

**1200057 [2012] RRTA 531 (23 July 2012)**

**DECISION RECORD**

**RRT CASE NUMBER:** 1200057

**DIAC REFERENCE(S):** clf2011/90259 CLF2012/34455 CLF2012/34455\*

**COUNTRY OF REFERENCE:** Burundi

**TRIBUNAL MEMBER:** Carolyn Wilson

**DATE:** 23 July 2012

**PLACE OF DECISION:** Adelaide

**DECISION:** The Tribunal remits the matter for reconsideration with the direction that the applicants satisfy 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 applicants Protection (Class XA) visas under s.65 of the *Migration Act 1958* (the Act).
2. The applicants who claim to be citizens of Burundi, applied to the Department of Immigration for the visas on [date deleted under s.431(2) of the Migration Act 1958 as this information may identify the applicant] May 2011.
3. The delegate refused to grant the visas [in] December 2011, and the applicants 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.

### **Member of the same family unit**

19. Subsections 36(2)(b) and (c) provide as an alternative criterion that the applicant is a non-citizen in Australia who is a member of the same family unit as a non-citizen mentioned in s.36(2)(a) or (aa) who holds a protection visa. Section 5(1) of the Act provides that one person is a 'member of the same family unit' as another if either is a member of the family unit of the other or each is a member of the family unit of a third person. Section 5(1) also provides that 'member of the family unit' of a person has the meaning given by the Regulations for the purposes of the definition. The expression is defined in r.1.12 of the Regulations to include spouse.

### **CLAIMS AND EVIDENCE**

20. The Tribunal has before it the Department's file relating to the applicants. 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.
21. The applicants are both citizens of Burundi, as evidenced by their passports, and state they are husband and wife. They arrived in Australia [in] April 2011 as the holders of Subclass 679 Visitor visas.

### **Protection visa application**

22. The applicants provided a joint statement with their applications for Protection visas. In the written statement they state they joined the opposition party Movement for Solidarity and Democracy (MSD) in 2005. They were 'active members and helped organise meetings and made financial contributions' Later, such meetings were banned. In 2009 stones were thrown at their house and in February the police questioned the first named applicant about why he was supporting the opposition and making financial contributions. He was beaten and suffered a broken wrist and tooth. Whilst visiting him in hospital [in] February 2009, the second named applicant was stopped by 4 policemen who told her to stop supporting the opposition or she would receive the same treatment. They received further threats at home calling them 'evil Tutsi' They moved house and continued to conduct their import business. They paid bribes to police but travelled outside Burundi including trips to [Countries deleted: s.431(2)]. They did not face further problems until May to August 2010. Police threatened people and tried to force the population to vote for the ruling CNDD-FDD party. They received threatening phone calls. Members of the party living in rural areas were killed. [In] January 2011 three people came to their shop and tied them to a chair but they were rescued by a client. The first named applicant received another summons in February 2011, which he ignored. On [a date in] February 2011 the second named applicant was followed when driving home from a meeting at the Women's Association. They were invited to his brother's daughter's wedding in Australia and visas were granted and they left Burundi [in] April 2011. A friend helped them at the airport to get the exit stamp. The applicant states that they cannot get any protection from police or government. There is a list of 40 persons to be killed, and a [relative] is on the list. They are concerned about the welfare of their adopted [children].

### **Delegate's decision**

23. The delegate refused the application as he was satisfied the applicants had an existing legally enforceable right to enter and reside in any of the East African Community (EAC) countries. The EAC agreement provides for the free movement of citizens between member countries. The delegate notes in his decision that the applicants agreed at interview that they were entitled to enter and reside in any of these countries, but stated that there was no safe place in any of the countries and that they could be found anywhere.
24. The delegate did not accept that the applicants had a political profile that would be associated with the level of interest that would entail them being pursued in another country. They helped to organise some meetings and provided some financial support. They did not hold leadership positions or speak at meetings.
25. The delegate considered that the ability of the second named applicant to fly to Nairobi to obtain the Australian visas without hindrance made it unlikely that they would need the assistance of a friend in order for both of them to leave Burundi. The delegate did not accept that the EAC was a small community that would allow everyone knowing you were there, as Uganda alone had a population of 33 million people. The EAC countries were signatories to the Refugee Convention and were bound by the *non-refoulement* obligation in Article 33(1) of the Convention. The applicants did not have a well-founded fear of Refugee-Convention-based persecution in any of the EAC countries.

### **Application for review**

26. The applicants were represented in relation to the review by their registered migration agent.

27. [In] March 2012 the Tribunal received submissions and evidence from the representative, including:
- Statutory declaration of the applicants dated [in] March 2012. They declare the delegate was wrong to find they could reside in other EAC countries. They concede they can visit those countries but declare they are not able to reside because they do not have work permits. Even if they could reside in another EAC country they do not believe there is any assurance of security in those countries. They also dispute the delegate's finding they are not of sufficient profile to attract attention and state hundreds of normal Burundian citizens, like themselves, have been targeted and killed. They declare the delegate has failed to take into account the persecution they already suffered in Burundi at the hands of police.
  - Psychological report prepared by [Mr A], Senior Clinical Psychologist, dated [in] February 2012. [Mr A] states the first named applicant suffers severe levels of depression, anxiety and stress. In his opinion there are three causes for these conditions: the long period of political persecution he experienced; his diagnosis of [illness deleted: s.431(2)]; and his fear for the future if returned to Burundi.
  - Medical report of [Dr B], Royal Adelaide Hospital, dated [in] November 2011. [Dr B] states she first reviewed the applicant [in] July 2011 when he was referred by Immigration following a positive [test]. In her opinion the applicant has the potential of a normal lifespan if he is able to remain in Australia and continue [details of treatment deleted: s.431(2)].
  - Report from [Ms C], Counsellor, Relationships Australia, dated [in] January 2012. [Ms C] states she is counselling the applicant to provide support with dealing with his [illness].
  - Numerous articles and reports about Burundi, including articles on the arrest of Alexis Sinduhije at Dar es Salaam in an operation allegedly involving Tanzanian and Burundian intelligence.
  - Extracts from the Protocol on the Establishment of the East African Community Common Market.
28. [In] April 2012 the representative provided a report prepared by [name and position deleted: s.431(2)], Amnesty International Australia. The report was prepared at the request of the applicants to support the application. The Tribunal has reproduced sections of that report under the heading of Country Information below.
29. The applicants appeared before the Tribunal [in] May 2012 to give evidence and present arguments. The first named applicant's [brother] came to the hearing as a support person. The Tribunal hearing was conducted with the assistance of an interpreter in the French and English languages.
30. The Tribunal raised with the first named applicant that it was aware of the psychologist report from [Mr A] and noted it stated the first named applicant suffered from severe depression, anxiety and stress as well as having trouble with concentration and his memory. The Tribunal asked how he was feeling today. The applicant said he did suffer from those things but today he was feeling well. The Tribunal asked if he had taken any medication that day

which might affect his ability to concentrate, such as valium, and he said no he had only taken medication for his high blood pressure. The Tribunal invited the first named applicant to seek a break if at any time he felt he needed it. The Tribunal also said that if he was having trouble remembering something it would be better to say so rather than guess at answers. The Tribunal asked if it would be easier for him to answer questions first or would he prefer to listen to his wife answering questions so he would know what would be expected. He said he would prefer to go first.

31. The first named applicant confirmed he was born in Burundi and had lived there all his life. He has two sisters still in Burundi, his parents are deceased and he has other brothers, sisters and half brothers and sisters who are either deceased or their whereabouts is unknown. He has a brother who has lived in [Australia] for the last 10 years. His brother was granted a protection visa with his wife. He doesn't know their exact claim but he knows they feared for their safety.
32. The first named applicant said he and his wife look after [details of children deleted: s.431(2)]. The children are still living in their house and are being cared for by friends and neighbours. They keep in contact with them by telephone.
33. The first named applicant said he had previously travelled to [details of business travel deleted: s.431(2)]. He went for business purposes about every three months. He imported [building materials]. He had also travelled to [details of business travel deleted: s.431(2)] for business purposes. He had no trouble exiting or re-entering Burundi.
34. The Tribunal asked the first named applicant when he joined the MSD. He said he joined in 2005. He was impressed with the leader of the party and his views on social welfare. The leader was previously a well-known journalist. It became an official party in 2007 but was around before that. The goal of the party was to bring democracy through trust, humility and humanity, and to have justice for all.
35. The first named applicant said he was involved in organising political meetings. He did things such as get the meeting room ready. He did this throughout the country, not just in his local area. He would also organise transport for members going to meetings. They had meetings every three months, until such political meetings were stopped by the party in power.
36. The first named applicant said the problems started in February 2009 when he received a summons from the police. He went to the police station and when he arrived they started interrogating him. They asked him about the MSD. They beat him and threatened to kill him if he didn't stop associating with the MSD. He suffered a lot as they used sharp objects under his feet and broke his left wrist. When they realised he wasn't breathing they took him by car and threw him out near the [Hospital] and some people passing by took him inside for treatment. He spent two weeks in hospital.
37. The first named applicant said he also received threatening anonymous phone calls. However up until the elections he didn't have too many problems.
38. The first named applicant said he remained an active member of the MSD. The Tribunal asked why he would do that, given the threats and the treatment by the police. He said he was convinced they would win the election in 2010. He believed the party in power would be

defeated and his party could form a coalition with other opposition parties. But then the party in power cheated in the elections.

39. The first named applicant said that after the elections he continued to get threatening phone calls. Sometimes they said to him that as a Tutsi he was not allowed to be part of a party.
40. The first named applicant said he was in his shop with his wife when 3 policemen entered. He and his wife were tied to chairs and beaten. The police left when a person came to collect merchandise. The Tribunal asked why the police would leave when only one person came in. He said all the beatings are done in a clandestine way and they don't want others to witness it. Maybe the police also feared more people would be coming.
41. Then in February 2011 he received another summons from the police. This time he didn't go because he was scared he would be tortured. The police won't give you judgment, they'll just lock you up in jail and people go missing this way. The Tribunal asked if the police had come looking for him and he said fortunately they had not. Then a few days later he received his visa to travel to Australia.
42. The Tribunal asked the first named applicant if he came to Australia intending to seek protection, and he said yes. After he and his wife had been assaulted by the police in 2011 he decided it would be good to get out of Burundi. He didn't know which country would accept him, but he jumped at the opportunity to come to Australia. The Tribunal asked why he hadn't brought his children with him. He said he wasn't sure he'd be able to. They knew some other people who applied for visas to Australia and they weren't granted.
43. The Tribunal asked if his children had been threatened. He said one son was beaten at school, but he's not sure why that happened. The Tribunal asked if the police had been to the house looking for him and he said not that he knew of.
44. The Tribunal asked the first named applicant whether he agreed with the delegate's conclusion that he had the right to enter and reside in other EAC countries. He said people are not safe in the EAC. They have the right to come and go but they don't have the right to live in other EAC countries unless they're working there.
45. The first named applicant said that at his age he wouldn't have tried to stay in another country like Australia unless he had a serious safety issue. He has suffered a lot in Burundi.
46. The second named applicant said she was born in Burundi and had always lived there. Her mother still lives in Burundi and she has a sister in [country deleted: s.431(2)]. Her sister moved there in 2001 with her [children] after her husband was killed. She has [details of children deleted: s.431(2)]. There has been a lot of war in Burundi since 1993 and she has taken in the children of her siblings and cousins when their parents have been killed. The Tribunal asked why she had arranged formal guardianship papers for them. She said it was for school purposes, as she needed to be officially recognised as the person caring for them. The children started living with them from 2005.
47. The second named applicant said she had previously travelled to [countries deleted: s.431(2)]. All the travel was for business for their shop, looking for prospective markets to import goods and materials from. Prior to working with her husband she had been a [vocation deleted: s.431(2)].



48. The second named applicant said the travel had been done before the elections. They didn't go anywhere after the elections. She went to Nairobi to get the visas. She disguised herself as a Muslim lady and paid someone to take her passport to be stamped. Once her passport was stamped she went straight to the transit lounge. She wore the disguise as she didn't want to be recognised. She used the same person to tip or bribe to get their passports stamped when they were coming to Australia and then went straight to the transit lounge. She said they didn't tell anyone they were going to Australia. They only told the children on the day they were travelling. She's not sure if the children have had problems since they left because they don't tell them things like that. She does know one of them was beaten and she fears it was because they left.
49. The Tribunal asked what had happened to their business since they left. She said they'd asked a friend and their oldest child to do a stocktake. The stock has been sold by this friend and the money has helped the children survive. She said they had done really well in their business and on the material level everything was fine for them. It was their safety they worried about.
50. The second named applicant said she joined the MSD from the beginning, about 2005. She and her husband joined because they really wanted change in Burundi. She liked the president of the party because he was all about justice, democracy and anti-corruption. She helped the party by trying to recruit more members. She'd talk to people about the party and help to organise meetings. She'd visit women and take them a gift such as rice or milk and talk to them about the MSD.
51. The second named applicant said they started having problems when her husband was beaten by police in 2009. When she went to visit him in hospital she was threatened by some people. They told her if she didn't leave the party she would have the same problems. She continued to support the party despite the threat because she and her husband believed in change. They thought there was a real chance their party could win in elections and you have to fight for change.
52. The second named applicant said they were living in fear and started changing addresses to avoid harm. They lived in 4 different [addresses]. The Tribunal asked how this would help, wouldn't anyone who wanted to harm them be able to find them in their shop. She said they didn't always work in the shop, they had a person working for them.
53. The second name applicant said she was followed one day on her way home from a Women's Association meeting. She was sure they were following her because whenever she stopped or accelerated they did too. She drove to a school where a friend worked and her friend took her out a back gate in another car. She was always in fear and then in January 2011 she and her husband were beaten in their shop.
54. The Tribunal asked her if they had come to Australia with the intention of seeking protection. She said at first it was just a vague idea but they had thought about it.
55. The Tribunal asked if they had thought about moving to another country in the EAC. She said if people want to find you in the EAC they can. Just like them, the police are free to move in and out of EAC countries. People have tried to flee to other EAC countries but they're not safe. For example, the President of the MSD was arrested in Tanzania. If the Tribunal looks at country information they will find many people from Burundi have been killed in EAC countries. They can enter but cannot reside in EAC countries as you can only

stay if you have working permit. They don't have a working permit and therefore don't have residency rights in other EAC countries.

### **Country Information**

56. The US Department of State 2011 report on Human Rights Practices in Burundi gives the following information on arbitrary or unlawful deprivation of life in Burundi:

The UN Office of the High Commissioner for Human Rights (UNOHCR) documented 61 cases of extrajudicial executions committed by police, intelligence service, military, and local government officials during the year. Members of the Youth Wing (Imbonerakure) of the ruling CNDD-FDD political party also were implicated in some of these cases. The UNOHCR conveyed all these cases and their documentation to representatives of an interministerial committee of the Ministry of Interior; the Ministry of National Solidarity, Human Rights, and Gender; the Ministry of Public Security; the National Intelligence Service (SNR); and others in the government. The UNOHCR monitored the government's actions on each case; as of November 30, no prosecutions were underway in any of the cases. Besides these 61 cases, through November 30, the UNOHCR documented an additional 42 cases of politically motivated assassination in which the perpetrators were unknown; the victims included members of the opposition parties National Liberation Front (FNL) and Movement for Solidarity and Democracy (MSD), as well as members of the ruling CNDD-FDD.

In November the UNOHCR requested from the Ministry of Justice a list of those police officials who the government claimed were in custody pending trial or serving jail terms for commission of human rights violations, including extrajudicial killings. As of mid-December the ministry did not produce the list. On May 19, the government established an ad hoc commission to investigate, within three months, incidents of violence committed before, during, and after the 2010 elections. By year's end the commission's report was not conveyed to the prosecutor general of the republic.

The government established an ad hoc commission under the jurisdiction of the public prosecutor for Bujumbura City to investigate cases of extrajudicial executions in Bujumbura Rurale Province reported during the period from November 2010 through June. In August the commission completed its investigations and transmitted its report to the prosecutor for Bujumbura City, but it did not release the report publicly. To address the numerous unsolved killings and allegations of extrajudicial executions and to prevent recurrences in the future, in September the government instructed all public prosecutors to open case files and pursue all murder cases, regardless of whether or not a suspect was in custody.

The new National Independent Human Rights Commission (CNIDH), which commenced its work in June, investigated as "emblematic" one case of extrajudicial execution, that of Joel Ndereyimana, who was killed on the night of June 22 while in the custody of police in Gihanga Commune, Bubanza Province. According to the commission's investigation, villagers apprehended Ndereyimana attempting to burglarize a local residence and turned him over to the local Ndava-Busongo village police. The Ndava-Busongo police then delivered Ndereyimana to Gihanga police chief Dieudonne Magorwa on the night of June 22. Ndereyimana was last seen alive

in Magorwa's custody; his corpse was discovered on June 23 in another location. On July 4, the commission requested the Bubanza prosecutor general to open a case file and pursue an investigation as required by law. The prosecutor general initially was reluctant to open a case file and did not do so until late July. The commission's on-site investigation revealed that the delay in opening the case was due primarily to the unwillingness of the two Ndava-Busongo village police officers to testify because certain unidentified senior police officials had threatened them with death if they talked to the commission or cooperated in any investigation. In August the commission recommended to the prosecutor general of the republic that Magorwa and a lower level police officer be charged formally with extrajudicial execution. The prosecutor general of the republic turned the case over to the Bubanza provincial prosecutor general for investigation. A trial date was set for October 26, but due to a strike by judges and court personnel, the hearing was rescheduled to begin after the end of the year.

Investigation into the alleged extrajudicial killing and beheading of opposition MSD party member Leandre Bukuru in November continued. The head prosecutor for the Gitega court of appeals investigated the case, as a local police commissioner was alleged to be involved in the killing. The CNIDH conducted its own investigation. Both investigations continued at year's end.

The Special Commission of Inquiry established by the minister of justice in November 2010 to investigate cases of extrajudicial executions in the provinces of Cibitoke and Bubanza through the end of October 2010 submitted its report to the prosecutor general of the republic in June. According to the prosecutor general of the republic, four cases involving local police officials were being pursued but, as of November 30, no one was arrested. In addition, no action was taken on the following cases from 2010: police officer Jackson Ndikuriyo, who was killed in August 2010 while in the custody of Bubanza Province Police Commissioner Remegie Nzeyimana and four other police officers; and Japhet Bigirimana (alias Kadura), Boniface Mahungu, Nsabiyaemye (alias Zairois), and Niyonkuru who were killed in September 2010 while in the custody of Police Chief Eugene Bizindavyi of Buganda Commune, Cibitoke Province, and other police officers.

In September the government's investigation of the 2010 killing of Fabien Mpfubusa found that Mpfubusa was shot while resisting arrest; four of his accomplices in the killing of two persons in Mubanga were charged and in detention. There was no independent information available to confirm or deny the allegation that Mpfubusa was a victim of extrajudicial execution.

Burundi has been marked by political turmoil since independence in 1962. In 1993, the Tutsi dominated army assassinated the then newly-elected President from the Hutu led Burundi Democratic Front (FRODEBU). This assassination sparked a long-running conflict between the army and Hutu rebel groups. Ethnic tensions were further exacerbated the following year when a second President from the FRODEBU party died in a plane crash. Between 1998 and 2000 a series of peace negotiations attempted to ameliorate tensions between ethnic factions, but four hard-line rebel groups, including the current ruling party, the National Council for the Defence of Democracy – Forces for the Defence of Democracy (CNDD-FDD), initially refused to sign the agreement.

The CNDD-FDD won the September 2005 elections and installed former rebel leader Pierre Nkurunziza as president. The new government continued to fight the National Liberation Forces (FNL), the dominant rebel group, as the CNDD-FDD, the FNL, and other rebel groups broke the peace agreement. In the following years, the CNDD-FDD government was accused of extrajudicial execution, torture and arbitrary arrest.

A number of new political parties have emerged in Burundi over the last ten years. During the 2010 elections however the government intensified restrictions on freedom of expression and freedom of association. Municipal election observers noted some irregularities and pre-electoral intimidation, but ‘found the elections to be broadly free and fair’. Opposition parties, however, rejected the outcomes and withdrew from the presidential and legislative elections, and the CNDD-FDD won by a large margin.

...

There were at least 242 election-related arrests documented by the United Nations during the election period, 62 of which were ‘politically motivated’. Individuals were charged with holding illegal meetings, threatening state security, and inciting the population to abstain from voting. The CNDD-FDD government, National Intelligence Service (SNR), and local police authorities were increasingly likely to resort to violent measures to silence dissidence, even after the election period.

...

President Nkurunziza reached an agreement with the presidents of four other East African nations – Kenya, Tanzania, Uganda and Rwanda – to form the EAC, an economic union that allows for the free movement of goods, capital and people within the member states. ..

Although any citizen of the EACT partner states is able to reside in a different EAC country, residency is contingent upon continuous employment. Moreover, movement between countries and obtaining a work visa still requires a valid passport or national identity document. In a 2010 report the University of Oxford’s Refugee Centre raised concerns about resettlement within the EAC as an alternative to refugee status...

...

According to a 2012 country summary released by Human Rights Watch, in 2011 there was an increase in both torture and killings by government agents as the government of Burundi continued to crack-down on civil society, media, and opposition parties. On 18 September 2011, for example, gunmen in military uniforms entered a bar in Gatumba, a town in Bujumbura Rural province, and began firing indiscriminately...

It has been reported that between June and November 2011, the Imbonerakure, which has been described as a ‘Government backed death squad’, was responsible for the deaths of 300 opposition members. Though they have largely targeted FNL members who have returned to the bush, Onesphore Nduwayo, head of the Government Action Observatory, said that the MSD opposition party ‘now appears to be in the eye of the storm’. Three MDS members were arrested and killed within two weeks in November 2011.

57. The Human Rights Watch report 'You Will Not Have Peace While You Are Living: The Escalation of Political Violence in Burundi' released in May 2012 summarises the situation as follows:

For many Burundians, 2011 was a dark year, marked by alarming patterns of political violence. Scores of people have been brutally killed in politically motivated attacks since the end of 2010. The state security forces, intelligence services, members of the ruling party and members of opposition groups have all used violence to target real or perceived opponents. The victims have included members and former members of political parties; members of their families; other individuals targeted because of their presumed sympathy with the ruling party or the opposition; demobilized rebel combatants; and men, women, and children with no known political affiliation who simply found themselves in the wrong place at the wrong time.

Political killings escalated throughout the year, with a string of targeted assassinations and a pattern of reprisals: killings of opposition sympathizers were quickly followed by killings of ruling party sympathizers, and vice-versa, leading to a cycle of violence that neither side seemed prepared.

...

Common to almost all these incidents is the blanket impunity protecting the perpetrators. In the vast majority of cases documented by Human Rights Watch, the individuals responsible for ordering or carrying out these killings have not been arrested, charged or tried, even when they have been identified by witnesses. Not only has the state failed to take reasonable steps to ensure security and provide protection for its citizens, it has also not fulfilled its duty to take all reasonable measures to prevent and prosecute these types of crimes.

The impunity has been particularly striking in cases where the perpetrators are believed to be linked to the security forces or the ruling party (National Council for the Defense of Democracy-Forces for the Defense of Democracy, *Conseil national pour la défense de la démocratie-Forces pour la défense de la démocratie*, CNDD-FDD). In these instances, most of the victims were members or former members of the National Liberation Forces (*Forces nationales de libération*, FNL), one of the main rebel groups during Burundi's civil war, which turned into a political party in 2009. In a minority of cases, members of other opposition parties, such as the Front for Democracy in Burundi (*Front pour la démocratie au Burundi*, FRODEBU) and the Movement for Solidarity and Democracy (*Mouvement pour la solidarité et la démocratie*, MSD), were also targeted by state agents or members of the ruling party.

...

Many opposition leaders have been living in exile since the 2010 elections; the coalition of opposition parties, the ADC-Ikibiri, is not officially recognized. Opposition leaders living in exile have refused to return to Burundi, despite public reassurances and invitations by the president, partly out of fear for their safety and partly because some do not believe that the government's overtures are in good faith. In this political impasse, both sides have resorted to violence to settle scores, and occasional international pressure and quiet diplomacy to find a peaceful solution have

not been successful. FNL elements and other opposition groups have retreated to the bush and to bases in neighboring Democratic Republic of Congo (DRC) and taken up arms once again, while elements of the security forces and other individuals close to the CNDD-FDD have carried out targeted assassinations against their opponents.

58. The EAC (Free Movement of Workers) Regulations, as reproduced on the official EAC website for Burundi ([www.eac.bi](http://www.eac.bi)), state:

## **REGULATION 2**

### **Purpose of Regulations**

The purpose of these Regulations is to implement the provisions of Article 10 of the Protocol and to ensure that there is uniformity among the Partner States in the implementation of the Article and that to the extent possible, the process is transparent, accountable, fair, predictable and consistent with the provisions of the Protocol.

...

## **REGULATION 4**

### **Scope of Application**

These Regulations shall apply to the following categories of citizens of a Partner State who move to, stay in and exit another Partner State:

- (a) workers;
- (b) spouses of workers; and
- (c) children of workers.

## **REGULATION 5**

### **Entry, Stay and Exit**

1. A citizen of a Partner State who seeks to enter or exit the territory of another Partner State as a worker, shall do so at entry or exit points designated in accordance with the national laws of the Partner State and shall comply with the established immigration procedures.
2. A citizen of a Partner State who seeks to enter the territory of another Partner State as a worker shall:
  - (a) present to the immigration officer a valid common standard travel document or a national identity card where a Partner State has agreed to use a machine readable and electronic national identity card as a travel document;
  - (b) declare all the information required for entry and exit; and
  - (c) present a contract of employment to the immigration officer.
3. The provisions of paragraph 2 (c) of this regulation shall not apply to the spouse and child of a worker.
4. Upon fulfilment of the requirements in paragraph 2 of this regulation, a citizen to whom these Regulations apply, shall be issued with a pass which shall entitle the citizen to enter into the territory of the host Partner State and stay for a period of up to six months for purposes of completing the formalities for obtaining a work permit.
5. The spouse or child of a worker shall be issued with a pass of a period not exceeding six months upon fulfilment of the requirements of paragraph 2 (a) and (b) of this regulation pending completion of formalities to obtain a dependant pass.
6. A pass issued under this regulation shall be issued without a fee.

## **REGULATION 6**

### **Procedure for Acquiring Work Permit**

1. A worker who has a contract of employment of a period of more than ninety days in the territory of another Partner State shall apply to the competent authority for a work permit within fifteen working days from the date of entry into the territory of the host Partner State.
2. The application for a work permit shall be supported by a valid common standard travel document or a national identity card, where that Partner State has agreed to use the national identity card as a travel document, the contract of employment and any other document the competent authority may require.
3. Notwithstanding paragraph 2 (c) of regulation 5 and paragraph 1 of this regulation, a citizen of a Partner State who, while in the territory of another Partner State concludes a contract of employment shall, apply to the competent authority for a work permit within fifteen working days from the date of concluding the contract.
4. Where a worker secures employment for a period of not more than ninety days, the worker shall apply for, and be issued with a special pass.
5. The special pass shall entitle the holder to enter, remain and work in the territory of the Partner State for the period stated in the pass.
6. Where a worker secures employment for a period of more than ninety days, the worker may, before being issued with a work permit, apply for, and be issued with a special pass.
7. The competent authority shall, within thirty days of application for a work permit, issue a work permit for an initial period of up to two years which may be renewed upon application.
8. The duration of the work permit issued under these Regulations shall not exceed the duration of the contract of employment or the duration of the validity of the common standard travel document presented under paragraph 2 of regulation 5.
9. The work permit or a special pass issued under these Regulations shall be issued in accordance with the harmonized classification of work permit and forms, fees and procedures as may be approved by the Council.
10. An employer shall furnish the competent authority with an annual return of the workers from another Partner State in his or her establishment.
11. Where the holder of a work permit ceases to engage in the employment in respect of which the work permit was issued, the employer specified in the work permit shall, within fifteen days of the cessation of the employment in writing, inform the competent authority.
12. Where a worker changes employment in respect of which the work permit was issued, the worker shall within fifteen days of the change of employment, in writing, notify the competent authority and shall apply to the competent authority for another work permit.
13. A worker who ceases to engage in the employment in respect of which the work permit was issued shall within fifteen days of the cessation of the employment, in writing, notify the competent authority and apply for a pass or leave the territory of the Partner State

## **REGULATION 7**

### **Denial of Work Permit**

1. A competent authority may reject an application for a work permit.
2. Where the competent authority rejects an application for a work permit, the competent authority shall in writing, notify the applicant, stating the reasons

for the rejection.

3. An applicant notified under paragraph 2 of this regulation may appeal against the decision of the competent authority in accordance with the national laws of the host Partner State.

4. Where the competent authority rejects an application for a work permit or where an appeal is rejected, the competent authority shall give the applicant and his or her spouse, child or dependant, reasonable time to leave the territory of the host Partner State.

## **REGULATION 8**

### **Cancellation of Work Permit**

1. The competent authority shall cancel a work permit issued under these Regulations where a worker:

- (a) is expelled or deported from the territory of the host Partner State;
- (b) ceases to engage in or does not take up the employment for which the work permit was issued; or
- (c) obtained the work permit fraudulently.

2. Where a work permit is cancelled under paragraph 1 (b) of this regulation, the worker shall within thirty days of the cancellation:

- (a) regularise his or her status; or
- (b) leave the territory of the host Partner State.

59. The EAC Regulations on the Free Movement of Persons, as reproduced on the official EAC website for Burundi ([www.eac.bi](http://www.eac.bi)), state:

## **REGULATION 5**

### **Entry, Stay and Exit**

1. A citizen of a Partner State who seeks to enter or exit the territory of another Partner State, shall do so at entry or exit points designated in accordance with the national laws of the Partner State and shall comply with the established immigration procedures.

2. A citizen of a Partner State who seeks to enter, transit or exit the territory of another Partner State shall:

- (a) present to the immigration officer a valid common standard travel document or a national identity card, where a Partner State has agreed to use machine readable and electronic national identity card as a travel document; and
- (b) declare all the information required for entry or exit.

3. Upon fulfilment of the requirements in paragraph 2 of this regulation, a citizen to whom these Regulations apply shall be issued with a pass which shall entitle the citizen to enter into the territory of the host Partner State and stay for a period of up to six months.

4. A citizen whose pass is due to expire and who wishes to stay in a Partner State for a longer period shall, before the expiry of the pass, apply to the immigration office of the Partner State for an extension of the pass.

5. The immigration office shall renew the pass where the applicant provides justification for a longer period of stay.

6. The duration of a pass issued under these Regulations shall not exceed the duration of the validity of the common standard travel document or national identity card, presented under regulation 2.



7. A citizen transiting through the territory of another Partner State, shall be issued with a transit pass which shall entitle the citizen to transit within the period stated in the pass.
8. A pass issued under this regulation shall be issued without a fee.

60. The University of Oxford Refugee Studies Centre in a report from December 2010 stated as follows:

**(b) Freedom of Movement Within Regional Economic Communities**

Each of the two regional economic communities relevant to the countries under discussion possess a free movement protocol. The East African Community's (EAC) Common Market Protocol allows citizens of its member states – Burundi, Kenya, Rwanda, Tanzania and Uganda – visa free movement and rights of establishment, including the right to work, throughout the Community. Having only entered into force on 1 July 2010, the modalities of the EAC Protocol's implementation remain unelaborated. The Southern African Development Community (SADC) – which includes Angola, Botswana, the Democratic Republic of Congo, Lesotho, Malawi, Mauritius, Mozambique, Namibia, the Seychelles, South Africa, Swaziland, Tanzania, Zambia and Zimbabwe – has the Draft Protocol on the Facilitation of Movement of Persons, which aims to remove obstacles to free movement of citizens within the SADC region. The Draft Protocol includes a provision (Article 28) relating to refugees, which provides that member states will manage refugees in the region in accordance with international law and pursuant to a yet-to-be-drafted memorandum of understanding among them. The Protocol opened for signature in 1995 but will not come into force until it receives the requisite nine ratifications. So far, only Botswana, Lesotho, Mozambique, South Africa and Swaziland have signed and it seems that the necessary ratifications are a long way off. The effect of these protocols on refugee protection gave rise to interesting debates at the workshop.

Although not yet operational, these protocols have raised the prospect that an unrecognised refugee or a refugee whose protection has ceased may nevertheless be permitted to remain in the country to which he or she has fled, with a sub-set of the rights that would have been accorded to him or her as a refugee. This may be of particular importance to Rwandans in Uganda, for example, many of whom wish to remain there despite the impending 2011 invocation of the cessation clause. Neither the EAC nor the SADC protocols remove the rights of states to expel or deport regional citizens on national security or public order grounds. Thus, the right to freedom of movement within a regional economic community is unlikely to constitute a substitute for refugee protection, not least the protection from refoulement that would protect EAC or SADC citizens who are also refugees. Furthermore, these regional free movement protocols do not take account of the fracturing of relations between a refugee and his or her home state, which could, for example, frustrate the refugee's ability to obtain or renew passports or national identity documentation permitting them to travel throughout the region or to reside in one or more of the

participating states. Convention Travel documents would still be needed in such situations.

## **FINDINGS AND REASONS**

61. The applicants claim to be citizens of Burundi and arrived in Australia on apparently valid Burundian passports. The Tribunal has assessed their claims against Burundi as their country of nationality.
62. The applicants claim to have suffered persecution and to fear further persecution if they return to Burundi, or any EAC country, in the foreseeable future for reason of their political opinion, that is, membership of the MSD.
63. The delegate found the applicants could access third country protection as they had the right to enter and reside in other EAC countries and therefore were excluded from Australia's protection by s.36(3) of the Act.
64. The evidence before the Tribunal indicates citizens of Burundi can enter other EAC countries and receive a pass to stay for up to 6 months. Citizens of Burundi who have a contract of employment in another EAC country can apply for a work permit to stay longer than 6 months. There is no evidence before the Tribunal that either applicant has a contract of employment in another EAC country. They therefore presently have only the right to enter and reside for up to 6 months.
65. Section 36(3) makes it clear that the right to reside can be permanent or temporary. This raises the question of what will qualify as a right to 'reside' temporarily for the purposes of s.36(3). There is no minimum period specified as being sufficient, but the term 'right ... to reside' suggests more than a right to a mere transitory presence. Justice Hill observed in *WAGH v MIMIA* that while a transit visa, for example, would be a right to enter, it would clearly not be a right to enter and reside. ((2003) 131 FCR 269 at [64].) Whether a tourist visa is a visa which authorises both entry and (temporary) residence was, in his Honour's opinion, a more difficult question. The applicants in that case held US visas 'for the purpose of business and tourism'. Referring to the usual dictionary sense of 'reside', ('To dwell permanently or for a considerable time; have one's abode for a time': *The Macquarie Dictionary* (revised 3rd ed).) his Honour stated that it would be an unusual, but not impossible, use of the word to refer to a tourist: while a tourist may stay for a time in a country, that country would not be his or her place of abode, even temporarily (*WAGH v MIMIA* (2003) 131 FCR 269 per Hill J at [65].) In the same case, Lee J took a narrower approach. Justice Lee held that the right to enter and reside in s.36(3) is a right which a person may exercise pursuant to a prior acceptance or acknowledgement by the relevant country, to enter and reside and, implicitly, to receive protection equivalent to that to be provided to that person by a contracting state under the Convention. While the right to reside may not be permanent, it must be co-extensive with the period in which protection equivalent to that to be provided by Australia as a contracting state would be required. (*WAGH v MIMIA* (2003) 131 FCR 269 at [34].)
66. The Tribunal finds the applicants have a right to enter other EAC countries and stay for up to 6 months. The Tribunal does not accept however that the right to enter and reside up to 6 months is a 'right to enter and reside' as intended by s.36(3) given the applicants would have to leave whichever EAC country they seek protection in after 6 months. The Tribunal notes the persecution of political opponents in Burundi is ongoing. On the basis of reports such as

the Human Rights Watch report of May 2012 the Tribunal is not satisfied that persecution of political opponents in Burundi will cease within the foreseeable future or within 6 months such that the applicants could return to Burundi. The Tribunal finds in the circumstances of this case that such a temporary right to enter another EAC country for up to 6 months is not sufficient to amount to a right to enter and reside.

67. The Tribunal found both applicants to be credible witnesses and finds their oral evidence was given in a believable manner without embellishment. The Tribunal accepts the applicants were active members of the MSD based on their oral evidence, consistent claims, and the copies of their membership cards. The Tribunal accepts the first named applicant has been detained and tortured by the police, that both applicants were tied up and threatened by police in their shop, and that they had a history of other lower level threats made against them. The Tribunal accepts they were targeted because of their political affiliation to MSD.
68. The Tribunal finds there is a real chance the applicants could be targeted on return to Burundi because of their past political affiliation and activities with the MSD. The Tribunal makes this finding based on the past persecution they have studied and the country information, such as reports by Amnesty International and Human Rights Watch, on the ongoing targeting of people associated with opposition parties in Burundi. The Tribunal accepts there is a real chance the applicants could suffer serious harm, including threat to life or liberty, significant physical harassment or ill-treatment. The Tribunal finds their political opinion is the essential and significant reason for the persecution and that the persecution involves systematic and discriminatory conduct.
69. The Tribunal finds, on the basis of country information such as the reports referred to above from the US Department of State and Human Rights Watch, that the authorities are either implicated in the persecution or unwilling to offer protection. The Tribunal accepts the conclusions of the Human Rights Watch report that the state has failed to take steps to protect its citizens and failed to take any steps to prosecute those committing the crimes. The Tribunal finds the state is unable to provide adequate protection against the harm but is also motivated to withhold such protection for a Convention reason, that is, the applicants' political opinion as supporters of an opposition party. Further, the Tribunal accepts the persecution the applicants fear is not localised and therefore the Tribunal is satisfied internal relocation is not reasonably open to the applicants and finds they have a well-founded fear of persecution in relation to the country as a whole.
70. In all the circumstances the Tribunal accepts there is a real chance the applicants will face serious harm now or in the reasonably foreseeable future if they return to Burundi for reason of their political opinion. The Tribunal finds the applicants have a well-founded fear of persecution for reason of their political opinion.

## **CONCLUSIONS**

71. The Tribunal is satisfied that each of the applicants is a person to whom Australia has protection obligations. Therefore the applicants satisfy the criterion set out in s.36(2)(a) for a protection visa.

## **DECISION**

72. The Tribunal remits the matter for reconsideration with the direction that the applicants satisfy s.36(2)(a) of the Migration Act.

