. However, subsequent events overtook him.

[17] After arriving in New Zealand, the appellant had several sexual encounters with other gay men he contacted through local social media. In early 2016, he began to feel unwell and became concerned that he may have contracted HIV. As his health declined he became depressed and insular. His academic performance deteriorated and he became fearful that he would have to return to India and disclose to his parents that he was HIV positive. Eventually, in late 2016, he admitted his concerns to a local man who took the appellant under his wing. He arranged an appointment at a clinic in a different city and in due course the appellant's HIV positive status was confirmed.

[18] Despite his suspicions and fears, this news came as a shock to the appellant. However, he is well-supported by a local peer group that have helped him to realise that it was possible to restore his health, look after himself and others, and to live a normal life despite his HIV status. Early in 2018, he married a New Zealand citizen, who is also HIV positive.

[19] The appellant's parents do not know that he is gay, but he fears that they will inevitably find out if he returns to India. People continually ask after him and as to whether he is married yet. The dowry system that operates in the appellant's caste is such that, the older he gets, the lower the dowry he will attract, which is of concern to his father, who expects him to return and to get on with his life. The pressure on

the appellant to marry will not abate and the truth will eventually become apparent. There is no privacy in an Indian home and the fact that the appellant is now dependent upon anti-retroviral medication is an additional complication. His parents would eventually become aware of it and it would not take much for them to find out what the medication is for.

[20] Nor does the appellant believe that he can avoid difficulty by moving elsewhere. There are practical impediments to any such attempt. If he seeks to move out of New Delhi, his parents would not cease putting pressure on him. On the contrary, they would inevitably ask why he wanted to leave. He would be limited in where he could settle in that he will need to find a place where Hindi is the predominant language. Even then, he has extended family throughout India, and his parents will expect him to make contact with any to whom he is near. If he could find an appropriate place, there is no guarantee that he would be able to find work quickly. It is not easy to find rental accommodation as a single man. Prospective landlords will require references and perhaps guarantees and will want to know where he is from. He has no savings and would be reliant upon his parents for funds. The appellant's family will not have difficulty finding where he is.

[21] The appellant has been subjected to domestic violence by his father throughout his life. He has been beaten for trivial and minor infractions, and the shame his parents would feel when they learn the truth would place the appellant at risk again. The appellant believes that his father would go further than just beating him. He is well-acquainted with people through his business dealings who would be prepared to take matters into their own hands, and the appellant fears for his life.

[22] The appellant lodged his claim for refugee and protected person status in early 2017. After being interviewed by a refugee and protection officer in April 2017, the RSB issued a decision declining his application in late 2017. It is from that decision that the appellant appeals.

Material and Submissions Received

[23] The Tribunal and the appellant were provided with copies of the Immigration New Zealand files relating to the appellant's claim for refugee and protected person status. Prior to the appeal hearing, the Tribunal was provided with two bundles of documents on behalf of the appellant. The first, forwarded on 16 April 2018, included an updated statement from the appellant together with a memorandum of counsel and copies of various items of country information. The second, dated 4 May 2018, enclosed a letter dated 22 March 2018 from a Sexual Health Service,

confirming the appellant's HIV status and providing an outline of his current good health, a copy of the appellant's marriage certificate, a declaration from the appellant's husband, BB, and a letter from the Sexual Health Service regarding BB's current HIV status and state of health.

[24] The Tribunal was subsequently informed that the appellant had instructed new counsel. An adjournment was sought to enable time to prepare for the hearing. However, the newly instructed counsel was experienced in such appeals, evidence and submissions had already been lodged and the decision to change counsel was made at a late stage and without reasons being outlined in detail. In the absence of cogent grounds justifying an adjournment, the Tribunal indicated that the hearing date would remain unchanged.

[25] The Tribunal also indicated that it would be willing to consider any steps that might assist counsel to prepare for the hearing. In the event, no steps were advised or requested, and it was agreed that counsel would be provided with additional time to lodge closing submissions following the conclusion of the hearing. In that regard, a memorandum of closing submissions was received on 13 July 2018, together with a bundle of relevant country information.

[26] In early September 2018, it came to the attention of the Tribunal that the Supreme Court of India had issued a judgment dated 6 September 2018 in *Johar v Union of India* (2018) WP (Cri) No 76 of 2016 (SCI). Counsel was invited to consider to lodge submissions as to the relevance, if any, of that decision. An additional memorandum of counsel was received by the Tribunal on 20 September 2018.

ASSESSMENT

[27] Under section 198 of the Act, on an appeal under section 194(1)(c) the Tribunal must determine (in this order) whether to recognise the appellant as:

(a) a refugee under the 1951 Convention Relating to the Status of Refugees (the Refugee Convention) (section 129); and

(b) a protected person under the 1984 Convention Against Torture (section 130); and

(c) a protected person under the 1966 International Covenant on Civil and Political Rights (the ICCPR) (section 131).

Credibility and Findings of Fact

[28] In determining whether the appellant is a refugee or a protected person, it is necessary first to identify the facts against which the assessment is to be made. That requires consideration of the credibility of the appellant's account.

[29] The credibility of the appellant's account as to the past is accepted, with the caveat that the Tribunal does not accept every assertion he has made as to the future. Accordingly, the Tribunal accepts that the appellant is a national of India who has spent most of his life living with his family in New Delhi. He is gay, and is in a relationship with a New Zealand citizen male, but has not yet disclosed either his sexuality or that he is in a relationship to his family. He is also HIV positive. Though presently in good health, he has not informed his family of this either. It is also accepted that the appellant's father has routinely been violent towards him throughout his life. He has also been violent towards his wife (the appellant's mother) and his daughters (the appellant's sisters).

[30] It is on that basis that the appellant's appeal is to be assessed.

The Refugee Convention

[31] Section 129(1) of the Act provides that:

> A person must be recognised as a refugee in accordance with this Act if he or she is a refugee within the meaning of the Refugee Convention.

[32] Article 1A(2) of the Refugee Convention provides that a refugee is a 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 as a result of such events, is unable or, owing to such fear, is unwilling to return to it.

[33] In terms of *Refugee Appeal No 70074* (17 September 1996), the principal issues are:

(a) Objectively, on the facts as found, is there a real chance of the appellant being persecuted if returned to the country of nationality?

(b) If the answer is yes, is there a Convention reason for that persecution?

Assessment of the Claim to Refugee Status

[34] For the purposes of refugee determination, "being persecuted" requires serious harm arising from the sustained or systemic violation of internationally recognised human rights, demonstrative of a failure of state protection: see *DS (Iran)* [2016] NZIPT 800788 at [114]-[130] and [177]-[183].

[35] In determining what is meant by "well-founded" in Article 1A(2) of the Convention, the Tribunal adopts the approach in *Chan v Minister for Immigration and Ethnic Affairs* (1989) 169 CLR 379 (HCA), where it was held that a fear of being persecuted is established as well-founded when there is a real, as opposed to a remote or speculative, chance of it occurring. The standard is entirely objective: see *Refugee Appeal No 76044* (11 September 2008), at [57].

Objectively, on the facts as found, is there a real chance of the appellant being persecuted if returned to India?

[36] The appellant's sexuality is relevant to the predicament he would face if he were to return to India, in part because section 377 of the Indian Penal Code of 1860 provides that whoever "voluntarily has carnal intercourse against the order of nature with any man, woman or animal" (which has been interpreted as including sex between consenting males) shall be punished with up to life imprisonment and "shall also be liable to a fine."

[37] The incidence of prosecution for an offence under section 377 is unclear. In *DT (India)* [2017] NZIPT 801159 the Tribunal observed that the provision appears only rarely to be enforced (at [52]). However, in *DS (India)* [2017] NZIPT 801073 a differently constituted Tribunal panel referred to a report at [54], not cited in *DT (India)*, according to which nearly 1,500 people were arrested under section 377 in 2015 (the twelfth edition of the International Lesbian, Gay, Bisexual, Trans and Intersex Association *State-Sponsored Homophobia: A World Survey of Sexual Orientation Laws: Criminalisation, Protection and Recognition* (May 2017) at 124-125).

[38] In any event, while the mere fact that same-sex sexual activity is criminalised does not mean that every gay man is at risk of being persecuted, the existence of the provision in the Penal Code has played a fundamental part in setting the context in which the appellant's predicament is to be assessed.

[39] The International Commission of Jurists published a report based on research conducted in nine cities around India in 2016, including interviews with individuals who identified as LGBTIQ and with lawyers and activists: see International Commission of Jurists, *"Unnatural Offences" - Obstacles to Justice in India Based on Sexual Orientation and Gender Identity* (February 2017) (the ICJ report). At 17 it cites one author's claim that section 377 has a

> … significant role in perpetuating a certain kind of discourse about queer people which classifies groups as criminal and stigmatizes sexual behaviour … The discourse which constructed queer people as 'unnatural' and 'perverted' therefore has the effect of legitimizing violence against all queer people.

[40] The ICJ report noted examples of section 377 being used to facilitate blackmail and the extortion of money from queer persons, by perpetuating homophobic attitudes and making it impossible for victims of such abuse to access justice (at 18). It recorded reports of violence, abuse and harassment at the hands of the police and stated that the possibility of invoking section 377 prevented gay individuals from approaching the police when they are the victims of criminal acts (at 18). The routine failure of the police to act upon complaints submitted by gay persons puts members of that community at increased risk of violence from non-State actors (at 33).

[41] The constitutional validity of section 377 has been under judicial scrutiny in recent years. In 2013, the Indian Supreme Court overruled a 2009 decision from the New Delhi High Court, which had held section 377 to be unconstitutional (see *Koushal v Naz Foundation* (2013) CA No 10972 of 2013 (SCI). Accordingly, even private consensual sex between two men remained a criminal offence.

[42] The Supreme Court has since revisited its decision. In *Johar v Union of India* WP (Cri) No 76 of 2016 (SCI), it considered petitions challenging the constitutional validity of section 377.

[43] The five judges of the Supreme Court published four separate decisions, but agreed that, as far as section 377 criminalised consensual sexual acts between competent adults, criminalisation is manifestly arbitrary and "cannot be regarded as constitutional" (per Misra CJI and Khanwilkar J at [253(xvii)] and per Chandrachud J at [156(i)].

[44] In time, the decision of the Supreme Court will undoubtedly be a landmark decision in combatting discrimination experienced by the LGBTIQ community in India. However, the mere removal of the statutory provision will not immediately alter the predicament of the LGBTIQ community in India. This is exemplified by a

report cited by Australia's Refugee Review Tribunal in 2014. In *1213081* [2014] RRTA 75, it referred to a report by Dr Sheleyah Courtney *Homosexuality in India* (25 March 2011). At the time she prepared her report, the High Court in New Delhi had found section 377 to be unconstitutional (and this decision had not yet been overturned by the Supreme Court, as did happen in 2013). Dr Courtney stated that, despite the High Court's decision, "at the dominant social-cultural level across India, attitudes of fear, hatred and disgust regarding homosexuality intractably persist". She concluded that individual members of the LGBTIQ community remained at risk of serious harm "in numerous forms ranging from extreme violence to economic endangerment".

[45] In short, while the impact of the Indian Penal Code in perpetuating homophobic attitudes was undoubtedly significant, the nature of Indian cultures and society is complex. Societal prejudice may have been underpinned by legislation, but the legislation did not operate in a vacuum. A recent report outlines, for example, the preference among parents for sons, which is "deeply rooted in the Indian socio-cultural context", having been "pervasive for centuries": see International Centre for Research on Women *Masculinity, Intimate Partner Violence and Son Preference in India, 2014: A Study* (January 2014) at 2 (the ICRW study). It continues (at 51):

> The practice is deeply rooted in patriarchal, cultural and religious beliefs that uphold the essential value of having a son in a family, all of which are also powerfully driven by kinship and inheritance systems. The belief that sons are critical to a family's social survival by carrying on its lineage, sustains the ideology of son preference. Sons are perceived as important to ensure a family's economic security over time, as providers of income and resources to parents in their old age, while girls usually move away from their families.

[46] The study states that this preference has led to stereotypical perceptions about masculinity and has fostered an environment of deeply-rooted impunity for violent behaviour (p2). More than 60 per cent of the more than 9,000 male respondents aged between 18 to 49 said that they had acted violently towards their wife/partner.

[47] In *DT (India)* [20017] NZIPT 801159, the Tribunal adopted the finding of the United Kingdom Upper Tribunal that same-sex orientation is seen as unacceptable "socially and within the close familial context". It observed that attitudes are improving but acknowledged that "progress is slow" (at [61]). It also found (at [68]) that:

> The country information indicates that attitudes from [educated, middle class urban people] towards the LGBT community are significantly more in enlightened and tolerant than is the case in rural areas.

[48] While that may be so in a broad sense, it cannot be assumed that there is a clear-cut urban-rural divide. According to the ICJ report (at 7) while the context and experiences of LGBTIQ people varies across socio-economic lines:

> … it is safe to generalize that they face stigma, harassment and violence in their everyday lives, in private and public spaces, motivated in whole or in part by ignorance of, prejudice and hatred against their real or imputed sexual orientation and gender identity.

[49] The ICJ report refers to "systemic discrimination and violence faced by queer persons in India, and the challenges they face accessing justice and seeking remedies for human rights violations". It states (at 4-5) that these reflect the failure of Indian authorities to

> … respect, to protect and to fulfill the rights to equality before the law, equal protection of the law and freedom from discrimination; the rights to privacy, liberty and security of the person, including the right not to be subjected to arbitrary arrest and detention; the right to life, to freedom from torture and other ill-treatment; and the right to access justice and to an effective remedy, for all persons, including queer people, without discrimination as to their real or imputed sexual orientation and gender identity.

[50] Even the Supreme Court justices stated that section 377 had "become an odious weapon for the harassment of the LGBT community by subjecting them to discrimination and unequal treatment": see *Johar v Union of India (supra)* per Misra CJI and Khanwilkar J at [253(xvii)].

The appellant's predicament

[51] If the appellant were to return to India, the truth about his sexuality will inevitably emerge. First, there is the fact of his relationship with a male New Zealand citizen. Even if he were not still in a relationship when he returned, or if his New Zealand citizen partner did not accompany him to India, the appellant's parents will inevitably learn the truth. The appellant has never considered it viable that he should simply acquiesce to the social and familial expectation that he marries, with no thought to the integrity of that decision or the impact upon his non-suspecting spouse.

[52] The appellant, his mother and his siblings have been subjected to routine domestic violence throughout his life. The appellant's description of this was not gratuitous or self-serving. If anything, it was an afterthought that emerged as a detail to which he had given little thought, as it had become a matter of normality. He has not suggested that the violence levelled against him in the past has led to lasting physical injury. However, the inevitability of such abuse in the form of serious

assault at the hands of his family, the psychological impact that it carries, and the fact that he will have no recourse to the protection of the police, combines to give rise to the risk of serious harm. The harm would arise out of sustained or systemic breaches of internationally recognised rights, not least his right to security of the person under Article 9 of the ICCPR. His inability to access state protection is, in itself, a breach of the right to enjoy such rights free of discrimination.

[53] For these reasons, the Tribunal finds that, objectively, on the facts as found, there is a real chance of the appellant being persecuted if returned to India.

Internal protection alternative

[54] The protection offered under the Refugee Convention is surrogate in nature, in that it is extended by the receiving state only where the claimant's country of nationality is unwilling or unable to protect them from being persecuted. The question as to whether a claimant can access protection anywhere in their country of nationality is addressed in New Zealand in the manner articulated in *Refugee Appeal No 76044* (11 September 2008). At [178], the Refugee Status Appeals Authority:

> … [affirmed] the Hathaway/New Zealand rule, namely that once a refugee claimant has established a well-founded fear of being persecuted for a Convention reason, recognition of that person as a Convention refugee can only be withheld if that person can genuinely access in his or her home country domestic protection which is meaningful. Such protection is to be understood as requiring:
>
> (a) That the proposed internal protection alternative is accessible to the individual. This requires that the access be practical, safe and legal.
>
> (b) That in the proposed site of internal protection there is no risk of being persecuted for a Convention reason.
>
> (c) That in the proposed site of internal protection there are no new risks of being persecuted or of being exposed to other forms of serious harm or of *refoulement*.
>
> (d) That in the proposed site of internal protection basic norms of civil, political and socio-economic rights will be provided by the State. In this inquiry reference is to be made to the human rights standards suggested by the Refugee Convention itself.

[55] The issue of internal protection in India for a gay male has been considered in the United Kingdom. The United Kingdom Upper Tribunal (Immigration and Asylum Chamber) found that there is a "large, robust and accessible" support network for the LGBTIQ community in the major cities, and that "in general" it would not be unreasonable or unduly harsh for such a claimant at risk of being persecuted

in his home area "to relocate internally to a major city within India": *MD (same-sex oriented males: risk) India CG* [2014] UKUT 00065 (IAC) at [174 (e)].

[56] The Upper Tribunal's conclusion that it would not "in general" be unreasonable or unduly harsh implicitly conveys the notion that there may be some exceptions to the asserted general position. However, the decision of the Upper Tribunal does not identify what these might be. Further, while the decision makes broad findings in relation to the availability of internal protection alternatives (or relocation) elsewhere, it must be noted that the legal framework for considering this issue in the United Kingdom is fundamentally different from New Zealand, where questions of unreasonableness or undue harshness do not enter into the analysis.

[57] In New Zealand, a case-by-case approach is required, focussing on the particular circumstances of the appellant in light of the prevailing conditions in the country of nationality.

[58] The Tribunal does not find (and is not required to find) that, in all cases, there could not be a viable internal protection alternative for an LGBTIQ person in India.

[59] However, the Tribunal is not satisfied that this appellant can access meaningful protection by relocating within India. As he stated, there are practical impediments to him doing so. He has no savings and will be reliant upon his parents for funds. The Tribunal is aware of the circumstances of the appellant's partner, and is satisfied that he would not be able to provide meaningful support to the appellant, whether from India or from New Zealand. If the appellant sought to move elsewhere in India, his parents will inevitably ask why and, on learning the truth, he will be at risk of physical harm as outlined above.

[60] Even supposing that the appellant could identify a large urban centre where Hindi is widely spoken (excluding New Delhi, where his family reside) there is no guarantee that he would be able to find work quickly, particularly if he were to seek to live openly acknowledging his sexuality, as he is entitled to. While no longer facing the threat of prosecution under section 377 of the Indian Penal Code, the social attitudes that have been underpinned by that legislation will not have evaporated. The fact that the appellant is HIV positive would, if it became known, expose him to additional discrimination both in the employment sphere and in general; in that regard, see *DS (India)* at [57]: despite the passage of legislation banning discrimination against people who are HIV-positive, individuals continue to face discrimination in the home, community, workplace and healthcare sector: A

Dhillon “India passes HIV/AIDS anti-discrimination law, but stigma endures” *Sydney Morning Herald* (18 April 2017).

[61] To avoid such discrimination, the appellant would have to hide his sexuality and his health condition. He would therefore be deprived of a meaningful private life, in breach of his fundamental right to freedom from arbitrary or unlawful interference with his privacy, family and home and his right to be treated equally and without discrimination. These rights exist by virtue of Articles 2, 17 and 26 of the ICCPR and the prohibition on discrimination goes to the core of the Tribunal’s understanding of “being persecuted”. Being deprived of the ability to enjoy these rights would amount to serious harm for the appellant. He is under no duty to forego his exercise of these fundamental human rights to avoid harm.

[62] In short, the Tribunal finds that the appellant will be unable to avoid being persecuted or other forms of harm in any proposed site of internal protection in India. He does not have a viable internal protection.

Is there a Convention reason for the persecution?

[63] Having answered the first principal issue in the affirmative, it is necessary to determine whether the appellant’s predicament arises for a Convention reason. The Tribunal finds that it does.

[64] In reaching that conclusion, the Tribunal adopts the findings of previous refugee appeals, in which it was determined that sexual orientation can form the basis for a particular social group: *Refugee Appeal No 1312 Re GJ* (30 August 1995) at 57-58, [1998] INLR 387 at 422-423 (as approved by Lord Steyn in *R v Immigration Appeal Tribunal: ex parte Shah* [1999] 2 AC 629 at 643D and 644D).

Conclusion on Claim to Refugee Status

[65] For the reasons given, the Tribunal finds that the appellant has a well-founded fear of being persecuted in India, for reason of his membership of a particular social group. He is entitled to be recognised as a refugee under the Refugee Convention.

The Convention Against Torture

[66] Section 130(1) of the Act provides that:

> A person must be recognised as a protected person in New Zealand under the Convention Against Torture if there are substantial grounds for believing that he or she would be in danger of being subjected to torture if deported from New Zealand.

Conclusion on Claim under Convention Against Torture

[67] The appellant is recognised as a refugee. By virtue of section 129(2) of the Act (the exceptions to which do not apply) he cannot be deported from New Zealand. This is in accordance with New Zealand's *non-refoulement* obligation under Article 33 of the Refugee Convention. Accordingly, there are no substantial grounds for believing that he would be in danger of being subjected to torture if deported from New Zealand and he does not require protection under the Convention against Torture.

The ICCPR

[68] Section 131 of the Act provides that:

> (1) A person must be recognised as a protected person in New Zealand under the Covenant on Civil and Political Rights if there are substantial grounds for believing that he or she would be in danger of being subjected to arbitrary deprivation of life or cruel treatment if deported from New Zealand.
>
> ...
>
> (6) In this section, cruel treatment means cruel, inhuman, or degrading treatment or punishment.

Conclusion on Claim under ICCPR

[69] Again, for the reasons given, the appellant cannot be deported from New Zealand. There are, therefore, no substantial grounds for believing that he would be in danger of being subjected to arbitrary deprivation of life or cruel treatment if deported from New Zealand. Accordingly, he does not require protection under the ICCPR and he is not a protected person within the meaning of section 131(1) of the Act.

CONCLUSION

[70] For the foregoing reasons, the Tribunal finds that the appellant:

(a) is a refugee within the meaning of the Refugee Convention;

(b) is not a protected person within the meaning of the Convention Against Torture;

(c) is not a protected person within the meaning of the Covenant on Civil and Political Rights.

[71] The appeal is allowed.

Order as to Depersonalised Research Copy

[72] Pursuant to clause 19 of Schedule 2 of the Immigration Act 2009, the Tribunal orders that, until further order, the research copy of this decision is to be depersonalised by removal of the appellant's name and any particulars likely to lead to the identification of the appellant.

"A N Molloy"
A N Molloy
Member

Certified to be the Research Copy released for publication.

A N Molloy
Member