

1108957 [2012] RRTA 502 (29 June 2012)

DECISION RECORD

RRT CASE NUMBER: 1108957

DIAC REFERENCE(S): CLF2011/19673

COUNTRY OF REFERENCE: Nigeria

TRIBUNAL MEMBER: Tony Caravella

DATE: 29 June 2012

PLACE OF DECISION: Perth

DECISION: The Tribunal remits the matter for reconsideration with the direction that the applicant satisfies s.36(2)(aa) of the *Migration Act 1958*.

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

1. This is an application for review of a decision made by a delegate of the Minister for Immigration and Citizenship to refuse to grant the applicant a Protection (Class XA) visa under s.65 of the *Migration Act 1958* (the Act).
2. The applicant, who claims to be a citizen of Nigeria, first arrived in Australia on [date deleted under s.431(2) of the *Migration Act 1958* as this information may identify the applicant] July 2004 and applied to the Department of Immigration and Citizenship for the visa [in] February 2011. The delegate decided to refuse to grant the visa [in] July 2011 and notified the applicant of the decision.
3. The delegate refused the visa application on the basis that the applicant is not a person to whom Australia has protection obligations under the Refugees Convention.
4. The applicant applied to the Tribunal [in] August 2011 for review of the delegate's decision.
5. The Tribunal finds that the delegate's decision is an RRT-reviewable decision under s.411(1)(c) of the Act. The Tribunal finds that the applicant has made a valid application for review under s.412 of the Act.

RELEVANT LAW

6. Under s.65(1) a visa may be granted only if the decision maker is satisfied that the prescribed criteria for the visa have been satisfied. The criteria for a protection visa are set out in s.36 of the Act and Part 866 of Schedule 2 to the Migration Regulations 1994 (the Regulations). As a result of amendments to the Act, some of the criteria in s.36 do not apply to visa applications made before 1 October 2001. However, the criteria in cl.866.221 of the Regulations broadly reflect the criteria for a protection visa in s.36(2) of the Act. An applicant for the visa must meet one of the alternative criteria in cl.866.221(2), (3), (4) or (5): cl.866.221(1). That is, the applicant is either a person to whom Australia has protection obligations under the 1951 Convention relating to the Status of Refugees as amended by the 1967 Protocol relating to the Status of Refugees (together, the Refugees Convention, or the Convention), or on other 'complementary protection' grounds, or is a member of the same family unit as a person to whom Australia has protection obligations under either the Refugees Convention or the complementary protection grounds and that person holds a protection visa.

Refugee criterion

7. Clause 866.221(2) is satisfied if the Minister is satisfied that the applicant for the visa is a person to whom has protection obligations under the Refugees Convention.
8. Australia is a party to the Refugees Convention and generally speaking, has protection obligations to people who are refugees as defined in Article 1 of the Convention. Article 1A(2) relevantly defines a refugee as any person who:
 - owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being

outside the country of his former habitual residence, is unable or, owing to such fear, is unwilling to return to it.

9. The High Court has considered this definition in a number of cases, notably *Chan Yee Kin v MIEA* (1989) 169 CLR 379, *Applicant A v MIEA* (1997) 190 CLR 225, *MIEA v Guo* (1997) 191 CLR 559, *Chen Shi Hai v MIMA* (2000) 201 CLR 293, *MIMA v Haji Ibrahim* (2000) 204 CLR 1, *MIMA v Khawar* (2002) 210 CLR 1, *MIMA v Respondents S152/2003* (2004) 222 CLR 1, *Applicant S v MIMA* (2004) 217 CLR 387, *Appellant S395/2002 v MIMA* (2003) 216 CLR 473, *SZATV v MIAC* (2007) 233 CLR 18 and *SZFDV v MIAC* (2007) 233 CLR 51.
10. Sections 91R and 91S of the Act qualify some aspects of Article 1A(2) for the purposes of the application of the Act and the regulations to a particular person. These provisions were inserted on 1 October 2001 and apply to all protection visa applications not finalised before that date.
11. There are four key elements to the Convention definition. First, an applicant must be outside his or her country.
12. Second, an applicant must fear persecution. Under s.91R(1) of the Act persecution must involve 'serious harm' to the applicant (s.91R(1)(b)), and systematic and discriminatory conduct (s.91R(1)(c)). The expression 'serious harm' includes, for example, a threat to life or liberty, significant physical harassment or ill-treatment, or significant economic hardship or denial of access to basic services or denial of capacity to earn a livelihood, where such hardship or denial threatens the applicant's capacity to subsist: s.91R(2) of the Act. The High Court has explained that persecution may be directed against a person as an individual or as a member of a group. The persecution must have an official quality, in the sense that it is official, or officially tolerated or uncontrollable by the authorities of the country of nationality. However, the threat of harm need not be the product of government policy; it may be enough that the government has failed or is unable to protect the applicant from persecution.
13. Further, persecution implies an element of motivation on the part of those who persecute for the infliction of harm. People are persecuted for something perceived about them or attributed to them by their persecutors.
14. Third, the persecution which the applicant fears must be for one or more of the reasons enumerated in the Convention definition - race, religion, nationality, membership of a particular social group or political opinion. The phrase 'for reasons of' serves to identify the motivation for the infliction of the persecution. The persecution feared need not be *solely* attributable to a Convention reason. However, persecution for multiple motivations will not satisfy the relevant test unless a Convention reason or reasons constitute at least the essential and significant motivation for the persecution feared: s.91R(1)(a) of the Act.
15. Fourth, an applicant's fear of persecution for a Convention reason must be a 'well-founded' fear. This adds an objective requirement to the requirement that an applicant must in fact hold such a fear. A person has a 'well-founded fear' of persecution under the Convention if they have genuine fear founded upon a 'real chance' of being persecuted for a Convention stipulated reason. A fear is well-founded where there is a real substantial basis for it but not if it is merely assumed or based on mere speculation. A 'real chance' is one that is not remote or insubstantial or a far-fetched possibility. A person can have a well-founded fear of

persecution even though the possibility of the persecution occurring is well below 50 per cent.

16. In addition, an applicant must be unable, or unwilling because of his or her fear, to avail himself or herself of the protection of his or her country or countries of nationality or, if stateless, unable, or unwilling because of his or her fear, to return to his or her country of former habitual residence. The expression 'the protection of that country' in the second limb of Article 1A(2) is concerned with external or diplomatic protection extended to citizens abroad. Internal protection is nevertheless relevant to the first limb of the definition, in particular to whether a fear is well-founded and whether the conduct giving rise to the fear is persecution.
17. Whether an applicant is a person to whom Australia has protection obligations is to be assessed upon the facts as they exist when the decision is made and requires a consideration of the matter in relation to the reasonably foreseeable future.

Complementary protection criterion

18. If a person is found not to meet the refugee criterion in cl.866.221(2) he or she may nevertheless meet the criteria for the grant of a protection visa if he or she is a person to whom the Minister is satisfied Australia has protection obligations because the Minister has substantial grounds for believing that, as a necessary and foreseeable consequence of the applicant being removed from Australia to a receiving country, there is a real risk that he or she will suffer significant harm: cl.866.221(4) ('the complementary protection criterion').
19. 'Significant harm' for these purposes is exhaustively defined in s.36(2A): s.5(1). A person will suffer significant harm if he or she will be arbitrarily deprived of their life; or the death penalty will be carried out on the person; or the person will be subjected to torture; or to cruel or inhuman treatment or punishment; or to degrading treatment or punishment. 'Cruel or inhuman treatment or punishment', 'degrading treatment or punishment', and 'torture', are further defined in s.5(1) of the Act.
20. 'Cruel or inhuman treatment or punishment' for the purposes of s.36(2A)(d) is exhaustively defined in s.5(1) of the Act to mean an act or omission by which severe pain or suffering, whether physical or mental, is inflicted on a person, or pain or suffering, whether physical or mental, is inflicted on a person, so long as, in all the circumstances, the act or omission could reasonably be regarded as cruel or inhuman in nature. The pain or suffering must be intentionally inflicted.
21. However, 'cruel or inhuman treatment or punishment' does not include an act or omission which is not inconsistent with Article 7 of the International Covenant on Civil and Political Rights (the ICCPR), nor one arising only from, inherent in or incidental to, lawful sanctions that are not inconsistent with the Articles of the ICCPR. Article 7 of the ICCPR prohibits torture and cruel, inhuman or degrading treatment or punishment.
22. The final type of significant harm listed in s.36(2A) is degrading treatment or punishment: s.36(2A)(e). Degrading treatment or punishment is exhaustively defined in s.5(1) of the Act to mean an act or omission which causes, and is intended to cause, extreme humiliation which is unreasonable.
23. However, 'degrading treatment or punishment' does not include an act or omission which is not inconsistent with Article 7 of the International Covenant on Civil and Political Rights (the

ICCPR), nor one that causes, and is intended cause, extreme humiliation arising only from, inherent in or incidental to, lawful sanctions that are not inconsistent with the Articles of the ICCPR. Article 7 of the ICCPR prohibits torture and cruel, inhuman or degrading treatment or punishment.

CLAIMS AND EVIDENCE

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

Background and Protection Claims

25. In the applicant's application for a protection visa, (Form 866C), the applicant states that he left Nigeria for a better education overseas. He goes on to say that before he left the Delta State to go to Lagos, which was at least two months or so before heading to Australia, he knew his life was threatened not only from inter-ethnic crisis at the time, but also because he saw "a few people were killed" by the military and his local community. The applicant claims that his family was unaware of this because he had given his word to "the nefarious people" that it would be a secret between the applicant and them. He claims that they threatened him if they found out that he had told anyone about what he had seen.
26. The applicant claims he fears that if he returns that the people he fears may kill him. He claims they killed someone he knew who was also aware of what was going on however they claimed that person drowned because he couldn't swim after being involved in oil bunkering. The applicant claims that he would not "go public" until he knew the military had completely lost its grip on power in Nigeria. The applicant also writes that recently two of the boys that also witnessed the event were killed. He claims the military and the community claims that the two boys were shot because they were caught in an armed robbery. He claims there have been joint killings where people who were part of the crowd and who saw community youth burning people alive in their homes and soldiers killing young people at random.
27. The applicant claims that he believes the military "... is out to get me." He also claims he believes the leaders and the youth group in Delta State may be after him.
28. The applicant claims that some of the people he knows have been killed over the last few years. He claims some of them were shot by the military and accused of armed robbery, while others just disappeared suddenly and the story is that they have gone abroad.
29. The applicant writes that he believes his qualification as a journalist exposes him to more dangers from these people. He claims he made a mistake by announcing that he had studied journalism overseas and intends to go back to Nigeria and cover some of the things that he feels is wrong with the country. He claims his mother specifically warned him not to go back until things are settled.
30. On the question of whether the authorities of Nigeria can and will protect him if he returns, the applicant states that he is confident the authorities will not protect him because the authorities generally do not protect anyone and the country is still partially controlled by the military. He claims by looking at the news one finds stories of political assassination, religious and interethnic crisis. He claims the authorities are aware of this but somehow they might be benefiting from the killings and violence.

The Delegate's Decision

31. The delegate refused the visa applicant's application for a protection visa and sets out the reasons for this in a decision record dated [July] 2011. The Tribunal summarises the key findings by the delegate as follows:
- the delegate accepted that the applicant may have been witness to violent incidents in the [Town 1] area around 2004, however the delegate states that she has considerable doubts that the applicant would be at risk of being killed if he were to return to Nigeria;
 - the applicant has been out of his country since 2004 and is emphatic that he has never said anything about what he witnessed;
 - the applicant stated that he had only been a member of his church group and that he has never had any difficulties in regards to practising his religion and that he and his family had never been members of any political, ethnic, religious (apart from his church group) or military organisation. The delegate found that the applicant had never been involved in politics and that he was able to obtain a police character certificate from the Central Register of the Nigeria Police [in] 2004. The delegate also found the applicant was able to obtain a passport in 2004, and depart the country, as well as renew his passport in 2009 without any problems;
 - on the question of the applicant's claim regarding journalism the delegate found that the applicant has never worked as a journalist and has not produced any written materials in relation to Nigeria, nor has he written any papers that have been published;
 - the delegate also found that she was satisfied the applicant would be able to live elsewhere in Nigeria if the fears relate to a localised threat.

Application for Review

32. [In] August 2011, the applicant applied to this Tribunal for a review of the delegate's decision.
33. In a statement received by the Tribunal [in] August 2011 the applicant writes:

“... ”

I now like to provide the Tribunal with some context to help in its decision process.

The first is that:

- I currently have a graduate visa application with the Department that is still under consideration.
- My fiancé for over two years is an Australian citizen and she attended the interview with me in July.
- I originally sought protection from the Department because I feared for my life and not because I merely want to stay permanently in Australia.
- I had the opportunity to apply for a permanent visa when I graduated in 2009. I can still apply to other visas that would allow me to reside in Australia permanently.

It needs to be noted also that it wasn't originally my intention to seek protection from the Australian government, hence, reside permanently in Australia.

I still fear for my life every day. That I'm alive today means a lot to me. Nigeria still not a safe place especially for someone like me. People get killed for all sorts of reasons in that country. If I returned without any kind of protection, I fear I would become a statistic like the others before me.

The case officer who considered my application recognised I had a genuine humanitarian case and based on the information she had, she had no doubt it would be a risk for me to go back to Delta State.

However, she's asking me to go back to the country but relocate to a different State. Anyone who's had their lives (sic) threatened such as mine would not come to such a conclusion.

If my life is not safe in Delta State, my life is not safe anywhere in Nigeria. It is the military, the community that are after me not a soldier. They are everywhere in Nigeria.....”

Tribunal Hearings

Tribunal hearing held [February] 2012

34. The applicant appeared before the Tribunal [in] February 2012 to give evidence and present arguments.
35. The applicant began his oral evidence by telling the Tribunal that he was born in [Town 1] in the Delta State of Nigeria. He said that he is of the Urhobo / Itsekiri / Isoko ethnic group. He claimed he is a member of all three of the ethnic groups because his [grandfather and his grandmother are from these groups].
36. The applicant told the Tribunal that he is getting married in [2012] as he is engaged. He said his fiancée is [name deleted: s.431(2)] who is an Australian citizen. He said they met in [2009].
37. The Tribunal invited the applicant to explain why he fears returning to Nigeria. He said that before he left Nigeria there was a lot of ethnic trouble between the Urhobo and the Itsekiri and the Isoko tribes. He said there were a lot of killings and the federal government declared a state of emergency and the military came into the area. He told the Tribunal there was a lot of corruption which meant that the military was corrupt and it permitted one ethnic group to attack or harm another ethnic group. He said the military would take money from the conflicting groups and would turn a blind eye to their actions. He said there were curfews during the day and the military would delay their intervention when violence flared up between the ethnic groups.
38. The applicant said that his family has a big compound where they live and that the military would use the compound as its base. He said that they lived in the Itsekiri area and that one day someone from the Urhobo group came into their compound. He said the man was killed because he was suspected of being Urhobo and also suspected of involvement in giving money or information for the purpose of hurting the Itsekiri. The applicant said that he and three others saw the Urhobo man killed. Asked to explain what in particular he saw, he said that some of the Itsekiri men told the Urhobo man that some of the elders wanted to speak to

him that this was just a ruse and that they seized him and took him to a place in the bush where they beat him to death. The applicant said he saw the men beat the man; he described how they broke his legs and arms killed and buried him.

39. The Tribunal asked the applicant how he managed to witness this killing. He said that he and some others were around the compound at the particular time and near the military and could see what had happened. He said they followed the group of men who had taken the Urhobo man to the bush. He said that the perpetrators spotted him and the others who were witnessing this incident and told them to leave, but they did not leave and saw the beating and killing. He went on to say that after the killing, stories began circulating about the Urhobo man being missing.
40. The applicant said that approximately two weeks later the military and the community leaders of the Itsekiri came to speak to him and three others who had witnessed the killing. He said that the military told them to be quiet about it and not to speak to anyone. He said that he told them he would be quiet.
41. The applicant said that around the time this happened his uncle was processing his student visa application. He said his uncle has three children in Australia. He said his mother could not afford to send the applicant to Australia to study and so his uncle told him that he would give the applicant the opportunity to come to Australia and to get out of Nigeria. The applicant said he arrived in Australia in July 2004 and completed a Bachelor [degree] at [institution deleted: s.431(2)]. He said he studied there from 2007 to 2009 and before that he completed a [Diploma] in 2006 to 2007 at [institution deleted: s.431(2)].
42. The applicant told the Tribunal that in Nigeria he was a sales representative for a [publication] called [name deleted: s.431(2)]. He said he worked there for two years.
43. The applicant went on to say there is one thing that he did not tell his case officer about his claim. He said that he was embarrassed to talk about it because his fiancée was present at the interview. He went on to say that the community youth of the Itsekri and some soldiers took the applicant to the bush where they took his clothes off and they beat him with tree branches. He said they then gave him a lamp and forced him to hold a lamp in front of his private parts and he was forced to walk into the community holding a lamp while naked. He said that after walking into the community he ran to his cousin's place and locked himself in. He said this occurred around 2002. The Tribunal asked the applicant why they did this to him. He said that this was because he saw the killing, and added that Nigeria is corrupt and its military and leaders are all corrupt. He said that this was very embarrassing. He said he feels powerless as he realises how dangerous it is. He added that his mother has told him not to visit Nigeria and she is happier that the applicant is in Australia. He said his mother, his aunt, and sisters are coming to Australia for his wedding.
44. The applicant told the Tribunal that the soldiers were jointly with the communities in carrying out the atrocities. He said that the military is aware of what's going on but do nothing to stop it.
45. The Tribunal asked the applicant why those involved in the beating and killing of the Urhobo man, or anyone else, would still be interested in targeting him after the passage of all this time since the incident he described. He said that the reason for this is that the same people continue to live in the area and it has the same community leaders so not much has changed.

46. The Tribunal asked the applicant to comment on why he would not be able to relocate to another part of Nigeria if he was fearful of returning to [Town 1] or the Delta State. He said that he believes that as soon as he returns to Nigeria the people who want to harm him will know that he is there. He said he believes this because of what has happened to the other three who witnessed the beating and killing. He said that in the case of one of the other witnesses who saw the killing, he was killed by police who claimed that he had raped a woman. He said another of the witnesses was killed by the military who claimed that he was “bunkering” which the applicant described as when a person illegally breaks or taps into pipes to steal oil. He said that in a place like Nigeria, there is no respect for human rights or the law. He said the whole military is involved so going back to another state in Nigeria is not a solution and that the military would harm him and blame the Boko Haram for it.
47. The Tribunal asked the applicant how he knows that the attackers are still after him. He said that the other witnesses have died or have been killed and he thinks that the attackers are still actively looking for him. He told the Tribunal that he has not returned to Nigeria. He said that even though he has no visa restriction against returning to Nigeria, he has not returned to see his parents.
48. The applicant told the Tribunal that he used to have a Facebook account which he closed in late 2010. He said that when the Facebook account was active, he used to put comments on it about people not being safe in Nigeria. He said that he believes the military went to his house and spoke to his mother about the applicant and his whereabouts. He said that his mother has not told him what the military wanted but she has told him not to go home. The applicant told the Tribunal that no one has confirmed the crime and nor have any charges being laid for the killing of the Urhobo man.
49. The applicant said that he called the police in Western Australia and he said that he was worried about whether the people he fears want to harm him would find him in Australia. He said the police had directed him to the Department of Immigration.
50. The Tribunal asked the applicant to explain why he wrote, at question 46 of his application for a protection visa form, that he is confident that the authorities will not protect him. He replied that in Nigeria there is no confidence in the military, police, or government. He said that in Nigeria the mere wearing of a green cap may lead the military to pick the wearer up and to beat them. The Tribunal put it to the applicant that in a country where corruption is as pervasive as he claims, that it would appear that the entire population faces the problem together. The applicant agreed, and added that he has information about the military, that is that it beat and killed the Urhobo man, and that the information would be scandalous.
51. The Tribunal asked the applicant whether he had any documents which would or could verify his claims. He said that he has not provided any documents because he doesn't have any. He said that the information he provided is accurate and based on what he saw with his own eyes. The applicant went on to say that what he claims is true and that if he wanted to make up a story for a protection application he would have obtained fraudulent documents as they are easy to obtain in Nigeria.
52. The applicant concluded that he is afraid for his life if he returns to Nigeria. He said that he has applied for a subclass 485 visa as well and is awaiting the outcome of that application.
53. The Tribunal advised the applicant that it would give him two weeks until [a certain date in] February 2012 to make any final and further submissions to support his claims.

Post hearing submission

54. [In] March 2012, the Tribunal received an e-mail from the applicant stating, relevantly:

I write to inform you that everyone I have contacted to provide statement or evidence declined to speak on this issue. The majority of people I spoke to pretend that they knew nothing about the issue whilst others said they wish not to get involved.

I don't know how this affect my case but just thought to let you know the situation of things.

Tribunal hearing held [April] 2012

55. The Tribunal resumed its hearing [in] April 2012 and explained to the applicant that it had decided to have a further hearing because it had further questions. It also explained that because of the change in the Act which introduces complementary protection provisions, the Tribunal wanted the applicant to have the opportunity to provide submissions on this matter.
56. The Tribunal invited the applicant to make any further comment or to provide an update on claims made in the first hearing. The applicant replied that he and his fiancée are getting married in [month deleted: s.431(2)] in a native wedding in [City 2] and then in [month deleted: s.431(2)] a wedding will be held in a church in [suburb deleted: s.431(2)]. He said he wanted to go to Africa for the wedding but because of the situation there they decided not to go back.
57. The Tribunal asked the applicant whether he has had any contact or any news from Nigeria. He said that he had been in touch with his friends through Facebook and they talk about the suicide bombings and violence; that he has no further news about the specific crime which he witnessed. He said that his contacts told him that the military are still in the area but there is no fighting taking place. The applicant told the Tribunal that he does not want to change anything that he had said at the first hearing. He added that there are other things that he did not feel comfortable to say. He went on to say that the things he did not feel comfortable talking about were things that were done to him in the bush.
58. The Tribunal explained the introduction of the complementary protection provisions in the Act and invited the applicant to make submission with respect to that. The applicant initially replied that he does not know whether Nigeria would apply the death penalty, but went on to say that he thinks he would be tortured or subjected to cruel and inhuman punishment. He said he fears the military might arrest him and claim that they may try him and put him in jail without explaining any reason. He said that if the army got to know about this his fear is that the military might want to kill him because of the information he has given. He said that he thinks he might just be kept in prison.
59. The applicant referred to another incident when he was in Nigeria and where he was punished for breaking curfew when in fact he had not broken the curfew. He said that on that occasion he was forced to hold a block in the air while kneeling down on the side of the road. He said that he was forced to maintain that position for one hour. He said that this occurs in Nigeria because there is no law or protection against the military.

60. The Tribunal asked the applicant to confirm the convention ground upon which he was relying for his protection claim. He said that his protection ground is not religious but it falls under ethnic or political grounds.
61. The Tribunal asked the applicant to explain how he managed to obtain a police clearance and passport. The applicant said that he believes he was able to obtain police clearance because he was in Australia when he applied for it and the police would not withhold it because it would signal that they had an interest in him if they withheld a police clearance. Further, he said that if the police clearance had been withheld this would stop him from going back to Nigeria. He said that the police would avoid doing anything which would stop him going back to Nigeria. In respect of a passport, the applicant said that he renewed the passport in Canberra so the passport was not sent to Nigeria for renewal.
62. The Tribunal put it to the applicant that the murder he witnessed occurred in 2001 or 2002 and that as so much time had passed since then he may not be of further interest to the military and invited the applicant to comment on this. The applicant replied that the passage of time does not diminish the risk. He said that another witness is reported to have drowned and another was killed by shooting because he was accused of committing a serious crime. He added that another problem in Nigeria is that the media is weak and it does not cover all the crime or the people who are shot dead by the military or who are raped. He said the media only focuses on politics and economics.
63. The Tribunal asked the applicant for more information about his Facebook account. The applicant replied that his current Facebook account has one military person as a "friend" He said that he had made a comment that people are killed in Nigeria and he hoped to expose this with his journalism skills if he returned to Nigeria. The applicant went on to say that he then received a message from a military official who warned him that people who spoke out get hurt in Nigeria. The Tribunal asked the applicant whether he could provide a copy of that message; he replied that he has closed the account, that he will see if he could get a copy anyway.
64. The Tribunal asked the applicant for more background about his parents. He replied that his mother is a teacher and his father is a business person. He said he did not get to meet his father until he was [age deleted: s.431(2)] years old and that he had grown up with his mother. He said that his extended family is wealthy but his mother is not and she is simply a teacher. He said that people would not target him for kidnapping or extortion because they would have to wait for years for his mother to accumulate money to pay a ransom.
65. On the question of relocation, the applicant said that if he was dealing with a small ethnic group it would be different and he could possibly go to Lagos or Abuja, however, in his case he is dealing with the military institution. He said that as soon as he returned to Nigeria the military would know because they run Nigeria.
66. The applicant said the leader of the Boko Haram was captured in southern Nigeria and it was reported that he was arrested, but the next day he was released. The applicant claimed that this was a sign of bribery. The applicant said that if his persecutors were not the military which has reach across Nigeria, he would move to Abuja. The Tribunal asked the applicant whether there was any other reason for his not wanting to return to Nigeria, he replied he has not committed any crime and also he had a good job. He concluded that he would not be protected by police and the military would want to silence him.

67. The Tribunal invited the applicant to provide further written submission, on the question of complementary protection or on the question of convention persecution, if he chose to do so by [a certain date in] May 2012.

Post hearing submission

68. [In] May 2012, the Tribunal received an e-mail from the applicant stating the following:

I have taken a very close look at the complementary protection clause that was only recently put into place by the Australian government. I believe with all honesty that this new legislation is relevant to my case.

For example, I believe returning to Nigeria will endanger my life. It's not the first time that the Nigerian government and the military in that country have done something like this.

They (The government and the military) may and could fabricate some lies that would give them the opportunity to imprison me, torture or subject me to inhuman treatment.

They've subjected me to degrading treatment in the past. They've stripped me naked, beaten me, made me kneel in public whilst lifting heavy bricks in the past. They could do worse.

They've killed a few people and claimed that they were criminals. If they did it to me it won't be the first time.

With these (*sic.*) information before you, I believe the complementary protection does apply to my case. So if it's possible I would like my case to be considered under this new legislation.

I would like the Australian government to please provide me protection knowing what it knows based on the information and the facts before it.

Independent Country Information

Overview of the current security situation in Nigeria, particularly in Delta state.

69. Nigeria is roughly divided between a predominantly Muslim north and Christian south.¹ The overall security situation in Nigeria remains extremely volatile, with bombings and attacks by militant groups continuing to occur on a regular basis, particularly in the northern region.² Delta state is located in southern Nigeria, although similarly experiences kidnappings and attacks by armed insurgents.^{3 4}

¹ 'Blasts death toll rises as Nigeria descends into chaos' 2012, *The Age*, 22 January <http://www.theage.com.au/world/blasts-death-toll-rises-as-nigeria-descends-into-chaos-20120122-1qbtr.html> – Accessed 23 January 2012

² Zounmenou, D. & Chatora, A. 2011, 'Nigeria Seeking an Effective Response to Boko Haram', Institute for Security Studies, 16 November http://www.issafrica.org/iss_today.php?ID=1389 – Accessed 23 January 2012

³ Malina, T. 2010, 'Militancy in the Niger Delta', Matthew B. Ridgway Center for International Security Studies, University of Pittsburgh, 15 March <http://research.ridgway.pitt.edu/nigeria/2010/03/15/militancy-niger-delta/#more-5> – Accessed 23 January 2012

⁴ Human Rights Watch 2012, *World Report 2012 – Nigeria*, 22 January, pp.143-144, 146-147

70. The Department of Foreign Affairs and Trade (DFAT) advised in January 2012 that Australian citizens should “reconsider [the] need to travel to Nigeria at this time due to the very high threat of terrorist attack, the high risk of kidnapping, the unpredictable security situation, the heightened risk of violent civil unrest and the high level of violent crime” DFAT has issued a ‘do not travel’ warning for the Nigerian states of Bayelsa, Delta, Rivers, Abia, Akwa Ibom, Anambra, Bauchi, Borno, Gombe, Plateau and Yobe.⁵
71. Human Rights Watch reports that throughout 2011, ongoing inter-communal violence, riots and sectarian killings, particularly in the northern region, claimed hundreds of lives. The Nigerian Police Force has also been “implicated in frequent human rights violations, including extrajudicial killings, torture, arbitrary arrests, and extortion-related abuses” Widespread corruption, poverty and police abuse have ensured that groups such as militant Islamist group Boko Haram thrive. During the year, Boko Haram reportedly carried out “[a] series of bombings and numerous targeted killings [that] left more than 425 people dead”. The group also claimed responsibility for the August 2011 attack on a United Nations building in the centrally-located capital city of Abuja that killed 24 people.⁶
72. Attacks by Boko Haram (also known as Jama’atu Ahlus Sunnah Lid Da’awati Wal Jihad) have reportedly increased sharply in recent months, mostly in the northeast of the country, forcing tens of thousands of people to flee their homes.^{7 8} The most recent bomb attacks targeted security forces in the northern city of Kano on 21 January 2012, killing approximately 170 people.^{9 10 11} *Reuters* claimed on 24 January that the death toll had reached 186, making the incident “Boko Haram’s most deadly attack to date”.¹² A purported spokesman for Boko Haram claimed responsibility for the attacks that he stated were “in response to authorities’ refusal to release its members from custody”.¹³
73. Further attacks attributed to Boko Haram in January 2012 include an attack on a military checkpoint in Borno state which resulted in the deaths of two soldiers and four Boko Haram members; two separate attacks in Adawama state and Gombe state on 13 January; the killings of four Christians in Yobe state on 11 January; an attack in Yobe state on 10 January which

⁵ Department of Foreign Affairs and Trade 2012, ‘Travel Advice for Nigeria’, Smartraveller website, 20 January <http://www.smartraveller.gov.au/zw-cgi/view/Advice/Nigeria> – Accessed 23 January 2012

⁶ Human Rights Watch 2012, *World Report 2012 – Nigeria*, 22 January, pp.143-144, 146-147

⁷ ‘NIGERIA: Timeline of Boko Haram attacks and related violence’ 2012, *IRIN News*, 20 January <http://www.irinnews.org/report.aspx?reportid=94691> – Accessed 23 January 2012

⁸ ‘Blasts death toll rises as Nigeria descends into chaos’ 2012, *The Age*, 22 January <http://www.theage.com.au/world/blasts-death-toll-rises-as-nigeria-descends-into-chaos-20120122-1qbtr.html> – Accessed 23 January 2012

⁹ ‘Blasts death toll rises as Nigeria descends into chaos’ 2012, *The Age*, 22 January <http://www.theage.com.au/world/blasts-death-toll-rises-as-nigeria-descends-into-chaos-20120122-1qbtr.html> – Accessed 23 January 2012

¹⁰ Mark, M. 2012, ‘Scores dead in northern Nigeria as Islamist militants terrorise the country’, *The Guardian*, 22 January <http://www.guardian.co.uk/world/2012/jan/21/scores-dead-nigeria-islamist-militants> – Accessed 23 January 2012

¹¹ Pflanz, M. 2012, ‘Nigeria sectarian violence shows no signs of abating’, *The Telegraph*, 22 January <http://www.telegraph.co.uk/news/worldnews/africaandindianocean/nigeria/9030987/Nigeria-sectarian-violence-shows-no-signs-of-abating.html> – Accessed 23 January 2012

¹² Cocks, T., Brock, J. & Oboh, M. 2012, ‘Nigeria’s Boko Haram killed 935 people since 2009’, *Reuters*, 24 January <http://www.reuters.com/article/2012/01/24/us-nigeria-sect-idUSTRE80N1GX20120124> – Accessed 25 January 2012

¹³ ‘Blasts death toll rises as Nigeria descends into chaos’ 2012, *The Age*, 22 January <http://www.theage.com.au/world/blasts-death-toll-rises-as-nigeria-descends-into-chaos-20120122-1qbtr.html> – Accessed 23 January 2012

resulted in the deaths of eight people, including five police officers; the killings of a police officer and a civilian as they were leaving a mosque in Borno state on 9 January; the killings of three Christians in the town of Biu on 7 January; the killings of 25 Christians in Adamawa state on 6 January; the killings of six Christians in an attack on a church in Gombe on 5 January; and an attack on a police station in Jigawa state on 3 January which resulted in one death.¹⁴

74. Additionally, in the northern state of Bauchi on 22 January 2012, two churches were destroyed by explosions, while 11 people were killed in a separate attack which has been blamed on “a Muslim ethnic group”.^{15 16}
75. Boko Haram was also responsible for bombing attacks on Christian churches on Christmas Day 2011, which killed at least 40 people and led to the imposition by Nigerian President Goodluck Jonathan of a state of emergency in areas where the group is believed to have its strongholds – the northeastern states of Borno and Yobe, the central state of Plateau and Niger state in the northwest.^{17 18} However, concerns have been raised over the effectiveness of the state of emergency, as the group is backed by powerful northern politicians, and could easily relocate.¹⁹ *The Age* reported on 22 January 2012 that “[t]he state of emergency has not stopped attacks, and the areas targeted have spread beyond the locations covered by the decree”.²⁰
76. A December 2011 assessment of the Nigerian security situation states that:

There is little doubt that the on-going threat from Boko Haram – and, more importantly, its ability to ferment sectarian violence between Nigeria’s Muslim and Christian communities – is extremely serious. It seems obvious that the government and its security services urgently need a new and much better co-ordinated strategy if they are to succeed. Unless they do so then the outlook in 2012 for the security situation – particularly in the north and the middle belt but also for isolated attacks in the predominantly Christian south – look very bleak.²¹

¹⁴ ‘NIGERIA: Timeline of Boko Haram attacks and related violence’ 2012, *IRIN News*, 20 January
<http://www.irinnews.org/report.aspx?reportid=94691> – Accessed 23 January 2012

¹⁵ Pflanz, M. 2012, ‘Nigeria sectarian violence shows no signs of abating’, *The Telegraph*, 22 January
<http://www.telegraph.co.uk/news/worldnews/africaandindianocean/nigeria/9030987/Nigeria-sectarian-violence-shows-no-signs-of-abating.html> – Accessed 23 January 2012

¹⁶ Pflanz, M. 2012, ‘Fresh attacks kill nine in northern Nigeria as police hunt Boko Haram bombers’, *The Telegraph*, 22 January
<http://www.telegraph.co.uk/news/worldnews/africaandindianocean/nigeria/9030752/Fresh-attacks-kill-nine-in-northern-Nigeria-as-police-hunt-Boko-Haram-bombers.html> – Accessed 23 January 2012

¹⁷ ‘NIGERIA: Timeline of Boko Haram attacks and related violence’ 2012, *IRIN News*, 20 January
<http://www.irinnews.org/report.aspx?reportid=94691> – Accessed 23 January 2012

¹⁸ Adekoya, R. 2012, ‘Nigeria’s Islamists have the government dancing to their tune’, *The Guardian*, 4 January
<http://www.guardian.co.uk/commentisfree/2012/jan/04/nigeria-islamists-boko-haram> – Accessed 23 January 2012

¹⁹ Adekoya, R. 2012, ‘Nigeria’s Islamists have the government dancing to their tune’, *The Guardian*, 4 January
<http://www.guardian.co.uk/commentisfree/2012/jan/04/nigeria-islamists-boko-haram> – Accessed 23 January 2012

²⁰ ‘Blasts death toll rises as Nigeria descends into chaos’ 2012, *The Age*, 22 January
<http://www.theage.com.au/world/blasts-death-toll-rises-as-nigeria-descends-into-chaos-20120122-1qbtr.html> – Accessed 23 January 2012

²¹ ‘Nigeria Politics & Security’ 2011, Menas Associates, 30 December, pp.1-3
https://www.menas.co.uk/pubsamples/Nigeria_Politics_and_Security_30.12.11pdf – Accessed 23 January 2012

77. Delta state is located in southern Nigeria:²² A March 2010 report on militancy in the Niger Delta, which includes the three states of Delta, Bayelsa and Rivers, states that the resource-rich region has “been plagued with armed groups and insurgents for decades”. Compensation for appropriated and polluted land paid by multinational corporations operating in the region “has led to inter-communal and inter-ethnic violence, most notably between the Ijaws and the Itsekiris in the Warri area of Delta State. Since the discovery of oil in the Delta, this type of ethnic conflict has been driven primarily by the desire to control resources along disputed community borders” In addition, the establishment of a military presence in the Niger Delta in recent years, and subsequent “reports of extortion, rape, and the general intimidation of the populace by the security forces”, has led to conflict between armed groups and the military.²³
78. Recent news reports indicate that armed groups continue to operate in Delta state. In January 2012, a US citizen was kidnapped outside a bank in Warri, the capital of Delta state, by a group of assailants. *USA Today* reports that the incident was “the first such attack targeting foreigners in the restive region for several months”; however, it is also reported that although “foreign workers have become harder to target, local kidnapping gangs have begun seizing middle-class Nigerians as well”.²⁴
79. According to Human Rights Watch, throughout 2011, “kidnappings, mostly of family members of wealthy Nigerians, continued in the Niger Delta”.²⁵ The US Department of State advises “avoiding all but essential travel to the Niger Delta states...because of the risks of kidnapping, robbery, and other armed attacks in these areas”.²⁶ DFAT has similarly issued a ‘do not travel’ warning for Delta state.²⁷ The Commissioner of Police in Delta state, Ibrahim Mmamma Tsafe, recently stated that “261 suspected kidnapers were arrested in the state in 2011 [and] 46 others have been arrested in 2012”.²⁸
80. Nigerian publication *Vanguard* reports that a police officer was shot dead in Warri in January 2012, while three police officers were killed in Delta state in December 2011 “by bandits, operating in camouflage military uniform”. Security in Warri and other areas of the state was increased following the incidents. Police Commissioner Tsafe reportedly stated that “policemen in the state had been put on alert following the unprovoked attacks and killing of some personnel in recent times in the state, especially in Warri, by men of the underworld”.²⁹

²² ‘Nigeria’ 2004, United Nations Cartographic Section, October

<http://www.un.org/depts/Cartographic/map/profile/nigeria.pdf> – Accessed 24 January 2012

²³ Malina, T. 2010, ‘Militancy in the Niger Delta’, Matthew B. Ridgway Center for International Security Studies, University of Pittsburgh, 15 March <http://research.ridgway.pitt.edu/nigeria/2010/03/15/militancy-niger-delta/#more-5> – Accessed 23 January 2012

²⁴ ‘U.S. citizen kidnapped in Nigeria’s oil delta’ 2012, *USA Today*, 20 January

<http://www.usatoday.com/news/world/story/2012-01-20/us-man-kidnapped-nigeria/52697556/1> – Accessed 24 January 2012

²⁵ Human Rights Watch 2012, *World Report 2012 – Nigeria*, 22 January, pp.143-144, 146-147

²⁶ US Department of State Bureau of Consular Affairs 2012, ‘Nigeria Country Specific Information’, 12 January http://travel.state.gov/travel/cis_pa_tw/cis/cis_987.html – Accessed 23 January 2012

²⁷ Department of Foreign Affairs and Trade 2012, ‘Travel Advice for Nigeria’, Smartraveller website, 20 January <http://www.smartraveller.gov.au/zw-cgi/view/Advice/Nigeria> – Accessed 23 January 2012

²⁸ Niyi-Eke, K. 2012, ‘Police Arrest 261 Kidnap Suspects In Delta’, *Leadership Newspapers*, 19 January http://leadership.ng/nga/articles/13760/2012/01/19/police_arrest_261_kidnap_suspects_delta.html – Accessed 24 January 2012

²⁹ Amaize, E. 2012, ‘Kidnapping: Poilce, army beef up security in Warri’, *Vanguard*, 23 January

<http://www.vanguardngr.com/2012/01/kidnapping-poilce-army-beef-up-security-in-warri/> – Accessed 24 January 2012

81. Also in January 2012, a group of about 2000 youths in Sapele, Delta state, attacked a Hausa community (primarily Muslims from northern Nigeria³⁰) in retaliation for attacks on southerners living in the north by Boko Haram. Approximately 50 people were injured in the attack, although the deployment of security forces reportedly prevented the group from burning two mosques in the area.³¹ Additionally, on 28 December 2011, “[a]ssailants threw an explosive device into an Arabic-Koranic school in Sapele...injuring seven people”.³²

Boko Haram in Delta state

82. Boko Haram primarily operates in northern Nigeria, and has reportedly “so far failed to gain significant traction outside its homebase states of Yobe and Borno”.³³ However, a November 2011 report by the Institute for Security Studies states that “Boko Haram should not be underestimated and its threat to take the fight southward needs to be dealt with carefully”.³⁴
83. On 10 December 2011, a suspected Boko Haram member bombed the main mosque at Hausa Quarters in Sapele.³⁵ However, according to Police Commissioner Tsafe, “[t]here is no Boko Haram in Delta and the police are doing everything possible to maintain law and order”.³⁶

State protection in Nigeria

84. Information on the availability of state protection in Nigeria more broadly indicates that corruption is endemic at all levels of government. Police and security forces are notoriously corrupt, and the progress of criminal proceedings has frequently been reported to depend on paying significant bribes to arresting officers, prison guards and other officials. Improper influence of the judiciary, life-threatening pre-trial detention facilities, and lack of access to legal representation and a fair, timely trial are endemic in the Nigerian criminal justice system.³⁷
85. A culture of impunity is pervasive, and violent crime is often reported but very rarely punished through official channels. Politically motivated murder, extra-judicial killings and

³⁰ Dickinson, G. H. (undated), ‘Nigeria: People’, The College of New Jersey website <http://dickinsg.intrasun.tcnj.edu/nations/nigeria/people.htm> – Accessed 25 January 2012

³¹ Akintunde, W., Idowu, S. & Jimoh, Y. 2012, ‘Boko Haram Kills 26 In Adamawa, Gombe; Northerners Attacked In Delta, Many Injured; As 30 Die In Kogi Auto Crash’, *Saturday Tribune*, 7 January <http://tribune.com.ng/sat/index.php/news/6323-boko-haram-kills-26-in-adamawa-gombe-northerners-attacked-in-delta-many-injured-as-30-die-in-kogi-auto-crash.html> – Accessed 24 January 2012

³² US Department of State Bureau of Consular Affairs 2012, ‘Nigeria Country Specific Information’, 12 January http://travel.state.gov/travel/cis_pa_tw/cis/cis_987.html – Accessed 23 January 2012

³³ Mark, M. 2012, ‘Scores dead in northern Nigeria as Islamist militants terrorise the country’, *The Guardian*, 22 January <http://www.guardian.co.uk/world/2012/jan/21/scores-dead-nigeria-islamist-militants> – Accessed 23 January 2012

³⁴ Zounmenou, D. & Chatora, A. 2011, ‘Nigeria Seeking an Effective Response to Boko Haram’, Institute for Security Studies, 16 November http://www.issafrica.org/iss_today.php?ID=1389 – Accessed 23 January 2012

³⁵ Idowu, S. 2012, ‘Suspected Boko Haram bomber dies in Delta’, *Nigerian Tribune*, 23 January <http://tribune.com.ng/index.php/news/34751-suspected-boko-haram-bomber-dies-in-delta> – Accessed 24 January 2012

³⁶ Niyi-Eke, K. 2012, ‘Police Arrest 261 Kidnap Suspects In Delta’, *Leadership Newspapers*, 19 January http://leadership.ng/nga/articles/13760/2012/01/19/police_arrest_261_kidnap_suspects_delta.html – Accessed 24 January 2012

³⁷ Human Rights Watch 2010, ‘Nigeria: Corruption Fueling Police Abuses’, Human Rights Watch website, 17 August <http://www.hrw.org/en/news/2010/08/17/nigeria-corruption-fueling-police-abuses> – Accessed 16 October 2010

abductions by police, security forces and militia groups occur regularly throughout the country.³⁸

86. In March 2011, Amnesty International noted that Nigeria “has a weak criminal justice system. It is under-resourced, blighted by corruption and struggles to earn the trust of the population...Investigations into crimes, if they do occur, are often cursory and not intelligence led” Amnesty further stated that the Nigeria Police Force (NPF) “lack[s] sufficient funding and resources to effectively discharge its duties. Police stations lack the resources to investigate complex crimes that require specialized skills”.³⁹ According to USDOS in 2010, the “[n]ational police, army, and other security forces committed extrajudicial killings and used lethal and excessive force to apprehend criminals and suspects, as well as to disperse protesters”.⁴⁰
87. A 2010 report by the Open Society Justice Initiative (OSJI) noted that “[e]xtrajudicial killings are a routine feature of policing in Nigeria. Hundreds of Nigerians are murdered each year by the NPF...[s]uspects are “confirmed” through torture and “escorted” or “transferred” through summary execution or disappearance”. The OSJI report further noted that “[p]olicing in Nigeria is also characterized by pervasive corruption, such as diverting police resources for personal protection or enrichment in a variety of police-for-hire arrangements; harassment and intimidation of victims; and the destruction of evidence, including the bodies of victims of extrajudicial executions”.⁴¹
88. According to Human Rights Watch (HRW), the NPF “solicited bribes from victims of crimes to initiate investigations, and from suspects to drop investigations”.⁴² In March 2011, Amnesty International reported that following the murder of a former human rights activist who was planning to run for local government, police demanded money from the victim’s wife in order to carry out an investigation into his death. Despite the wife receiving a number of threatening telephone calls after the murder, police reportedly failed to offer her any protection.⁴³

Whether there are any reported barriers to relocation within Nigeria

89. According to the US Department of State in 2011, “[t]he constitution and law provide for freedom of movement within the country, foreign travel, emigration, and repatriation; however, security officials restricted freedom of movement at times by enforcing curfews in

³⁸ Human Rights Watch 2011, *World Report 2011- Nigeria*, 24 January <http://www.hrw.org/en/world-report-2011/nigeria> – Accessed 31 January 2011

³⁹ Amnesty International 2011, *Nigeria: Loss of life, insecurity and impunity in the run-up to Nigeria’s elections*, Amnesty International website, 18 March, p.12, 14
<http://www.amnesty.org/en/library/asset/AFR44/005/2011/en/c7365bb1-8eb5-41c2-be6b-a5338128746a/afr440052011en.pdf> – Accessed 25 March 2011

⁴⁰ US Department of State 2011, *Country Reports on Human Rights Practices for 2010 – Nigeria*, 8 April, Section 1.a

⁴¹ Open Society Justice Initiative 2010, *Criminal Force: Torture, Abuse, and Extrajudicial Killings by the Nigeria Police Force*, Open Society Foundations website, May, p.53, 23
http://www.soros.org/initiatives/justice/articles_publications/publications/nigeria-police-abuse-report-20100519/criminal-force-20100519.pdf – Accessed 13 October 2011

⁴² Human Rights Watch 2011, *World Report 2011- Nigeria*, <http://www.hrw.org/en/world-report-2011/nigeria> – Accessed 31 January 2011

⁴³ Amnesty International 2011, *Nigeria: Loss of life, insecurity and impunity in the run-up to Nigeria’s elections*, Amnesty International website, 18 March, p.13
<http://www.amnesty.org/en/library/asset/AFR44/005/2011/en/c7365bb1-8eb5-41c2-be6b-a5338128746a/afr440052011en.pdf> – Accessed 25 March 2011

areas experiencing ethno-religious violence and routinely set up roadblocks and checkpoints to extort money from travelers”.⁴⁴

90. In April 2009 the UK Home Office stated that the Nigerian government in practice generally respected the right to travel within the country, and noted that internal relocation to escape ill-treatment from non-state agents is almost always an option”.⁴⁵ The British High Commission (BHC) in Abuja informed a 2005 joint British-Danish fact-finding mission to Nigeria that “internal relocation to escape any ill treatment from non-state agents was almost always an option. Some individuals may, however, face difficulties with regard to lack of acceptance by others in the new environment as well as lack of accommodation, land etc. The situation would be considerably easier if the individual concerned has family or other ties on [sic] the new location”.⁴⁶

FINDINGS AND REASONS

Country of Reference

91. The applicant travelled to Australia on an apparently valid passport issued in his name by the Federal Republic of Nigeria and claims to be a national of Nigeria. A copy of the biodata page from the applicant’s passport is held on the Department’s file (at folio 34). The Tribunal accepts that the applicant is a national of Nigeria and has assessed his claims against Nigeria as his country of nationality.
92. The applicant has declared that he does not hold citizenship of any other country and also declares he does not have a right to enter or reside in any other country. There is nothing before the Tribunal which could lead the Tribunal to conclude that the applicant has a legally enforceable right to enter and reside in any other country apart from Nigeria. The applicant is therefore not excluded from Australia's protection by subsection 36(3) of the Act.

Credibility issues

93. The Tribunal accepts that the mere fact that a person claims fear of persecution for a particular reason does not establish either the genuineness of the asserted fear or that it is “well-founded” or that it is for the reason claimed. It remains for the applicant to satisfy the Tribunal that he or she satisfies all of the required statutory elements. Although the concept of onus of proof is not appropriate to administrative inquiries and decision-making, the relevant facts of the individual case will have to be supplied by the applicant himself or herself, in as much detail as is necessary to enable the Tribunal to establish the relevant facts. A decision-maker is not required to make the applicant’s case for him or her. Nor is the Tribunal required to accept uncritically any and all the allegations made by an applicant. (*MIEA v Guo & Anor* (1997) 191 CLR 559 at 596, *Nagalingam v MILGEA* (1992) 38 FCR 191, *Prasad v MIEA* (1985) 6 FCR 155 at 169-70.)
94. In determining whether an applicant is entitled to protection in Australia the Tribunal must first make findings of fact on the applicant’s claims. This may involve an assessment of the applicant’s credibility and, in doing so, the Tribunal is aware of the need and importance of

⁴⁴ US Department of State 2011, *Country Reports on Human Rights Practices for 2010 – Nigeria*, 8 April, Section 2.c

⁴⁵ UK Home Office 2009, *Operational Guidance Note Nigeria*, 14 April p.10, Section 3.11.6

⁴⁶ Danish Immigration Service 2005, *Report on human rights issues in Nigeria: Joint British-Danish fact-finding mission to Abuja and Lagos, Nigeria: 19 October to 2 November 2004*, January, p.37

being sensitive to the difficulties asylum seekers often face. Accordingly, the Tribunal notes that the benefit of the doubt should be given to asylum seekers who are generally credible, but unable to substantiate all of their claims.

95. The Tribunal is not required to accept uncritically any or all allegations made by an applicant. In addition, the Tribunal is not required to have rebutting evidence available to it before it can find that a particular factual assertion by an applicant has not been established. Nor is the Tribunal obliged to accept claims that are inconsistent with the independent evidence regarding the situation in the applicant's country of nationality (See *Randhawa v MILGEA* (1994) 52 FCR 437 at 451, per Beaumont J; *Selvadurai v MIEA & Anor* (1994) 34 ALD 347 at 348 per Heerey J and *Kopalapillai v MIMA* (1998) 86 FCR 547). On the other hand, if the Tribunal makes an adverse finding in relation to a material claim made by an applicant, but is unable to make that finding with confidence, it must proceed to assess the claim on the basis that the claim might possibly be true (See *MIMA v Rajalingam* (1999) 93 FCR 220).
96. After considering all evidence that is available to the Tribunal, the Tribunal finds that the applicant's evidence as to his own experiences in Nigeria is plausible and credible. The Tribunal carefully considered the applicant's additional claim raised at the Tribunal hearing but not at the interview with the delegate, namely the claim that he was taken to the bush by Itsekiri youth and some soldiers where he was stripped, beaten, and then forced to walk back into the community holding a lamp (referred to as the 'lamp incident'). The Tribunal accepts that the applicant may have felt embarrassment in disclosing this incident to the delegate in the presence of his fiancée and accepts that this is the reason for the incident not being raised before the delegate. The Tribunal is satisfied that the lamp incident is not a fabricated story or invention for the purposes of bolstering the applicant's claims.

Assessment of Claims

97. The applicant's claims for protection are summarised as follows: he claims he witnessed the killing of a few people, including killings where youths burned people in their homes, but in particular and of greatest relevance to his protection claims, he witnessed what he claims was a racially motivated killing of an Urhobo man. He claims that others who also witnessed the killing of the Urhobo man, died under suspicious circumstances and fears the same may happen to him if he returns to Nigeria. He claims that he was threatened and that he was previously subjected to abuse and cruel and degrading treatment for breaking a curfew. He claims the military leaders and youth groups in Delta State are asking his mother for his whereabouts and that they may target him because they fear he holds information which may be scandalous and which may also implicate them. He claims he has qualifications as a journalist and this exposes him to more danger and that the authorities will not protect him. The applicant summarised his claims for protection as being on the grounds of his ethnicity and for reasons of his political opinion.

Assessment of refugee claims

Claim as to witnessing killings

98. Based on the applicant's general credibility, the Tribunal accepts his claim that he witnessed the killing of the Urhobo man as described in his oral evidence and as set out above. The Tribunal also accepts, taking into account the country information that is available to it on the overall security situation and violence in Nigeria, that the perpetrators of the violence were the military and the militant youths in his community.

99. The Tribunal considered the applicant's claim that two others who he claims also witnessed the killing of the Urhobo man have been killed by the military or the police. Notwithstanding that the applicant has provided no corroborating evidence of this claim, the Tribunal finds the applicant is a witness of truth and in light of the country information as to the parlous security situation in Nigeria, the Tribunal accepts that the two persons have met their death under suspicious circumstances. However, taking the applicant's claims into account, the Tribunal finds that their deaths were not due to a Convention ground but rather due to criminality and corruption on the part of the perpetrators of the killing which the two persons witnessed.
100. The Tribunal accepts the applicant's claim that the perpetrators of the murder of the Urhobo man have identified the applicant as being a witness to the crime and that they have a desire to silence him and that there is a real chance that such silencing may involve inflicting serious harm on the applicant, or killing him. The Tribunal however finds that the motive behind this intention to silence the applicant is not a Convention ground, but instead is based on the motive of criminality and motivated by self-preservation and the avoidance of prosecution and conviction. The Tribunal accepts that the motive behind an intention to harm a person may be multifaceted and driven by more than one reason, however, for a person to succeed in an application for a protection visa, s.91R(1)(a) of the Act requires that a Convention reason is the 'essential and significant' reason for the persecution feared. In this case, the Tribunal considered whether the underlying reason behind the serious harm intended by the perpetrators might be a Convention ground, such as political opinion, religion, race, nationality, or membership of a particular social group, but concluded that there is no evidence to suggest it is motivated by any of these reasons. The Tribunal accepts that the exposure of corruption may amount to a 'political opinion' for the purposes of the Convention, however, on the evidence before the Tribunal, it is not satisfied that those who may seek to harm the applicant view any exposure by him of their actions to be an expression of political opinion. The Tribunal therefore finds that the applicant does not satisfy the requirements of s.91R(1)(a) of the Act

Claim as to fear of harm due to journalism qualification

101. The Tribunal considered the applicant's claim that he fears serious harm for reasons of his journalism qualification. The Tribunal understands the applicant's reasoning in this respect to be that as he has journalism skills, he may be targeted by those who fear the applicant may expose their wrongdoings through his writing and publication. The Tribunal finds on the evidence before it, that the applicant has not written and published material which exposes the killers or others, or which may embarrass or lead to the prosecution and conviction of the perpetrators of the crimes. Furthermore, the Tribunal considered the applicant's claim that if he returns to Nigeria he intends to use his journalism knowledge to expose the wrongdoings of the killers or others. The Tribunal accepts that the applicant would like to expose the wrongdoers, and that he may attempt to do so by using his knowledge of journalism even though he has not done so in the past. However, the Tribunal does not accept that even if he does publish articles of reports on the wrongful event he witnessed that he would therefore face a real chance of serious harm for one or more of the Convention grounds; rather, the Tribunal finds that any resultant serious harm would be motivated by revenge on the part of those he might expose and who might thereby be incriminated.

Claim as to fear of harm as a result of inter-ethnic violence or other harms motivated by the Convention grounds

102. The Tribunal considered the country information which confirms that there has been, and continues to be, interethnic violence in Nigeria. The Tribunal is not satisfied on the evidence before it that the applicant has in the past suffered serious harm for reasons of his ethnicity or for any other of the Convention grounds, as opposed to the harm he has suffered due to his witnessing the killing of the Urhobo man. However, the Tribunal must look to the reasonably foreseeable future and determine whether there is a real chance that he may suffer serious harm for one or more of the Convention grounds in the reasonably foreseeable future. The absence of past harm, although a relevant consideration, is not determinative of the chances of harm in the reasonably foreseeable future. Having regard to all the evidence, including the country information cited above, some of which indicates there inter-ethnic conflicts exist in Nigeria, the Tribunal finds that the chance of the applicant suffering serious harm for reasons of his ethnicity is remote in the circumstances of this case.
103. The Tribunal accepts the applicant's claim that he has not been involved in political activity which would lead him to being targeted for serious harm for reasons of his political opinion in the past. On this evidence, and having regard to the relevant country information, the Tribunal finds the applicant does not face a real chance of serious harm in Nigeria now or in the reasonably foreseeable future for reasons of his actual or imputed political opinion. The Tribunal also accepts the applicant's evidence that neither he, nor his family, have been persecuted for reasons of their religious beliefs in the past. On this and all the evidence before the Tribunal, including the country information cited above, the Tribunal finds that there is not a real chance that the applicant would suffer serious harm amounting to persecution for reasons of his religious beliefs if he returns to Nigeria now or in the reasonably foreseeable future.
104. In respect of the incident where he claims that in 2002 the community youth of the Itsekiri and some soldiers took him to the bush where they took his clothes off, beat him with tree branches, gave him a lamp and forced him to walk into the community holding a lamp while naked, the applicant claimed that this occurred because he witnessed the killing of the Urhobo man. While the Tribunal finds that this mistreatment is serious and will consider it further under the 'complementary protection' provisions of the Act (see below), the Tribunal finds that this mistreatment is not motivated by a Convention reason but for the purpose of threatening and intimidating the applicant against disclosing what he saw in terms of the killing of the Urhobo man.
105. The Tribunal also considered the applicant's claim that he was mistreated when caught in breach of the curfew, whereby he was made to kneel by the side of the road and hold heavy weights above his head for an extended period of time. The Tribunal finds that while this mistreatment is serious, on the evidence before it, it is not satisfied that it was motivated by one or more of the Convention grounds but was motivated by the impunity of the relevant law enforcement authorities, a fact which is confirmed by the country information extracted above.

Other considerations

106. The Tribunal considered the period of time which has elapsed between the occurrence of the murder which it accepts was witnessed by the applicant in 2002, and now, and the delay between the applicant's arrival in Australia and his application for a protection visa.
107. Relevant case law indicates that the period of time that has passed between a person's arrival in Australia and their application for a protection visa may be a relevant consideration in

determining whether a person has a well-founded fear of persecution. The applicant arrived in Australia [in] July 2004 and has remained in Australia since then with the exception of one short trip out of Australia in 2010. As stated above, the applicant applied for a protection visa [in] February 2011. The Tribunal considered whether the delay of over six years indicates that the applicant regarded the circumstances were such that he did not face a real chance of serious harm should he return to Nigeria. The Tribunal accepts that the applicant has not returned to Nigeria since he left there in 2004. The Tribunal in this case accepts that the applicant felt that as a result of holding other visa subclasses, including student visas, he did not face the prospect of a forced return to Nigeria to face the harm he fears. The Tribunal therefore does not draw an adverse inference on the question of the genuineness of the applicant's fear of serious harm should he return to Nigeria on the basis of his delay in applying for the protection visa.

108. On the question of the passage of time between the applicant having witnessed the crime in 2002 and his possible future return to Nigeria to face the perpetrators of the crime, the Tribunal is not satisfied that the passage of this time, even though it is a significant period, would have changed the characterisation of the applicant in the eyes of the killers, that is, he would continue to be seen as a damaging witness who would be best silenced or eliminated
109. The applicant has advised the Tribunal that he also has a graduate visa application on foot and under consideration with the Department. The Tribunal also understands from the applicant's written and oral evidence that he is to marry an Australian citizen in September 2012 and thereby may, subject to a valid application and subject to meeting the relevant eligibility for a spouse / partner visa, qualify for such a visa. The Tribunal accepts that a person may apply for alternative visas and qualify for one or some, and not for another, or others. The fact that a person has applied for one class of visa, and not qualified for it should not prejudice his or her prospects in respect to another application as each application is assessed on its merits having regard to all the circumstances.
110. In summary, on the question of the applicant's claim for protection under the Refugee's Convention, the Tribunal finds that the applicant does not have a well-founded fear of persecution for one or more of the Convention grounds. It follows that the Tribunal finds that the applicant does not meet the requirements in s.36(2)(a) of the Act.

Assessment of complementary protection claims

111. The Tribunal considered the applicant's claims and the country information cited above and considered whether in the light of this information Australia owes the applicant protection obligations under the complementary protection provisions of the Act. As stated above, section 36(2)(aa) of the *Migration Act 1958* (Cth) provides that a criterion for a protection visa is that the applicant for the visa is a non-citizen in Australia (other than a non-citizen mentioned in paragraph (a)) to whom the minister is satisfied Australia has protection obligations because the Minister has substantial grounds for believing that, as a necessary and foreseeable consequence of the non-citizen being removed from Australia to a receiving country, there is a real risk that the non-citizen will suffer significant harm.⁴⁷

⁴⁷ Section 36(2)(aa) was introduced by the *Migration Amendment (Complementary Protection) Act 2011* (No.121 of 2011), which commenced on 24 March 2012: s.2; Schedule 1, item 12, and Proclamation, *Migration Amendment (Complementary Protection) Act 2011* dated 21 March 2012 (FRLI F2012L00650) fixing date of commencement as 24 March 2012.

112. The types of harm that will amount to ‘significant harm’ are exhaustively defined in ss.36(2A) and 5(1) of the Act, and s.36(2B) sets out circumstances in which there is taken not to be a real risk that a non-citizen will suffer significant harm. Section 36(2C) further provides for circumstances in which a non-citizen is taken not to satisfy the criterion in s.36(2)(aa), and s.36(3) sets out circumstances in which Australia is taken not to have protection obligations to a non-citizen.
113. The criterion in s.36(2)(aa) was intended to introduce greater efficiency, transparency and accountability into Australia’s arrangements for adhering to its *non-refoulement* obligations under the *International Covenant on Civil and Political Rights (ICCPR)*, *Second Optional Protocol to the International Covenant on Civil and Political Rights Aiming at the Abolition of the Death Penalty* (‘Second Optional Protocol’), *Convention on the Rights of the Child* (‘CROC’) and *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (‘CAT’).⁴⁸
114. The Tribunal considers the components of the complementary protection provision in s.36(2)(aa) in the following paragraphs.
115. The Tribunal finds that the applicant is a citizen of Nigeria. The Tribunal finds that he does not have a present right to enter or reside in any other country. The Tribunal finds that if the applicant is removed from Australia he would have little choice but to return to Nigeria. The Tribunal therefore finds that Nigeria is the ‘receiving country’ for the purposes of complementary protection under s.36(2)(aa) of the Act.
116. In considering whether the applicant meets the requirements in s.36(2)(aa) of the Act, the Tribunal considered the Explanatory Memorandum to the Migration Amendment (Complementary Protection) Bill 2011 (the Explanatory Memorandum) which, inter alia, states that:
- [a] real risk of significant harm is one where the harm is a necessary and foreseeable consequence of removal. The risk must be assessed on grounds that go beyond mere theory and suspicion but does not have to meet the test of being highly probable. The danger of harm must be personal and present.⁴⁹
117. The Second Reading Speech on the introduction of the Bill stated ‘[a] real risk of significant harm has been found in instances where there is a personal or direct risk to the specific person’⁵⁰
118. The Tribunal also had regard to the statement in the Explanatory Memorandum that ‘[a] real risk of significant harm is one where the harm is a necessary and foreseeable consequence of removal’⁵¹ and which suggests that the ‘necessary and foreseeable consequence’ element of the definition was intended to inform the determination of ‘real risk’ rather than impose an additional requirement, although as noted below a plain reading of the text suggests an added

⁴⁸ Explanatory Memorandum to the Migration Amendment (Complementary Protection) Bill 2011 at 1. Prior to the introduction of the criterion in s.36(2)(aa), protection on the basis of obligations arising from these instruments could only be granted under s.417 of the Act, pursuant to which the Minister may exercise a discretion to grant a visa to a non-citizen where the Minister considers it in the public interest to do so. However, that discretion can only be exercised by the Minister personally, and only after the non-citizen has been refused a protection visa by a delegate of the Minister and unsuccessfully sought review by the Refugee Review Tribunal.

⁴⁹ Explanatory Memorandum to the Migration Amendment (Complementary Protection) Bill 2011 at [67].

⁵⁰ Commonwealth of Australia, *Parliamentary Debates*, House of Representatives, 24 February 2011, 1357 (Chris Bowen, Minister for Immigration and Citizenship).

⁵¹ Explanatory Memorandum to the Migration Amendment (Complementary Protection) Bill 2011 at [67].

temporal or causal element. The term ‘necessary and foreseeable consequence’ is a phrase which has been used by the UN Human Rights Committee both to explain the meaning of the term ‘real risk’⁵² and also as an additional element of the *non-refoulement* obligation. The Tribunal also considers that on a plain reading of the words in s.36(2)(aa) it would appear that ‘necessary and foreseeable consequence’ imposes a causal and temporal requirement – there must be some link between the removal of the applicant from Australia to the receiving country, and the real risk of significant harm.

119. The Tribunal considered the types of harm which will amount to ‘significant harm’ are exhaustively defined by s.36(2A) of the Act. Under this provision, a person will suffer significant harm if he or she will be arbitrarily deprived of their life; or the death penalty will be carried out on the person; or the person will be subjected to torture, or to cruel or inhuman treatment or punishment, or to degrading treatment or punishment. ‘Cruel or inhuman treatment or punishment’, ‘degrading treatment or punishment’, and ‘torture’, are further defined exhaustively in s.5(1) of the Act which provides that cruel or inhuman treatment as:

an act or omission by which:

- (a) severe pain or suffering, whether physical or mental, is intentionally inflicted on a person; or
- (b) pain or suffering, whether physical or mental, is intentionally inflicted on a person so long as, in all the circumstances, the act or omission could reasonably be regarded as cruel or inhuman in nature;

but does not include an act or omission:

- (c) that is not inconsistent with Article 7 of the [ICCPR]; or
- (d) arising only from, inherent in or incidental to, lawful sanctions that are not inconsistent with the Articles of the [ICCPR].

120. The Tribunal also considered whether the applicant may face ‘degrading treatment or punishment’ ‘Degrading treatment or punishment’ is exhaustively defined in s.5(1) of the Act and means:

an act or omission that causes, and is intended to cause, extreme humiliation which is unreasonable, but does not include an act or omission:

- (a) that is not inconsistent with Article 7 of the [ICCPR], or
- (b) that causes, and is intended to cause, extreme humiliation arising only from, inherent in or incidental to, lawful sanctions that are not inconsistent with the Articles of the [ICCPR].

121. In considering the meaning of ‘extreme humiliation which is unreasonable’ that Tribunal had regard to interpretations of degrading treatment or punishment in other jurisdictions, which also involve an element of humiliation,⁵³

122. The Tribunal accepts the applicant’s claim that he witnessed the killing of the Urhobo man at the hands of militants and members of the Nigerian military. Based on the credible evidence of the applicant, the Tribunal accepts his claim that he has been intimidated, threatened, and

⁵² See Human Rights Committee, *Views, Communication No 692/1996*, UN Doc CCPR/C/60/D/692/1996 (11 August 1997) (*ARJ v Australia*) at [6.8].

⁵³ *Greek case*, European Commission on Human Rights, Application Nos 3321/67, 3322/67, 3323/67, 3344/67 (18 November 1969), 12 *Yearbook of the European Convention on Human Rights* 170, 186; *East African Asians v United Kingdom* (1973) 3 EHRR 76, [189], [195]; *Loayza Tamayo v Peru*, Series C No 33 [1997] IACHR (17 September 1997) at [57], in McAdam and Albert2; *Views, Communication No 265/1987*, UN Doc CCPR/C/35/D/265/1987 (7 April 1989), [9.2] (*Vuolanne v Finland*).

mistreated (the lamp incident) in order to maintain his silence. Although unrelated to the applicant witnessing the killing, the Tribunal also accepts that the applicant was mistreated over the breaking of the curfew. The Tribunal accepts that the perpetrators of the killing of the Urhobo man are motivated to silence the applicant. In the circumstances, the Tribunal finds there are substantial grounds beyond mere theory or suspicion for believing that as a necessary and foreseeable consequence of the applicant being removed to Nigeria, there is a real risk that the applicant will suffer significant harm on this basis.

123. The Tribunal considered all the evidence in the circumstances of this case which essentially amounts to the applicant's sworn oral evidence and the independent country information. As already stated, the Tribunal finds that the applicant is a credible witness. The Tribunal finds that notwithstanding the passage of some 10 years since the witnessing of the killing, the Tribunal is satisfied that on the basis the perpetrators of the crime would continue to want to silence him that there are substantial grounds for believing that as a necessary and foreseeable consequence of his removal to the receiving country (Nigeria) the applicant would face a real risk of significant harm.
124. The Tribunal accepts the applicant's claim that he has been threatened and intimidated by the killers of the murder which he witnessed. The Tribunal also accepts the mistreatment the applicant suffered during the 'lamp incident' described above occurred as described by the applicant and that this amounts to significant harm. The Tribunal finds that this mistreatment was intentionally inflicted on the applicant and that the intention was to silence and intimidate him against reporting the crime which he witnessed. In light of the corruption and impunity of the Nigerian authorities, as indicated by the country information cited above, the Tribunal is satisfied that if the applicant returns to Nigeria there are substantial grounds for believing that as a necessary and foreseeable consequence of this removal to Nigeria there is a real risk that he will again suffer significant harm.
125. The Tribunal also finds that the 'lamp incident' amounted to 'extreme humiliation which is unreasonable' The Tribunal also finds that the applicant's mistreatment associated with his breach of the curfew may be an isolated incident, however for reasons stated in this decision, the Tribunal finds that the applicant has been the victim of degrading treatment or punishment. The Tribunal also finds that for reasons discussed in this decision, that there are substantial grounds for believing that there is a real risk that such significant harm will be repeated on the applicant should he return to Nigeria.
126. The Tribunal considered the exclusion clauses in s.36(2B) which qualifies s.36(2)(aa) by setting out three circumstances in which there is taken not to be a real risk that a non citizen will suffer significant harm. Those circumstances are:
 - where it would be reasonable for the applicant to relocate to an area of the country where there would not be a real risk that the applicant will suffer significant harm;
 - where the applicant could obtain, from an authority of the country, protection such that there would not be a real risk that the non-citizen will suffer significant harm; or
 - the real risk is one faced by the population of the country generally and is not faced by the non-citizen personally.
127. The Tribunal finds based on the country information available to it and cited above, that the significant harm which he has a real risk of being subjected to is not isolated to a particular part of Nigeria. The Tribunal therefore finds that it would not be reasonable to expect the

applicant to relocate to another area where there would not be substantial grounds for believing that there is a real risk of 'significant harm' as that term is defined in the Act. The Tribunal also finds that it is not satisfied that the applicant could obtain, from an authority of Nigeria, protection such that there would not be a real risk that he would suffer significant harm, indeed the Tribunal finds that the significant harm which the applicant faces emanates from the Nigerian state authorities. Finally, the Tribunal finds that the real risk faced by the applicant is not one faced by the population of Nigeria generally but is faced by the applicant personally. Based on these findings, the Tribunal finds that the applicant is not excluded from protection under s.36(2)(aa) by the operation of s.36(2B) of the Act

128. Based on the forgoing findings, the Tribunal is satisfied that the applicant meets the provisions in s.36(2)(aa) of the Act.

CONCLUSIONS

129. For the reasons set out above, the Tribunal is not satisfied that the applicant is a person to whom Australia has protection obligations under the Refugees Convention. Therefore the applicant does not satisfy the criterion set out in s.36(2)(a) of the Act).
130. Having concluded that the applicant does not meet the refugee criterion in s.36(2)(a) of the Act, the Tribunal has considered the alternative criterion in s.36(2)(aa) of the Act.
131. The Tribunal finds that having regard to all the evidence there are substantial grounds for believing that, as a necessary and foreseeable consequence of the applicant being removed from Australia to a receiving country, there is a real risk that the applicant will suffer significant harm. The Tribunal therefore finds the applicant satisfies s.36(2)(aa) of the Act.

DECISION

132. The Tribunal remits the matter for reconsideration with the direction that the applicant satisfies s.36(2)(aa) of the *Migration Act 1958*.