

1108892 [2012] RRTA 432 (29 May 2012)

DECISION RECORD

RRT CASE NUMBER:	1108892
DIAC REFERENCE(S):	CLF2010/108121
COUNTRY OF REFERENCE:	Papua New Guinea
TRIBUNAL MEMBER:	Paul Fisher
DATE:	29 May 2012
PLACE OF DECISION:	Melbourne
DECISION:	The Tribunal remits the matter for reconsideration with the direction that the applicant satisfies s.36(2)(a) of the Migration Act.

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 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 Papua New Guinea, applied to the Department of Immigration for the visa on [date deleted under s.431(2) of the *Migration Act 1958* as this information may identify the applicant] August 2010.
3. The delegate refused to grant the visa [in] August 2011, and the applicant applied to the Tribunal for review of that decision.

RELEVANT LAW

4. 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). An applicant for the visa must meet one of the alternative criteria in s.36(2)(a), (aa), (b), or (c). 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 s.36(2) and that person holds a protection visa.

Refugee criterion

5. Section 36(2)(a) provides that a criterion for a protection visa is that the applicant for the visa is a non-citizen in Australia to whom the Minister is satisfied Australia has protection obligations under the Refugees Convention.
6. 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.
7. 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 *SZF DV v MIAC* (2007) 233 CLR 51.

8. 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.
9. There are four key elements to the Convention definition. First, an applicant must be outside his or her country.
10. 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.
11. 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.
12. 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.
13. 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.
14. 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.

15. 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

16. If a person is found not to meet the refugee criterion in s.36(2)(a), he or she may nevertheless meet the criteria for the grant of a protection visa if he or she is a non-citizen in Australia 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: s.36(2)(aa) ('the complementary protection criterion').
17. '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.
18. There are certain circumstances in which there is taken not to be a real risk that an applicant will suffer significant harm in a country. These arise 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 applicant will suffer significant harm; or where the real risk is one faced by the population of the country generally and is not faced by the applicant personally: s.36(2B) of the Act.

CLAIMS AND EVIDENCE

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

Background

20. The applicant's background and protection claims were set out in the following statutory declaration which accompanied the visa application:
 1. I make this statement in support of my application for a protection visa.
 2. I was born in [Region 1], in Papua New Guinea on [date] and am now 4 am a Christian.
 3. I arrived in Australia on a student visa [in] January 2009. I am studying [Diploma]. My visa is due to expire [in] January 2011. I have travelled to Australia numerous times for short holidays both before and after I arrived on the student visa.
 4. My parents are both alive and living in [a] village [in Region 1]. I have one [sibling] who is married with [number] children. [They] also live in [the same] village.
 5. My other [sibling] is deceased. He died in 2003. Just prior to his death he asked me to take responsibility for his wife and children. They now live with my parents. My husband and I have been providing financial support to them.
 6. I completed [School] in [year]. In [years] I was in College [studying] and obtained a [certificate] in [year]. In [year] 1 obtained my first job with [a] company as a typist. I was in

this job until 1990 when I got another job with [employer] as a secretary. In 1992 I secured a job with [company] also as a secretary. I remained in this job until I obtained my visa to study in Australia. I was able to access special travel rates as a result of this work and I travelled to Australia on numerous short trips for holidays.

7. I married my [husband] [in] 1988 in [a] village. It was an arranged customary marriage. A bride price of K6,000 in cash and 20 pigs were given to my people by [my husband's] tribe. There was also a ceremony where both families gather. During the ceremony the bride price is exchanged and it is witnessed by the Chief of the village. There is no formal paperwork for the marriage.
8. After the marriage my husband and I lived in [Town 2] as my husband was working [there]. We stayed there for about one year and then moved to Port Moresby where my husband gained another [job].
9. My husband and I have [six children]. Because the marriage was arranged, I would say that I have never been really happy. He had a lot of relationships outside of our marriage. I have not felt respected or loved by him.
10. In April 1994 my husband was charged with alleged [details deleted: s.431(2)] and was sent to one week in prison. He was not convicted of this crime. I was very upset when I found about this and it created a lot of tension between us. I understand there was an out of Court settlement where money was [paid], however I did not attend Court. It was too much of an embarrassment for my husband to have me there.
11. In December 1995, my husband kicked me with his boots from the head right down to my body, and I was unconscious for one day. I had caught him talking with another lady at the supermarket. I was sure he was having other relationships. My cousin's sister who was present at the time, took me to [Hospital 5]. I stayed in hospital for one week. I had welts on my arms and legs and was in a lot of pain.
12. After I came out of hospital I went to the police station with my cousin's sister's husband to make a report. Someone had seen I was at the police station, had told my husband and he arrived there. We decided not to go into the station as I was too scared that he would retaliate and that he could harm me again or even kill me. I went back home and the marriage continued. My [employer] was very understanding. I always enjoyed going to work to get out of the house.
13. The violence by my husband continued after this. He was drinking a lot and this was when he was most often violent. I would be afraid when he came home from work. He would be violent in front of the children.
14. In 2004 I found out that my husband had another woman. I saw my husband's vehicle going into a village and caught him with the woman. She was already pregnant. My husband started living with this woman from this time. In PNG we would say he was then married to her. He would spend some nights with myself and the children and then go away for weeks until he returned.
15. In 2004 my husband broke my hand and I had a cast for 3 months so that my broken bone on my right hand would heal. I went to the police station after this incident. At the station a police officer wanted a bribe to deal with my issue. I told him I had no money to give and left the station.
16. In 2006 my husband pushed my head against a brick wall trying to [kill me]. I had bleeding through my nose and ears and had concussion. I was hospitalized again in [Hospital 5]. After I was released I went to the police to get an OP number which registers the incident. I was asked for a sexual favour by one of the police and again I did not take the report any further.
17. The violence by my husband continued up until the time I left Australia. He would force me to have sex with him. He would threaten to harm me if I didn't agree and also accuse me of

having relationships with other men which was not true. Because AIDS is such a problem in PNG I worry a lot about this too. He continued to drink and threatened to kill me if I decided to leave him. He told me that if I tried to leave him he would hunt me down. As we come from the same area in the Highlands he would always know where to find me,

18. It is a matter of pride and status for my husband that I stay with him. He would lose face in the community if I left him.
19. I have tried to leave my husband a few times to go back to my parents. My father told me that I had to go back to him. Because the bride price had been paid my family would have to return the money and pigs to my husband's family and my father was not able to do this. My parents knew about the violence but said that the right thing for me to do was to go back and stay with my husband. My parents were worried about me but said there was nothing they could do. My mother used to pray that it would end.
20. The other thing that helped me get through this terrible life was the ability to travel to Australia for short trips from time to time. I would often fly to [Australia] for a short break. I had girls who would mind the children while I was at work. They would also look after the children when I went away.
21. In 2007 I saw advertisements in the [newspaper] for [support] to study in Australia. I decided to apply because I felt it was a way out of the situation I was in with my husband. The application was made in 2008 to [study] and I was [successful].
22. I made arrangements to bring three of my six children with me to Australia. The youngest was to stay with the child minder back home. My husband was prepared to agree with this. I think the fact that I was taking three children with me helped.
23. I arrived in Australia on the student visa [in] January 2009. I found [rental accommodation]. In March 2009 my husband came with the three children to [City 3]. He stayed for about one week and then returned to PNG.
24. In July 2009 I returned to PNG to see the other children and stayed for a few weeks. A friend here in Australia looked after the children. There were problems with my husband during this time also. He would come over drunk, abuse me, and force himself on me,
25. In December 2009 my husband came to attend the children's school graduation in [City3]. He said that the children and I were to return to PNG with him for holidays. When we got back to PNG he said that the children would stay with him in PNG and that I was to return on my own. I couldn't argue with him about this. Since this time I have been in Australia on my own.
26. I returned to PNG again in April 2010 for the school holidays to see the children. It was then that I found out that my husband had moved his second wife into our house. When I found out I said that I was unhappy about this. He said 'I am the man to make the decision as to where my two wives live'. I said that I would leave him. He said 'you are not going to leave me' and he then struck me to the head with his hand. I was injured to me head and was bleeding. Five of my children were present when this happened. My [son] drove me to a private hospital where I was treated. The doctor said it was a deep cut and needed to be stitched. My husband must have had keys or something in his hand which caused the cut. I have a medical record about this.
27. After I left the doctor, I went stay with a cousin until I left PNG again to return to Australia. I did not go to the police - after what I had been through I did not want to see the police whom I knew would do nothing to assist me, and in addition I did not have a lot of time before departing for Australia. The PNG police are not professional like they are here in Australia.
28. In May 2010 my father became very ill and I needed to go and see him. He has developed diabetes. I went straight to my parent's village and stayed with them. I didn't let my husband know that I was in the country. I was only there in PNG for four days. I saw my eldest

daughter at the airport on the way home. She had a child [date deleted: s.431(2)]. She became pregnant during the time I was in Australia. She is not in a relationship with the father. She and the baby still live in the family home with the other children, my husband, his second wife and their two children.

29. I have been seeing a student counsellor here in Australia and spoke to her about what was happening with my husband. Because I am [sponsored] I am faced with return to PNG in January 2011 but this was frightening to me due to my concerns for my safety. I also took my [education] very seriously and I was under a contractual obligation to return to PNG or repay my school fees which I cannot afford. The student counselor encouraged me to look into other options for staying in Australia because of my fears for my safety at the hands of my husband.
 30. In my own mind I have ended my relationship with my husband. He however will not accept that, and in fact assaulted me in April 2010 when I told him I was leaving him. He will never accept it. As I have said, my leaving him will bring shame to him. I am sure he will do what he has threatened and hunt me down if I return. He knows where my family are and could easily locate me. My family will tell me to stay with him in any event. As a woman it would be too dangerous for me to locate anywhere else in PNG It is very unsafe for women all over the country, especially without a male to offer protection.
 31. I cannot return and live in the family home with my husband's second wife where I will face serious violence on a regular basis. Finding that he had taken his second wife into the family home and then challenging him about this and telling him I am leaving him, has caused him to be angrier with me than ever before. My decision to make an application for a protection visa was made after all of this happened. Since I have been in Australia I have also learnt more about my rights as a woman to be safe and to have a voice. I realise that I do not have to live in constant danger and fear.
 32. The police in PNG are corrupt and have no interest in protecting women. The police discriminatorily deny protection to women because they perceive women to be second class citizens, unless you can pay them a bribe. Many settlements for violence against women happen outside of the courts. There is a great deal of violence against women in PNG. The government are not doing enough to protect women and this is also because women are not considered to be equal to men. The government do not ensure that laws to protect women are implemented and there is nothing being done to improve the way the police respond. There are no safe places for women to go.
 33. The bride price tradition makes it very difficult for women to leave violent marriages. Often as in my case, families cannot support women because of the expectation that the bride price will be paid back. Women have no power in family relationships. The father makes decisions about where the children go. There is no financial security for women who leave marriages unless they can get some work.
 34. In my case there is nowhere in the country I would be safe I have already suffered severe physical injury. I have not received any counselling for what I have been through but I know I have been badly effected emotionally also.
21. The application was also accompanied by a certified copy of the applicant's Papua New Guinea passport indicating that she is a national of that country.
 22. The applicant was interviewed by a delegate of the Minister in connection with her protection claims [in] July 2011, and [in] July 2011 she provided some additional supporting documents including a letter dated [July] 2011 issued by [Hospital 4] and indicating that applicant was treated there [in] April 2007 for various injuries said to have been incurred in a domestic violence incident.

23. The application was refused [in] August 2011. The delegate noted that the hospitalisations the applicant claimed to have experienced were not evidenced, and the instance which was evidenced after the interview was not actually mentioned in either the written statement or at interview. The delegate considered that the applicant's employment history and earning capacity meant that she could if necessary have repaid the bride-price, and that this had therefore been no barrier to her leaving what was claimed to have been an abusive relationship. The delegate seemed to draw an adverse inference from the apparent failure by the applicant to obtain counselling in Australia, ultimately accepted that the applicant suffered domestic violence on two occasions, but did not accept that the violence was ongoing, noting that the applicant's husband had remarried. With respect to the claim of the new wife having supplanted the applicant in the family home, the delegate seems to have concluded that this was irrelevant given that the home in question has since burnt down, and the applicant would therefore have to find a new home in any case upon her return to New Guinea. The delegate also noted that despite claiming to have left her husband in March 2010, the applicant continued to list him as an emergency contact person when she completed her passenger arrival card upon returning to Australia, continued to reside at the same address, received her husband there when he came to retrieve the youngest child in January 2011, and failed to call the police when he arrived. The husband's visit and retrieval of the child was instead attributed to the financial difficulties the applicant was experiencing looking after the child. The delegate found that the applicant had embellished her claims, and concluded that as a *resourceful woman with the capacity to support herself* she was not a person to whom Australia has protection obligations.

Review Application

24. The review application was lodged [in] August 2011.
25. [In] November 2011 the applicant was invited to a proposed hearing scheduled for [December] 2011.
26. [In] December 2011 the Tribunal received a supplementary statutory declaration, submissions of fact and law, and a number of supporting documents, as follows:
- a. Statutory Declaration made by [the applicant] addressing the DIAC delegate's rejection of her case, dated [December] 2011;
 - b. Letter from [Hospital 4] Hospital dated [October] 2011;
 - c. Letter from The [Hospital 5] dated 1 November 2011;
 - d. Request for special consideration for [the applicant] from [a] Senior Counsellor/Psychologist at [TAFE] dated [October] 2010;
 - e. Tenant agreement between [the applicant] and [a] Real Estate;
 - f. Letter from [Region 1] General Hospital dated [April] 2011 regarding [the applicant's father];
 - g. Letter from [name deleted: s.431(2)] dated [October] 2011;
 - h. Letter from the [education provider] regarding the [applicant's daughter] dated [May] 2010.
27. The applicant's statutory declaration includes the following:
2. I would like to say I am very anxious and nervous about my upcoming hearing and about giving evidence about my background of domestic violence. I worry that I will not be able to remember things clearly or mix things up given my long history of abuse and given the

DIAL delegate has refused my case, which upset me a great deal. I hope that this can be taken into account when considering my case and my ability to answer questions during the hearing. I had been assisted by the counselling I had received whilst as a student, but after I received the rejection notice from DIAL, I have gone backwards and am suffering again from anxiety and depression. To date I had not sought any treatment however I have now made arrangements to start seeing someone at [a refugee resource centre] as I have been feeling so bad after receiving the rejection letter given my fears of returning to PNG. After I received the rejection letter I couldn't eat and couldn't sleep, worrying about what would happen to me. Before that I had held out some hope, that Australia would provide me with protection, so to receive the rejection tatter was a shock,

3. I refer to the DIAL delegate's comments regarding the fact that no medical evidence had been submitted to corroborate my claims that I was hospitalised for one week in 1995, that my hand had been broken and treated in 2004, and that I had been hospitalised in June/July 2006 when my husband tried to kill me. After the DIAC delegate raised this evidentiary issue I attempted to obtain evidence for her of these incidents. However she only gave me two weeks in which to get this evidence. In relation to the incidents that occurred in 1995 and 2004, I was hospitalised/treated at [Hospital 5] which is a public hospital. I was never able to get a clear answer from the [Hospital 5] about obtaining my records despite making many phone calls to the hospital regarding obtaining my patient file in these two weeks. I also asked my older children to try and assist me to obtain my file, but they were too fearful of their father in case he ever found out they were assisting me. In relation to the incident that occurred in 2006, I managed to obtain evidence from [Hospital 4]. It was much more straightforward and quicker to obtain these records. The date on the letter was an administrative error by the hospital, which in my anxiety about my situation I did not realise until I read the DIAC rejection letter: The incident the letter refers to occurred in 2006 and not in 2007. [Hospital 4] has now corrected this for me and included that I was pregnant at the time (as I asked them to state that if they had that recorded) and I have attached a new letter from them, In addition I would like to clarify that in my original Statutory Declaration lodged with my application for a protection visa I refer to being pushed against a brick wall in relation to this 2006 incident. I was also hit over the head with a piece of wood during this incident and I am not sure why I didn't mention this in my original Statutory Declaration, but it was probably because I didn't outline any of the incidents in any great detail due to the stress it causes me to do so, I was never able to obtain anything for DIAL regarding the incidents where I was treated at the [Hospital 5]. Within the two week timeframe I was given, and hoped that the evidence from [Hospital 4] would be enough given it did prove that I had been the victim of domestic violence.
4. After my case was rejected, which shocked and upset me, I tried again to obtain further medical reports. I have had more time to arrange this. This time I asked my niece to go to [Hospital 5] because my children did not want to do it, and she was able to get a letter regarding the [July] 2004 incident. They told my niece that they were unable to find any information about the 1994 incident. I now attach a letter from the [Hospital 5] regarding the incident [in] July 2004.
5. I refer to the DIAC delegate's comments regarding my ability to divorce my husband and the bride price system. As I tried to explain to the DIAC delegate, it is not acceptable in my Highlands custom for me to repay the bride price, it is for my parents and the people who shared my bride price to repay it. But really the most important issue in my case, which has been lost within this bride price issue and who pays it, is the fact that my ex-husband did not want me to leave this marriage. Despite him living with his new wife, he believed he would lose face and prestige in our community if a wife was to leave him. It is normal and common in our custom, especially in the highlands region, for polygamy to be practiced, When a man decides to take another wife the first wife has no choice but to continue in her marital relationship. I stated in my original Statutory Declaration for a protection visa that it was a matter of pride and status for my husband that I stay with him, and that he would lose face in the community if I ever left him. Therefore, whether I personally could repay Me

bride price or not was irrelevant, he would never have agreed to it. It is not done in our culture. I am sorry I have not been clearer about this but sometimes I find it difficult to make myself clear and this has perhaps come across in my original Statutory Declaration and interview with DIAL.

- 6, I refer to the DIAC delegate's comments regarding the fact that I had been receiving counselling. In this regard I now attach herewith a letter from [a] Senior Counsellor/Psychologist at [TAFE] dated [October] 2010 in relation to my ability to attend and focus on my studies, as evidence of the fact that I did seek this assistance and was suffering significant psychological distress and symptoms consistent with anxiety and depression, I had told [her] about the domestic violence that I had suffered in Papua New Guinea and she was aware that this was part of my stress and anxiety.
7. I refer to the DIAC delegate's concerns regarding the fact that I did not enquire about seeking protection in Australia earlier and that there was nothing that the DIAC delegate could see, that would have prevented me from seeking protection in Australia prior to August 2010. In addition I refer to the DIAL delegate's concerns that as I didn't make any attempt to lodge an application for protection at any stage over the last sixteen years, this needs to be taken into account when considering the genuineness of my alleged fear of persecution. As I have previously stated, It was my lack of knowledge that I could seek protection in Australia as I had no idea that I would be able to apply to be a refugee, or anything about women in PNG being a group that deserves protection. In relation to my time here in Australia when I was studying, prior to coming for my studies, I had to sign a contract to say that I had to return after my studies to contribute to the development of our country. If I were to remain I would have to refund the entire amount of the [sponsorship]. I took this obligation and debt very seriously. I was extremely anxious when the events unfolded as they did during 2010 as I was petrified of returning, and yet was trapped as I would have a [large] debt. In addition, when I came on my [education sponsorship], I lived here in Australia on my own for 2 years without my husband who only came to see me on two occasions for short visits. Together with the events of 2010, including another assault on myself and his marriage to a second wife, and after receiving counselling about this situation in Australia and with my counsellor's encouragement, I finally had some confidence, after suffering abuse and domestic violence during my entire marriage, to seek the courage to investigate options about seeking safety which meant staying in Australia permanently. It was that I found out that applying for protection could be an option for someone like me, a woman who feared domestic violence,
8. I refer to the DIAL delegate's comments regarding my family and my visit to PNG in May 2010. Despite the fact that I have left my former husband, he still takes care of [details deleted: s.431(2)]. In relation to my adult daughter [Ms A], and the fact that my husband did not know I had returned to PNG in May 2010, I would like to explain the following. My daughter [Ms A] was a student who had fallen pregnant and gave birth [details deleted: s.431(2)]. My return trip to PNG in May was to visit my sick father who was very ill at that time and he needed me to go home, I have attached a letter to confirm his illness from the [Region 1] Hospital. My trip was to [Region 1] as my parents live in [Region 1] and not in Port Moresby. I met [my daughter] and her [baby], in Port Moresby on my way to see my dad as this was obviously also very Important to me. [Ms A] did not tell her father that I was in Port Moresby.
- 9, I refer to the DIAL delegate's comments regarding my former husband's second wife and that I would not have returned to PNG for the purposes of confronting my husband about his action of moving his second wife into our home: It Is correct that my husband called me in February 2010 to tell me that the second wife had moved into the family home, What I said in paragraph 26 of my Statutory Declaration was a mistake, in that I did not find out in April 2010 that my husband had moved his second wife into our home. I already knew this but confirmed it with my own eyes in April 2010, I don't know why this mistake occurred in my Statutory Declaration, perhaps I just missed it within the wording, but I sought to correct it

during the DIAC interview. In April 2010, during term break, I went to PNG to see my children as my husband's relationship with his other wife and her being in the home was affecting them. They were having difficulty studying and not coping. In addition I did not want to talk to my husband and tell him that it was not right that he had moved his second wife into the family house with the children. I felt angry about this and felt as if I had to say something about it. I did not stay in the family home because the other wife was already living there, I stayed with a cousin in [town]. When I went to visit the children in the family home, and mentioned to my husband that I was very unhappy that his new wife was living in the family home with my children, this is when he hit me on the forehead with a bunch of keys and I had to go to the hospital to get it stitched. I have provided evidence in relation to this incident. In relation to why I returned to PNG after this altercation, I have outlined above.

10. I refer to the DIAC delegate's comments regarding my ability to subsist in PNG. I was granted [three years] study leave by my employer. Given the amount of time DIAC has taken to process my case that time is now nearly up, I do not know what will happen when this period expires. In addition, even if I can obtain my job back, I know that it is not safe for me to live and work in Port Moresby where I would need to live to do this job, because my former husband lives there.
11. I refer to the DIAC delegate's comments regarding [Ms A's] letter to the [education provider] and the delegate's doubts that my husband moved his second wife into our home. In this regard I would like to explain that [Ms A]'s letter to the institution that I provided to DIAC in support of my case was written on [date] January 2010 because [Ms A] had failed the MSDS2 in 2009. This was an appeal letter regarding the events of 2009. This is why my daughter states she was having difficulties as her 'mother was away for study purposes in Australia' and 'her father remarried and moved out of the house to live with his second wife'. During 2009 my former husband had moved out of the family home to be with his wife, and then, in February 2010 he moved his wife into the family home. I would like to clarify that when I came to Australia in January 2009 I had three children with me. They stayed with me until December 2009. So at that time [Ms A] was aged [age] at the time, my [age] year old, and my second born son who was [age] at the time and so not dependent on [Ms A] to help take care of him. Because I had three of my six children, and [Ms A] was looking after the [age] year old, my former husband would have thought it was easy to leave and go and live with his wife. [Ms A] appeal letter was asking for permission to repeat in 2010. A reply from the Registrar is attached. I only provided this letter as the DIAC delegate asked for proof that my husband now had another wife, and I didn't know how else to prove it.
12. I would like to clarify that when I say my husband's wife, I am not sure if they have arranged a bride price etc. In our culture given he has been with this woman since 2004 and now has [number] children with her we refer to her as his 'wife'.
13. I refer to the DIAC delegate's comments regarding the fact that I provided my husband's details on my incoming passenger card. I didn't think twice about putting this information down so cannot really give an explanation except to say of course if something happened to me in Australia I would need my children to be made aware and as most of them live with my husband he would need to know. I said at the DIAC interview only by way of explanation when pressed that my parents live in a village I was not sure how easy it would be to get emergency information to them. In addition they are illiterate and don't speak English and didn't come to mind as an option for a contact for an emergency situation. I did write my husband's name out of habit this was true but we do share six children and this is why I did not think through the decision to put his name on my passenger card, despite my fears of him. In addition, my husband knew I was in Australia - it was not a secret. So if something happened to me, where I assume DIAC would only need to contact him in an utmost emergency such as if I had been killed or seriously injured, he would probably need to be aware of this information. I had other things on my mind at the time and I did not think through this decision.
14. I refer to the DIAC delegate's comments regarding my husband permitting me to come to

Australia with the children, He agreed for me to come and study in the event that I was to take the kids with me, We all went back to visit in December 2009 and then he decided that the children could not return in 2010. I was very upset and sad about that but couldn't do anything about it given the position of women of PNG He did not offer an explanation for why they couldn't come and wouldn't give me an explanation. All I can think of now is that at the time he was probably planning to move his new wife in to the family home. I had actually leased a [house] in [City 3] thinking the children would be there. During 2010 my then [age] year old son came with my mother as she was travelling on a tourist visa in September because he was not at school. The other kids are at school. My former husband let my [youngest child] come because my mother was coming with him and he assumed they would come back together. My mother stayed for three months and then went back to PNG, The child stayed with me without my husband's permission.

15. I refer to the DIAC delegate's comments regarding the fact that I did not move address while living with my youngest [child] so that my husband would not know where I was living. As I have stated, I did not change address because my [rent period] was for 2 years and was due to expire end of January 2012, I had a contract with [the] Real Estate for 2 years and could not move or my bond would have been forfeited (Lease Agreement attached) The Lease was from [January] 2010 to [January] 2011. I vacated the premises at the end of January 2011 and I have not advised my ex-husband of my whereabouts since. I have also changed my phone number.
16. In addition I just did not think my former husband would come for our [youngest child]. I knew he had his other wife and [number] children with her. My former husband had my address and contact number so for this reason would have put it on the incoming card. When my husband turned up unexpectedly at our place, I was petrified, but I did not report it to police because he had not harmed me. He arrived at 11.30pm. He was verbally abusive when he arrived. I opened the door and I was shocked. My son was up as we had been watching a movie and he had slept a long time in the day that day. He was happy to see his father. My former husband came into the house. I tried to make some small talk but I was scared. I felt that the environment was very tense. I asked him if he was going to sleep there in our son's room and he said 'we'll see'. I tried to offer him food and he refused. I could tell he was very angry. My son was still up and in earshot of the conversation. My husband wouldn't talk to me but questioned our son about who comes to the house, He asked my son why he didn't come back to PNG with his grandmother. My son said that mummy and I were going to come at a later time. He asked my son if any males came to the house. My son said no. I was beginning to get scared so I then said I was going to go out if he didn't want to talk to me. I then left the house and slept in the car at the train station, and drove to [another town] the next day where I stayed with a girlfriend I met through my studying as I was fearful to go back to house. I wasn't thinking when I left my son with him, but I knew that if my husband wanted to take him back he could, because I believed that if his father didn't want him to stay he wouldn't be able to. So I thought I couldn't change this. I never checked this with a lawyer. I was so shocked I was just not thinking straight and I regret this.
17. In relation to the delegate's comments regarding why I did not include my youngest son on this application, at this stage I was still not sure what to do as I was unsure if his father would give consent which I believed was necessary to have my son stay here. My son arrived after I had lodged the application for a protection visa. I did talk to my lawyer about adding him but I thought that I could never get my husband's consent (which I thought was necessary) and I was worried about how I would support him. I was waiting for approval from the Red Cross which had not gone through yet. While I was studying, I was on an [allowance] which helped me to support my son, and I had a part time [job] when my mother was here. However when my allowance ceased in the first week of December 2010, I could only rely on the money with [the part-time job] and my son had to stay with friends while I worked, But it wasn't enough money to support both of us and I couldn't work full time as I had to care for my son.

18. I refer to the DIAL delegate's comments regarding my family dependents continuing to receive discounted fares with authorisation from me only through our HR Department. My ex husband is not travelling on my concession because I have not authorised him to do so. I send an email to my workmate who signs a fills the Concession form on my behalf and approved by my Manager before it goes to HR for Concession privileges and I don't do this for my former husband obviously.
 19. I refer to the DIAC delegate's comments about the lack of evidence of the fact that I was seeking counselling, I have now attached evidence of this, In addition, towards the end of 2010, I was really traumatized when my studies were coming to an end and I was extremely anxious about returning home, as if I stayed I would [owe] a huge amount of money. The Student counsellor wrote a letter to the college to give me extra time for my exams which I have attached.
 20. I refer to the DIAL; delegate's concluding. remarks and state the following; My husband was re-married after 16 years when he started his relationship with his new wife as I have referred to in my statutory Declaration at paragraph 14, but he had extramarital affairs outside of our marriage before this, and his abusive behavior always existed. As our marriage was an arranged one according to our culture, I was never happy in our marriage.
 - 21 Our family home was burnt down [in] November 2010, while all the occupants escaped unhurt including my children. They are now renting a house where my children, my ex-husband and his second wife live. My children are very unhappy and always cry on the phone when I speak to them. I wish I could bring them here, I hugely regret that I didn't properly think through or seek advice on adding my [age] year old to my application form at the time he was here, despite not having enough money to support us both, and I regret leaving him at home with my husband that night when he took him away. At that time, I just acted out of fear and I just left the house, I was not organised to take my [age] year old with me and I wasn't thinking straight as I was so shocked to see my husband, I am aware that the Australian police would have protected me if I had called them at that time but I didn't call them - I wish I had now so that I could still be with my son.
 22. Now that I have separated from my ex-husband, it is not safe for me to go back home as I strongly fear that he will kill me as he has threatened. I fear for my safety and want to remain in Australia, There is nowhere in PNG where I can go and seek refuge. My parents are from the same area as my former husband and he would easily find me there. In addition, if my parents sought to protect me or retaliate this could open up an entire different set of protection concerns for me. I have heard from my children that there is rumour that is spreading that my husband is saying that since I did not return to PNG and have left him, and I have remarried to an Australian These are baseless accusations but could put me at risk of serious harm as my husband will seek to defend his honour. In fact my children have told me that he has said that I will land in a "coffin" when I land in Port Moresby.
 23. I refer to the DIAC delegate's comments about the fact, that my claims have been embellished and that my claims to fear returning to PNG are not well-founded. I have found it very upsetting that the DIAL delegate doubted my claims given I have always been honest and open and I have suffered a great deal at the hands of my husband, for which I have medical evidence. If I have given incorrect information it is just because I was not able to explain clearly. In Papua New Guinea, I have my children, I had a job, I have my parents and my friends and extended family members but I fear for my life if I am to return there. I want to live peacefully in Australia which is a safe haven for me.
28. The submissions made on behalf of the applicant outline various gender-based particular social groups the applicant is said to come within the scope of, and include the following [footnotes omitted]:
- We submit that the fact that the applicant has requested protection against her husband, yet was asked for a bribe in order to do so where no charge has eventuated, is strong probative evidence

of the lack of effective state protection in PNG for victims of domestic violence. We submit that the applicant does not rely upon mere inability of the police and other authorities of PNG to protect her against personally motivated violence. She claims that the violence is tolerated and condoned; not merely at a local level by corrupt, or inefficient, or lazy, or under-resourced police, but as an aspect of systematic discrimination against women, involving selective enforcement of the law, which amounts to a failure of the state of PNG to discharge its responsibilities to protect women.

We submit that independent country information (described below) indicates there is a clear state tolerance or condonation of domestic violence in PNG, and systematic discriminatory implementation of the law. We submit that the applicant's likely subjection to further abuse without state protection is by reason of her membership of a particular social group described above,

We refer to the applicant's fears that she will face social discrimination, harassment and stigma to such a severe degree that it amounts to persecution on account of the fact that she has left her husband. We also note the decision of the UK House of Lords in *Hoxha V Secretary of State for the Home Department*.¹ Although in that case the Court was referring to an instance of stigmatization stemming from being raped, we submit that the same would apply in the applicant's case in relation to her claims of stigmatization as a result of leaving her husband and her status as a separated woman:

"To suffer the insult and indignity of being regarded by one's own community (in Mrs B's words) as "dirty like contaminated" because one has suffered the gross ill-treatment of a particularly brutal and dehumanising rape directed against that very community is the sort of cumulative denial of human dignity which to my mind is quite capable of amounting to persecution. Of course the treatment feared has to be sufficiently severe, but the severity of its impact upon the individual is increased by the effects of the past persecution. The victim is punished again and again for something which was not only not her fault but was deliberately persecutory of her, her family and her community."

We submit the above quote provides the correct interpretation of the available country information relevant to women in PNG, and that country information supports a finding that the treatment the applicant would face on her return to PNG would amount to serious harm within the meaning of s 91 R of the *Migration Act 1958* (Cth)(the Act).

In light of the above examples of judicial reasoning, we submit that it is clearly open for the Tribunal to find that women in PNG, and the alternative formulations of the group described above, are particular social groups in PNG. The applicant is clearly a member of these social groups. We submit the country information below indicates that the applicant has a well-founded fear that she will face persecution because of her membership of the defined groups

2. Country Information relating to the applicant's claims regarding her fears of returning to PNG by reason of her membership of a particular social group (as defined) and the mistreatment of women in PNG

The most recent reports from Amnesty International, Human Rights Watch and the US Department of State confirm the discrimination against, and lack of protection for, women in Papua New Guinea who face such persecution the applicant has described,

The position of women in Papua New Guinea is as follows. The Constitution of Papua New Guinea provides that 'every person has the right to the full protection of the law' and that 'all citizens have the same rights, privileges, obligations and duties irrespective of race, tribe, place of origin, political opinion, colour, creed, religion or sex' Article 2 in particular calls for 'an equal opportunity for every citizen to take part in the political, economic, social, religious and cultural life of the country,' and 'equal participation by women citizens in all political, economic, social and religious activities,' However, despite constitutional guarantees, women in Papua New Guinea are regarded as second-class citizens. They often face discrimination and violence in all aspects of life.

Amnesty International have stated that many women have come to see violence as 'normal', as have

men, confident in the knowledge that the state will not act quickly, decisively or consistently against them. Those women who do report domestic violence, locally termed 'wife bashing', to the police are often sent back home without their complaint being investigated, and having been told that it was a 'family matter'.

The US Department of State in its Country Report on the human rights practices in Papua New Guinea released in April 2011 commented that:

- Violence against women, including gang rape and domestic violence is a "serious and prevalent problem"
- Spousal rape is punishable by imprisonment but few rapists are apprehended. This is due to the willingness of some communities to settle incidents of rape through material compensation rather than criminal prosecution, as the current legal system allows this. This makes the crime difficult to target.
- Domestic violence is a common crime. Most communities view this as a private matter, so few victims reported and prosecutions are rare.
- According to Amnesty International: 2/3 of women in PNG have been hit by their partners
- Police also commit widespread sexual, violence, which is a barrier to women reporting domestic violence.

In our submission country information indicates that there is clear evidence of systematic and discriminatory enforcement of the law for female victims, which is endemic across all government agencies and within the judicial system in Papua New Guinea. The applicant's claims are therefore consistent with known country information.

We further refer to the Human Rights Watch 2011 World Report which states as follows in relation to women in PNG,

- Violence against women and girls is very common in PNG;
- Support services are severely lacking in resources, and form barriers to obtaining justice for these women through the justice system (lack of information, limited legal aid, geographic distance);
- Village courts rely on customary laws which fail to protect women's rights
 - Leaves perpetrators unpunished
 - Intensified by some police officers' own tendency to engage in sexual violence

Amnesty International's report, "Papua New Guinea: A Briefing to the UN Committee on the Elimination of Discrimination Against Women Violence Against Women" (19 April 2011) also stated as follows:

There is a need to introduce legislation to protect women against all forms of gender based violence;

- There is no law in PNG that addresses domestic violence
- In 2002 PNG introduced the Sexual Offences and Crimes Against Children Act. The Act amended a number of sections in the Criminal Code, which includes rape and marital rape, sexual assault and child sexual exploitation;
- This Act is a significant step towards the protection of women's basic rights in PNG, but there is *no legislation specifically criminalising domestic violence* Domestic violence cases currently fail under the Criminal Code;
- In the PNG criminal justice system, there is an assumption that "that an intimate relationship between the victim and the perpetrator acts as a kind of defence, which ensures that the ordinary law of assault is not applied"
 - This contravenes the right of women under article 15(9) of the Convention on the Elimination of Discrimination against Women, which guarantees "women equality with men before the law"
- Amnesty International's interviews reveal that gender based violence against women is "widespread and pervasive", but the exact dimension of the problem is unknown, and that;
 - Intimate partner violence: research by the Law Reform Commission between 1982 and 1986 is from a questionnaire completed by 1,191 men and 1,203 women, and found that on average, two thirds of women had been hit by their partners.

The UN Committee on the Elimination of Discrimination Against Women in its 'Concluding

Observations" in July 2010 also stated as follows:

- The Committee has serious concerns about the persistence of "patriarchal attitudes and deep-rooted stereotypes" regarding the role of women. Customs and practices such as "polygamy, bride price (dava), "good" woman stereotypes, the traditional view of "big man" leadership and the custom of including women as part of compensation payment". This has resulted in discrimination against women and the perpetuation and persistence of violence against women, in which PNG has failed to take systemic action to eliminate stereotypes and these negative practices.
- The Committee is very concerned at the persistence of violence against women at the domestic and community levels, the lack of statistical data on this violence. This indicates that this behaviour is "socially legitimized" and is endorsed by a "culture of silence and impunity"
 - Concerns about "traditional apologies" as a resolution in village courts
- The Committee is concerned by the lack of a comprehensive legal framework addressing all forms of violence against women.
- The Committee is concerned about sexual abuse of women upon arrest and in custody by police officers, and the incidence of collective rape.

The UN Committee on the Elimination of Discrimination Against Women (CEDAW), Consideration of reports submitted by States parties under article 18 of the Convention on the Elimination of All Forms of Discrimination against Women : combined initial, 2nd and 3rd periodic report of States parties: Papua New Guinea, 22 May 2009 states that:

- p.50-51. Domestic or intimate partner violence is very common in PNG and has been estimated to affect 70 per cent of women... It is almost impossible to access reliable statistics about the rates of such violence in PNG as they are not collected - an example, perhaps, of its acceptance as a custom and of women's invisibility... women do not commonly use the law largely because it is still seen to be a private, family matter.

We refer to the current status of the applicant's relationship with her husband and submit that there is a real risk or reasonable likelihood of continuing domestic violence from the applicant's husband if she returns to Papua New Guinea. We submit that the country information referred to above strongly indicates that the applicant has a real chance of being persecuted by reason of her membership of a particular social group as defined.

As a woman without male protection the applicant fears that she would be discriminated against and targeted, including being targeted for rape and violent assault due to the fact that violence against women in Papua New Guinea is endemic and women have few avenues for redress. The threat of rape, sexual assault and other violence is so great that women and girls cannot freely move round their communities, go to school, to the market or to work.

Every day the local media delivers news stories of women being subjected to violence and exploitation. Examples of gender-based violence in Papua New Guinea include: a woman who had been burnt by a hot iron by her neighbours on suspicion of practicing Witchcraft; a woman who had been placed alive in a grave and covered in grass because she was HIV positive; a woman who had been raped by a group of men while walking alone in an area where tribal fighting was underway and then later severely beaten by her husband for the shame she had caused him; an eight year old school girl who had been raped by her teacher; and numerous women who had lacerations, scars, missing teeth, bruises and broken bones inflicted upon them by angry or drunken partners, often using bush knives or other implements.²

According to UNICEF:

Rape [in Papua New Guinea] has become a major, threat to social stability and economic development and seriously impedes the full and active participation of women and girls. Rape and sexual assault have reached epidemic levels, but the vast majority of cases are not reported.

Young women all over the country are at high risk of rape, gang rape and other forms of violent sexual assault, and the attendant fear accompanies them in every aspect of their daily life in urban and rural settings. It severely limits their rights to freedom and to assembly and their right to participate equally alongside young men in all forms of social, political and economic life.

In response to an increase in sexual violence, the police in [Town 2] released the following appeal

in February 2006;

I'm appealing to parents not to let your daughters travel by themselves anywhere. Make sure that they are accompanied by a male relative or go in a group'

Victims are mostly chosen by circumstance, with perpetrators seizing the opportunity to rape or violently assault women who are alone or to whom they have unexpected access.

We submit that independent country information, described above, indicates there is a clear state tolerance or condoning of domestic violence in Papua New Guinea, and systematic discriminatory implementation of the law...

6. Comments on the DIAC delegate's decision in addition to the applicant's Statutory Declaration made [in] December 2011

We refer to the applicant's Statutory Declaration made [in] December 2011 by way of primary response to the DIAL delegate's rejection of her case.

In addition we wish to add the following matters;

a) The DIAC delegate's comments regarding the applicant returning the bride price.

We refer to the DIAC delegate's comments regarding the fact that the applicant should have been able to pay back the bride price. In our submission, the applicant's claims in paragraph 4 of her Statutory Declaration made [in] December 2011 are consistent with country information. The UN Committee on the Elimination of Discrimination Against Women in its 'Concluding Observations' in July 2010 at page 5 of the report:

The Committee recognizes the rich culture and traditions of the State party and their importance in daily life. However, the Committee expresses its serious concern about the persistence of harmful norms, practices and traditions, as well as patriarchal attitudes and deep-rooted stereotypes, regarding the roles, responsibilities and identities of women and men in all spheres of life. These include polygamy, bride price (dave), "good" woman stereotypes, the traditional view of "big man" leadership and the custom of including women as part of compensation payment. The Committee is concerned that such customs and practices perpetuate discrimination against women and girls, that they are reflected in women's disadvantageous and unequal status in many areas, including education, public life, decision-making and in the persistence of violence against women, and that, thus far, the State party has not taken sustained systematic action to modify or eliminate stereotypes and negative traditional values and practices.

The UN Committee on the Elimination of Discrimination Against Women (CEDAW), Consideration of reports submitted by States parties under article 18 of the Convention on the Elimination of All Forms of Discrimination against Women : combined initial, 2nd and 3rd periodic report of States parties: Papua New Guinea, 22 May 2009, also states that:

Women also find it difficult to proceed with divorce due to the fact that if the divorce turned out to be her fault and not her husband's, her family would have to return the bride price they had received for her.

Her family might therefore be unwilling to welcome her back and if she come from a patrilineal society, she would not be able to take her children with her when she left her husband because they belonged to his clan.

The DIAC delegate also claims that there is no evidence that a bride price must be repaid if the marriage fails after [more than 20 years], however there is no country information that suggests that the length of the marriage has any bearing on this custom. The CEDAW report of 22 May 2009 goes onto state as follows in relation to the situation of women wishing to divorce:

The whole body of family law relating to divorce, separation, division of marital property, maintenance orders and custody of children is both confusing and discriminatory against women, making it very hard for women to leave abusive marriages and fault based divorces, which require proof of a matrimonial offence such as desertion or habitual rape, place women in the difficult position of having to provide evidence of situations that may be humiliating, embarrassing, or that may interfere with their dignity and privacy.

...Women also face discrimination in proving fault, particularly cruelty and adultery if they choose not

to be witnesses or they do not wish to attend court proceedings. Divorce in PNG is based on fault based criteria (including adultery, desertion and cruelty) and 1.5 therefore not compliant with CEDAW.

In addition, the court can order the restitution of conjugal rights, a provision which is manifestly discriminatory. There is also provision for damages for adultery, which is a criminal offence. *These are discriminatory provisions imparting the notion that one spouse (typically the female spouse) is the property of the other.* Maintenance orders during separation and after divorce for both children and spouses can be provided, however, the basis on which maintenance is determined is left largely to the discretion of the court with the broad criteria of the 'means, earning capacity and conduct' of the parties. The latter, however, imports a notion of fault which is discriminatory to both children and spouses. The standards recommended by CEDAW pertaining to the needs and means of both parties, the financial commitments of both parties to themselves and others, their respective capacities to earn and the needs of any children for whom maintenance is sought are unlikely to be prioritised.

While the right to own, manage, enjoy and, dispose of property is central to a woman's right to enjoy financial independence, women in PNG do not enjoy equality in relation to the ownership, administration, enjoyment and disposition of property since land tenure is based on custom leaving men in control of many aspects of land and property. PNG has adopted the recommended standard of the best interests of the child as the paramount consideration in custody disputes after separation and divorce. However, a lack of economic independence or an inability to gain custody of their children upon separation forces many women to stay in violent or difficult relationships. The division of property is based on what is 'just and equitable', which fails to provide a clear criteria for judges. Such criterion is unlikely to include women's unpaid contributions to the household. 42

b) *The DIAC delegate's comments regarding the fact that country information she has accessed suggests men with multiple wives usually provide alternative housing to reduce tension, relied on to cast doubt on the applicant's claim that her husband moved his new wife into their matrimonial home.*

In our submission, country information in fact indicates that men with multiple wives do not always provide alternative housing, especially if the first couple are already separated. Page 50 of the CEDAW report of 22 May 2009 states that

Many husbands have more than one partner, but if a wife challenges that privilege, she faces the risk of being beaten.

The Encyclopaedia Britannica suggests that only wealthy and prominent men with multiple wives retain separate households for each.

In addition we submit that in reaching her decision, the DIAC delegate has relied on the fact that the applicant will need to find new housing irrespective of where her husband and his new wife are living, because the family home has burnt down. In our submission however this indicates that the applicant will suffer additional hardship and financial burden which has not been considered by the DIAC delegate in her later findings regarding the applicant's ability to subsist.

29. Enclosed with the submission were the letters referred to therein, their contents as described in the applicant's supplementary statutory declaration.
30. The letter from [Hospital 4] Hospital is dated [October] 2011, correcting the previous letter from the same organisation, and states that the applicant was hospitalised [in] April 2006, following a domestic fight, and that at the time she was [pregnant].
31. The letter from the [Hospital 5] is dated [November] 2011 and states that the applicant was treated [in] July 2004 for *a fracture of one of the carpals and with bruises and abrasions allegedly sustained from her husband.*
32. [In] December 2011 the Tribunal cancelled the hearing in light of the submissions received, indicating that the hearing would be re-scheduled to the new year, if indeed it was necessary to have a hearing at all.

33. [In] December 2011 the Tribunal was provided with a letter dated [December] 2011 from [a] Senior Counsellor at the [Institute 6], which states as follows:

[The applicant] (DOB [date]) presented to the Counselling and Personal Development Centre at [Institute 6] initially [in] October 2009. She disclosed that she had safety concerns regarding her return to Port Moresby and that she had received 2 concussions in the past due to physical abuse by her husband. In a session [in] June 2010 [the applicant] informed me that she had been hit in the head with keys over the Easter break last year and was again anxious about returning home to visit her children over the upcoming mid semester break for safety reasons.

[In] October 2010 [the applicant] came to see me reporting ongoing distress about her refugee status and returning home, concerns for her children, and thoughts about her husband and his new partner. She also stated that this stress was affecting her studies.

During this session she completed the Kessler 10 - a brief measure of non-specific psychological distress in the anxiety-depression spectrum. The K10 comprises ten questions about psychological distress. It is designed to quantify the frequency and severity of anxiety and depression related symptoms experienced in the four weeks prior to screening. Her score was in a severe range indicating that [the applicant] was experiencing high levels of distress and symptoms consistent with anxiety and depression over the last month prior to screening. It is my opinion that concern for her safety if forced to return home to her husband has been a major stressor for [the applicant] and has contributed to her distress. Some of the symptoms reported by [the applicant] [in] October include poor sleep, feeling nervous most of the time, sad all of the time, feeling worthless and depressed most of the time.

Other Information

34. The most recent United States Department of State (USSD) reports on human rights practices were published on 24 May 2012. The Papua New Guinea report, which can be accessed from http://www.state.gov/j/drl/rls/hrrpt/humanrightsreport/index.htm?dynamic_load_id=186299, includes the following section concerning discrimination and societal abuses against women:

Rape and Domestic Violence: Violence against women, including gang rape and domestic violence, was a serious and prevalent problem.

Rape, including spousal rape, is a crime punishable by imprisonment, and prison sentences were imposed on convicted assailants, but few rapists were apprehended. The willingness of some communities to settle incidents of rape through material compensation rather than criminal prosecution made the crime difficult to combat. The legal system allows village chiefs to negotiate the payment of compensation in lieu of trials for rapists.

Domestic violence is criminalized yet existed at high levels throughout the country and was generally committed with impunity. Since most communities viewed domestic violence as a private matter, few victims pressed charges, and prosecutions were rare. Widespread sexual violence committed by police officials and their unresponsiveness to complaints of sexual or domestic violence deterred reporting by both women and men. Traditional village mores, which served as deterrents against violence, were weak and largely absent when youths moved from their villages to larger towns or to the capital. According to Amnesty International (AI), approximately two-thirds of women in the country have been struck by their partners, with the number approaching 100 percent in parts of the Highlands. AI reported that there were only three shelters for abused women in Port Moresby, all privately run; the situation was even worse outside the capital.

Violence committed against women by other women frequently stemmed from domestic disputes. In areas where polygyny was customary, an increasing number of women were charged with murdering one of their husband's other wives. Independent observers indicated that approximately 90 percent of women in prison had been convicted for attacking or killing another woman.

Sexual Harassment: Sexual harassment is not illegal, and it was a widespread problem.

Reproductive Rights: Under the country's family planning policy, couples and individuals have the right to decide freely and responsibly the number, spacing, and timing of their children free from violence and coercion. However, in practice the decision of the husband or male partner on such matters usually prevailed over the wishes of the woman. Access in practice to contraception and adequate prenatal, obstetric, and postnatal care was hindered by logistical problems faced by the Health Department in distributing supplies. Medical facilities also were limited in their capacity to provide adequate services to the growing population. According to indicators published by the Population Research Bureau, 26 percent of married women between the ages of 15 and 49 used some form of contraception. The country's estimated maternal mortality ratio exceeded 250 deaths per 100,000 live births.

Discrimination: Although laws have provisions for extensive rights for women dealing with family, marriage, and property disputes, gender discrimination existed at all levels. Although some women have achieved senior positions in business, the professions, and the civil service, traditional discrimination against women persisted. Many women, even in urban areas, were considered second-class citizens. Women continued to face severe inequalities in all spheres of life: social, cultural, economic, and political. There is no employment antidiscrimination law.

Village courts tended to impose jail terms on women found guilty of adultery while penalizing men lightly or not at all. By law a district court must endorse orders for imprisonment before the sentence is imposed, and circuit-riding National Court justices frequently annulled such village-court sentences. Polygyny and the custom in many tribal cultures of paying a "bride price" tended to reinforce the view that women were property. In addition being purchased as brides, women sometimes were given as compensation to settle disputes between clans, although the courts have ruled that such settlements denied the women their constitutional rights.

35. The Australian Institute of Criminology (AIC) in April 2010 published a report entitled *Emerging issues in domestic/family violence research*, which deals, *inter alia*, with the phenomenon of family violence in people from culturally and linguistically diverse backgrounds: see <http://www.aic.gov.au/publications/current%20series/rip/1-10/10.aspx> The Australian Family Law Courts have acknowledged the difficulties inherent in family violence cases by establishing the *Family Violence Best Practice Principles* The current version published on 19 July 2011, draws on the April 2010 report of the AIC. Accessed from http://www.familylawcourts.gov.au/wps/wcm/connect/FLC/Home/Publications/Family+Law+Courts+publications/fv_best_practice_for_flc, it includes the following guidance on dealing with domestic violence in culturally and linguistically diverse backgrounds:

[I]nsofar as broad statements can be made about violence and culturally and linguistically diverse communities, research has tended to suggest that cultural values and immigration status increases the complexities normally associated with family violence and abuse. In a summary of the available research, the Australian Institute of Criminology stated that women from culturally and linguistically diverse (CALD) backgrounds are generally less likely to report cases of family violence. The factors that may influence this can include:

- being excluded from their community
- the limited availability of appropriate translator/interpreter services and access to support services
- limited support networks
- reluctance to confide in others
- lack of awareness about the law
- continued abuse from immediate family
- cultural and/or religious shame, and
- religious beliefs about divorce.

Policy and service responses, including those of family courts and allied agencies, need to be developed within an understanding of complex cultural dynamics and the inter-relationship between violence, cultural and religious identity and social marginalisation.

36. The Tribunal's *Gender Guidelines* issued on 24 March 2012 include the following

Difficulties making and presenting gender-related claims

13. Applicants may, for social and cultural reasons, find it difficult presenting and pursuing gender-related claims in the protection visa process.

14. The difficulties faced by applicants may include but are not limited to:

- an assumption that female applicants' claims are derivative of male relatives' claims;
- difficulty an applicant may have in discussing his or her experiences of persecution because of shame or trauma;
- cultural differences or experience of trauma affecting an applicant's ability to give testimony or his or her demeanour;
- the compounding effect on an applicant's trauma that immigration detention may have;
- difficulties establishing the credibility of an applicant's claims; and
- a fear of rejection and/or reprisals from his or her family and/or community.

37. In a similar vein, the Tribunal's policy document, *Guidance on the Assessment of Credibility*, includes the following:

Traumatic experiences including torture may impact upon a number of aspects of an applicant's case including the timeliness of an application, compliance with immigration laws, or the consistency of statements since arrival in Australia. They may also impact adversely on an applicant's capacity in providing testimony of such events.

38. Departmental movement records indicate that the applicant first visited Australia in 1990, and has subsequently travelled here on [many] occasions, failing to return to Papua New Guinea only after last arriving here [in] May 2010. Departmental movement records also accord with the applicant's claims with respect to the movements of her estranged and children.

FINDINGS AND REASONS

39. The Tribunal has considered the evidence before it, including the oral evidence given by the applicant at the departmental interview. Having had regard to this evidence, much of which was not before the delegate, the Tribunal resolved, pursuant to subsection 425(2)(a) of the Act, to decide the review in the visa applicant's favour on the basis of the material before it. It was therefore unnecessary for the applicant to appear before the Tribunal to give oral evidence in relation to the decision under review.

Nationality

40. The applicant claims to be a citizen of Papua New Guinea. She entered Australia on an apparently valid Papua New Guinea passport, indicating that she is a national of that country, and there is no evidence before the Tribunal to suggest that she is a national of any other country. The Tribunal finds on this basis that the applicant is a national of Papua New Guinea, and has assessed her claims against that country.

Assessment of Protection Claims

Basis of Claim

41. The applicant claims to be at risk of serious harm capable of amounting to persecution both from her estranged husband and also from violent men in Papua New Guinea generally, in circumstances where the state will fail to protect her from the harm feared. The applicant claims that she will experience this persecution for the Convention reason of her membership of one or more particular social groups comprised of women.

Assessment of Credibility

42. The applicant provided detailed written claims in support of her protection visa application, and gave oral evidence in support of those claims at a departmental interview.
43. Upon review, the applicant provided detailed supplementary statutory declaration, submissions of fact and law, and documentary supporting evidence clarifying certain aspects of her previous evidence and seeking to address the concerns identified by the delegate in the primary decision.
44. In particular, the report of the [Institute 6] counsellor dated [December] 2011 confirms that the claims of domestic violence were first raised with her in October 2009, some 10 months before the protection visa application was lodged. The counsellor's report also notes that when tested in October 2010 the applicant *scored in a severe range indicating that [she] was experiencing high levels of distress and symptoms consistent with anxiety and depression over the last month prior to screening*
45. The Tribunal also observes that if the applicant had simply wished to make an opportunistic claim for protection in Australia she had [many] visits here over some 20 years during which she could have done so, and that her decision to finally claim protection seems the Tribunal to be more consistent with the situation she faced in Papua New Guinea having become increasingly intolerable until the prospect of returning the became impossible for the applicant to bear, consistent with the counselling report extracted above.
46. In general terms the applicant's claims are consistent with country information about the prevalence of domestic violence in Papua New Guinea and the failure of the State to protect the victims of such violence. Some specific aspects of her claims are corroborated by medical and counselling reports indicating that over a long period the applicant has displayed physical and/or psychological symptoms consistent with the claimed abuse.
47. The depth of the applicant's fears is also reflected, in the view of the Tribunal, in her prolonged separation from her children, a number of whom are quite young. The applicant has elected to remain in or return to Australia after three of the children, having been brought to Australia to study and reside with the applicant in March 2009, were then taken back to New Guinea by their father later the same year, the applicant being helpless to prevent their removal. Similarly, after her youngest child was brought here in September 2010 and the applicant's husband again came to Australia to retrieve him in January 2011, the applicant again failed to prevent him from doing so. The Tribunal does not consider that the applicant's apparent acquiescence in this respect to be indicative of a healthy and consensual relationship between herself and the child's father, but rather infers that her helplessness reflects the power imbalance in that relationship, and her preparedness to be separated from her children an indicator of the depth of her subjective fear or persecution.

48. The Tribunal notes that the applicant made little effort to report the domestic violence during the relationship, and failed to call the police when her husband arrived unexpectedly on her doorstep in January 2011 to retrieve their youngest child. The tribunal also notes that some aspects of the applicant's claims were not presented entirely consistently at the primary stage, and/or have been amended at the review stage. However, it is important to bear in mind both the nature of the applicant's claimed experiences and their potentially debilitating impact on both her capacity to extricate herself from the abusive relationship and also her ability to give evidence about that relationship. The Tribunal refers in this respect to the literature extracted above concerning the impact of domestic violence and to the Tribunal's policies with respect to both gender-based claims of persecution and credibility generally.
49. Having carefully considered the applicant claims and evidence, the Tribunal concludes that rather than embellishing her account, the applicant has truthful and accurate description of her past experiences, and that her expressed fears are genuinely held.

Real Chance of Serious Harm

50. The question then arises as to what harm if any the applicant will encounter if she returns to Papua New Guinea in the reasonably foreseeable future.
51. The applicant's fears in this respect appear to be twofold; firstly that her estranged husband will harm her, and secondly that she is at risk of harm from predatory males who target women in Papua New Guinea generally, particularly those lacking male protection.
52. The first claim depends upon the applicant's estranged husband possessing the means and motivation to harm her. With respect to the former, it is evident - and the Tribunal accepts - that that he has a track record of being violent and abusive towards the applicant. With respect to whether he is motivated to do so, the applicant has explained that he assaulted her in April 2010 when she threatened to leave him, and that her children have reported him telling them that if she comes back to New Guinea it will be in a coffin. It is suggested that he does not accept her leaving him, and will revenge himself on her in order to save face or otherwise maintain some similarly twisted concept of honour. The suggestion that he would take such drastic measures is unsurprising in light on the country information reproduced above, particularly the July 2010 CEDAW report, in which the committee expressed...
...its serious concern about the persistence of harmful norms, practices and traditions, as well as patriarchal attitudes and deep-rooted stereotypes, regarding the roles, responsibilities and identities of women and men in all spheres of life. These include polygamy, bride price (dave), "good" woman stereotypes, the traditional view of "big man" leadership and the custom of including women as part of compensation payment.
53. The applicant has also explained that she and her husband come from the same area as a consequence of which he could easily locate her if she sought the protection of her family, and that they may even be dragged into a larger conflict if she did so.
54. In light of the evidence before it Tribunal accepts the applicant's claim that there is a real chance that if she returns to Papua New Guinea in the reasonably foreseeable future she will experience serious harm in the form of physical violence – including sexual abuse – at the hands of her estranged husband.

Availability of State Protection

55. The Tribunal acknowledges that although the law of Papua New Guinea establishes in-principle rights and protections for women, but also accepts the applicant's argument that these have little or no practical effect. On the contrary, the country information indicates that State agents are often implicated in the abuse of women, consistent with the applicant's claim to have been asked for sexual favours by a policeman when she attempted to file a domestic violence complaint. This was the applicant's experience in 2006 when she tried to report her husband for violently assaulting her, and it is still the situation today, as can be seen from the following extract from the latest USSD report:

Domestic violence is criminalized yet existed at high levels throughout the country and was generally committed with impunity. Since most communities viewed domestic violence as a private matter, few victims pressed charges, and prosecutions were rare. Widespread sexual violence committed by police officials and their unresponsiveness to complaints of sexual or domestic violence deterred reporting by both women and men.

56. The Tribunal concludes that Papua New Guinea at present fails to provide the level of protection which its female citizens are entitled to expect according to international standards: see *Minister for Immigration and Multicultural Affairs v Respondents S152/2003* (2004) 222 CLR 1 at [27]-[29]. The Tribunal concludes that the applicant's unwillingness to seek protection from those authorities is therefore justified for the purposes of Article 1A(2)..

Convention Nexus

57. The country information before the Tribunal and extracted above, including the USSD and CEDAW reports, makes it quite clear that the situation for women in Papua New Guinea is deplorable, reflecting the kind of entrenched discrimination which readily leads to the conclusion which the Court found to be open to the Tribunal in *Khawar*. The *custom of including women as part of compensation payment* in Papua New as reported by CEDAW indicates that in such cases they are literally treated as chattels.
58. For a putative social group to amount to a particular social group for the purposes of the Convention, it must meet the criteria enunciated by the High Court *Applicant S v Minister for Immigration and Multicultural Affairs* (2004) 217 CLR 387 ("*Applicant S*"). In their majority joint judgment, Gleeson CJ, Gummow and Kirby JJ. set out, at paragraph [36], the correct approach to the question of whether a group falls within the scope of the term *particular social group* for the purposes of the Convention:
- Therefore, the determination of whether a group falls within the definition of "particular social group" in Art 1A(2) of the Convention can be summarised as follows. First, the group must be identifiable by a characteristic or attribute common to all members of the group. Secondly, the characteristic or attribute common to all members of the group cannot be the shared fear of persecution. Thirdly, the possession of that characteristic or attribute must distinguish the group from society at large. Borrowing the language of Dawson J in *Applicant A*, a group that fulfils the first two propositions, but not the third, is merely a "social group" and not a "particular social group". As this Court has repeatedly emphasised, identifying accurately the "particular social group" alleged is vital for the accurate application of the applicable law to the case in hand
59. The Tribunal finds on the evidence before it that the women in Papua New Guinea are identifiable by the common characteristic of their gender, which is distinct from their shared fear of persecution. Furthermore, it is clear that their gender sets women aside from Papua New Guinean society at large, making them second class citizens in their own country despite

some ineffectual laws suggesting otherwise. The Tribunal therefore concludes that women in Papua New Guinea constitute a particular social group for the purposes of the Convention.

60. In order for the claim to succeed, the threat of harm must be directed against the applicant for reason of his or her membership of the group in question, as opposed to the threat being directed against the person in his or her individual capacity, as Gummow J observed in *Applicant A v Minister for Immigration and Ethnic Affairs* (1997) 190 CLR 225, at 285 (citing with approval *Ram v MIEA & Anor* (1995) 57 FCR 565 at 569):

When a member of a social group is being persecuted for reasons of membership of the group, he is being attacked, not for himself alone or for what he owns or has done, but by virtue of his being one of those jointly condemned in the eyes of their persecutors, so that it is a fitting use of language to say that it is ‘for reasons of’ his membership of that group.

61. The Tribunal acknowledges the USSD report’s point that police unresponsiveness deters reporting of domestic violence by *both* women and men. Nevertheless, the country information generally makes it clear that it is violence against women which is the problem. In addition to the relevant extract above at [55], the USSD report includes the following points indicative of both the seriousness and the entrenched nature of the problems women face in Papua New Guinea:

Sexual harassment is not illegal, and it was a widespread problem.

Under the country’s family planning policy, couples and individuals have the right to decide freely and responsibly the number, spacing, and timing of their children free from violence and coercion. However, in practice the decision of the husband or male partner on such matters usually prevailed over the wishes of the woman.

Although laws have provisions for extensive rights for women dealing with family, marriage, and property disputes, gender discrimination existed at all levels. Although some women have achieved senior positions in business, the professions, and the civil service, traditional discrimination against women persisted. Many women, even in urban areas, were considered second-class citizens. Women continued to face severe inequalities in all spheres of life: social, cultural, economic, and political. There is no employment antidiscrimination law.

Village courts tended to impose jail terms on women found guilty of adultery while penalizing men lightly or not at all

62. While the state maintains these discriminatory laws and practices, it is in effect sanctioning and institutionalizing systematic state discrimination against women. Consequently, the Tribunal finds that state protection is unavailable to the applicant is because she is a woman.

Conclusion on Persecution

63. The Tribunal finds that there is a real chance that the applicant will experience serious harm capable of amounting to persecution for the purposes of s.91R(1)(b) in the reasonably foreseeable future, in the event that she returns to Papua New Guinea.
64. It is evident from the applicant’s account, and the Tribunal accepts, that the threat of serious harm she faces comes immediately from her husband, but also, in the sense of what the Tribunal finds to be its discriminatory withholding of protection from the applicant, from the State itself. In this respect, and that for the purposes of s.91R(1)(c) of the Act, the Tribunal finds that the persecution involves systematic and discriminatory conduct.

65. Finally, for the purposes of s.91R(1)(a) of the Act, the Tribunal finds, having regard to the conclusion on Convention nexus, that the essential and significant reason for the State withholding such protection, and thereby giving rise to the real chance of persecution, is the applicant's membership of the particular social group comprising women in Papua New Guinea.

Internal Relocation

66. It may be that the applicant could avoid the threat of persecution she faces at the hands of her husband by relocating within Papua New Guinea, but in the view of the Tribunal this would not eliminate or even reduce to a remote level the threat of Convention persecution faced by the applicant generally, given the country information about the rampant levels of sexual abuse of women in Papua new Guinea, as the evidence indicates that if she did relocate the applicant would be living without the benefit of male and/or familial protection.
67. In any case, the applicant and her persecutor share seven children, and it would not be reasonable to expect her to have no contact with those children if she returned to New Guinea. Doing so would, in the view of the Tribunal, once again expose her to a real chance of serious harm at the hands of her estranged husband. The Tribunal therefore finds that the harm feared by the applicant could not reasonably be avoided by relocation within Papua New Guinea.

Safe Third Country

68. There is no evidence before the Tribunal that the applicant has the right to enter and reside in any third country for the purposes of s.36(3) of the Act, and the Tribunal finds accordingly that she does not.

CONCLUSIONS

69. The Tribunal is satisfied that the applicant is a person to whom Australia has protection obligations under the Refugees Convention. Therefore the applicant satisfies the criterion set out in s.36(2)(a).

DECISION

70. The Tribunal remits the matter for reconsideration with the direction that the applicant satisfies s.36(2)(a) of the Migration Act.