

**0907337 [2010] RRTA 165 (15 March 2010)**

**DECISION RECORD**

**RRT CASE NUMBER:** 0907337

**DIAC REFERENCES:** CLF2008/11688 and CLF2008/8408

**COUNTRY OF REFERENCE:** Vanuatu

**TRIBUNAL MEMBER:** Deborah Morgan

**DATE:** 15 March 2010

**PLACE OF DECISION:** Adelaide

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

## **STATEMENT OF DECISION AND REASONS**

### **APPLICATION FOR REVIEW**

1. This is an application for review of a decision made by a delegate of the Minister for Immigration and Citizenship (the delegate) 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 Vanuatu, most recently arrived in Australia [in] June 2004 and she applied to the Department of Immigration and Citizenship (the Department) for a Protection (Class XA) visa [in] January 2008.
3. The delegate refused the visa application on the basis that the applicant is not a person to whom Australia has protection obligations under the Refugees Convention. The delegate decided to refuse to grant the visa [in] April 2008 and notified the applicant of the decision and her review rights.
4. The applicant sought review of the delegate's decision and the Tribunal (RRT file number 0802686), differently constituted (the first Tribunal), affirmed the delegate's decision [in] October 2008. The applicant sought review of the first Tribunal's decision by the Federal Magistrates Court and [in] March 2009 the Court upheld the first Tribunal's decision. The applicant appealed the Federal Magistrate's decision and [in] August 2009 the Federal Court allowed the appeal and set aside the decision and remitted the matter to the Tribunal to be determined according to law.
5. The matter is now before the Tribunal pursuant to the order of the Court [in] August 2009.

### **RELEVANT LAW**

6. Under s.65(1) a visa may be granted only if the decision maker is satisfied that the prescribed criteria for the visa have been satisfied. In general, the relevant criteria for the grant of a protection visa are those in force when the visa application was lodged although some statutory qualifications enacted since then may also be relevant.
7. Section 36(2)(a) of the Act provides that a criterion for a protection visa is that the applicant for the visa is a non-citizen in Australia to whom the Minister is satisfied Australia has protection obligations under the 1951 Convention Relating to the Status of Refugees as amended by the 1967 Protocol Relating to the Status of Refugees (together, the Refugees Convention, or the Convention).
8. Further criteria for the grant of a Protection (Class XA) visa are set out in Part 866 of Schedule 2 to the Migration Regulations 1994.

### **Definition of 'refugee'**

9. Australia is a party to the Refugees Convention and generally speaking, has protection obligations to people who are refugees as defined in Article 1 of the Convention. Article 1A(2) relevantly defines a refugee as any person who:  
owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the

country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence, is unable or, owing to such fear, is unwilling to return to it.

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

“real chance” is one that is not remote or insubstantial or a far-fetched possibility. A person can have a well-founded fear of persecution even though the possibility of the persecution occurring is well below 50 per cent.

17. In addition, an applicant must be unable, or unwilling because of his or her fear, to avail himself or herself of the protection of his or her country or countries of nationality or, if stateless, unable, or unwilling because of his or her fear, to return to his or her country of former habitual residence.
18. Whether an applicant is a person to whom Australia has protection obligations is to be assessed upon the facts as they exist when the decision is made and requires a consideration of the matter in relation to the reasonably foreseeable future.

## **CLAIMS AND EVIDENCE**

### **The primary application**

19. The Tribunal notes that the following information on the Department’s files has not been disputed at review The applicant is a citizen of Vanuatu who was born on [date deleted: s.431(2)], and she most recently arrived in Australia [in] June 2004 on a visitor visa subject to the condition “no further stay.” [On a date in] June 2004 the applicant’s visitor visa ceased and she became unlawful after that day. In January 2008 the owner of a roadhouse [location deleted: s.431(2)] contacted the Department about the applicant’s immigration status as there had been difficulty in obtaining a tax file number for the applicant.
20. [In] January 2008 an officer of the Department spoke to the applicant by telephone and interviewed her. At interview the applicant claimed that she came to Australia because her husband was physically violent to her and she had been told that in order to obtain a divorce in Vanuatu she needed to stay away from her husband for three years. She has daily telephone contact with her children who also live in Vanuatu. When told by the officer that her visa had ceased the applicant was upset and repeatedly asked not to be sent back to Vanuatu The applicant was interviewed in person by the Department on 17 January 2008 and, among other matters, told the officer that she could not return to Vanuatu because she is afraid of her husband. She stated that her husband calls her now and again.
21. The applicant’s protection visa application includes the following: her tourist visa application and associated documents; Form 866C; a letter of support from STARRS that confirms the applicant is “a victim of prolonged and sustained abuse” and also a written submission from her former registered migration agent.

### **The delegate’s decision**

22. The Decision Record dated [in] April 2008 included the following passage:

.....her [the applicant’s] statements, while based on her past experience of living with her husband, are mere conjecture at this point in time. She has given no evidence of her claimed past experience of domestic violence and I am not convinced that her ex-husband is actively pursuing her, or that he is likely to pursue her, or that he would be able to find her if she resided in Vanuatu outside of Port Vila or her ex-husband's former township. The applicant's ex-husband would not know her whereabouts unless

she chose to tell him. I find that there is no real chance that the applicant will face persecution now or in the reasonably foreseeable future if she relocates within Vanuatu to an area outside Port Vila or her ex-husband's former place of residence.

The applicant has not claimed to fear harm from any source other than her ex-husband. As her fears relate only to her ex-husband I find it is not likely that she will require State protection for a Convention reason if she relocates within Vanuatu. Furthermore, I consider that if required, protection in another region within Vanuatu is reasonably accessible to the applicant.

I find that the applicant does not have a well-founded fear of return to Vanuatu in accordance with the finding of the Federal Court of Australia in *Syan v RRT & Anor* (1995), as I have found that the applicant can safely relocate within Vanuatu, it is not necessary for me to consider whether or not the applicant has a well-founded fear of persecution in Vanuatu based on a Convention reason. ....

### **The first Tribunal File 0802686**

23. The application for review was lodged [in] May 2008. [In] June 2008, the applicant's former migration agent, submitted his written submissions; the letter from STARRS contained in the Department's file referred to above; a letter dated [in] June 2008 written in support of the application by [the applicant's son]; and a letter dated [in] June 2008 written in support of the application by [the applicant's sister].
24. The representative's written submissions included the following: the applicant claims a well-founded fear of persecution due to her membership of a particular social group, namely the particular social group of victims of domestic violence and/or spousal abuse. Even though she is now divorced and has fled from Vanuatu, she is still being threatened by her former husband by telephone. The applicant wanted a working holiday visa and presumed she had been granted a work visa for 12 months. Following her arrival in Australia, the applicant worked as a fruit picker in [town deleted: s.431(2)] and when, around twelve months later, she asked her employer about her visa, she was told she could keep working. That employer charged her exorbitant rent and electricity bills and, in 2007, when another worker told her she was being ripped off, she left and commenced working at the [name deleted: s.431(2)] Roadhouse. The applicant's new employer assisted her with an application for a tax file number and was advised that she would need to contact the Department. The applicant was unaware she was not lawfully in Australia. After she discovered that she was not lawfully in Australia she was devastated and frightened as she could not return to Vanuatu because she feared serious harm or death at the hands of her former husband.
25. The representative summarised the applicant's evidence as follows. When she was married to her husband he believed that she was his property and he did not treat her as a human being or as his wife. When she tried to get help from the church or the village chiefs she was spurned. When her family tried to help her they were threatened. The applicant's ex-husband is a church leader. If she had gone to the police for help they would not have helped. Vanuatu is a male dominated society where women have few rights. If forced to return to Vanuatu her ex-husband would find her and she

would likely be seriously injured or killed. Relocation by the applicant would not prevent this harm.

26. The representative referred to the High Court's judgment in *Minister for Immigration and Multicultural Affairs v Khawar* (2002) 210 CLR 1 ("*Khawar*") at 28, for example, McHugh & Gummow JJ stated:

The membership of the potential social groups which have been mentioned earlier in these reasons would reflect the operation of cultural, social, religious and legal factors bearing upon the position of women in Pakistani society and upon their particular situation in family and other domestic relationships. The alleged systemic failure of enforcement of the criminal law in certain situations does not dictate the finding of membership of a particular social group.

27. In conclusion, the representative submitted that the applicant has a well-founded fear of persecution in Vanuatu for reasons of her particular social group and that she could not obtain effective protection in any other country.
28. The first Tribunal conducted a hearing [in] July 2008. A summary of the evidence taken by the first Tribunal at that hearing is stated in the first Tribunal's decision dated [in] October 2008 and the relevant sections of that evidence are now summarised: At age 19, in [year deleted: s.431(2)], the applicant moved from [town deleted: s.431(2)] where she spent her childhood to Port Vila. She worked as a Bank Officer in Port Vila and met her husband through her work. She married her husband in 1978 after she became pregnant to him. At first, her husband did not reveal his whole personality. When she was giving birth to their first child her husband went fishing. After the baby was born, he started to slap her. When she protested he said that he had paid a dowry and it was his right. Her husband would often leave the house to spend time with his friends, leaving her alone with the baby.
29. When it was time for the applicant to return to work, a dispute arose over who would take care of the baby during the day. The applicant wanted her sister to baby-sit but her husband wanted his parents to care for the child. Her husband was angry that she did not like his mother and family. The situation continued to deteriorate. Her husband started to find lots of faults with the applicant. He shouted and was very demanding. Everything they did together as a family revolved around his family.
30. Her husband is a Seventh Day Adventist and he is eight years older than her. She was not allowed to make decisions and if she did make a decision she would be criticised. When she was pregnant her husband pushed her off the beach in a canoe and other people had to help her back to shore. One day she was gardening when her husband pushed her into the fence and she received a cut on her leg. Another time he hit her in the face and broke her teeth. When she was around 21 her husband hit her on the back with a sewing machine. On another occasion, her son found her lying on the floor unconscious after her husband hit her. She was around 24 or 25 at that time. When she was around 30, she had to take a taxi to the hospital after her husband hit her. More recently, her husband stopped friends from visiting and would not allow her to visit her brother. She was not allowed to buy new clothes.
31. In 2000, after returning from her second visit to Australia, her husband hit her. In Vanuatu, women must always listen to and respect their husbands. One of her close friends has also suffered similar treatment from her husband.

32. In response to the first Tribunal's question whether she had sought assistance from the police; the applicant said that "they can only do what they can". If she went to the police that would inflame her husband and make matters worse. Her friend went to the police and they went to speak to the husband and this made matters worse for that friend.
33. The applicant told the first Tribunal that there are no domestic violence laws in Vanuatu but there are general laws to protect people. If the police went to see her husband he would tell them that it was his private business. The police do not condone this type of violence, but they try to keep the peace and may defer to customary law.
34. The first Tribunal asked why the applicant had stayed in the marriage for so long if the abuse had been ongoing for such a long time to which she said that she could not leave her children. She finally decided to leave her husband in 2003.
35. The first Tribunal asked the applicant why she had waited so long to apply for a protection visa. The applicant said that she was not aware of the refugee program and that she had no understanding of the different visa classes.
36. The applicant stated that she applied to the National Council of Women in 2003 and her divorce was finalised in 2007.
37. The first Tribunal asked the applicant how she knew her husband was angry with her to which she stated that her children called her [in] January 2008 and her husband took the phone from them and abused her because she had divorced him. He accused her of wanting to marry an Australian. She is scared that he will come after her to kill her. The first Tribunal asked the applicant to explain why her husband had not come to Australia to kill her. She said that he would find it hard to come to Australia to kill her.
38. The first Tribunal asked the applicant whether she could relocate in Vanuatu to which she responded that she would not relocate because she did not want to lose contact with her children. If she did relocate she would be noticed and her husband would come and get her. Her husband wants revenge and he is very angry.
39. Following the hearing the first Tribunal received further evidence from the representative that indicated the applicant is not divorced and that she had approached the Vanuatu Women's Centre in 2004 to seek advice as to how to divorce her husband and was advised that if he was cruel and if she stayed away from him for three years, she would be able to divorce him. A letter from the applicant to the Vanuatu Women's Centre asked it to lodge a divorce petition on her behalf. The applicant also provided a statement to the first Tribunal dated [in] July 2008 which among other matters set out a history of acts of abuse by her former husband against her.

### **The first Tribunal's decision**

40. The decision set out country information available at that time that included a report prepared by the Australian Department of Foreign Affairs and Trade (DFAT) Post in Vanuatu issued to the RRT on 18 August 2008 that is set out below under Country Information (see paragraph 74)

41. The first Tribunal accepted that physical acts of domestic violence amounted to significant physical harassment of the applicant for the purpose of section 91R of the Act and he accepted that the applicant had suffered physical assaults at the hands of her husband in the past which she fears in the future. The first Tribunal accepted that the applicant fears a real chance of serious harm from her husband in the reasonably foreseeable future if she were to return to Vanuatu. The first Tribunal found that the applicant is a member of a particular social group which he labelled “Vanuatu women” or, alternatively, “married Vanuatu women.” The Tribunal rejected the applicant’s claim that she feared persecution from her husband in consequence of her membership of a particular social group because he found that the harm the applicant fears is not for the reason of her membership of the particular social group but in consequence of the individual circumstances of her relationship with her husband.
42. The first Tribunal next turned to the applicant’s claim that the persecution she fears is the failure of the Vanuatu authorities to protect her from the harm she fears from her husband. The first Tribunal concluded from the country information available that State protection although somewhat imperfect is available to the victims of domestic violence in Vanuatu. The first Tribunal placed weight upon the applicant’s failure to produce evidence that the authorities of Vanuatu have been asked to give her protection and made the finding that country information indicated that Vanuatu is attempting to grapple with domestic violence and that the level of protection available to the applicant was reasonable. The Tribunal found that the serious harm faced by the applicant did not give rise to persecution in a Convention sense. With respect to relocation, the first Tribunal noted that country information generally supported her claims that her husband would be able to find her were she to return to Vanuatu.

### **Appeals by the applicant to the Federal Magistrates Court and to the Federal Court**

43. As stated above, the applicant unsuccessfully appealed the first Tribunal’s decision to the Federal Magistrates Court. However, her appeal was allowed by the Federal Court in a judgement dated [in] August 2009. The Federal Court judgement held as follows: the issue in the appeal was as it was in *Khwar*, if the State or its agents condone, approve or tolerate or are indifferent to the criminal conduct concerned, or are unwilling or unable to afford protection then “...the requirement that the persecution be by reason of one of the Convention grounds may be satisfied by the motivation of either the criminals or the state [or one of its agents]: *Khwar*, at [31].” Finn J. set out exchanges between the applicant, the first Tribunal and the applicant’s registered migration agent in his reasons and noted that the representative advanced an alternative claim to the first Tribunal which was that the lack of domestic violence laws in Vanuatu was indicative of the withholding of protection to the applicant. Finn J found that the first Tribunal’s inquiry did not consider an evaluation of the law in Vanuatu with respect to domestic violence or the traditional cultural norms and practices in Vanuatu that might bear on the police’s willingness or ability “to take reasonable measures to protect the ...safety” of victims of domestic violence. Finn J held that there was no conceivable reason why the law would require an applicant to expose herself to likely future harm to substantiate that she was persecuted for government purposes. The Federal Court ordered the Tribunal to review the decision made by the delegate.

### **Federal Court remittal to the Tribunal**

44. The applicant has been represented at review by a registered migration agent.



45. [In] December 2009 the Tribunal received a submission from the applicant's representative that stated at the outset that the applicant had no new information to add to her claims and referred the Tribunal to some of the Federal Court's findings as summarised above. The representative contended that evidence had been provided throughout the history of this matter that indicated domestic violence is a serious problem and despite the introduction of domestic violence laws and the establishment of women's domestic violence support groups, the fact remains that cultural norms and practices take precedence meaning that in the majority of matters, village chiefs or church pastors deal with such matters. The representative referred the Tribunal to reports from The Convention on the elimination of all forms of Discrimination against Women, 38<sup>th</sup> session 14 May -1 June 2007 in relation to Vanuatu and AusAID reports with respect to the position of women's access to justice in Vanuatu.
46. The Tribunal, differently constituted, invited the applicant to a hearing [in] January 2010 but that hearing had to be re-scheduled as the Tribunal member was unable to attend for unforeseen personal reasons.
47. The Tribunal hearing was re-scheduled to [a date in] February 2010 and the applicant appeared before the Tribunal on that date to give evidence and present arguments. The applicant's representative assisted at the hearing.

*The Tribunal hearing - oral evidence taken from the applicant*

48. The Tribunal now summarises the applicant's oral evidence. She is currently unemployed. Her three adult children reside in Vanuatu. None of them is married but her son has a girlfriend who lives with him. Her two brothers and her sister are married and live in Vanuatu. Her father died in 1979.
49. The applicant married her husband after her first child was born. They had a "blessing marriage" rather than a church marriage because they had a child. Her parents were Presbyterians but in consequence of marriage she changed to Seventh Day Adventist because that is her husband's church. She does not know if her husband has other wives. If she asked him that question he would punch her. Every day he reminded her that he paid a bride price for her that was too high. She and her husband argued from the start. He was cross that her mother was ill. Her husband would not allow her to help her mother. Her brothers are frightened of her husband.
50. The applicant told the Tribunal that she has discovered that she is not divorced from her husband as she had previously thought. She had assumed that because she had approached the Vanuatu Women's Centre about divorcing her husband that the matter would go to court.
51. The applicant confirmed that her passport has expired. She stated she intended to apply for a new passport in the near future.
52. In Vanuatu each village has its own chief. Chiefs have a very important role in society as do church leaders. A woman cannot be a chief. The role of women in Vanuatu is to stay at home and have children. Women cannot voice their opinions in Vanuatu.
53. Because her birthplace was [location deleted: s.431(2)], it is custom that she returns there to sort out any problems through the chief of [the village]. Her husband was born

and raised [at] [location deleted: s.431(2)] which is 90 kilometres from [the applicant's birthplace]. His chief is the chief of [location deleted: s.431(2)] It is common practice to approach a chief when a domestic violence issue arises. The chiefs call the parties together and try to sort their problems out by working out who is in the wrong and they order penalties to be paid, for example, provide three pigs to the other party. However, the domestic violence occurs again.

54. The applicant stated that many husbands commit violence towards their wives in Vanuatu and the reason is the bride price. In Vanuatu, the culture of payment of a bride price means that women don't have any rights. Her husband paid 160,000 Vanuatu vatu which, equating to approximately AUD3, 500, to her parents as a bride price before she married him.
55. The applicant's brothers went to the chiefs for her five times. The first time was when her son was 4 months old and her husband, who was steering the canoe with ten persons on board, did not help her when their canoe sank in rough seas. He helped other people but not her or their baby. The chief did not help her on that occasion. On a subsequent occasion she was late to return from fishing and her husband took the cover off a sewing machine and hit her on the back with it. Her brother told their chief who called him later and said he had fixed the problem. She did not feel as though she was helped.
56. In 1997 she had not prepared lunch for her husband and he was angry and slapped her and pushed her into a barb wire fence on their property. Her brothers went to their chief after that but the chief was no help to her. She showed the Tribunal scars on her neck from that incident. She said that her legs are also scarred.
57. In 2003 her husband hit her in the mouth and her front teeth were broken. At that point she decided that she had had enough. She asked her eldest brother to report to their chief about her teeth but her husband would not listen to her brother. She did not report the reason for the breakage of her teeth to a health professional because she was frightened that if she did that her husband would give her more trouble. The Tribunal put it to the applicant that information provided by her to a doctor should be confidential to which she responded that in Vanuatu if she talked about her husband's violent conduct it would get back to him. After this incident she told her two older children about their father's violence and they said it was okay for her to leave Vanuatu.
58. The Tribunal asked the applicant if the Vanuatu police use chiefs to sort out family and domestic violence disputes. The applicant stated that the police do use chiefs for those matters and that in Vanuatu village chiefs are more like police than the police. Chiefs think their laws are better than police laws. People listen to chiefs. Vanuatu chiefs and church leaders want couples to reconcile but a violent husband will repeat his violence.
59. The applicant told the Tribunal that she did not ever report her husband to the police because if she did he would only repeat his violent behaviour; he would "go for" her brothers and her husband would tell the police that it is family problem which he will fix.
60. There would be no point in going to court for protection because that would have the same results as reporting the matter to the police.

61. The applicant did not ever move out of home after domestic violence from her husband because he told her she was not allowed to move away.
62. In 1995 her husband became an elder of the Seventh Day Adventist church. She was happy about that appointment because she thought he might change for the better. When she left Vanuatu her husband was an elder but she does not know if he has that title now. The Tribunal asked the applicant if she had considered reporting her husband's conduct to a different church. She replied that her husband would not permit discussion between churches on the topic. She thought of asking the Seventh day Adventist church for help but because her husband is an elder she decided that would not work
63. The Tribunal asked the applicant if she knew of any support groups for abused women in Vanuatu. She replied that she was aware of the Women's centre to which she wrote about divorce. She further stated that support groups advise women to go to the police for restraining orders. She did not report her husband's conduct to the police because she was scared of what her husband might do to her brothers if she did.
64. The applicant stated the reason she stayed with her husband in a violent marriage was her children. She left when she had to go and her youngest child was 13.
65. The applicant stated that the only reason she left Vanuatu in 2004 was her fear of her husband's violence. She left secretly without his knowledge. She told the children and caught a taxi to the airport. Her husband found out that she was in Australia from their children. He got her telephone number from the children and has rung her many times. She has changed her telephone number but still her husband gets her number from the children. When her husband calls her he always threatens her. He rang her about six times in 2009. He most recently called her on 1 January 2010 and alleged she was living with a white man and that she should not bring that man to Vanuatu.
66. If she returned to Vanuatu because everyone knows everyone else her husband would know she had returned once she arrived at Port Vila. Her husband would come for her because she is his wife. She said she finds that prospect very frightening.
67. The Tribunal asked the applicant if she thought the police could protect her if she returned to Vanuatu in the near future. The applicant replied that because she has been in Australia for seven years she does not know if the police in Vanuatu could assist her.
68. The Tribunal put it to the applicant that Vanuatu consists of 80 islands and asked her whether it would be reasonably possible for her to live on a different island that has nothing to do with her husband or his family. The applicant responded that such a move would be difficult because lands belong to other people. She conceded that renting a house in a different place might be possible but she does not know how she could get money to pay rent.
69. The Tribunal informed the applicant that Vanuatu's Family Protection Act came into effect on 2 March 2009. The Tribunal provided the applicant with DFAT's report dated 4 January 2010 on the situation in Vanuatu post the implementation of the legislation. The Tribunal and requested the applicant's written comments on the report.

#### **Further submission after the hearing**

70. [In] February 2010 the Tribunal received a submission from the representative in relation to the DFAT report that made the following points: effective implementation of Vanuatu's Family Protection Act will require considerable planning, training and effort and in its present state the legislation is presently ineffective in relation to the protection of abused women and it is not clear how long it may take before effective genuine protection is afforded to such women. The representative concluded by submitting there is no evidence that there is effective state protection for the applicant as a victim of domestic violence in Vanuatu, now, or in the future.

### **Country Information before the Tribunal**

71. The US Department of State Report on Human Rights in Vanuatu issued on 25 February 2009 included the following:

Vanuatu is a multiparty parliamentary democracy with a population of approximately 218,000. The head of government, Prime Minister Edward Natapei, governed with a seven-party coalition. The most recent elections, held on September 2, were considered generally free and fair. Civilian authorities generally maintained effective control of the security forces; however, police officials on occasion acted preemptorily or at the direction of senior politicians.

The government generally respected the human rights of its citizens, but there were problems in some areas. These included poor prison conditions, arrests without warrants, an extremely slow judicial process, government corruption, and violence and discrimination against women.

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#### **Women**

Violence against women, particularly domestic violence, was common, although no accurate statistics existed. Although rape is a crime, with a maximum penalty of life imprisonment, spousal rape is not cited specifically in the law, and police frequently were reluctant to intervene in what were considered domestic matters.

On June 19, parliament passed a Family Protection Act that covers domestic violence, women's rights, children's rights, and family rights. Violators could face prison terms of up to five years or pay a fine of up to 100,000 vatu (approximately \$900) or both. Most cases of violence against women, including rape, went unreported because women, particularly in rural areas, were ignorant of their rights or feared further abuse. There were no government programs to address domestic violence, and media attention to the abuse was limited. Churches and other nongovernmental organizations (NGOs) operated facilities for abused women. NGOs such as the National Council of Women and the Vanuatu Women's Center also played an important role in educating the public about domestic violence but did not have sufficient funding to implement their programs fully.

Prostitution is illegal and was not regarded as a serious problem. However, on March 4, the Vanuatu Daily Post reported that "practices of prostitution" were increasing. The Protection Project noted that the number of young women and girls turning to prostitution as a result of poverty was rising in Port Vila.

Sexual harassment is not illegal and was a problem.

While women have equal rights under the law, they were only slowly emerging from a traditional culture characterized by male dominance, a general reluctance to educate women, and a widespread belief that women should devote themselves primarily to childbearing. The majority of women entered into marriage through "bride-price payment," a practice that encouraged men to view women as property. Women also were barred by tradition from land ownership. Many female leaders viewed village chiefs as major obstacles to social, political, and economic rights for women. Women interested in running for public office received encouragement from the Vanuatu Council of Women.

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### **Civil Judicial Procedures and Remedies**

There is an independent and impartial judiciary for civil matters, including for human rights violations; however, police were reluctant to enforce domestic court orders.

72. The "Women Living Under Muslim Laws" group reported on its website the following press release issued by the Fiji Women's Crisis Centre and the Pacific Women's Network Against Violence Against Women on 28/06/2008:

On 18 June, 2008 the Parliament of Vanuatu, an island in the Pacific, passed a Family Protection Order Bill.

The Fiji Women's Crisis Centre and the Pacific Women's Network Against Violence Against Women would like to congratulate the Vanuatu Women's Centre and the Vanuatu National Council of Women on the passing of the Family Protection Order Bill in Parliament.

This is a momentous occasion for the women of Vanuatu and a testament of the hard work done by the women's movement in Vanuatu over the past 10 years. Kudos also the Vanuatu government for recognising violence against women as a violation of women's human rights. We join you in celebrating this historic occasion.

The Ministry of Women, Community & Social Development, Government of Samoa joins others in congratulating the Vanuatu Women's focal point and all women of Vanuatu for this wonderful achievement.<sup>1</sup>

73. With respect to the situation of women in Vanuatu, Freedom House reported in 2007 as follows:

Few women hold positions of authority in government or the private sector. Local traditions are frequently sources of discrimination against women, including in the country's laws and before the courts. Violence against women is common and particularly severe in rural areas. Spousal rape is not a crime, and no law prohibits domestic abuse or sexual harassment. Most cases go unreported because the victims fear reprisal or are discouraged by family pressure, and the police and courts generally hesitate to intervene or impose stronger punishments on offenders. Women's rights leaders consider village chiefs to be major obstacles to improving conditions for women. The traditional practice of "bride payment," or dowry, is still common, and critics charge that it encourages the view of women as property. Abortion is permitted only to save the life of a woman or to preserve the woman's physical and mental health, and it is not available on request, even for pregnancies resulting from rape or incest. Men and women are supposed to enjoy equal rights, and

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divorce was approved in 1986, but the government has yet to pass a much-debated family law bill to provide protections to women and children.

74. A report prepared by Australia's Department of Foreign Affairs and Trade Post in Vanuatu (for the purposes of the application to the first Tribunal), issued to the RRT on 18 August 2008, noted the following:

Domestic violence against women is an issue throughout Vanuatu. It is largely seen as a family matter. Because of this, other community members or relatives of domestic violence victims are unlikely to intervene to protect a woman.

Culture plays an important part on the lives of Vanuatu. Many Vanuatu are caught in a society which is trying to find harmony between the traditional and modern ways of life. There is pressure to keep the traditions necessary for the continuation of culture but there are the modern ways of thinking and living which can often conflict with culture. As many marriages in Vanuatu involve a 'kastom' ceremony where the husband's family pays a 'bride price' for the woman, husbands can consider their wife as property.

Many women are subjected to domestic violence in Vanuatu, particularly in rural areas, [and] only consider contacting police as a last resort. This is often because of the fear of inciting greater violence from the husband but also because of the treatment that women can sometimes receive from police. Police can be slow to respond due to lack of police resources. However, it is relevant to note that a high proportion of Vanuatu's current prisoners are serving sentences for sex-related offences.

The Vanuatu Police Force (VPF) has a Family Protection Unit. The Unit deals with sexual offences, child abuse and domestic violence. However, as domestic violence is considered a family matter, only very serious cases are reported to police. Generally, the first step in dealing with cases of domestic violence cases is for the police to counsel the parties. Often the next step is for a local chief or chiefs to resolve the problem.

There are a number of organisations that provide services for victims of family violence. The Vanuatu Women's Centre is an independent community service organisation that provides counselling and legal services for victims of violence as well as community awareness and legal advocacy interventions throughout Vanuatu. The Centre has a network of island-based Committees Against Violence Against Women which undertake community awareness activities. Safe house services can be provided for women and a court fees fund is used to assist women with domestic violence court orders.

Women can obtain a Domestic Violence Protection Order (DVPO). These are processed by the Public Solicitor's Office and the Vanuatu Women's Centre can facilitate the process. DVPOs provide relatively quick and effective legal protection against domestic violence for a short period – generally around 14 days.

In many cases, domestic violence appears to be dealt with by village chiefs. Traditional courts, led by local chiefs, are empowered to hear cases dealing with a variety of issues including domestic violence cases. The traditional court case is resolved by the exchange of goods on both sides of the dispute. A chief will rarely find fault on only one side of the dispute and, we understand, will rarely, if ever, support the separation of a couple.

Some women seek support from Christian pastors. Like the chiefs, the pastors have a strong orientation towards reconciliation so the likely outcome can often be counselling to 'forgive and forget'.

Vanuatu's Constitution prohibits the discrimination against women. Article 5(1) states: 'The Constitution prohibits discrimination on the basis of race, place of origin, religious or traditional beliefs, political opinions, language or sex.' It appears that women remain victims of discrimination, particularly in rural areas where cultural traditions play a stronger role. The Vanuatu Government has a Gender Equity Policy which is explicit in identifying violence against women and discriminatory laws as a hindrance to the advancement of women.

Parliament passed a Family Protection Bill in June 2008 but it has not been implemented as the President of Vanuatu has referred the Bill to the Supreme Court over concerns that four of its provisions are unconstitutional. The Bill, which provides for the protection of women and children from domestic violence, creates a specific domestic violence offence, allows police to intervene in instances of domestic violence and excludes bride price payments as grounds for defence in domestic violence cases. The Bill also allows for people other than a complainant to apply for protection orders and for applications to be made orally and by telephone if necessary.

We note in the tasking cable that the applicant's agent's submission has stated the applicant cannot relocate within Vanuatu as her (former) husband would become aware of her presence and track her down. This is possible. Family ties in Vanuatu's population of 212,000 spread across 80 islands are strong. There could be no guarantee that the former husband would not become aware of the applicant's presence – including in the two main commercial centres of Port Vila and Luganville. Discussions with those who work on domestic violence matters indicated that there could be no guarantee that divorce ensures an ex-husband is not violent towards a former wife.

For the preparation of this report, Post consulted with the Vanuatu Police Force, the Vanuatu Women's Centre and AusAID at Post. Reports consulted include:

- *Roselyn Tor and Anthea Toka, 'Gender Kastom and Domestic Violence: a research on the historical trend, extent and impact of domestic violence in Vanuatu, (Draft 2), Department of Women's Affairs, Vanuatu Government, August 2004.*
- *AusAID Office of Development Effectiveness, 'Addressing Violence Against Women in Melanesia and East Timor, Vanuatu Country Supplement (draft - not yet published)*
- *Pacific Prevention of Domestic Violence Programme (PPDVP), New Zealand report on a scoping visit to Vanuatu, December 2007 (draft - not published).*

75. Vanuatu's Family Protection Act came into effect on 2 March 2009. The object of this Act is stated thus: "to provide for an offence of domestic violence and family protection orders in cases of domestic violence, and for related purposes" (Republic of Vanuatu 2009, 'The Family Protection Act, No. 28 of 2008', 2 March [http://www.paclii.org/vu/legis/num\\_act/fpa2008206.rtf](http://www.paclii.org/vu/legis/num_act/fpa2008206.rtf) - Accessed 23 November 2009).

76. The AusAID August 2009 report on violence against women in Melanesia included the information that the Family Protection Bill was signed by the President of Vanuatu on 23 December 2008 and gazetted on 2 March 2009. The report included the following:

The Family Protection Act (FPA) has significantly improved legal protections for women who have experienced violence. It creates a specific domestic violence offence and confers obligations on the police to intervene if violence is suspected. Enforceable Family Protection Orders can be made by courts to constrain the behaviour of perpetrators for up to two years. Protection orders can be made on the basis that acts of domestic violence have been, or are likely to be, committed. Further, the FPA excludes the payment of bride price as grounds for defence in domestic violence cases.

Women in rural areas generally have difficulty accessing the formal justice system, due to distance and cost, and often rely on kastom law. Traditional courts are empowered to hear cases relating to domestic violence but are not supposed to deal with cases of sexual assault. The FPA aims to increase the accessibility of protection orders for women in remote areas by allowing people other than a complainant to apply for a protection order orally or by telephone, and by permitting authorised community members to issue temporary protection orders to protect complainants for up to 28 days.

The Vanuatu Police Force does not currently have formal protocols in place to respond to violence against women. There is a need for formal procedures and ongoing training for police to support them in responding to violence against women.

Vanuatu is one of six countries that will be participating in the project Changing Laws, Protecting Women. The project is being carried out by the Pacific Regional Rights Resource Team with funding under the 2008 grants round of the UN Trust Fund in Support of Actions to End Violence against Women (the Global Trust Fund). Through this project, the Regional Rights Resource Team will work with the Government of Vanuatu to advance legislation to combat gender violence.

...The Family Protection Act represents an important legislative reform for addressing violence against women, providing a specific basis for legal action for survivors of violence.

The Department of Women's Affairs is playing a key role in implementing the legislation. One objective of the Department of Women's Affairs' draft implementation strategy for the FPA is to provide a safe environment for women and increase women's access to justice. Activities proposed in the draft strategy to achieve this include improving advocacy on gender equality under the law; increasing access to legal solutions to family problems; holding workshops on gender issues with key justice system personnel; and using positive traditional justice processes.

...The Family Protection Act, which came into effect in March 2009, is the cornerstone of Government of Vanuatu efforts to protect women and children from domestic violence. One component of the draft implementation strategy for the FPA, managed by the Department of Women's Affairs, is the prevention of violence against women. It aims to increase community awareness of violence against women and children as being a violation of human rights. Awareness raising, community education and research into violence against women are planned to meet this objective.

...The government, through the Department of Women's Affairs, is planning a two-year implementation strategy for the Family Protection Act. The strategy, still in draft form, focuses on three key areas: prevention, protection and punishment (Australian Agency for International Development (AusAID) 2009, 'Vanuatu' in *Stop Violence: Responding to Violence Against Women in Melanesia and East Timor* 2009, August, pp. 93-94, 98, 101



[http://www.ausaid.gov.au/publications/pdf/ResVAW\\_vanuatu.pdf](http://www.ausaid.gov.au/publications/pdf/ResVAW_vanuatu.pdf) – Accessed 23 November 2009 – file://melsrv1\melref\INTERNET\vut35779.we1.pdf).

77. A June 2009 report by the United Nations Human Rights Council provides the following information:

8...The Minister of Justice has appointed a Vanuatu Committee on the Elimination of Discrimination against Women, comprised of Government officials and representatives of non-governmental organizations, to oversee the implementation of the concluding comments of the Committee on the Elimination of Discrimination against Women. With regard to the universal period review report, two Government officials were part of the committee that prepared the non-governmental organizations' submission. Vanuatu's attendance and participation in the present review reaffirmed its commitment to human rights.

15. Vanuatu has progressed in the protection of women's rights by passing the Family Protection Act. The Ministry of Justice and Social Welfare through the Department of Women's Affairs is working on a draft conceptual framework for the implementation of the Act focusing on prevention, protection and punishment. Meetings are being conducted with stakeholders involved in implementing this Act to take stock of what is being done under these thematic interventions. A feasibility study on the strengths and weaknesses [sic] regarding resources in all provinces will be undertaken before a province can be identified [sic] to pilot implementation of the Act.

16. The Police Academy is being trained to handle domestic violence cases and sexual assaults. The Ministry of Justice and Social Welfare will push for better infrastructure and services to give women easy and affordable access to justice, and for training of registered counsellors and authorized persons, including chiefs, teachers, community leaders, judiciary, health workers and police, who will be working towards women's access to justice. The Department of Women's Affairs will run advocacy and awareness training programmes on domestic violence and the Act.

17. The Government will compile existing laws on family issues such as marriage, child maintenance, family maintenance, property rights and maintenance after divorce, family protection and temporary domestic violence orders into one consolidated family law.

...27...Congratulating Vanuatu on legislative steps towards the elimination of domestic violence against women and children, including through the Family Protection Act, [Australia] recommended (a) taking prompt action to implement the new legislation (United Nations Human Rights Council 2009, *Report of the Working Group on the Universal Periodic Review – Vanuatu*, UNHCR Refworld website, 4 June, pp. 4-6 <http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain>

78. A draft report of the Human Rights Council on its Twelfth Session dated 2 October 2009 states:

The representative of Vanuatu said that the Family Protection Act came into effect. Vanuatu had taken positive steps to ensure its full implementation. The Government was working on awareness programmes for the Family Protection Act in collaboration with a leading NGO working on violence against women. Moreover, Vanuatu was prioritizing work on a proposal for the review of all relevant legislations that are discriminatory and marginalize women. Vanuatu had established a Family Protection Unit within the Police Force to deal with issues related to domestic violence with a view to ensuring that all cases are properly investigated (United Nations Human Rights Council 2009, 'Draft Report of the Human Rights Council on its Twelfth Session' *Human Rights Council A/HRC/12/L.10*, 2 October [http://www2.ohchr.org/english/bodies/hrcouncil/docs/12session/HRC\\_12\\_](http://www2.ohchr.org/english/bodies/hrcouncil/docs/12session/HRC_12_)

79. An article on Amnesty International’s website indicates “Amnesty International welcomes the progress made towards ensuring that human rights are promoted and protected in Vanuatu, including through the enactment by Parliament of the Family Protection Act in June 2008, which is the first dedicated domestic violence legislation in Pacific Island countries. Amnesty International now urges the government to proceed with the implementation of the Act, including through training programmes for stakeholders and the allocation of adequate resources” (Amnesty International 2009, ‘Human Rights Council adopts Universal Periodic Review Outcome on Vanuatu: Amnesty International welcomes new Family Law’, Amnesty International website, 25 September <http://www.amnesty.org/en/library/asset/ASA44/001/2009/en/2fe16348-6a56-43fb-b131-36938bb773b4/asa440012009en.html> - Accessed 23 November 2009 - \\melsrv1\melref\INTERNET\vut35779.we3.doc).
80. The United Nations Convention on the elimination of All Forms of Discrimination against Women (CEDAW) included the following in its report for the Thirty-eighth session 14 May to 1 June 2007

**Concluding comments of the Committee on the Elimination of Discrimination against Women: Vanuatu**

.....

10. The Committee is concerned that, although the Convention was ratified in 1995, the Convention has not yet been fully incorporated into domestic legislation. The Committee is deeply concerned that the Constitution gives equal status to cultural and religious norms, some of which have an adverse impact on women’s enjoyment of their human rights, with legal norms. The Committee is further concerned that the principle of equality of women and men and the prohibition of discrimination lacks primacy over contradictory norms of customary law. The Committee is also concerned that neither the Constitution nor other domestic legislation contain a definition of discrimination against women in accordance with article 1 of the Convention, which prohibits both direct and indirect discrimination.

.....

22. The Committee is concerned about the persistence of adverse cultural 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. The Committee is concerned that such customs and practices perpetuate

discrimination against women, and are reflected in women's disadvantageous and unequal status in many areas, including in public life and decision-making, and in marriage and family relations, and the persistence of violence against women, and that so far, the State party has taken ad hoc, rather than sustained and systematic, action to modify or eliminate stereotypes and negative cultural values and practices.

**23. The Committee requests the State party to view its specific culture as a dynamic aspect of the country's life and social fabric and therefore subject to change. It urges the State party to put in place without delay a comprehensive strategy, including legislation, to modify or eliminate cultural practices and stereotypes that discriminate against women, in conformity with articles 2 (f) and 5 (a) of the Convention. Such measures should include awareness-raising efforts targeting women and men at all levels of society, including traditional leaders, and be undertaken in collaboration with civil society and women's organizations. The Committee encourages the State party to effectively use innovative measures in targeting young people and adults through the educational system to strengthen understanding of the equality of women and men, and to work with the media so as to enhance a positive and non-stereotypical portrayal of women. It also requests the State party to put in place monitoring mechanisms and to regularly assess progress made towards the achievement of established goals in this respect.**

24. The Committee is concerned about the prevalence of violence against women and girls, including cultural practices that constitute, or perpetuate, violence against women. The Committee is especially concerned about the use of customary methods of punishment (*kastom faen*) in cases of rape, which may act as a substitute for or lessen the punishment of offenders provided for in the law.

**25. The Committee urges the State party to give priority attention to combating violence against women and to adopt comprehensive measures to address all forms of violence against women and girls, in accordance with its**

**general recommendation 19. It requests the State party to raise public awareness, through media and education programmes, that all forms of violence against women, including domestic violence, are a form of discrimination under the Convention and unacceptable. The Committee calls on the State party to enact legislation concerning all forms of violence against women, including sexual abuse and sexual harassment, as soon as possible, so**

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**as to ensure that violence against women and girls constitutes a criminal offence. It calls on the State party to ensure that women and girls who are victims of violence have access to immediate and effective means of redress and protection and that perpetrators are prosecuted and punished. The Committee requests the State party to remove impediments women face in gaining access to justice, and recommends that legal aid be made available to all victims of violence, particularly in rural/remote areas. The Committee recommends the implementation of training for the judiciary and public officials, in particular law enforcement personnel, and health-service providers, in order to ensure that they are sensitized to all forms of violence against women and can provide adequate support to victims.**

81. On 2 December 2009 the Tribunal requested DFAT to provide information with respect to the following issues: the number of cases relating to domestic violence claims under the Family Protection Act since its enactment in Pt Vila and elsewhere; the number of protection orders granted under the Family Protection Act for domestic violence; information in relation to temporary protection orders with respect to domestic violence made under s.17 of the Family Protection Act by authorised persons under s.29 and any further information about the implementation of the Family Protection Act.

82. DFAT responded on 23 December 2009 with the following information:

**Summary**

In response to the research request from the Refugee Review Tribunal, Post advises that the Vanuatu courts have not proceeded with any cases or protection orders since the gazettal of the Family Protection Act on 29 March 2009. We understand the courts' position is there are currently no training or support services to complement the new Act. A number of information sessions have actually been delivered to Vanuatu Police Force officers around the country. AusAID also has a six month part-time technical adviser working with the Vanuatu

Department of Women's Affairs to put in place a structure to ensure the Act is implemented effectively.

### Questions

**A. The number of cases relating to domestic violence (DV) claims under the FPA legislation since its enactment in Port Vila and elsewhere.**

Nil.

**B. The number of protection orders granted under the FPA for DV.**

Nil.

**C. Any information in relation to temporary protection orders granted under the FPA for DV.**

The Vanuatu Family Protection Act was gazetted and effective from 29 March 2009. We understand no Domestic Violence charges have been proceeded with in Vanuatu courts.

**D. Any further information about the implementation of the FPA.**

The Vanuatu courts are not accepting applications for Family Protection Orders (FPOs) and Temporary Protection Orders (TPOs) under the new Act. We understand the courts' position is that all applications must be under the "old" *Civil Procedures Code*. The basis for this decision is that there are currently no training or support services to complement the new Act.

The Prosecutor's office has advised that three FPA charges were laid in Santo (none as yet in Port Vila). Of the Santo cases, all charges were eventually withdrawn as they were duplicitous with the main charge of Assault under the Penal Code.

A number of information sessions on the FPA have been delivered to members of the Vanuatu Police Force, in Port Vila on Efate and on Tanna, Santo and Malekula. All police who undertake refresher training are given briefings on the new Act. All new police recruits are also briefed.

The Australian Government's aid agency, AusAID, has a six month part-time technical adviser working with the Vanuatu Department of Women's Affairs to put in place a structure to ensure the Act is implemented effectively.<sup>2</sup>

## FINDINGS AND REASONS

83. The Tribunal accepts that the applicant is a citizen of the Republic of Vanuatu and that she is outside of that country.
84. There is no evidence to suggest that the applicant is a national of, or has a right to reside in, any other country. The Tribunal is satisfied that the applicant has no such right.
85. The Tribunal found the first named applicant's oral evidence at the hearing was credible and consistent against the claims she has made in relation to her application for a protection visa. The Tribunal was impressed by the applicant's response to the question whether she would receive protection from the Vanuatu police if she were to return to that country now because she was candid in her response that because she has been out of Vanuatu for 6 years she does not know what level of protection the police might afford her.

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<sup>2</sup> Department of Foreign Affairs and Trade 2009, *DFAT Report No. 1091 – Vanuatu*.

86. The Tribunal is satisfied that the applicant's claims in relation to conditions in Vanuatu with respect to women generally and specifically the conditions affecting those women who are victims of domestic violence are consistent with country information about the treatment of women in Vanuatu. The Tribunal accepts the applicant's oral evidence taken at the hearing as reliable and gives it considerable weight.

### **Claims**

87. The applicant has described numerous assaults against her by her husband throughout her marriage until 2004 when she came to Australia. The Tribunal accepts that physical acts of violence such as have been inflicted on the applicant by her husband over the years, some of which were vicious and extreme. The Tribunal is satisfied the applicant's husband's conduct towards her represents significant physical harassment of her for the purposes of s.91R of the Act.
88. The Tribunal accepts that the applicant has suffered serious harm from her husband in the past and it further accepts that she faces a real chance of serious harm from him in the reasonably foreseeable future if she were to return to Vanuatu.
89. The Tribunal is satisfied that this treatment amounts to 'serious harm' as required by subsection 91R(1)(b) of the Act and that as required by subsection 91R(1)(c), the persecution she faces involves systemic and discriminatory conduct and involves her selectively for a Convention reason.

### **Convention nexus**

90. The persecution which the applicant fears must be for one or more of the reasons set out in the Convention definition – race, religion, nationality, membership of a particular social group or political opinion.
91. The applicant has claimed that her circumstances attract the Convention ground of particular social group. The meaning of the expression 'for reasons of .. membership of a particular social group' was considered by the High Court in *Applicant A's* case and also in *Applicant S*. In *Applicant S* Gleeson CJ, Gummow and Kirby JJ gave the following summary of principles for the determination of whether a group falls within the definition of particular social group at [36]:
- ... 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". ...
92. Whether a supposed group is a 'particular social group' in a society will depend upon all of the evidence including relevant information regarding legal, social, cultural and religious norms in the country. Furthermore, the Tribunal must be satisfied that the persecution feared is for reasons of membership of a particular social group, being a group that shares a common element that sets them apart from society at large.

93. The Tribunal is satisfied that the applicant belongs to a social group with the characteristic or attribute common to the entire identified group being that they are “women in Vanuatu”. The Tribunal is satisfied that the essential and significant reason that the applicant could experience persecution in Vanuatu, if her claims are made out, is the reason of her membership of the particular social group comprising women in Vanuatu, thereby satisfying the requirements of s.91R(1)(a).

### **Well founded fear of persecution**

#### *Risk of Serious Harm Capable of Amounting to Persecution*

94. In light of its acceptance of the applicant’s claims, and having regard to the country information before it, the Tribunal finds that if the applicant were to return to Vanuatu there is a real chance that she will experience serious harm in the reasonably foreseeable future capable of amounting to persecution for the purposes of s.91R(1)(b) and 91R(2) of the Act, such as serious physical harassment or mistreatment, or possibly worse.
95. In light of its acceptance of the applicant’s claims and the country information available to it, the Tribunal also finds for the purposes of s.91R(1) that any such serious harm would involve systematic and discriminatory conduct for the purposes of s.91R(2)(c).

### **Availability of State protection**

96. The Tribunal finds, on the basis of the country information extracted above generally, that the threat which the applicant would face upon her return to Vanuatu is from a private individual, namely her husband, and the issue of state protection therefore arises.
97. The Tribunal is mindful of the terms of Federal Court judgement that ordered the applicant’s application for a protection visa be remitted to the Tribunal. The critical issue for the Tribunal’s consideration is whether the Vanuatu authorities condone, approve or tolerate or are indifferent to domestic violence in Vanuatu, or are unwilling or unable to afford protection to the victims of that violence. If the Tribunal finds that such circumstances exist then on application of *Khwar*, “the requirement that the persecution be by reason of one of the Convention grounds may be satisfied by the motivation of either the criminals or the state [or one of its agents]: *Khwar*, at [31].”

#### *Evaluation of the law and the cultural norms and practices in Vanuatu with respect to domestic violence*

98. In relation to the law with respect to domestic violence in Vanuatu, it was claimed before the first Tribunal that the lack of domestic violence laws in Vanuatu was indicative of the withholding of protection to the applicant and during this review that claim has been the central focus by the representative in her written submissions to the Tribunal.
99. The Tribunal notes that country information indicates that Vanuatu’s legal system contains provision for protection of victims of assault through the common law. During the hearing before the first Tribunal the applicant said she did not ever report her husband to the police and in that context she told the first Tribunal that police can only

do what they can and that they have been born and bred under the influence of cultural customs in Vanuatu.

100. She gave evidence to this Tribunal that if she had reported her husband to the police after he broke her teeth then the police would have visited him and he would have told them that the matter was a family issue and that they did not have any business in the matter. The applicant further told the Tribunal that she did not ever report her husband to the Vanuatu police for fear of further violence from him and because they would not give her the protection she required.
101. Country information indicates police in Vanuatu have been reluctant to intervene in domestic violence matters and that courts have ‘occasionally’ prosecuted offenders in domestic violence matters using common law assault as the basis for prosecution. Country information further shows that women in Vanuatu only consider contacting the police as a last resort because of the fear of inciting further violence from their husbands and also because police can be slow to respond due to lack of resources.
102. Country information also indicates that because domestic violence is largely seen as a family matter, the community or relatives of domestic violence victims are unlikely to intervene.
103. Taking all of the above into account and on the basis of country information before it that women who are the victims of domestic violence in Vanuatu have not been and are not afforded a reasonable level of protection by its common law assault laws.
104. It is significant and relevant to this case that the Family Protection Act (hereafter “the FP Act”) came into effect on 2 March 2009. The Tribunal gives weight to the AusAID 2009 report on violence against women in Melanesia, noting that while the FP Act is regarded as the cornerstone of the Vanuatu government’s efforts to protect women and children from domestic violence, the Vanuatu police force do not have formal protocols in place to respond to violence against women. The report relevantly also states that there is a need for such protocols to respond to violence against women in Vanuatu and that there is a two year implementation strategy of the FP Act being planned through the Department of Women’s Affairs that at the time of the report was in draft form.
105. The Tribunal gives significant weight to the DFAT report of 4 January 2010 set out above that included the information that the Vanuatu courts are not accepting applications for protection orders or temporary protection orders under the FP Act for the reason that there are currently no training or support services to complement the new Act.
106. The Tribunal further notes that DFAT reported that AusAID has a six month part-time technical adviser working with the Vanuatu Department of Women’s Affairs to put in place a structure to ensure the Act is implemented effectively.
107. The Tribunal is satisfied that at time of decision the FP Act is not yet effectively implemented in Vanuatu and that effective implementation of the Act is very much in a developmental stage with only a part time advisor working with the Department of Women’s Affairs to formulate a plan for implementation of the Act.

*Cultural norms and practices in Vanuatu in relation to domestic violence*



108. The applicant gave oral evidence to this Tribunal that in Vanuatu the police use chiefs to sort out family and domestic violence disputes and that people in Vanuatu listen to chiefs. She made a distinction between 'police laws' and 'chiefs' laws' in Vanuatu. The applicant also gave evidence to the Tribunal that Vanuatu chiefs and church leaders push for reconciliation in domestic violence cases. She further claimed that husbands who have committed domestic violence against their wives in Vanuatu are not known to cease their violent conduct after a chief has intervened.
109. The Tribunal notes that country information indicates that the cultural practice of village chiefs resolving domestic violence disputes in Vanuatu is resolved by the exchanging of goods with rare support for the separation of a couple or a finding of fault of one of the parties.
110. The Tribunal refers to the CEDAW report above in particular paragraphs 22 to 25 noting the references to the Committee's concern that adverse customs and practices in Vanuatu perpetuate discrimination against women in many areas of life including marriage and family relations and its express reference in paragraph 24 to its concern about the prevalence of violence against women.
111. The Tribunal accepts as plausible and reasonable in light of country information, the applicant's claim that because her husband was an elder of his church that she faced very significant hurdles in approaching other elders in his church or persons with leadership positions in other churches for assistance in relation to his violent conduct.
112. The Tribunal is satisfied on the evidence before it that cultural norms and practices with respect to domestic violence in Vanuatu have not in the past and do not presently afford a system of adequate protection for the female victims of that violence.
113. In consequence of country information cited above and accepting the applicant's claims with respect to the inadequate standard of protection for domestic violence victims through common law assault prosecutions, taking into account the failure of the Vanuatu authorities to have effectively implemented the FP Act and the lack of protection in accordance with cultural norms and practices, the Tribunal is satisfied that the Vanuatu authorities are unable to provide a level of protection to women who are victims of domestic violence that is in accordance with international standards.

### **Internal Relocation**

114. The Tribunal has considered whether it would be reasonable for the applicant to relocate to another part of Vanuatu where she would be less at risk from her husband. The Tribunal notes and accepts the applicant's evidence that while it may be possible for her to rent a house on an island in relation to which her husband has no connection, she has no access to funds to pay rent.
115. The Tribunal accepts the applicant's claim that soon after her arrival at the airport in Port Vila her husband would be aware that she had arrived in Vanuatu because it is a small town where everyone knows each other. The Tribunal further accepts that it is more than likely that her husband would search for her because, as country information indicates, she is his property in accordance with the bride price culture. The Tribunal further takes into account that if the applicant were to return to Vanuatu she would naturally want to be reunited with her children and it is satisfied that their knowledge of

her presence in Vanuatu and the public knowledge of her arrival at the airport would soon filter through to her husband.

116. The Tribunal is satisfied that it would be unreasonable for the applicant to establish herself in another part of Vanuatu where she would more than likely be located by her husband and be without adequate protection from the law of Vanuatu or from local customs and practices to assist her to put an end to her husband's violent conduct towards her.
117. For the above reasons the Tribunal is therefore satisfied that Vanuatu fails to protect members of the particular social group "women in Vanuatu" from serious harm. The Tribunal further finds that the applicant's fear is a well founded fear for a Convention reason and that therefore she is a refugee within the meaning of article 1A(2) of the Convention.

## **CONCLUSIONS**

118. The Tribunal is therefore satisfied that the applicant is a person to whom Australia has protection obligations under the Refugees Convention and that she satisfies the criterion set out in s.36(2)(a) for a protection visa.

## **DECISION**

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

I certify that this decision contains no information which might identify the applicant or any relative or dependant of the applicant or that is the subject of a direction pursuant to section 440 of the *Migration Act 1958*.

Sealing Officer's I.D. PRMHSE