

Before the High Court

Applicants S396/2002 and S395/2002, a gay refugee couple from Bangladesh

CATHERINE DAUVERGNE* AND JENNI MILLBANK*

On 11 October 2002 the High Court granted leave to appeal from a decision of the Full Federal Court, *Kabir v Minister for Immigration & Multicultural Affairs (MIMA)* (hereinafter *Kabir*).¹ The case concerns a gay couple from Bangladesh seeking asylum. This marks the first time that a final appellate court anywhere in the world will consider a refugee claim based on the ground of sexual orientation. Refugee decision-makers around the world follow each other's rulings closely and the High Court of Australia has played an important role in developing international refugee jurisprudence to date. The outcome of this case has the potential to influence decision-making in all refugee-receiving states.

1. *The Context of the Claim*

Canada and Australia have been described as 'leading the way' in recognising asylum claims based on sexual orientation.² By the time the UK had even accepted that lesbians and gay men were eligible to apply for protection,³ Australia and Canada had between them evaluated hundreds of claims on the basis of sexual orientation.

Asylum is granted on the basis of the refugee definition agreed upon internationally in the 1951 Convention Relating to the Status of Refugees⁴ as amended by the 1967 Protocol relating to the Status of Refugees (hereinafter the Convention).⁵ A total of 136 states are parties to the Convention and the Protocol as of 30 September 2002. The definition of a refugee is someone who:

* Canada Research Chair in Migration Law, Associate Professor, Faculty of Law, University of British Columbia.

♦ Senior Lecturer, Faculty of Law, University of Sydney. Thanks to Tiffany Hambley for her research assistance on this paper.

1 [2002] FCAFC 129. Now renamed by file number as *Applicants S396/2002 and S395/2002*. At leave to appeal the matter was heard as *S114/2002 and S115/2002*. The leave to appeal transcript is available online at: <<http://www.austlii.edu.au/au/other/hca/transcripts/2002/S115/1.html>> (accessed 30 January 2003).

2 John Russ, 'The Gap Between Asylum Ideals and Domestic Reality: Evaluating Human Rights Conditions for Gay Americans by the United States' Own Progressive Asylum Standards' (1998) 4 *UC Davis International Journal of Law and Policy* 29, unpaginated electronic copy.

3 Kristen Walker, 'Sexuality and Refugee Status in Australia' (2000) 12 *International Journal of Refugee Law* 175; Derek McGhee, 'Persecution and Social Group Status' (2001) 14 *Journal of Refugee Studies* 20.

4 198 UNTS 150.

5 606 UNTS 267.

owing to a 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 (Article 1(A)(2)).⁶

Australia has accepted that sexual orientation can form the basis of a ‘particular social group’ claim under the Refugee Convention since 1994. This acceptance was based upon the Supreme Court of Canada decision in *Ward v Attorney-General (Canada)* (hereinafter *Ward*).⁷ This is vital because refugee protection is extended only to those who face persecution on the basis of one of the five grounds in the Convention definition, not to those who simply face persecution without a demonstrated link to one of the named factors. In early Australian cases the particular social group was defined as ‘homosexuals’ and was subsequently refined as ‘homosexuals in X country’ but the group was never more specifically defined. Tribunal use of the category, for example, is frequently not gender-specific.⁸ Moreover, in numerous cases concerning sexual orientation the tribunal does not even state what the particular social group is for the purpose of the claim, or if it is stated does not explain on what basis it is so defined.

In our comparative analysis of over 300 decisions on the basis of sexual orientation from the refugee tribunals of Australia and Canada, we found that Canada’s acceptance rate was over twice that of Australia.⁹ One of the major reasons for the sharp disparity in acceptance rates was the Australian ‘discretion’ test. Fully one-third of Australian cases considered whether applicants could avoid persecution by hiding their sexuality. This was *required* of the applicant in over

6 Australia acceded to the Refugee Convention in 1954. Coming within the refugee definition is the basis for an Australian protection visa under s36 of the *Migration Act* 1958 (Cth).

7 (1993) 2 SCR 689. The Supreme Court of Canada identified three possible categories under particular social group, ‘1. groups defined by an innate or unchangeable characteristic; 2. groups whose members voluntarily associate for reasons so fundamental to their human dignity that they should not be forced to forsake the association; and 3. groups associated by a former voluntary status, unalterable due to its historical permanence.’ The Court expressly identifies sexual orientation with the *first* category: at para 103. This categorisation of sexuality as immutable is critiqued in detail by Nicole LaViolette: see ‘The Immutable Refugee: Sexual Orientation in *Canada (AG) v Ward*’ (1997) 55 *University of Toronto Faculty of Law Review* 1. Note that in 1995 when New Zealand accepted sexual orientation under the social group category it held that sexual orientation was ‘*either* innate or unchangeable or so fundamental to identity or human dignity ...’ (emphasis added): *Re GJ* [1995] Refugee Appeal 1312/93 (Unreported, 30 August 1995): <www.refugee.org.nz/rsaa>. Most Australian decisions appear to have accepted this less categorical approach, as has the US 9th Circuit Court of Appeals in *Hernandez-Montiel v INS* 225 F3d 1084 (2000).

8 From 1995 through to 1997 in decisions on lesbian claimants, the country evidence utilised the gender-neutral (and usually male-centred) category ‘homosexual’ and the RRT did not even discuss whether or how ‘homosexuals’ were a particular social group: see RRT Reference *V95/02999* (Unreported, Boland, 26 April 1995); RRT Reference *N95/08186* (Unreported, Gibbons, 23 April 1996); RRT Reference *N96/12929* (Unreported, Smidt, 24 March 1997). In 1997 the tribunal finally defined the particular social group more specifically (as ‘lesbians in the Philippines in that case’): RRT Reference *N97/13774* (Unreported, Hunt, 30 May 1997).

one-fifth of cases, and when imposed produced a 98 per cent failure rate among applicants.¹⁰ Thus, there was a very strong correlation between the requirement of ‘discretion’ and the applicant’s chances of success. If ‘discretion’ was required and there was even the slightest chance that an applicant could comply, it effectively prevented him or her from qualifying for refugee status in Australia. By way of contrast, ‘discretion’ was imposed in only 4 per cent of Canadian cases and it was rejected as an inherently discriminatory approach very early on in Canadian jurisprudence.

The imposition of the discretion requirement is likely to have increased since the end of our study, as, after divided approaches at tribunal level and mixed responses to the requirement from the Federal Court of Australia in 2000 and 2001, the Full Federal Court appeared to finally endorse the application of the discretion requirement in 2002.¹¹ This requirement effectively reverses the responsibility of a state to ensure protection from persecution and places the onus instead on the applicant to ensure safety through suppression and secrecy. It constructs a Catch-22 situation for applicants because it imposes a requirement of secrecy but also denies the possibility of persecution if the applicant is secretive. Consequently, the Refugee Review Tribunal (RRT) and Federal Court deny protection to those who do not choose secrecy. In the leave to appeal transcript Kirby J identified the circularity of the RRT reasoning:

It is, in effect, saying you cannot have a well-grounded fear of persecution if the only way you will have that is by living openly and therefore if that is the case you cannot have a well-grounded fear of persecution.¹²

Further, the application of the discretion requirement contradicts Australian refugee jurisprudence where suppression itself has been held to be a form of persecution on religious and political grounds. It also flies in the face of the refugee jurisprudence of comparable nations such as Canada, New Zealand and the USA on sexual orientation, and of international recommendations regarding how the ‘nexus’ requirement in the Refugee Convention ought best be interpreted.¹³

9 Our study focuses on the 6-year period from 1994–2000. 127 of the decisions studied were Canadian and 204 were Australian. In Australia only 22 per cent of claims overall were successful, while in Canada the figure was 54 per cent. For lesbians, Canada’s acceptance rate was almost 10 times higher than Australia: 69 per cent compared to 7 per cent. See also Jenni Millbank, ‘Imagining Otherness: Refugee Claims on the Basis of Sexuality in Canada and Australia’ (2002) 26 *MULR* 144.

10 Of the 43 cases in our pool where ‘discretion’ was required, only 1 applicant was successful. In contrast, in 14 of the Australian cases where the tribunal held that it was not possible for the applicant to avoid persecution by being ‘discreet’, 13 of them were successful (93 per cent). Only nine Australian cases held that ‘discretion’ was not a reasonable requirement, and in six of these the applicants (67 per cent) were successful. In a further three cases discretion was mentioned but no firm view was stated.

11 *WABR v MIMA* [2002] FCAFC 124.

12 *Applicant S114/2002 v MIMA* (11 October 2002) High Court, transcript of Leave to Appeal.

13 ‘5. An individual shall not be expected to deny his or her protected identity or beliefs in order to avoid coming to the attention of the State or non-governmental agent of persecution’: ‘The Michigan Guidelines on Nexus to a Convention Ground’ (2002) 23 *Michigan Journal of International Law* 210 at 213.

The discretion requirement is also linked to the definition of the particular social group. As the group is very broadly defined, it is then open to the tribunal to utilise information about the situation of ‘discreet’ members of that group as evidence that the applicant is not at risk. However, the comparisons may well not be valid ones — for example, comparing evidence of the risk of persecution of married men who have occasional and anonymous male–male sex with the risk to a gay identified claimant, or even the risk to a lesbian claimant. The group is very broadly defined for the purposes of eligibility, but the danger of persecution is assessed in relation to one narrower element and then applied to the whole. This process of risk assessment is premised on the same basic assumption as the discretion requirement: that the defining feature of the group is same-sex sexual activity, which is then the only factor at issue in determining risk of persecution.

Although they are clearly related, the issues of ‘discretion/suppression’ and particular social group will be addressed in turn in this paper for the sake of clarity. Recommendations about the proper definition of particular social group follow.

2. *The Claim*

At the time of the original hearing, K was 28 and R was 47. The couple had lived together for four years in Bangladesh and claimed that they had experienced a variety of violent and harassing incidents prior to coming to Australia. The tribunal expressed serious reservations about the applicants’ credibility and did not believe a number of their claims of experiences of persecution. The tribunal expressly disbelieved K’s evidence that he had complained to the police of harassment on the basis that it was ‘not plausible’ that he would have sought police assistance in the first place, ‘given the attitudes towards homosexuals in Bangladesh’.¹⁴ However, the tribunal did accept that the couple were genuinely gay and in a long-term cohabiting relationship, and accepted that this had led to some of the lesser claims of harassment. On the basis of these findings, the tribunal concluded that the applicants did not have a well-founded fear of persecution as they had:

lived together for over 4 years without experiencing any more than minor problems with anyone outside their own families. They clearly conducted themselves in a discreet manner and there is no reason to suppose that they would not continue to do so if they returned home now.¹⁵

Country evidence utilised in claims by several Bangladeshi gay men, including the case at hand, states that there are no openly gay men or lesbians in Bangladesh, that gay men who have relationships tend not to live together, that there are a number of public places where men may have anonymous male–male sex,¹⁶ the risks of doing so include police bashing and extortion and that, ‘Men who conform outwardly to social norms, most importantly by marrying and having children, can get away with male to male sex provided it is kept secret.’¹⁷ In *Kabir*, the tribunal concluded that:

¹⁴ RRT Reference *N98/28381* & *N98/28382* (Unreported, Smidt, 22 February 2002).

¹⁵ *Ibid.*

[i]t is clear that homosexuality is not accepted or condoned by society in Bangladesh and it is not possible to live openly as a homosexual in Bangladesh. To attempt to do so would mean to face problems ranging from being disowned by one's family and shunned by friends and neighbours to more serious forms of harm, for example the possibility of being bashed by the police. However Bangladeshi men can have homosexual affairs or relationships, provided they are discreet.¹⁸

-
- 16 And note another invidious Catch 22: discretion cases reasoned that using parks is a way of avoiding attention/persecution. However when this was disproved by a number of cases brought by asylum applicants from China who had been arrested and persecuted doing just that, the RRT refused the claims on the basis that an application of the general criminal law against public decency was not persecution and no convention ground had been invoked: see eg RRT Reference *N97/14768* (Unreported, Thomson, 29 April 1998) (ultimately upheld by the Full Federal Court in *MIMA v Gui* [1999] FCA 1496 (Unreported, Heerey, Carr & Tamberlin JJ, 29 October 1999)). See also RRT Reference *N98/25853 & N98/25980* (Unreported, Cristoffanini, 11 May 1999).
- 17 RRT Reference *N98/28381 & N98/28382* (Unreported, Smidt, 22 February 2002) citing a 1996 statement from Mr Khan of the NAZ Foundation (an international HIV/AIDS organisation).
- 18 RRT Reference *N98/28381 & N98/28382* (Unreported, Smidt, 22 February 2002). Note that almost all of the gay men who have applied for refugee status from Bangladesh have failed on this basis: see eg RRT Reference *N98/21362* (Unreported, Kelleghan, 28 March 2002); RRT Reference *N99/28400* (Unreported, Witton, 26 September 2001); RRT Reference *N00/36301* (Unreported, Rosser, 24 December 2001); RRT Reference *N99/28009* (Unreported, Smidt, 19 June 2000); RRT Reference *N98/20994* (Unreported, Rosser, 4 May 1998); RRT Reference *N94/04854* (Unreported, Woodward, 21 July 1998); RRT Reference *N95/09552* (Unreported, Woodward 4 September 1998). The country information evidence utilised in the cases on Bangladesh is very general in tone and much of it is very dated. In *Kabir*, most of the country evidence was five years old at the time of tribunal decision. More recent and more detailed evidence compiled through an NAZ Foundation study of 124 Bangladeshi men who have sex with men documented, in direct contradiction to the tribunal's repeated findings that Bangladesh is tolerant of male homosexual behaviour, widespread experience of violence at the hands of police and others. The study found that 64 per cent of respondents had faced police harassment, 48 per cent had been sexually assaulted by police and a further 65 per cent had been sexually assaulted by *mastaans* (thugs, who are often involved with the police through bribery and other practices) while 71 per cent had experienced other forms of harassment, such as extortion and bashings, by *mastaans*: see NAZ Foundation, 'Social Justice, Human Rights and MSM', Briefing Paper No 7, 2002: <<http://www.nazfoundint.com/home.html>> Papers, Essays & Reports > Briefing Papers (accessed 13 December 2002). See also the range of information collated in International Gay and Lesbian Human Rights Commission (IGLHRC), *Current Update Packet: Bangladesh*, 2001.

It is arguable that, at the narrowest level, *Kabir* was incorrectly decided by the tribunal because all of the evidence was that the applicants in the case at hand did not outwardly conform to social norms; they were openly non-conforming in that they were cohabiting as a gay couple. They could not therefore be rightly characterised as ‘discreet’ according to the country evidence. An earlier RRT decision on Bangladesh made exactly this point in determining that a committed and cohabiting gay male couple could not *by that fact alone* be ‘discreet’ given the local societal norms.¹⁹ However the Court is restricted in the extent to which it can revisit findings of fact, and the broader issue before the Court is whether applicants should be required to conform to the discretion standard if it is possible for them to do so. It is noteworthy that contradictory approaches to the ‘discretion’ requirement in cases on Bangladesh have led to one man in a gay couple being granted refugee status while his partner, in a decision by another member, was refused.²⁰

The Federal Court and Full Federal Court refused appeals from *Kabir*. At Federal Court level, the court accepted that the tribunal had made an implicit finding that the police ‘would not have protected Mr Kabir or would themselves have harmed him if he had revealed his homosexuality’.²¹ However the court held that this was not a reviewable error as the finding of fact had been that there had been no complaint to the police.²² The court also accepted that the tribunal had drawn a distinction between ‘living openly as a homosexual’ or being seen as or labelled as homosexual, which could lead to danger, and having ‘discreet’ homosexual ‘affairs’ or ‘relationships’ which would ‘not give rise to problems’.²³ The court held that the tribunal had rightly characterised the applicants as ‘naturally’ belonging to the latter class.²⁴ The court refused to consider whether discretion/suppression could in principle constitute persecution because the applicants had not complained that they had to ‘modify their behaviour so as not to attract attention’.²⁵ (Such complaint was not part of the applicants’ case because they claimed to have *already* attracted such attention.)²⁶ However, suppression through behaviour ‘modification’ was implicit in the tribunal’s findings about the applicant’s future conduct (as was a failure of police protection in the absence of such suppression). Accordingly, it was a matter which the tribunal ought properly to have addressed in its assessment of a *future* risk of persecution, and did not do so.

19 RRT References *N98/24186 & N98/24187* (Unreported, Hardy, 28 January 2000).

20 See RRT Reference *N99/28400* (Unreported, Witton, 26 September 2001).

21 *Kabir v MIMA* [2001] FCA 968 at para 13.

22 *Id* at para 20. This analysis ought not have a place in refugee decision making where the questions of persecution and state protection are forward looking: they are oriented towards what is *likely to happen* rather than what happened in the past. In addition, there is no requirement that applicants ‘exhaust local remedies’.

23 This is arguably an error of fact and results from poor evidentiary practices at the tribunal level, see above n18, and discussion in Catherine Dauvergne & Jenni Millbank, ‘Burdened by Proof: How the Australian Refugee Review Tribunal has Failed Lesbian and Gay Asylum Seekers’ forthcoming.

24 Above n21 at para 19.

25 *Ibid*.

The Full Federal Court also refused to address the argument that modifying behaviour to avoid danger could itself constitute persecution. The Full Court held the trial judge had construed the matter properly and that additional argument before the Full Court took the matter ‘no further’; yet the trial judge had not addressed what legal principles underlay the discretion requirement. The tribunal had been handing down contradictory decisions on the issue for eight years and at that time there were only single judge Federal Court decisions on point — all of which were inconclusive about the bounds of the requirement, whether it was a mandated consideration, and the extent of suppression that would constitute persecution. The Full Federal Court ought to have taken the opportunity to deal with the conflict presented by these cases.²⁷

In the leave to appeal hearing, Kirby and Gaudron JJ suggested in their remarks that the discretion requirement and the definition of the particular social group were both live issues that the court would consider on appeal.

26 In light of the credibility issues in the case it is also important to note that the discretion requirement provides a significant incentive to falsify claims, as the applicants were found to have done, to claim that persecution had already taken place (such that discretion cannot be imposed as it is no longer possible). It is likely that the discretion requirement had a profound impact upon the manner in which the case was put to the tribunal, as well as the manner in which it was construed by the tribunal. It is unhelpfully circular, and ultimately unjust, to then refuse to consider the legality of the discretion requirement on the basis that it was not raised earlier.

27 The second basis on which the Full Court refused to deal with the issue was that it had not been argued before tribunal and so it would be ‘wrong to allow it to be raised’ on appeal. We submit that this conclusion is unsupportable. The tribunal setting is a non-adversarial one in which applicants are generally not represented. The court has therefore held on previous occasions that it is not proper to refuse to hear argument on important legal issues (such as whether suppression constitutes persecution) based on the fact that it was not raised before the tribunal: see *Win v MIMA* [2001] FCA 132 (hereinafter *Win*). *Win* is a very close parallel to *Kabir* in that the applicants focused their claim at tribunal level upon persecution based on certain past political activities, and they did not address whether suppression preventing them from participating in political activity in the future would be persecution. The Court permitted the question to be fully addressed on appeal, and for support cited to Wilcox and Madgwick JJ in *Sellamuthu v MIMA* (1999) FCR 287 at para 16: ‘regard may be had to the way a case is presented, but not so as to relieve the Tribunal of the burden of considering the entire case.’

3. *Persecution and Discretion in the Australian Case Law*

The tribunal has expressed the discretion requirement as a ‘reasonable expectation that persons should, to the extent that it is possible, co-operate in their own protection’.²⁸ Discretion has been characterised as a corollary to the principle that Australian refugee law limits protection of sexual orientation to private consensual sex and does not extend to ‘indiscriminate disclosure’ such as public manifestations of sexuality or sexual identity.²⁹

Under the discretion requirement, claimants on the ground of sexual orientation are expected to conform to their culture or government’s oppressive or persecutory regimes in order to avoid harm, including harm as serious as the death penalty.³⁰ Decision-makers’ expectation that homosexuality be kept secret has enabled the improbable conclusion that a number of extremely repressive regimes, such as Iran, are ‘tolerant’ of homosexuality (as long as it is kept completely invisible).³¹ The tribunal has appeared oblivious to the paradox involved in characterising various regimes as ‘tolerant’ of something that is officially non-

28 RRT Reference *V95/03527* (Unreported, Brewer, 9 February 1996). In 1999 the RRT stated, ‘It is not an infringement of a fundamental human right if one is required, for safety’s sake, simply not to proclaim that sexuality openly. Individuals of a variety of sexual orientations live side by side in a society like Ghana and practise their sexual orientations privately without feeling a need to proclaim these orientations to the general public. The public manifestation of homosexuality is not an essential ingredient of being homosexual’: RRT Reference *N98/24718* (Unreported, Russell, 19 March 1999).

29 See eg, ‘The right to free expression of sexuality does not extend so far as a right to publicly proclaim one’s sexuality’ and it is reasonable to avoid ‘overt manifestations of homosexuality such as public embracing’ which while ‘irksome and unjust’ is ‘not an infringement of human rights’: RRT Reference *V96/05496* (Unreported, Hudson, 15 January 1998).

30 See eg, a finding that the applicant should ‘conduct himself in a manner acceptable to his own society’: RRT Reference *N98/23955* (Unreported, Gutman, 24 September 1998) and in another decision by the same member, ‘The applicant has said that he could not stop making his predilections obvious. However in the context of a traditional society such as Nepal, I do not accept that to expect citizens such as the applicant to conduct their lives more discreetly can be regarded as “persecutory”’: RRT Reference *N97/14489* (Unreported, Gutman, 23 July 1998).

31 See eg, *SAAM v MIMA* [2002] FCA 444; *Khalili v MIMA* [2001] FCA 1404, appeal to Full Federal Court reported as *SAAF v MIMA* [2002] FCA 343; *Nezhadian v MIMA* [2001] FCA 1415 appeal to Full Federal Court reported as *WABR v MIMA*, above n11. This conclusion is highly questionable but the Federal Court has held it unreviewable: ‘The country information consulted by the RRT suggested that the Iranian authorities do not actively seek out homosexuals and the risk of prosecution for homosexuality is minimal so long as the activities are carried out discreetly. *This evidence may or may not be correct.* However, it was before the RRT and the RRT formed the view that it was appropriate to rely on it. That essentially is a question for the RRT, being a question of fact and degree as to the relative weight to be given to the assertions by the applicant and the independent country evidence which is referred to in the decision’: *Gholami v MIMA* [2001] FCA 1091 (emphasis added). In *W133/01A* [2002] FCA 395, Lee J noted that some of the evidence relied upon to draw the conclusion of tolerance was misleadingly quoted and applied. A much-used source in the RRT decisions on Iran when examined in the original was found by Lee to make reference to tolerance in ‘Islam in general not Iran in particular’ (and indeed the original source went on to state that Iran was far more dangerous than other Islamic nations). For an analysis of the extremely poor evidentiary practices of the RRT see Dauvergne and Millbank, above n23.

existent and kept secret through the force of legal proscriptions and extreme cultural hostility.

In a 1998 case concerning a gay man from Sri Lanka the tribunal stated:

The evidence is that he can avoid a real chance of serious harm simply by refraining from making his sexuality widely known — by not saying that he is homosexual and not engaging in public displays of affection towards other men. He will be able to function as a *normal* member of society if he does this. This does not seem to me to involve any infringement of fundamental human rights.³² (Emphasis added.)

The tribunal held that there would be a risk of persecution if the applicant's sexuality were to become public knowledge but that he could avoid this risk 'provided that he does not openly proclaim himself to be a homosexual or parade his sexual expression in public'. The decision also expressly distinguished case law on religious grounds that

[f]reedom of religion is of course a fundamental human right. Furthermore, the public profession of one's religion will normally be an essential part of the practice of one's religion — public manifestations of religious belief and worship being part of what is involved in the concept of religion — so the inability to publicly profess and practice one's religion is a clear violation of freedom of religion. This is not the case with sexuality. People of many different sexual orientations exist in society and practise their sexual preferences privately without feeling a need to proclaim those preferences to the world. Public manifestation of homosexuality is not an essential part of being homosexual.³³

This decision was upheld on appeal to the Federal Court in *LSLS v MIMA* where the court read the above statement as standing for the principle that a 'reasonable' level of discretion for the purpose of avoiding persecution was to be 'expected' of the applicant. The court did not find a legal error in the tribunal's distinction between making one's sexuality known to the extent 'necessary to identify prospective partners' for sex, which was protected, and making one's sexuality known more widely — which it termed 'more gratuitous and indiscriminate' forms of disclosure — which was not protected.³⁴ The court instead characterised the first limb as having 'proper regard to the practice of a homosexual lifestyle', including the need to develop and maintain a 'meaningful

32 RRT Reference *V98/08356* (Unreported, Hudson, 28 October 1998). Upheld on appeal to the Federal Court: case *LSLS v MIMA* [2000] FCA 211 and endorsed by the Full Federal Court of Australia when it reviewed 'discretion' in *WABR v MIMA* [2002] FCAFC 124, discussed below.

33 RRT Reference *V98/08356* (Unreported, Hudson, 28 October 1998).

34 *LSLS v MIMA* [2000] FCA 211. However, note that in *MIMA v Guan* [2000] FCA 1033, Moore J held that the tribunal is not *required*, as a matter of law, to consider 'discretion'. The Court expressly stated that it did not read *LSLS* as making a finding of law on discretion: 'It is clear that Ryan J [in *LSLS*] was not propounding a principle that, as a matter of law, persecution of a member of a particular social group, namely homosexuals, would not arise if harm was avoided by the member being discreet about their sexuality while being able to give effect to their sexuality privately or at least not publicly' at para 24. *LSLS* was *not* read this way in *WABR v MIMA*, above n11.

same-sex relationship.³⁵ The prohibition of a ‘bare right to a public proclamation of one’s sexuality’ was characterised as obiter and the Court avoided making a finding on it.

A series of cases at Federal Court level followed. Decisions tended to avoid grappling with the principles of discretion, suppression and secrecy where at all possible.³⁶ The Federal Court tended to simply accept the division of seeking sex/indiscriminate disclosure division outlined above without addressing whether it was either practically possible or unlawfully discriminatory.³⁷ Suppression was on occasion noted as something that *could* be persecutory, but it was not construed as an issue that required determination (because the applicant was secretive, or had not argued a ‘right of proclamation’ or the tribunal had held that they were not disadvantaged by being secretive).³⁸ In these cases, the Federal Court applied a standard at the same time that it refused to analyse the legality of that standard. The tribunal has thus been left in disarray to decide hundreds of claims, with claimants never knowing what standard they need to satisfy.

In 2001 the Federal Court held that the Iranian Penal Code prohibiting homosexuality and imposing a death penalty did ‘place limits’ on the applicant’s behaviour in that the applicant had to ‘avoid overt and public, or publicly provocative, homosexual activity. But having to accept those limits did not amount to persecution.’³⁹ This case was appealed to the Full Federal Court and the decision handed down just months after *Kabir*. This decision, *WABR v MIMA*, expressly endorsed lower court and tribunal findings that ‘Public manifestation of homosexuality is not an essential part of being homosexual.’⁴⁰ The Full Court held that:

35 *LSSL v MIMA*, id at para 25.

36 See eg, ‘The applicant said that he did not want to live in secrecy as one who is active homosexually needs to do in Iran; he regarded himself as incompatible with Iranian society. That attitude does not sit well with the authorities to which I have just referred. They consider that it is reasonable to expect a measure of discretion to be exercised by those who wish, contrary to the law of their country, to engage in homosexual activity’. The Court did not consider the argument any further. *Khanmeeri v MIMA* [2002] FCA 625.

37 See eg *Khalili v MIMA*, above n31, appeal to Full Federal Court reported as *SAAF v MIMA*, above n31.

38 The Court did not question that a gay man in Iran had a ‘preferred lifestyle of discreet sexuality’ (emphasis added): *SAAM v MIMA*, above n31. See also *Nezhadian v MIMA*, above n31.

39 *Nezhadian v MIMA*, id at para 12.

40 Citing *LSSL v MIMA*, above n34 and quoting the tribunal level from that decision first, the Full Federal Court stated: ‘The Tribunal had addressed the argument [that the discretion requirement was an error of law] in its reasons, saying inter alia’ “People of many sexual orientations exist in society and practise their sexual preferences privately without feeling a need to proclaim those preferences to the world. Public manifestation of homosexuality is not an essential part of being homosexual.” The process by which the Tribunal determined the extent to which the applicant could safely communicate his sexual preference was accepted by Ryan J who considered the process “unexceptionable”. His Honour dismissed the application. We see no reason for departing from the line of authority that has evolved from these single judge decisions’: *WABR v MIMA*, above n11 at para 23.

[i]t is not appropriate to submit that the ability to proclaim one's sexual preference is an essential right, the denial of which would or could lead to persecution.⁴¹

The Court concluded:

it was open to the Tribunal to conclude, on the material that was before it, that there was no active program for the persecution of homosexuals in Iran, so long as they were discreet and concluded their affairs privately. It was also open to the Tribunal to conclude that it was *reasonable to expect that the appellant would accept the constraints that were a consequence of the exercise of that discretion*.⁴² (Emphasis added.)

This approach stands in stark contrast to the Federal Court jurisprudence developed in asylum cases brought on religious and political grounds, discussed below.

4. *What is a Normal Life?*

The Federal Court in *LSLS v MIMA* read the tribunal's definition of 'normal' such that it 'must include the ability to pursue a homosexual lifestyle, including, for example, meeting prospective sexual partners'.⁴³ However this is a generous misreading of the tribunal's decision which had held that the rights of homosexuals did not 'include', but were in fact, *limited to*, private sex.⁴⁴ The tribunal member held in this decision that a 'normal' life involved the applicant never telling anyone that he was gay.⁴⁵ Numerous tribunal decisions have implicitly or expressly premised the discretion requirement on an assumption that the gay applicant could express his sexuality by having anonymous sex in public places,⁴⁶ or that a lesbian applicant would remain celibate.⁴⁷

Is this a normal life? Would the court for example hold that a heterosexual person's fundamental human rights were not infringed if, for 'safety's sake' they had to pretend to be gay in every area of their professional, personal and social life, in every public place, by not living with their partner of choice, never showing affection to their partner or identifying themselves as a couple to friends or family, and only pursuing their heterosexual 'lifestyle' by having swift and furtive sex with strangers or prostitutes in a public park? Is such desperate secrecy and deception, undertaken in fear, for months, years, or decades, a *normal life*?

41 Id at para 19.

42 Id at para 27.

43 Id at para 33.

44 RRT Reference *V98/08356* (Unreported, Hudson, 28 October 1998).

45 Ibid.

46 See eg, RRT Reference *N98/2231* (Unreported, Zelinka, 22 September 1998); RRT Reference *V97/0648* (Unreported, Wood, 5 January 1998); RRT Reference *N97/20994* (Unreported, Rosser, 4 May 1998).

47 See eg, RRT Reference *V95/02999* (Unreported, Boland, 26 April 1995); RRT Reference *V97/06802* (Unreported, Wood, 30 September 1997).

In some instances the tribunal has seen gay men and lesbians as whole people rather than as merely a private sexual act to be undertaken in whatever circumstances were available. A noteworthy contrast is provided by a decision in 2000 also concerning a gay male couple from Bangladesh, where the tribunal held that the deliberate breaking up of a committed same-sex relationship could be compared to 'that of an inter-caste, inter-racial or inter-religious couple in a country where [such] marriages were effectively outlawed'.⁴⁸ Likewise, in a 1999 case from China the tribunal considered country evidence very similar to that from the Bangladesh cases, that if same sex partners 'don't attract attention and don't display the fact in public that they are a committed couple' authorities would 'probably leave them alone but not necessarily'. The tribunal continued, however:

If a same sex couple in China attempt to live *a normal life*, that is, go to restaurants, clubs, bars, theatre and make it obvious that they are a unit, they will sooner or later attract the adverse attention of the authorities ... Their lives are lived at the level of *furtiveness and fear* brought about by the intolerance of the state.⁴⁹ (Emphasis added.)

This expresses a very different conception of what a normal life is, including going out socially, and talking to one's friends. It is also a remarkable contrast to the 'discretion' decisions in that it discloses the motivation behind 'discretion': fear. To re-read every decision referred to above, replacing 'discreet' and 'discretion' with 'furtive' and 'fear' is very revealing indeed. This renders it considerably more difficult to see the 'discretion requirement' as a 'reasonable' limit on behaviour that causes 'no disadvantage' to the applicant.

In some cases, the tribunal took the discretion requirement to the extreme of suggesting that the applicant could avoid persecution by marrying and having a secret gay life.⁵⁰ While this finding faced strong disapproval in Federal Court obiter,⁵¹ numerous cases have continued to rely upon country evidence centred on married or non-gay identified men who have occasional male-to-male sex to find that if 'discreet', gay identified applicants are relatively safe from persecution. The 'normal life' of heterosexual marriage continues to be taken as a given, as if being compelled to live out a relationship that is antithetical to one's sexual orientation is not persecutory.

48 RRT References *N98/24186 & N98/24187* (Unreported, Hardy, 28 January 2000).

49 RRT decision quoted in *MIMA v Guan*, above n34 at para 7.

50 See RRT Reference *N97/14489* (Unreported, Gutman, 23 July 1998) and RRT Reference *N98/23955* (Unreported, Gutman, 24 September 1998), both concerning claims from Nepal.

51 See *Bhattachan v MIMA* [1999] FCA 547.

5. *Is the Discretion Requirement Discriminatory?*

At times the tribunal has opined that the issue is ‘not whether homosexuals enjoy the same rights as heterosexuals’.⁵² The tribunal and the Federal Court have repeatedly failed to find that the discretion requirement is discriminatory by using superficial and false comparators between heterosexual people and lesbians and gay men. Some cases have held that the discretion requirement is not discriminatory because it applies ‘equally’ to heterosexuals. So for example in another 2001 decision concerning a gay man from Bangladesh the tribunal held:

The Tribunal accepts that a person should not have to act “discreetly” to hide one’s sexual orientation. However, the independent evidence, which the Tribunal accepts, states that “Sexual issues are not normally discussed” and indicates that as Bangladesh is a very conservative society, the sexual practices and behaviour of all people, whether heterosexual or homosexual, are not matters that are made public. In light of this evidence, the Tribunal finds that any requirement to be discreet with regard to sexual behaviour is not selectively applied to homosexuals and hence does not involve the selective element which is inherent in the concept of persecution.⁵³

Other decisions have found that there is no discrimination because unmarried heterosexual people also have to be discreet in the sending country.⁵⁴ While it may be difficult for heterosexual people to have extra-marital affairs or relationships prior to marriage in some cultures, this equation fundamentally misconceives the position of lesbians and gay men, for whom there is *no* acceptable form in which to have a same-sex relationship.⁵⁵ It also overlooks the extent to which heterosexuality is constantly assumed and expressed publicly. In Cheshire Calhoun’s words,

52 RRT Reference *V98/08356* (Unreported, Hudson, 28 October 1998).

53 See RRT Reference *N99/28400* (Unreported, Witton, 26 September 2001). See also RRT Reference *N98/23086* (Unreported, Rosser, 8 July 1998); on appeal *F v MIMA* [1999] FCA 947.

54 The Tribunal also found in a number of cases that pressured marriage, if sufficiently detrimental to be persecutory, would not be ‘for reason of the applicant’s homosexuality’ as this is a pressure placed on all single adults. See RRT Reference *N99/28400* (Unreported, Witton, 26 September 2001); RRT Reference *N98/20994* (Unreported, Rosser, 4 May 1998); on appeal *MMM v MIMA* [1998] 1664 FCA.

55 Kris Walker argues that, ‘This is not the same as a right to engage in sexual activity in public ... but rather a right to express one’s identity as gay, lesbian, transgendered or bisexual, to live openly in a sexual relationship with one’s partner of choice, and to express intimacy in ways that are socially acceptable for heterosexual members of society. Although public expressions of intimacy may be proscribed for heterosexuals in some societies, this is by no means always the case; and some ways of expressing heterosexual identity are permitted in even the most restrictive societies, such as the right to live openly with one’s sexual partner if the couple is married. Thus Burchett J’s comment that ‘all persons in Iran ... have to be discreet in sexual matters’ (in *F v MIMA*, above n53) fails to recognise the many ways in which heterosexuals do not have to be discreet. Simply to represent oneself as married is to announce one’s heterosexuality, in a way denied to gay men and lesbians. Of course, in Iran an unmarried couple must be discreet, but heterosexuals generally have the option of marriage, which is denied to gay men and lesbians. Thus there is no way for a gay or lesbian couple to live openly together and avoid persecution’: Walker, above n3 at 205–206. The tribunal and Federal Court have also failed to grapple with the reality that pressure to marry affects lesbians and gay men very differently to heterosexual people.

unlike the love that ‘dare not speak its name’, heterosexuality is the love whose name is continually spoken in the everyday routines and institutions of public social life. Heterosexuals move about in the public sphere as heterosexuals, and that identity is by no means a private matter. Public social interaction and the structure of public institutions are pervaded with the assumption that public actors are heterosexual and with opportunities to represent themselves as such.⁵⁶

Decision-makers may be so accustomed to the assumption of heterosexuality in their own societies that they are unaware of the way that unconscious gestures of familiarity or affection, signs such as wedding rings, the use of specific language about partners (such as ‘wife’ or ‘girlfriend’), and cultural codes embedded in mass advertising and popular culture, make expressions of heterosexuality identity universally assumed, ‘normal’, and patently *indiscreet*. There is considerable slippage in the decisions regarding expression of sexual *identity* which is often construed as if it is public sexual behaviour.⁵⁷

There has been ongoing division within the tribunal over whether the discretion requirement is unlawfully discriminatory.⁵⁸ As early as 1995 an applicant’s adviser ‘trenchantly criticised’ the discretion requirement, and drew the tribunal’s attention to refugee expert James Hathaway’s view that

[s]ince the purpose of refugee law is to protect persons from abusive national authority, there is no reason to exclude persons who could avoid risk only by refraining from the exercise of their inalienable rights.⁵⁹

56 Cheshire Calhoun, *Feminism, the Family, and the Politics of the Closet: Lesbian and Gay Displacement* (2000) at 87.

57 This point is discussed more fully in Jenni Millbank, ‘Gender, Sex and Visibility in Refugee Decisions on the Basis of Sexual Orientation’, forthcoming.

58 Note that the requirement was rejected as inherently discriminatory as early as 1996: RRT Reference *V95/03527* (Unreported, Brewer, 9 February 1996). See also RRT Reference *N96/11136* (Unreported, Rosser, 27 October 1997). However, the lack of a precedent system within the tribunal means that the division has continued.

59 Quoted in RRT Reference *V95/03188* (Unreported, Hudson, 12 October 1995).

Yet a secret gay life has repeatedly been defined by members imposing the discretion requirement as ‘giving up something less’ than a fundamental human right.⁶⁰ That ‘something less’ has been expressed as ‘indiscriminate disclosure’, ‘flaunting’, ‘parading’ and ‘proclaim[ing] publicly’,⁶¹ rather than as a fundamental human right such as the right to family life,⁶² freedom of expression,⁶³ or freedom of association.⁶⁴ The tribunal has repeatedly construed the fundamental rights of homosexuals as extending *only* to private same-sex sexual activity.

The discretion cases are based on the express premise that gay and lesbian rights are distinct from, *and lesser than*, other human rights. Some tribunal decisions in 1994 and 1995⁶⁵ relied upon (then current) decisions of the European Court of Human Rights (ECHR) and opinions issued by the United Nations Human Rights Committee (HRC) to find that the rights of homosexuals were limited to privacy and did not extend to the right to equality or to family life. It is

60 ‘It is all a question of what one means by being “discreet”. If this is taken to mean giving up a fundamental human right, then clearly the expectation or requirement is not reasonable. If, on the other hand, it means giving up something less, then it may well be reasonable’: RRT Reference *V95/03188* (Unreported, Hudson, 12 October 1995).

61 See eg, RRT Reference *V98/08356* (Unreported, Hudson, 28 October 1998) (flaunt, parade, proclaim publicly) on appeal to Federal Court: *LSSL v MIMA*, above n34 (indiscriminate disclosure); RRT Reference *V98/09564* (Unreported, Vrachnas, 4 May 1999) and RRT Reference *V99/10323* (14 April 2000) (flaunt); RRT Reference *N94/04854* (Unreported, Woodward, 21 July 1998) and RRT Reference *V96/05496* (15 January 1998) (publicly proclaim).

62 In one case the member concluded: ‘international jurisprudence does not show that homosexuals have inalienable human rights relating to their sexuality which extend beyond the right to private consensual adult sex. I therefore think it is correct to say that it can be reasonable to expect a homosexual to avoid persecution by being discreet in his conduct where this discretion does not involve giving up this right’: RRT Reference *V95/03188* (Unreported, Hudson, 12 October 1995).

63 In one case, the tribunal characterised the issue of discretion as one of freedom of expression under Art 19(3) of the ICCPR and cited a decision of the HRC on ‘homosexuality in the context of freedom of expression’ that held when ‘public morals’ differ a margin of discretion ought to be accorded to the State: *Hertzberg v Finland*, Communication R.14/61, Report of the Human Rights Committee, 37 UN GAOR Supp. (No. 40), UN Doc. A/37/40 (1982). The tribunal used this decision to support its view that, ‘Given the conservative nature of Chinese society ... it is not unreasonable for the applicant to exercise discretion in giving expression to his homosexuality and that this restriction on his activities would not constitute persecution’: RRT Reference *BV93/00242* (Unreported, Glaros, 10 June 1994). The country evidence and the entire process of reasoning that followed is repeated verbatim, without attribution, in RRT Reference *V94/02607* (Unreported, Kelleghan, 29 June 1999). It is perhaps worth noting that the opinion of the HRC itself was a divided one, with three Committee members sharply dissenting on the issue even in 1982 when the consideration of sexual orientation issues in human rights law was in its infancy: see Douglas Saunders, ‘Human Rights and Sexual Orientation in International Law’ (2002) 25 *International Journal of Public Administration* 13 at 31. Saunders also argues that the HRC decision in *Toonen v Australia* in 1994 implicitly departs from *Hertzberg v Finland*.

64 A 1999 RRT case held that a gay Chinese man could avoid a risk of harm from the authorities by not frequenting gay meeting places and that this did not derogate from his fundamental right to express his sexuality: RRT Reference *V98/09564* (Unreported, Vrachnas, 4 May 1999).

65 RRT Reference *BV93/00242* (Unreported, Glaros, 10 June 1994); RRT Reference *V95/03188* (Unreported, Hudson, 12 October 1995).

arguable that such decisions should never have been literally applied, not least of all because the standards and objects of proof that they relate to differ so substantially: the ECHR applies a 'margin of appreciation' in favour of member states in balancing the rights of the individual and the state when determining if an individual's right has been breached, while the test for refugee determinations is a real chance of persecution of the individual. Even taken at face value, however, it is noteworthy that such decisions have since been completely overtaken by the fast developing international human rights jurisprudence on sexual orientation.⁶⁶

Much condemnation of the discretion requirement has drawn express parallels between persecution on the grounds of sexuality and that of political expression⁶⁷ and religious belief.⁶⁸ Justice McHugh's parallel between Christians and homosexuals in *Applicant A v Minister for Immigration and Ethnic Affairs*

66 See Robert Wintemute & Mads Andenæs (eds), *Legal Recognition of Same-Sex Partnerships: A Study of National, European and International Law* (2001). While the ECHR and UN HRC interpreted the positive assertion of a right to marry and found a family narrowly in two decisions in 2002 (*Frette v France* Hudoc REF 00003291 (26 February 2002) denying a gay man eligibility to apply for an adoption order, and *Joslin v New Zealand* UN Doc CCPR/C/75/D/902/1999 (17 July 2002) denying same-sex couples legal marriage) there have been suggestions in a recent ECHR decision that the Court is moving towards a non-gender specific reading of the right to marry and found a family: *Goodwin v United Kingdom* [2002] 2 FCR 577 (ECHR). Moreover, decisions on assertions of the negative right of freedom from state interference in family, such as those found in Art 8 have tended to be far stronger: see eg, *Salgueiro da Silva Mouta v Portugal* [2001] 1 FCR 653 (ECHR) (finding a breach of Art 8 right to privacy and family life, and Art 14 equality, when a gay man was denied custody of his children on the basis of his sexuality). The English Court of Appeal recently interpreted Art 8 of the ECHR as potentially protecting a gay or lesbian relationship from forced separation: *Secretary of State for the Home Department v Z & Ors* [2002] EWCA Civ 952. See also constitutional jurisprudence on equality, privacy and family rights evolving in Canada and South Africa, in cases such as: *M v H* [1999] 2 SCR 3; *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* (Constitutional Court of South Africa, No CCT10/99, 2 December 1999): <<http://www.concourt.gov.za/judgments/1999/natcoal.pdf>> (accessed 18 December 2002); *Satchwell v President of the Republic of South Africa* (Constitutional Court of South Africa, No CCT45/01, 25 July 2002): <<http://www.concourt.gov.za/judgments/2002/satchwell.pdf>> (accessed 18 December 2002); *Du Toit v Minister for Welfare and Population Development* (Constitutional Court of South Africa, No CCT 40/01, 10 September 2002) <<http://www.concourt.gov.za/judgments/2002/dutoit.pdf>> (accessed 18 December 2002).

67 Eg, 'As to the legal irrelevance of that comment, let it be assumed that the relevant social group were those of a particular political opinion, say fascism, to which another political opinion was opposed, say communism. Would it be an answer to persecution on the grounds that a person was a member of a group espousing fascism to say that person might well cohabit with persons of the opposite political persuasion thereby disguising his or her political opinion? That is to say nothing about the appalling consequences to both the applicant and the person with whom it was suggested he should cohabit to conceal his sexual orientation': *Bhattachan v MIMA*, above n51 at para 10 (Hill J).

68 See eg, 'If the claimant were a Christian and the country conditions were such that he could have lived a reasonably okay life if he were discreet about his Christianity, we would never have asked him to be discreet about his Christianity. The question before us is whether we should demand that of someone who is homosexual. Why should he have to live a discreet life as a homosexual in any country, if homosexuality and his right to be a homosexual is something that is a basic fundamental human right for him?': *Re VAC* [1998] CRDD No 161 (QL), IRB Reference V96-03502.

(hereinafter *Applicant A*)⁶⁹ supports the view that it is appropriate to compare experiences of persecution across groups under the Convention in order to develop refugee jurisprudence:

A group may qualify as a particular social group, however, even though the distinguishing features of the group do not have a public face. ... In Roman times, for example, Christians were a particular social as well as a religious group although they were forced to practise their religion in the catacombs. If the homosexual members of a particular society are perceived in that society to have characteristics or attributes that unite them as a group and distinguish them from society as a whole, they will qualify for refugee status.⁷⁰

The tribunal has evaded grappling with the essence of these important parallels by employing two strategies. One is to draw a 'vital distinction between religion and politics, which require public manifestations, and sexuality, which does not'.⁷¹ This reflects assumptions, discussed above, about homosexuality as only a private sexual experience, and a secret life as a normal life. The other avenue is to accept the principle that serious suppression can in and of itself constitute evidence of a well-founded fear of persecution,⁷² but then to repeatedly distinguish it as inapplicable to the case at hand. The employment of this distinction again sets sexuality apart on a discriminatory basis by holding that it is *not unreasonable* to live a closeted life, and that any applicant who has nevertheless managed to be at all sexually active was therefore *not disadvantaged* by doing so.⁷³ The questions that are never addressed are: What exactly does a closeted life entail in the sending country? How sustainable is it? Reasonable compared with what? What level of secrecy and suppression would be unreasonable? And disadvantaged compared with whom?

69 (1997) 142 ALR 331 at 359–360.

70 *Ibid.*

71 RRT Reference *V98/08356* (Unreported, Hudson, 28 October 1998). Upheld on appeal to the Federal Court in *LSSL v MIMA*, above n34.

72 'The applicant did not supply material dealing with the nature of religious observances which his faith requires. It is reasonable to assume, however, that some form of public worship would be amongst them. In the absence of evidence that the applicant could conceal his faith, consistently with practising it, it was not open to the first respondent to conclude he would not be persecuted because his faith was unknown to the authorities. The mere fact of the necessity to conceal would amount to support for the proposition that the applicant had a well-founded fear of persecution on religious grounds': *Woudneh v Inder & MILGEA* (Federal Court, Gray J, 16 September 1988) at 19.

73 See eg, RRT Reference *N94/04854* (Unreported, Woodward, 21 July 1998); RRT Reference *N98/23813* (Unreported, Rosser, 8 January 1999); RRT Reference *N98/23086* (Unreported, Rosser, 8 July 1998); RRT Reference *N98/20994* (Unreported, Rosser, 4 May 1998); RRT Reference *N01/37352* (Unreported, Witton, 24 April 2001).

It is noteworthy that when the Australian government argued for ‘discretion’ in a 2001 case involving political expression, the Federal Court rejected it with force.⁷⁴ In *Win v MIMA*,⁷⁵ a Burmese couple had been politically active in a clandestine manner for some years in Burma without being caught. They were denied refugee status by the RRT on the basis that if they returned to Burma and continued to be clandestine, the likelihood of persecution was low. On appeal, they argued that the RRT had failed to consider whether such suppression of their political freedom was in itself capable of amounting to persecution. Madgwick J responded eloquently:

There appears to be no reason why, similarly, a denial of freedom to express one’s political opinion may not, of itself, constitute persecution. To illustrate this point by reference to an historical example, upon the approach suggested by counsel for the respondent, Anne Frank, terrified as a Jew and hiding for her life in Nazi-occupied Holland, would not be a refugee: if the Tribunal were satisfied that the possibility of her being discovered by the authorities was remote, she would be sent back to live in the attic. It is inconceivable that the framers of the Convention ever did have, or should be imputed to have had, such a result in contemplation.

....

The principle, it seems to me, is that a denial of such civil rights would amount to persecution when that denial is so complete and effective that it actually and seriously offends a real aspiration so held by an asylum seeker that it can be fairly said to be integral to his or her human dignity. It is not fatal to such a claim of persecution that the claimant fails to show that he or she is a leading exponent of a claim to, or the wish to, exercise such rights, let alone that he or she exhibits a capacity for martyrdom. The Convention aims at the protection of those whose human dignity is imperilled, the timorous as well as the bold, the inarticulate as well as the outspoken, the followers as well as the leaders in religious, political or social causes, in a word, the ordinary person as well as the extraordinary one.⁷⁶

Madgwick J went on to state that it is unclear ‘exactly what civil and political rights the Convention extends to protect’ but concluded that under Australian jurisprudence free speech is certainly one of them and recommended the Universal Declaration of Human Rights (UDHR) and the International Covenant on Civil and Political Rights (ICCPR) as reliable guides in determining the scope of such protections.⁷⁷

Under Madgwick J’s analysis, lesbians and gay men from all countries where they are ‘tolerated’ if secret/discreet but face the chance of serious harm if they were openly gay are being denied the right to express a fundamental aspect of their human dignity by Australian law. They are persecuted through suppression, yet are being sent back to live in the attic in Bangladesh, as well as countries such as Iran, Sri Lanka, Ghana, Lebanon and Pakistan. This is reasonable, under Australian law, because it does not disadvantage them; they are leading a ‘normal life’.

⁷⁴ *Win*, above n27.

⁷⁵ *Ibid.*

⁷⁶ *Id* at para 18.

⁷⁷ *Id* at para 21–22.

6. *Other Jurisdictions*

The jurisprudence from Canada, New Zealand and the USA directly contradicts Australia on the issue of secrecy.

In Canada the Immigration and Refugee Board (IRB) rejected the discretion requirement in the strongest terms in 1995.⁷⁸ In numerous cases the IRB has explicitly credited applicants with the right to be openly identified as gay or lesbian⁷⁹ and connected this to human rights concepts such as freedom of expression and association. The IRB has never accepted, as the Australian tribunal has,⁸⁰ that being gay means only the ability to have secret gay sex:

The claimant stated that if he were sent back to Malaysia, he would have to hide the fact that he is gay in order to be safe. It is not possible to be openly gay. He would have to fit into a heterosexual lifestyle and try to be something that he is not. He would have to suppress his feelings. The claimant explained that being gay is more than simply about sex; he wishes to be acknowledged as a person ... The claimant has accepted that he is gay and is not ashamed of it. On the contrary, he is proud of it.⁸¹

78 In a passage similar to that of Madgwick J's in *Win*, id at paras 18, 20, the IRB held that, 'To find that one can remove one's fear of persecution by successfully hiding is perverse because it puts the onus of removing the fear of persecution on the victim, rather than on the perpetrator. There are many ways of "hiding". One can conceal oneself in a cave, or an attic, or a friend's apartment. One can also attempt to hide one's race, religion, nationality or indeed any one of the attributes of the person which fall under Convention grounds — for example, by practising the official state religion in public and one's own faith only in secret, or by carrying false identification and "passing" for someone of another race or nationality. At the heart of the Convention definition of a refugee is the concept that no person should face a reasonable chance of persecution because of her or his race, religion, nationality, membership in a particular social group or political opinion. To deny refugee status to someone who cannot or will not conceal one of these immutable or fundamental attributes, on the grounds that by such a concealment he or she could remove the fear of persecution, would make a mockery of the Convention': *Re XMU* [1995] CRDD No 146 (QL), IRB Reference T94-06899 (Griffith, Rucker, 23 January 1995) at paras 100–102.

79 See eg, a 1999 Canadian case involving a gay Mexican man who 'does, from time to time, dress as a transvestite': 'The panel is of the opinion that the claimant's profile is fairly high, that if he were to return to Mexico and continue to pursue the lifestyle that he feels he needs live in order to preserve his human dignity, that he would no doubt come to the attention of the police and others ...': *Re EHF* [1999] CRDD No 142 (QL), IRB Reference T98-03951 (Wolman, Okhovati, 24 June 1999).

80 See also a direct contrast between Canada and Australia in decisions on gay men from Singapore. In 1996 the IRB assumed and approved openness in a positive decision, stating: 'the claimant is a person who has now accepted he is gay and who is fiercely proud of it', and concluding that he would therefore be at risk: *Re OPK* [1996] CRDD No 88 (QL), IRB Reference U95-04575 (Schlanger, Jackson, 24 May 1996). In 1999 the RRT rejected a similarly situated man on the basis that he would be 'unlikely to experience trouble' 'unless he openly flaunts his lifestyle': RRT Reference *N98/24008* (Unreported, Gutman, 7 January 1999).

81 *Re LUM* [1996] CRDD No 193 (QL), IRB Reference U94-03926 (Chan, Jackson, 29 May 1996).

The New Zealand Refugee Status Authority (RSA) in the 1995 decision of *Re GJ*⁸² considered whether the applicant ‘could avoid persecution by being careful to live a hidden inconspicuous life’ and held that ‘to expect of him the total denial of an essential part of his identity would be both inappropriate and unacceptable’.⁸³

The New Zealand RSA referred to a 1983 decision of the German Administrative Court⁸⁴ stating:

The Court believed that telling a homosexual asylum seeker that he can avoid persecution by being careful to live a hidden, inconspicuous life is as unacceptable as suggesting that someone deny and hide his religious beliefs, or try to change his skin colour.⁸⁵

In 2000 the US Court of Appeals 9th Circuit considered the claim of a Mexican man who identified as gay but also sometimes cross-dressed as a woman. At first instance and on appeal to the Board of Immigration Appeals (BIA) the applicant’s claim was rejected. The BIA held that the way the applicant appeared in public was a choice, and that therefore his ‘mistreatment arose from his conduct’. (In the Australian parlance, he was a ‘flaunter’.) The Court of Appeals forcefully rejected the premise that the onus was on the applicant to avoid the persecution:

Perhaps, then, by “conduct”, the BIA was referring to Geovanni’s effeminate dress or his sexual orientation as a gay man, as a justification for the police officers’ raping him. The ‘you asked for it’ excuse for rape is offensive to this court and has been discounted by courts and commentators alike.⁸⁶

The Court determined that the proper particular social group of the applicant was ‘homosexual men with a female sexual identity’ and held that the applicant was under no duty to hide this just because he had on some occasions in the past, or could in the future, dress as a man.⁸⁷

Case law from the UK remains unsettled, as sexual orientation was only accepted as definitively qualifying as a particular social group in 1999. Jurisprudence from that jurisdiction is now further complicated by the fact that the Immigration Appeal Tribunal may have to consider both whether applicants face

⁸² *Re GJ*, above n5.

⁸³ *Ibid*.

⁸⁴ *Verwaltung Weisbaden* No IV/I E 06244/81 (Unreported, 26 April 1983) is summarised in Maryellen Fullerton, ‘Persecution Due to Membership in a Particular Social Group: Jurisprudence in the Federal Republic of Germany’ (1990) 4 *Georgetown Immigration Law Journal* 381.

⁸⁵ *Re GJ*, above n7.

⁸⁶ *Hernandez-Montiel v INS*, above n7 at 1098.

⁸⁷ The Court used the particular social group test of *Re GJ*, above n7 (*either* immutable or so fundamental to dignity, modified from *Ward*, above n7): ‘Geovanni should not be required to change his sexual orientation or identity ... Because we conclude that Geovanni should not be required to change his sexual orientation or identity, we need not address whether Geovanni could change them’: at 1095. Later, the Court added, ‘This case is about sexual identity, not fashion’: at 1096.

a risk of persecution under the Convention *and* whether if returned they face torture, inhuman or degrading treatment under Article 3 of the European Convention for the Protection of Human Rights (ECPR), or a breach of any other ECPR right, such as the right to family life and privacy under Article 8.⁸⁸ It appears from recent decisions that Article 8 could prevent refoulment where an applicant would be returned to a sending country where suppression was necessary to ensure freedom from persecution, or where it would break up a same-sex relationship.⁸⁹

7. *How Should the Particular Social Group be Defined?*

Since the early Australian decisions establishing that lesbians and gay men may constitute a particular social group in terms of refugee jurisprudence, there has been little analysis of the contours of this social group in any particular claim. In this regard, lesbians and gay men have been treated differently to others claiming on the basis of their membership in a particular social group. The careful analysis which the High Court set up as a model for claims on the ‘particular social group’ ground in *Applicant A*⁹⁰ has not been taken up in the cases of lesbians and gay men. Instead, the RRT and the Federal Court have treated the particular social group of homosexuals in their country of origin as a given. In one sense this is an important advantage for lesbian and gay claimants, as proving the existence of a social group that may have little cohesion, organisation or voice — and may indeed be officially non-existent in the sending country — would be a difficult, or even impossible, hurdle for many applicants.⁹¹

The automatic ascription of membership to a particular social group may reflect an inability to imagine a society where gay men and lesbians are *not* perceived as socially distinct, and discriminated against, on the basis of their non-conformity to societal norms around family, gender and sexuality. While experience of, and identity categories around, sexual orientation may vary widely around the world, we argue that the ascription of a group identity status to sexual orientation is correct in refugee law. It is not that sexual identity is universal.⁹² Rather, while sexual identity, and proscriptions around it, vary enormously, there is a unifying feature: in each context there is a continuum of disapprobation and

88 This is due to the incorporation of ECHR obligations under the *Human Rights Act* 1998 (UK) s6(1) which provides that it is unlawful for a public authority to act in a way which is incompatible with a Convention right. See *Secretary of State for the Home Department v Z & Ors*, above n66.

89 *Mudarikwa v Secretary of State for the Home Department* [2002] EWCA Civ 1608.

90 Above n69.

91 In countries with no public gay presence it may be very difficult to bring proof of the particular social group and decision-makers have at times interpreted evidence of suppression/invisibility as vitiating the particular social group. In one case on Bangladesh, the tribunal states: ‘Mr Khan’s words, “Since they are invisible they do not exist” appear to have been taken out of context in the primary decisions in both of the present cases, which appear to conclude that homosexuals may not constitute a “particular social group” in Bangladesh, due largely to their invisibility and to society turning a blind eye to individual outbreaks of “male friendships” ...’: RRT References *N98/24186 & N98/24187* (Unreported, Hardy, 28 January 2000).

persecution that is directly connected to non-conformity to heterosexual norms.⁹³ So while there may be culturally relative experiences of sexual orientation, such as male-to-male sex being, in some circumstances, acceptable, there is always a point — such as rejecting marriage, identifying as gay, or taking on a non-conforming gender identity — where tolerance ends and persecution of same-sex attracted individuals begins.

However, using a broad particular social group category is at odds with the approach to other particular social group claims where the contours of, and social reactions to, the group in question have been analysed in detail, in keeping with the view that the existence of a particular social group in a given refugee claim is a question of fact to be determined in each case.⁹⁴ In *Reg v IAT ex parte Shah* (hereinafter *Shah*)⁹⁵ (approved by the High Court in *Minister for Immigration & Ethnic Affairs v Khawar*)⁹⁶, Lord Steyn stated the principle thus:

Generalisations about the position of women in particular countries are out of place in regard to issues of refugee status. Everything depends on the evidence and findings of fact in the particular case.⁹⁷

When the existence of a marginalised group labelled homosexual is assumed, the analytic opportunity to consider how that group is constituted, identified, and discriminated against or persecuted in a particular society, may be lost. The decision-maker seemingly assumes that the place of homophobic discrimination is a familiar quantity, rather than considering the social place of a social group.⁹⁸

Omitting an analysis of how discrimination operates and of how the social group is identified in a given setting has, in the RRT's 'discretion' jurisprudence,

92 See eg, a discussion of male-to-male sex in Bangladesh around the identity concepts of *kothis* and *panthis*. *Kothis* have a feminised identification and visible presence, while *panthis* could be any 'manly' male seeking sex: NAZ Foundation, 'The Kothi Framework', Briefing Paper No 4, November 2000: <<http://www.nazfoundint.com/home.html>> Papers, Essays & Reports > Briefing Papers (accessed 13 December 2002).

93 This is frequently misunderstood. See eg, 'I accept that it is very difficult to have an openly gay identity in Bangladesh. Country information shows that, in fact, very few people would see this as a problem because the Western construct of a gay identity is foreign to Bangladeshis and would therefore be a matter about which the majority of Bangladeshis gays would worry': RRT Reference *N98/21362* (Unreported, Kelleghan, 28 March 2002). Contrast this with the evidence of very high levels of violence against men who have sex with men, particularly *kothis*, reported by the NAZ Foundation, above n18.

94 Kirby J expresses this in dissent in *Applicant A*, above n69 at 393–394, and the approach of the majority reflects this statement. In *Minister for Immigration and Multicultural Affairs v Khawar* [2002] HCA 14 at para 55, the High Court returned the matter to the RRT, affirming Branson J's decision that it was an error of law to determine that the claimant did not fear persecution for reasons of her membership in a particular social group *without first identifying the particular social group in question*. This is also reflected in the High Court's analysis in *Chen v MIMA* (2000) 170 ALR 553 and in *MIMA v Ibrahim* [2000] HCA 55.

95 [1999] 2 AC 629 (HL).

96 Above n94.

97 *Id* at 635.

98 In the words of Lord Hoffman: 'To identify a social group, one must first identify the society of which it forms a part': *Shah*, above n95 at 652.

led to a confusing slippage in group definition. While the particular social group has been broadly defined by the RRT since 1994 as ‘homosexuals’, the ‘inherent characteristic’ or ‘fundamental human dignity interest’ of that group — to use the *Ward*⁹⁹ language — has been narrowed. By defining private sexual activity¹⁰⁰ — not sexual identity, not same-sex relationships, and emphatically not public expressions of sexual identity — as the protected ground, the tribunal has very narrowly defined the experience of lesbian and gay lives as if they were always and *only* sex. In this sense the group has been implicitly defined in two different ways within the decisions: homosexual is the group for the purposes of eligibility, but when the questions of persecution and nexus are raised the narrower group of ‘person wanting to have same-sex intercourse under secretive (possibly anonymous) circumstances’ is the category under assessment.

In our view, the best way to resolve the tension between broad and narrow definitions of the group in question is to follow the High Court’s own jurisprudence: define the group broadly as ‘homosexuals’ but then assess persecution and nexus with an appropriate understanding of the diversity of experiences and identities that are captured by this category. This is in keeping with Justice McHugh’s approach in *Applicant A*, where he describes the potentially eligible social groups as ‘disparate in character’, but continues, ‘what distinguishes their members from other persons in their country is a common attribute and a societal perception that they stand apart.’¹⁰¹ The group is set apart on the basis of *external perception*,¹⁰² without this the discrimination which is the core logic of the refugee definition would not be present.

It is an error to allow the label ‘homosexual’ to lead to a conclusion that all members of the group experience or express their sexuality or identity in the same or even similar ways. The label is the product of discrimination and oppression, not of the identities it names. It is important, therefore, to use two principles in the analysis: first, to follow existing jurisprudence by *not* requiring that all members of the group must experience persecution; and second, to ensure the evidence about some members of the group is not taken as necessarily applicable to all members.

The first point is well supported and leads directly to the second. The Convention mandates an individual and future-looking analysis of persecution. The question must be whether *this individual* faces a real chance of persecution if the individual returns to his or her homeland and is not affected by finding that

99 Above n7.

100 The tribunal concluded that if a gay person was ‘unable to safely reveal is or her sexual preferences, and the consequence is that he or she is unable to safely engage in private consensual sexual activity, then ... we have a violation of a fundamental human right such that the protection of the convention is legitimately attracted.’ RRT Reference *V95/03188* (Unreported, Hudson, 12 October 1995).

101 Above n69 at 360.

102 Justice McHugh states: ‘The fact that the actions of the persecutors can serve to identify or even create a “particular social group” emphasises the point that the existence of such a group depends in most, perhaps all, cases on external perceptions of the group’ (id at 359).

some members of the same group are not persecuted. The United Nations High Commissioner for Refugees (UNHCR) states:

An applicant need not demonstrate that all members of a particular social group are at risk of persecution in order to establish the existence of a particular social group. As with the other grounds, it is not necessary to establish that all persons in the political party or ethnic group have been singled out for persecution. *Certain members of the group may not be at risk if, for example, they hide their shared characteristic, they are not known to the persecutors, or they cooperate with the persecutor.*¹⁰³ (Emphasis added.)

The UNHCR has clearly averted to the issue of ‘discretion’ and has found it has no place in the law.

The question of whether all members of the group must be at risk was before the House of Lords in *Shah*.¹⁰⁴ In strongly rejecting that proposition, Lord Steyn stated:

I regard it as established that depending on the evidence homosexuals may in some countries qualify as members of a particular social group. Yet some homosexuals may be able to escape persecution because of their relatively privileged circumstances. By itself that circumstance does not mean that the social group of homosexuals cannot exist. Historically, under even the most brutal and repressive regimes some individuals in targeted groups have been able to avoid persecution. Nazi Germany, Stalinist Russia and other examples spring to mind. To treat this factor as negating a Convention Ground under article 1A(2) would drive a juggernaut through the Convention.¹⁰⁵

Lord Hoffman used particularly evocative language:

Suppose oneself in Germany in 1935. There is discrimination against Jews in general, but not all Jews are persecuted. Those who conform to the discriminatory laws, wear yellow stars out of doors and so forth can go about their ordinary business. But those who contravene the racial laws are persecuted. Are they being persecuted on grounds of race? In my opinion they plainly are. It is therefore a fallacy to say that because not all members of a class are being persecuted, it follows that persecution of a few cannot be on grounds of membership in that class.¹⁰⁶

Lords Steyn and Hoffman, writing majority opinions, each followed the principles set out by the Australian High Court in *Applicant A*.¹⁰⁷ Their argument, that protection for some through hiding, collaborating, or economic privilege does not negate the refugee status of others, fits within the High Court’s framework. The

103 United Nations High Commissioner for Refugees, ‘Guidelines on International Protection: “Membership of a Particular Social Group” Within the Context of Article 1A(2) of the 1951 Convention, and/or Its 1967 Protocol Relating to the Status of Refugees’, HCR/GIP/02/02, 7 May 2002 at 17.

104 Above n94.

105 Id at 644–645.

High Court's decision in *Khawar*¹⁰⁸ also allows for this possibility, although it was not finally determined by the Court as the matter was returned to the RRT.

The facts and argument in *Shah*¹⁰⁹ forced the issue of whether all need be persecuted because of a debate about whether the group in question ought be framed broadly as 'women in Pakistan' or narrowly as 'women in Pakistan suspected of adultery and unprotected by a male relative'. The tension between a broadly defined group and a narrowly defined one parallels the implicit tension in much of the RRT's decision-making between 'homosexuals' and some narrow construction such as 'men/women wanting to have same-sex intercourse under secretive (possibly anonymous) circumstances'. The resolution which the House of Lords offers is instructive. The majority found that the relevant group was 'women in Pakistan'. They also found that the narrow construction is a result of an inappropriate analysis of the 'nexus' issue in the refugee definition, that is, the question of whether the persecution is 'for reasons of' group membership.¹¹⁰ Once it is established that not all members of the group need fear persecution for one to be a refugee, the nexus issue which forces a narrow definition of the group is resolved. It is for this reason that the particular social group should be defined broadly as homosexuals, but that the questions of persecution and of the nexus with the group definition must be analysed in light of the variety of experience and identity which the broad label encompasses.

Analysing in this way leads necessarily to the conclusion that the 'discretion' requirement is wrong in law. While some individuals may choose to attempt to

106 Id at 653. Lord Hoffman continued: '... suppose that the Nazi government in those early days did not actively organise violence against Jews, but pursued a policy of not giving any protection to Jews subjected to violence by neighbours. A Jewish shopkeeper is attacked by a gang organised by an Aryan competitor who smash his shop, beat him up and threaten to do it again if he remains in business. The competitor and his gang are motivated by business rivalry and a desire to settle old personal scores, but they would not have done what they did unless they knew that the authorities would allow them to act with impunity. And the ground upon which they enjoyed impunity was that the victim was a Jew. Is he being persecuted on grounds of race? Again, in my opinion, he is. An essential element in the persecution, the failure of the authorities to provide protection, is based upon race. It is true that one answer to the question "Why was he attacked?" would be "because a competitor wanted to drive him out of business." But another answer, in my view the right answer in the context of the Convention, would be "he was attacked by a competitor who knew that he would receive no protection because he was a Jew": at 653–654.

107 Above n69.

108 Above n94.

109 Above n95.

110 Lord Hoffman stated: 'The reason why the appellants chose to put forward this restricted and artificial definition of their social group was to pre-empt the question of whether their feared persecution was "for reasons of" their membership of the wider group of women. It was argued for the Secretary of State that they could not fear persecution simply for the reason that they were women. The vast majority of women in Pakistan conformed to the customs of their society, did not chafe against discrimination or have bullying husbands, and were not persecuted. Being a woman could not therefore be a reason for persecution I do not need to express a view about whether this strategy should have succeeded because, as I shall explain in a moment, I think that the argument on causation which it was designed to meet is fallacious: id at 652–653.

escape persecution, refugee protection is not denied to those who do not make that choice. The gay man or lesbian who lives and socialises with a partner and is persecuted because of that ‘choice’ must be protected as a matter of fundamental human right, in the same way as the Jewish person in 1935 who refuses to wear a yellow star and is then persecuted for his or her ‘choice’. It is discriminatory in law to mandate that gay men and lesbians must remain closeted in order to protect themselves.

Moreover, the discretion requirement is also, in many contexts, impossible in fact. The question of being ‘out’ is never answered once and for all, it is a decision made over and over, each day and in each new social situation. The country evidence on Bangladesh indicates that same-sex activity may be ignored between men if the partners are both young or are married, but not if they are gay-identified. This standard almost certainly does not apply to women, but even for men as they get older their status as ‘closeted’ may shift whether they choose it or not. While one may be able to maintain a closeted life in a country such as Bangladesh for weeks, months or years, an unconscious gesture, an inquisitive neighbour, a 20-year cohabitation with ‘a friend’, or a change of heart, render the state of ‘closetedness’ always a potentially permeable one. Many lesbian and gay asylum seekers from countries as varied as Malaysia, India, Bangladesh and Iran, testify that to remain unmarried through adulthood would in and of itself be interpreted as evidence that they were homosexual and expose them to risk. It is arguable that in such cultures even an applicant who desperately wishes — and takes all possible steps — to remain closeted does, in fact, become increasingly ‘visible’ with the passage of time.

Gail Mason, a criminologist who has written extensively on homophobic violence has argued that, as ‘it is never possible to be completely closeted, it is likely that it is never possible to be completely safe from homophobic violence’.¹¹¹ Refugee decision-makers have not understood that being closeted or open are not static, self-contained and opposing states. In one UK case, an openly gay man from Pakistan argued that he would be in danger if returned because he was out, but the tribunal, and court on appeal, held that he was not *really* out — because neither his work colleagues nor his family knew he was gay. Hence, they reasoned, being ‘out’ was not accomplished, and being closeted was still a viable option (which they then imposed upon him).¹¹²

Using a narrow particular social group based upon definitions such as open/closeted is also problematic for other reasons. The tribunal has tended to assume that applicants who have been closeted in the past will always remain so, and have

111 Gail Mason, *The Spectacle of Violence: Homophobia, Gender, and Knowledge* (2002) at 95.

112 *T v Special Immigration Adjudicator* [2000] EWJ 3020. The tribunal continued, ‘His fear is of persecution should he return to Pakistan and behave there as an open and outed homosexual and in a promiscuous manner’: quoted on appeal at para 11. The tribunal reasoned that as there weren’t gay clubs in Pakistan the applicant would probably return to ‘his former lifestyle’ of occasional covert sex and noted that ‘It is of course not a Convention reason that an asylum seeker returning to his own country is unable to enjoy the peripheral benefits of westernised and so called liberalised behaviour’: quoted on appeal at para 12.

disregarded the future focus of the assessment of persecution in holding that they are therefore safe.¹¹³ Moreover, applicants facing a tribunal are very unlikely to assert that they are or will be ‘out’ when doing so confronts both their own societal norms and those of the decision-maker. This is especially so when decision-makers have labelled such conduct with value-laden and negative terms such as ‘flaunting’ or creating ‘embarrassing public situations’,¹¹⁴ and have elicited information about the applicants’ expression of their identity by questioning them about whether they behave ‘modestly’ or ‘appropriately’. Very few refugee claimants in such a context would have the courage to assert that they are at future risk through belonging to the ‘open’ particular social group if it were so defined.

Should the court choose nevertheless to adopt a narrower particular social group, taking factors such as secrecy to be definitional of the group, we alternatively submit that in the case of applicants *S396 and S395*, the appropriate narrowly defined social group to consider in Bangladesh is not ‘men who have sex with men’ but rather, ‘gay men in committed cohabiting relationships with male partners, who are unmarried and beyond the age where the societal norm is for men to marry’.¹¹⁵ Independent country information shows that the risk of persecution for K and R increases over time as they remain unmarried. Defining the group in this way would create an alternative means of avoiding the pitfall of inappropriate evidence.¹¹⁶ The tribunal has frequently used a broad and homogenous category to determine eligibility but then utilised country information from the broadly drawn group to find that there is no danger of persecution or that discretion is acceptable. This evidence is frequently drawn from, and relevant to, a quite distinct group — such as married men who have anonymous gay sex in parks. This may not reflect the applicant’s own position at all, if he is, as the applicants in the case at hand are, a gay-identified man or in a cohabiting gay relationship. Because the group is so broadly drawn it is possible for the tribunal and the court to treat both groups identically and to apply evidence from one to the situation of the other.¹¹⁷

113 This approach has been even more common in the Australian decisions where if applicants had secret lives up to the point of departure, the RRT simply assumed that this would continue in the future. See eg, RRT Reference *V97/07412* (Unreported, Haig, 24 December 1997); RRT Reference *V97/06802* (Unreported, Wood, 30 September 1997); RRT Reference *N94/04854* (Unreported, Woodward, 21 July 1998); RRT Reference *N95/09552* (Unreported, Woodward, 4 September 1998); RRT Reference *N98/23086* (Unreported, Rosser, 8 July 1998).

114 See RRT Reference *N98/21362* (Unreported, Kelleghan, 28 March 2002).

115 See also the suggestion of a particular social group of ‘homosexuals who have entered into and seek to remain in an intimate and exclusive relationship’ in a case involving a gay couple from Bangladesh where the tribunal held that, ‘this case provokes consideration not merely of the Applicants’ fears in relation to being perceived as ‘homosexuals in Bangladesh’, but also of the Applicants’ particular relationship. This is evidently intimate, exclusive and of some long standing, like a marriage, and may be perceived by Bangladesh society as an outward sign of their homosexuality that, even if they try to do so, they may ultimately be unable to hide’: RRT References *N98/24186 & N98/24187* (Unreported, Hardy, 28 January 2000).

116 It would also allow for a self-definition of the contours of the group based upon the applicant’s own sense of their identity and could also therefore contradict the discretion requirement. For instance, See *Re ORC* [1997] CRDD No 66 (QL), IRB Reference V96-00083, where the IRB construed the particular social group as ‘Moroccan men wishing to live within, and to exhibit, a homosexual identity in Morocco’.

8. Conclusion

The discretion requirement takes the focus away from persecution and reverses the onus to instead question what is 'reasonable' about the applicants' behaviour and the extent to which they should live a life of secrecy and fear. In doing so, the discretion standard arguably distracts decision-makers from properly dealing with the real issues in front of them, such as the real chance of future persecution. The requirement of discretion is discriminatory and as such is antithetical to the central aims of the Refugee Convention.

In asylum claims on other grounds, suppression of key aspects of the claimant's identity or expression of their core human rights has been held to constitute persecution. The requirement has been rejected by many of the other key refugee-receiving nations at tribunal and intermediate court levels. The High Court should take this opportunity to eliminate the discretion standard from Australian jurisprudence, and to provide international leadership on this point. The most effective way to do so is to maintain a broadly defined social group but clearly establish that not every member of a particular social group need be persecuted for the feared harm to be for a Convention reason.

117 The broadly drawn and particular social group was a contributing factor in the frequently gender inappropriate usage of evidence: see Dauvergne & Millbank, above n23.