

0800484 [2008] RRTA 252 (1 May 2008)

DECISION RECORD

RRT CASE NUMBER: 0800484

COUNTRY OF REFERENCE: East Timor

TRIBUNAL MEMBER: Paul Fisher

DATE DECISION SIGNED: 1 May 2008

PLACE OF DECISION: Melbourne

DECISION: The Tribunal remits the matter for reconsideration with the following directions:

- (i) that the first named applicant satisfies s.36(2)(a) of the Migration Act, being a person to whom Australia has protection obligations under the Refugees Convention; and
- (ii) that the second named applicant satisfies s.36(2)(b)(i) of the Migration Act, being the dependant of the first named applicant.

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

This is an application for review of decisions made by a delegate of the Minister for Immigration and Citizenship to refuse to grant the applicants Protection (Class XA) visas under s.65 of the *Migration Act 1958* (the Act).

The applicants, who claim to be citizens of East Timor, arrived in Australia and applied to the Department of Immigration and Citizenship for Protection (Class XA) visas. The delegate decided to refuse to grant the visas and notified the applicants of the decision and their review rights by letter.

The delegate refused the visa application on the basis that the first named applicant is not a person to whom Australia has protection obligations under the Refugees Convention

The applicants applied to the Tribunal for review of the delegate's decisions.

The Tribunal finds that the delegate's decision is an RRT-reviewable decision under s.411(1)(c) of the Act. The Tribunal finds that the applicants have made a valid application for review under s.412 of the Act.

RELEVANT LAW

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.

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).

Section 36(2)(b) provides as an alternative criterion that the applicant is a non-citizen in Australia who is the spouse or a dependant of a non-citizen (i) to whom Australia has protection obligations under the Convention and (ii) who holds a protection visa.

Further criteria for the grant of a Protection (Class XA) visa are set out in Parts 785 and 866 of Schedule 2 to the Migration Regulations 1994.

Definition of 'refugee'

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.

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.

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.

There are four key elements to the Convention definition. First, an applicant must be outside his or her country.

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.

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.

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.

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.

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.

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 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.

Background and Claims:

The first-named applicant, Person A, is national of East Timor, of Ethnicity XY and of a Catholic religion. The second-named applicant, Person B, is the sibling of the first-named applicant, also a national of East Timor. He/she suffers from a medical condition.

The applicants arrived in Australia in the early 2000s, as the holders of visas granted to them in the early 2000s.

In the early 2000s, the applicants lodged a Protection Visa application with the Department in which only the first-named applicant made claims in his own right, although they appear from their nature to express concerns about the safety of the second-named applicant as well.

The protection claims are set out in response to Questions 39 to 44 of the Protection Visa application Part C.

In response to Question 40 the applicant indicates that he is seeking protection in Australia so that he does not have to go back to East Timor.

In response to Question 41, *why did you leave that country*, the applicant states as follows:

[Information about the applicant's submission amended in accordance with s.431 as it may identify the applicant]

My sibling Person B and I left the country in the early 2000s to attend the funeral of our late sibling Person C. However after arriving here, I told my family in details what had been happening to us in East Timor, they became concerned and suggested that we should seek protection in Australia. [Information deleted: s.431]

I joined the group in [year specified]. [Information deleted: s.431].

After East Timor gained independence, I continued to meet with the other members on a social basis. [Information deleted: s.431]. In the early 2000s, I was surrounded by a group of people, who belonged to another group called Group 2, [information deleted: s.431]. Group 2 had a conflict with Group 1 in Dili, where I was working at that time. Someone told them I was a member of Group 1 and Group 2 members surrounded the building where I worked. They damaged the building and demanded that I come out. I got panic and I rang my friends from Group 1 who came and began to fight with Group 2 and during the chaos, I fled the building and went home. The

next day I made arrangement to flee to Country X. While in Country X, I rang my friend in East Timor, who told me that Group 2 members were still looking for me, they have gone to the building where I work to look for me. Once my visa in Country X expired, I returned to East Timor to get a new visa and went back to Country X again. Since then, I have not been able to get an employment, because of fear of further attack. I hid myself at home and if I had to go out, I would only travel in a car and I would only go out when it is absolutely necessary. My sibling Person B does not have political connection, but due to his/her medical condition, he/she was attacked this year because of his/her behaviour. He/she has not been formally assessed, but ever since he/she was a child, he/she had learning and behavioural difficulties.

In response to Question 42, *what do you fear may happen to you if you go back to that country*, the applicant responded:

I fear that I would be killed by the members of Group 2. There are many people who joined Group 1, but as I am Ethnicity XY, I am an easy target, because I stood out. I know of other ethnic Ethnicity XY young men who are members of Group 1 and they have been attacked by Group 2 members.

In response to Question 43, *who do you think may harm/mistreat you if you go back*, the applicant responded:

If I were forced to return, I fear that the members of Group 2 would harm me as they have shown that they are capable of that.

In response to Question 43, *why do you think this will happen to you if you go back*, the applicant responded:

I believe this will happen to me, because of the current conflicts between Group 1 and Group 2 and the conflicts between the different groups in East Timor. Even though, we have the international forces present in East Timor, they are not able to resolve these conflicts. There is still a lot of fighting between groups taking places in East Timor, when the international police or peacekeepers arrived, they quickly dispersed. But once the peacekeepers are gone, they resumed the fight.

In response to Question 44, *do you think the authorities of that country can and will protect you if you go back? If not, why not*, the applicant responded as follows:

I do not believe that the government of East Timor would harm me, but I seriously doubt their ability to protect me. The government itself is full of division and the police forces are in total disarray. The international forces are not easily accessed by local people due to a number of reasons, such as language for example.

The application form also states at Part B Question 13 that the applicant will provide later a detailed statement outlining the reasons why he and his sibling cannot return to East Timor, and a copy of the a report. However, no such material was submitted to the Department.

The application was refused by a delegate of the Minister in the early 2000s, without the applicants having been interviewed. The delegate concluded that although the applicant being a member of Group 1 could possibly be targeted by the rival group, Group 2, she did not accept that being involved in gang rivalry constituted persecution for a Convention reason, and also noted that the applicant would still be afforded the same level of protection from local police and security forces as any other East Timorese national although, it is a question of whether equivalence is the relevant test as it is the effectiveness of that protection,

which is surely more important. The delegate noted that the applicant had stated that he was not involved in any political activities since the Indonesian occupation ended and she considered that the difficulties he may have faced were not politically motivated but random acts of gang violence and that they were not inflicted for reasons of any actual or imputed political opinion. Further, she found that his membership of the group, Group 1 did not constitute membership of a particular social group under the Refugees Convention, as membership was not unchangeable, innate or fundamental to the applicant's identity.

Review Application

An application for a review of that decision was received by the Tribunal.

The Tribunal wrote to the applicants inviting them to attend a proposed hearing.

A letter was received from the applicants' newly appointed representatives, apologising for the late notice and enclosing the following supporting documents:

- a statutory declaration by the review applicant dated the early 2000s as follows:
 - [Information about the statutory declaration amended in accordance with s.431 as it may identify the applicant].
 - 1. I make this Statutory Declaration in support of my Application for Review at the Refugee Review Tribunal.
 - 2. I was born in the early 1980s, in the district of District Y in East Timor. District Y is part of East Timor. I have no recollection of life in District Y and I do not know when my parents moved to Dili. However, I do remember what it was like to grow up in Dili.
 - 3. I had many siblings. Sadly, one sibling passed away recently. My ethnicity is Ethnicity XY and my religion is Catholic.
 - 4. The first person in my family to leave East Timor was my sibling Person D. Later, my sibling, Person E, also left, followed by my sibling, Person F, and my late sibling, Person C. My parent left in the late 1990s. I still have a few siblings in East Timor.
 - 5. I arrived in Australia with my parent in the early 2000s. [Information deleted: s.431]
 - 6. I have no recollection of the Indonesian invasion. My parents never talked to me about politics, but my friends have told me about the brutality of the Indonesian occupation.
 - 7. In Dili, we lived in a suburb near a medical facility. As a child, apart from going to school, I didn't really mix with the other children in the streets, because my parent did not approve as he/she was worried about my safety.
 - 8. My parent worked to support the family. I don't know whether my parent had suffered any abuse at the hands of Indonesians or not, as he/she rarely talks to us about it.
 - 9. My parent is a very traditional Ethnicity XY person, he/she loves us but she/he would not express it verbally and he/she rarely talks to us about his/her emotions.
 - 9. One thing that my parents would warn us about over and over was to be careful of the soldiers and police, because they would come and take people away and those who were taken away just disappeared. Therefore, as a child, I was terrified of the Indonesian soldiers and police. I was particularly afraid of

the weapons that they carried, as I have seen them pointing guns at people and assaulting other people.

10. During Primary School, I went to a public school; I did not like the experience because of the way Indonesian teachers favored other Indonesian students and often punished the East Timorese students unnecessarily or over punished us for little mistake.
11. In the early 1990s, I joined Group 1. The reasons why I joined the group and my activities in the group have been submitted to the Department together with my application.
12. I completed my schooling in the late 1990s and due to the political situation at that time, I could not continue my education. When the University in Dili was opened in the early 2000s, I wanted to go back to study, but my family could not afford the school fees.
13. In the late 1990s, my family and I fled to City Z in West Timor to flee from the chaos in Dili. We stayed at a friend's home. We were in City Z for a few months and later we were assisted by UNHCR to return to Dili.
14. When we were in City Z, some militias wanted to kill me, because of my involvement with the group. Fearing for my safety, my parent sent me to Country W for a brief stay. I stayed in a hotel. Before returning to Dili, I went back to City Z and stayed there briefly. Shortly after, we were taken back to Dili.
15. In the early 2000s, I found a job in customer service, I was glad that after many years of fighting, East Timor was finally independent. Sometimes I would have customers who were a bit difficult, but overall, the situation was stable and I was very optimistic about the future
16. In the early 2000s, there was briefly some violence in Dili, which was caused by police shooting dead an individual. The police intervened, but they did not shoot at the protesters.
17. In the early 2000s, I found a new job in customer service at Area I.
18. In the early 2000s, the political situation in Dili was plunged into chaos again. However, this time, it was a lot more serious, as the conflict was between the army and the police and between some political parties and between the Easterners and Westerners. It was terrifying, but I did not think of leaving East Timor. I began to think of leaving East Timor when I came under attack by a group of people in the early 2000s. This incident has been outlined in my original application.
19. For the sake of my safety, I fled to Country X on a number of occasions and stayed there for many months. The first time, I fled to Country X was in the early 2000s and I came back to East Timor some months later. Shortly afterwards, I went back to Country X and came back to East Timor on a few weeks later.
20. I could not stay in Country X because there were militias from East Timor and because my visa to Country X was temporary. After my visa expired I could not stay there any longer. I returned and applied for another visa but once this expired I had to leave.
21. Once I returned to East Timor, I did not go out at all, I just stayed at home. The rival gang group did not come and look for me, because our neighborhood was protected by Group 1 members. However, I have heard from other members of Group 1 that the other group is still looking for me. I was also under constant fear and felt very uneasy about the situation. I felt uneasy to know that law and

order in the neighborhood was maintained by Group 1, rather than by the proper authority. I knew that this is a volatile situation that could explode anytime.

22. It is difficult for expatriates to understand what life is like for the East Timorese and how difficult it is for us to ask the police to assist us. The Immigration Department case officer said that I could ask the police for help just like any other East Timorese. The reality is the East Timorese police force is hardly functioning at all and the International force could only prevent massive chaos from happening, but they are completely helpless in protecting individuals.

23. I have attached here an article from The Globe and Mail, and I quote some of the contents here:

DILI, EAST TIMOR - Passengers arriving at East Timor's airport are greeted with an ominous sign posted by the authorities, warning of the roving gangs of child extortionists who threaten physical harm to anyone refusing their "baggage services. "

The drive from the airport is equally unsettling. The road is controlled by gangs of violent youths who routinely hurl rocks at each other. Shops and homes are guarded with razor wire and spiked fences. Arson has destroyed much of the capital, Dili, and the streets are filled with camps of refugees who fed the destruction. Gang warfare, fuelled by poverty and a collapsing social order, has devastated East Timor.

24. Dili airport is guarded by International forces. It is one of the most important sites that must be guarded, but the gang could continue to operate right under their eyes. If the International force could not even guarantee the safety of the arriving passengers to East Timor, then how are they going to protect me?

25. On page 6 of the decision from the Department of Immigration, they quoted an article and in that article the East Timorese stated the reason why they need to be in a gang is because no one could protect them.

26. I have also attached another article by GEOFFREY YORK from The Globe and Mail, which showed that the International force is not able to provide effective protection to ordinary East Timorese.

27. I know the East Timorese government and the International force are willing to protect me, but their protection is very ineffective. Many of the houses that were burnt down or some of the fight that broke out happened right in front of the International force.

28. My membership of Group 1 is unchangeable because I am distinct and will always be identified as a member of the group. Even if I relocate to another part of the country or say I am no longer a member of Group 1, I will continue to be identified as a member by others because they know me or because of my physical features and I will be in danger.

29. What has happened in East Timor over the past couple of weeks is evident that the government and police cannot effectively protect me. If they cannot protect the President how can they protect me? The things that have happened in East Timor recently have made me feel more traumatized. I am a very easy target compared to the President.

30. Following the attack that I suffered in the early 2000s I continued to be in fear whilst I lived in East Timor. There were other acts of violence that caused me to feel afraid to live in East Timor. Members of Group 1 have been killed because of their membership of the group.

31. In the early 2000s, my family had tried to get me out of the country, but they were advised that it would be very difficult as it was unlikely the Department of Immigration would approve such application, if we stated the

real reason. Therefore, in the early 2000s, when we had to come to attend my sibling's funeral, I decided to come. Once I was here, I told my family I could not return to East Timor.

32. I have no fear of the government of East Timor, but I am fearful of the communal violence which the authority is helpless in stopping. I fought for East Timor's independence and I am glad that East Timor is finally an independent nation, but the country still has a lot of problems to resolve. I have tried to remain in East Timor as long as I could, when many other young people were leaving the country to go abroad. However, I think the situation has got to the point which makes it impossible for me to return.
33. I am sick and tired of the violence and fighting. All the violence reminds me of what happened in 1991 during the Santa Cruz massacre and the violence in 1999. Those were really terrifying time and I do not wish to continue to live in that situation.
34. I also fear for my sibling Person B who has a medical condition. Person B has never been to school in East Timor or worked. [Information deleted: s.431]
35. Person B is very close to my parent and is extremely attached to him/her. He/she could not get along with any of my siblings in East Timor, he/she is not able to look after himself/herself. To send him/her back to East Timor would be the end of him/her.
36. Even in Australia, he/she often has an episode and he/she injures himself/herself. We are now in the process of getting help for him/her. He/she is currently in a medical facility. In East Timor, the health system is only rudimentary, therefore, he/she would not be able to receive the care that he/she needs.
37. I was so relieved when I arrived in Australia, for the first time, I could feel relaxed and not worry about being attacked by people or worrying that violence or fights would break out again. In East Timor, as soon as I heard that there would be a protest or rally, I would get really nervous and anxious, but in Australia, there are many protests happening everyday, but you hardly hear about any violent incident.
38. I have had enough of violence and I want to find a life of peace and no fear. I ask that the Tribunal would look at our application with compassion and grant Person B and me the right to remain in Australia;

- a letter from an East Timorese support and settlement worker of the same date:

[Information about the East Timorese support and settlement worker amended in accordance with s.431 as it may identify the applicant].

I am writing in my capacity as the above-mentioned applicants' family support worker since their other siblings arrived in Australia in the early 1990s. I have known both of them since they arrived in Australia in the early 2000s. They came with their parent to attend the funeral of their late sibling, Person C [Information deleted: s.431]. This letter is aimed at clarifying the situation regarding these two siblings.

In the early 2000s, I was contacted by their parent Person G who was very concerned for Person A's safety. He said that because Person A's involvement with a former group, he had come under attack by another group. The family here tried to get him out of the country, but due to other logistical problems, they weren't able to do it. I saw Person G on a regular basis and he often told me that his family in East Timor

told him that Person A is still in danger. When Person A arrived in Australia, although he had expressed his concern for his safety in East Timor, and not knowing what to do, he did not have the intention of lodging for protection visa. It was his family who suggested to him to come and see me and lodge the Protection Visa application.

Person B is Person A's sibling. He/she is not able to attend the RRT hearing because he/she is currently at a medical facility. Like his/her sibling Person A, I have heard a lot about him/her prior to him/her coming to Australia. His/her parent often told me that he/she has a child who has a medical condition. My assessment of him/her since his/her arrival in Australia is that it is most likely that he/her has some sort of medical condition.

Since arrived in Australia, he/she often had a lot of behavioral problems. I received a call from his/her sibling, Person H, to say that Person B is extremely distressed and wanted to harm his/her parents. They tried to calm him/her down, but he/she could not understand them. Out of concern for the family's safety, I had to call the police. However, after interviewing him/her, the police officers were reluctant to get involve, and suggested that alternative medical department is more appropriate.

The alternative medical department was very busy that night and could not respond immediately, Person B's sibling, Person D, took him/her to his/her house at Suburb AB. However, he/she continued to make everyone's life very difficult. In desperation, Person D took him back to Suburb CD. On their way from Suburb AB to Suburb CD, he/she tried to injure his/her parent and behaved inappropriately

The family again contacted me and I immediately contacted the alternate department from a medical facility. They assessed him/her at home and admitted him/her as an involuntary patient at a medical facility.

At this stage, the doctors at the medical facility are unsure what is/are the diagnosis/diagnoses? They have started to rule out some medical conditions. There will be another family meeting, involving a number of doctors from multi-disciplinary fields, to try to determine his/her condition.

All his/her life, Person B relies on his/her parents and his/her sibling Person A for support, as he/she is completely incapable of living on his/her own, because his/her condition was not diagnose earlier in East Timor. To be frank, even if he/she were diagnosed early, it was unlikely that he/she would be receiving the appropriate service to assist him/her to live independently.

If he/she were sent back to East Timor, it is likely that he/she would not survive, because he/she lacks the skill to live on his/her own, he/she is also vulnerable to attack from the community, due to his/her behavior. He/she would not be receiving the appropriate service that he/she needs, which is vital to assist him/her to live independently. Since his/her admission to a medical facility, with the help of treatment, he/she is already making some improvement.

As I mentioned before, at this stage, his/her doctors are not sure of the diagnosis. However, once they have a clear diagnosis, I am happy to provide another report to the Tribunal. I thank you for your attention, and should you require further information, please feel free to contact me

and,

- a number of articles on gang culture and violence in East Timor (extracted below).

The first named applicant appeared before the Tribunal to give evidence and present arguments. He was accompanied by an articled clerk from the representative's firm, attending

with the applicant's consent as an observer. The Tribunal hearing was conducted with the assistance of an interpreter in the Tetum and English languages.

At the outset the Tribunal explained its role and purpose and noted that it intended to focus on the applicant's claims; whether, if genuine, they gave rise to a real chance of persecution for a Convention reason, and, if so, whether the problems the applicant may have experienced in Dili could be avoided by relocating elsewhere in and East Timor.

The applicant was asked about his involvement in Group 1. He said that he had joined during the Indonesian occupation in order to fight against the Indonesians. He said that he came into conflict with the rival Group 2 in the early 2000s. They came after him – they came to his house and assaulted him and he was scared and he asked friends to come and save him and then the friends took him to Country X. He said that after sometime he returned to East Timor but they kept coming after him so he had to go back to Country X. After a further period he returned to East Timor and then when his sibling passed away in Australia he travelled here for the funeral. When he got to Australia he told his family what had happened and that he did not wish to return. In Australia he felt free and more relaxed and he feels that if he goes back to East Timor he wouldn't have a life or a job. Jobs there are hard to find and here in Australia he is studying English hard so that he can look for a job and help his parents who are old.

If he returns to East Timor the situation is not good and everyone knows that there is no respect paid to the law. They don't understand about violence over there and also domestic violence against women is widespread. The government is unable to solve the problems there and as can be seen from the trouble there, such as the recent assassination attempt against the President, and if they can't solve those problems how can they solve the problems of the groups.

The applicant was asked to clarify whether he was attacked in his home and he said it was at work. Asked whether this was in Dili, he said that it was. He was asked why this attack occurred and he said it was because he was a member of Group 1. He said that Group 1 and Group 2 were fighting each other and going after their opposition members. He was asked whether he was involved in this himself and he said he was not involved in this conflict but it was reported. He was asked about whether there was anything special about him, which makes him stand out or whether he was the same as anyone else in the Group 1. He said it was just because they knew he was a member of the group. The applicant was asked which group has more members and he said that there are similar numbers and they are spread around the districts of Dili. He was asked whether, as his statement suggested, the streets where he lives are guarded by Group 1 members and he agreed that this is the case. He said when he returned from Country X he stayed with his parent in Area II and he could not return to Area I. He was asked whether that means that Area II was safer for him and he said that people on the other side of the street could still come and get him.

The applicant was asked to clarify his address as it did not appear in the Protection Visa application to show the address being Area II but he said this was the Indonesian name, which was still used, but that was the same area as the address listed as indicated in his Protection Visa application form.

The applicant clarified that he had actually been living in the building where he was working and had been living there in Area I for some time. The applicant was asked whether he had had any problems before he moved there and he said that he had not and that he was working

and living in the building without any problems. He was asked whether there were lots of Group 2 people there and he said that there were. He was asked to clarify precisely when he went to Country X and he said on the first occasion it was in the early 2000s and he stayed for some months and then his visa expired so he returned on some months later and came back to Dili. He was there for a few weeks on that occasion and lived with his parent and also his sibling. He returned to Country X and on this occasion he had a visa for a short period and returned to Dili shortly afterwards and went back to his parent's house in Area II. The applicant was asked whether he stayed there until he came to Australia and he said that he had. He was asked whether he had any problems during that period of months in the early 2000s and he said that when he returned Group 1 members came and warned him that Group 2 was looking for him to kill him. Asked how they had found out this information he said that neighbours who were members of Group 1 had heard that this was the case. The Tribunal was asked whether he was saying that the word on the street was that Group 2 wanted to kill him in particular and he said that they had already killed many other members of Group 1. Asked whether he knew any of them personally, he said he did and that he was scared. He named Person I who he thinks was killed in the early 2000s and Person J who was killed in about the early 2000s. The applicant was asked where they lived and he said that they lived in Area I. The applicant was asked whether he knew of any Group 1 members who had been killed in his local area and he said that Group 2 was fighting Group 1 in the Area II area and one of them was killed when he tried to injure a figure of authority who was intervening and he was killed as a result of this attack. Asked when this occurred, he said that it was the early 2000s. The applicant was asked whether Group 2 have gone back to Area II since then and he said that they have and they still do. The applicant was asked who they attack and what they do when they come back and he said that they have come, not just targeting Group 1 members but also damaging property. He was asked whether Group 1 retaliates and he said that they do. He was asked whether the Group 1 members attack Group 2 and damage property and he said that they don't do this deliberately but they will protect their own.

The applicant was asked whether there was anywhere in Dili where Group 2 is not active and he said it is hard to know – that they are all over Dili and members of both groups are spread throughout the city. The applicant was asked whether there was any stronghold of either group where the opposing group won't go and he then said that they have to guard their own areas but he doesn't think there is any particular area. The applicant was asked whether these groups also operate elsewhere in East Timor and he said that they do – that they operate everywhere because every time there is a Group 2 celebration they come in busloads from the regional districts. Asked to indicate how many people there are in Group 2, he said he thinks there are a large number and about the same for Group 1.

He was asked whether there was any political connection and whether the groups are aligned with particular political parties. He said that the Group 2 is aligned with the Party A1, which supports Group 2. He is not sure how, but they need votes and so he thinks they support them. He said however, that Group 1 has no political support and is not linked to any particular party. The applicant was asked whether he thinks there is any political element to his problem or is it just because of the gang rivalry and he said he doesn't know. He then said he thinks it might be political because of the old rivalry. He was asked what the basis for any political motivation would be if Group 1 is not aligned with any groups and he said they don't necessarily know which way he votes. He said he can't say exactly that it is political but he thinks that the parties are trying to use the different groups.

The applicant was asked to explain what it is that identifies him as a member of Group 1 and he said that it is his physical features. He displayed the aforementioned physical features on his body and attempted to explain the significance of the different physical features although it was not exactly clear what the significance was. He said that these symbols of powers that branded them immune to being shot by the Indonesians and that also helped them in combat as they transferred power to their forearms. He said that other groups have different configurations of physical features. The applicant was asked whether he can immediately recognise someone from Group 2 because of their physical features but he said he couldn't because their physical features are different and he wouldn't necessarily recognise them. He was asked then how they would have recognised him and he said he doesn't know but when they came into the building he wasn't making any effort to hide his physical features and he was recognised by those physical features as being a member of Group 1. The applicant was asked how widely known the physical features of Group 1 are and he suggested that almost everyone knows them and similarly another group called Group 3 is also well known.

The applicant was asked whether he has lived anywhere else in East Timor apart from Dili and he said that he has not.

He was asked where his siblings live and he said that they also live in Dili. He was asked whether he has any other family members in Group 1 but he said that he is the only one. The applicant was asked what he did after his second return from Country X and he said he didn't go out, he just stayed at home and he agreed that he had no problems at that time. The applicant was asked whether any other Group 1 members he knows had problems during that period. He said that the rivalry started in the Indonesian times and now involved petty things so that if children have disputes they will call their brothers and other people will get involved.

The applicant was asked whether he is any more at risk than any other member of Group 1 in East Timor and he said that he is because if he goes back now the problem will not have been sorted out and things have got worse lately with the shootings in East Timor. He was, nevertheless, asked why he faces a higher risk than any other member of Group 1 and he then said that because if he returns to East Timor and as soon as he gets out of the airport they will ask for money and give him a hard time, referring to the displaced children who hang around the airport and try to get money in return for carrying people's bags. He was asked whether these children have any connection to Group 2 and he said that he is not sure that there is any connection. The Tribunal observed that being harassed by airport touts is not likely to amount to persecution in any event but once again asked the applicant to clarify why he thinks he is differently at risk in East Timor as distinct from any other Group 1 member and he said that because he was attacked by them once and now if he goes back he will have to be very careful. The applicant was asked whether he thinks they will recognise him and he agreed that he does think that. The applicant also added that he had to accompany his sibling everywhere and can't leave him/her alone.

The applicant was asked whether his sibling accompanied him or lived with him at the building and he said that he had not and that he had lived at home with his parent at that time. He was asked whether his sibling accompanied him to Country X and he agreed that he had not. He was asked whether he has had any problems in Country X because of his sibling and he said that he has not. The Tribunal noted that the applicant had been recognised and had problems in Area I but queried why and whether he would be recognised anywhere else. He reiterated that he would because of his membership of Group 1.

The Tribunal put to the applicant that it could understand why, after what had happened to him, Area I might be an area where he would have problems but it was not clear that he would have problems elsewhere. The applicant said that the situation there is really bad and deaths and paybacks are common. The Tribunal, nevertheless, noted that it was unclear why he would be targeted simply on account of these isolated incidents when prior to this he had had no problems. It queried why he couldn't simply go back and live in a different area. The applicant replied that if he goes back and lives in a different area and something happens then he will have no-one to protect him. He said that the UN and the police can't do anything and they are busy solving the problems of the government and anyway they can't speak Tetum.

The applicant was asked whether these groups operate in West Timor and he said that they do, in Area IV and City Z. The applicant was asked whether he had gone to City Z when he travelled to Country X and he said he had stayed there and that he added that Group 2 is also operating in another city where its headquarters is.

The applicant was asked whether he had any problems in City Z and he said that he did not. He was asked whether anyone recognised him there as belonging to Group 1 and he said that there were many people there from Group 1 or Group 2 and that some of the militia lived there. The Tribunal, nevertheless, asked whether he was recognised there as belonging to Group 1 and he said that he was not. He was asked whether he mixed with any of these people there but he said that he just stayed with his family member who is studying there. The Tribunal queried then why, if he could relocate in that fashion without problems he could not do so in East Timor itself. The applicant said there was nowhere in East Timor where people wouldn't recognise him and that he could be attacked once again.

The applicant was asked, apart from his Group 1 membership, whether there was any other reason he fears returning to East Timor. The applicant said that in the early 2000s there was an incident between the police and the FDTL and he was very scared. The applicant was asked whether there was any particular reason why he felt at risk on account of this incident or was this just the generalised risk of violence that everyone faced. He said it is something that everyone fears because they all fought for independence and it makes us all bitter to think how it is just turned into violence and that he is traumatised by the shock of all this violence and after having finally gained independence.

The applicant was asked whether there was any other reason he fears returning to East Timor and he said that everyone is scared but the main reason is his Group 1 membership. The applicant was asked whether there was anything else about him that might place him at risk but he said that there was not. The applicant was then asked whether his ethnicity is a problem for him at all and he said that it was. Asked how this was, he said that sometimes he gets abused or criticised for his ethnicity, and that they can hunt him for that reason. Asked whether they have done that in the past he said that he was injured at school because of his ethnicity. Asked whether this was by East Timorese or Indonesians, he said both. He said even after independence he was accused of things for that reason. He said that when he was attacked they yelled out *You Group 1, come out and we will kill you*. The applicant was asked whether there were other people of his ethnic background in Group 1 and he said that there were. He was asked whether they have had any special problems and he said he couldn't tell. The applicant was referred to his statement at Folio 22 of the departmental file where it states that there are many people who joined Group 1 that due to his ethnicity he is an easy target because he stood out. He knows of other young men of the same ethnicity who are members of Group 1 and they have been attacked by Group 2 members. The applicant was asked whether there was any difference between him and non-ethnic members of Group

1 in terms of the risk they face and he said that there was not. He was asked to confirm that they were equally at risk and he said that they were.

The applicant was then asked about his sibling Person B. He said that he/she is in a medical facility at present. It was noted that Person B had not actually made any claims of his/her own in his Protection Visa application, and that the applicants' representatives had noted that he/she would not be able to attend the hearing but they, nevertheless, believed that his/her medical condition raises protection claims if he/she were to return to East Timor and asked for the opportunity to present claims following the hearing tomorrow. The representatives' letter apologies for the lateness of the request but asks that following the hearing they be given the opportunity to prepare and present Person B's claims.

The applicant was asked whether, in his opinion, Person B could give evidence and tell the Tribunal what had happened to him/her or why he/she is afraid to go back. He thought that Person B could give coherent evidence. He said that if he/she goes back to East Timor with his/her medical condition then he/she will face difficulties. The applicant was asked what his sibling wants to do and he said that he/she wants to stay here in Australia. He was asked who looked after his sibling in East Timor and he said that his mother did. He was asked whether his mother is still in East Timor and he said that she is not but she is in Australia having been granted permanent residence in the early 2000s just in time for her to attend the funeral. The applicant was asked whether anyone is still residing in his mother's house in East Timor. However, he explained that although it was referred to as his mother's house, it did not actually belong to her and they had simply moved into it in the late 1900s. When the owner eventually returned some years ago they then had to pay rent to him but he lived in one of his other houses but that he has now taken over the house again. The applicant was asked whether he is living there himself or someone else is renting it and he said he didn't know.

The applicant was asked which relatives are still back in East Timor and he said that he has many siblings. He was asked where they are residing and he said that a sibling is in Area III in Dili; that he has a sibling living close but who goes back and forth to Indonesia where her/his children are studying; he also has siblings in Dili.

The applicant was asked whether Person B had been included in his parent's visa applicant but he said that he/she had not.

The applicant was asked where he would stay if he returned to East Timor and he said that he is not sure – that he would have to look for a place. He was asked whether there was any reason why he couldn't stay with one of his siblings and he said because they are all married and their places are small. He was asked whether one of them wouldn't try to make room for him if he returned and he said that they have to work to support their families. He was asked where these places are in relation to his old home and whether they are a safe distance away and he appeared to agree that Area III is far enough away from his old home. He was asked whether that would be a good option for him then and he agreed that it would but he said that it could also be dangerous because there are Group 2 members there.

As the applicant's representative was not present, and noting the issues that had been raised in her letter, the Tribunal indicated that it would write to the applicant setting out any outstanding concerns after having heard his evidence at the hearing and also requesting additional information with respect to his sibling, prior to making any decision as to whether it was appropriate to take evidence from his sibling directly. Accordingly, the hearing was adjourned but with no commitment to resume it.

Post-Hearing

In the early 2000s the Tribunal wrote to the applicant in the following terms:

[Information about the Tribunal's letter amended in accordance with s.431 as it may identify the applicant].

You are invited to comment on information that the Tribunal considers would, subject to any comments you make, be the reason, or a part of the reason, for affirming the decision that is under review.

Real Chance of You Encountering Serious Harm in the Reasonably Foreseeable Future

- The Tribunal notes that prior to the early 2000s incident at the building where you worked in Area I, you had not experienced any problems on account of your membership of Group 1, and that, despite your belief that Group 2 members are now looking for you and your related fear of persecution, you do not appear to have experienced any further harm for reason of your Group 1 membership since that time.

This information is relevant because it might cause the Tribunal to conclude that the incident at Area I was an isolated one, and that there is not a real chance of you encountering persecution for reason of your membership of the Group 1 group in East Timor in the reasonably foreseeable future. This in turn might for the reason, or part of the reason, for affirming the decision under review.

Relocation

- For at least some of the intervening period since you were attacked at the shop in Area I, you relocated to City Z in Indonesian West Timor, where you evidently experienced no problems despite the presence of Group 2 members there.
- Furthermore, although the house in Area II where you formerly resided with your mother and your sibling is no longer available to you, you have given evidence that you have a number of siblings living elsewhere in Dili, including a sibling living at Area III which you seemed to agree at the hearing was a safe distance away from your old home.

This information is relevant because it might cause the Tribunal to conclude that even if you do face a real chance of persecution, either in your local neighbourhood of Dili and/or where you might be recognised by the Group 2 members from Area I who attacked your building, in the reasonably foreseeable future, it might be reasonably open to you to avoid that persecution by safely relocating to an area of East Timor where you are not known by local members of Group 2, such as where your sibling lives at Area III. This in turn may form the reason, or part of the reason, for affirming the decision under review.

Invitation to Provide Additional Information

Section 424(2) of the *Migration Act* allows the Tribunal to invite a person to give it additional information that is relevant to the review of a decision.

Accordingly, and as foreshadowed at the hearing of this matter, the Tribunal now invites you to provide medical evidence relating to Person B. In particular, the Tribunal would like to see evidence concerning his/her capacity to give evidence generally, whether he/she is currently able to give evidence, and, if not, whether that prognosis is likely to change in the near future.

Further, or in the alternative, the Tribunal invites you to make any additional claims in writing in respect of Person B as foreshadowed in the letter.

The Tribunal received a detailed submission in response, incorporating legal arguments, and referring to and relying on country information extracted in the submission, and to an accompanying statutory declaration by the first named applicant. A medical report and hospital discharge summary relating to the second named applicant were also provided.

The submission outlined the applicant's protection claims thus:

[Information about the applicant's submission amended in accordance with s.431 as it may identify the applicant].

We submit the applicant has a well-founded fear of persecution in East Timor and is unable to avail himself of the protection of the East Timorese government.

Convention related claims of applicant

1. The applicant fears persecution on account of his membership of a particular social group, namely as a member of the Group 1 gang.
2. He has experienced harm in the past at the hands of rival gangs and has a particular profile as a result of his support of Group 1.
3. The 'essential and significant' reason for the applicant's fears of persecution is not generalised or criminal violence, but of Convention related persecution for the above reason.
4. The East Timorese Government is unable/unwilling to provide effective protection to the Applicant against the persecution he fears at the hands of rival gangs given the security situation that prevails in the country. Country information also indicates that the security forces are themselves loyal members of gangs which are divided along political, ethnic and religious lines.
5. Relocation within East Timor or Indonesian West Timor is not reasonable in the circumstances.
6. The applicant's sibling Person B has also recently been diagnosed with "a medical condition." It is submitted on his/her behalf that he/she will face discrimination in East Timor, significant economic hardship or denial of access to basic services or denial of capacity to earn a livelihood. His membership of the social group of people with medical condition in East Timor is the essential and significant reason for the persecution he fears: s.91R(1)(a). With no support such hardship or denial threatens his/her very capacity to subsist in East Timor: s91 R(2).

The further statutory declaration of the first named applicant was in the following terms:

[Information about the applicant's statutory declaration amended in accordance with s.431 as it may identify the applicant].

1. I make this Statutory Declaration in response to the letter from the Refugee Review Tribunal.
2. The Tribunal has stated that it might conclude the incident at Area I was an isolated one and that there is not a real chance of me encountering persecution for reason of my membership of Group 1. I say there is a real chance of being injured or killed because of my membership if I return to East Timor. The incident at the shop where I worked in Area I was not a one off incident. The problems I experienced went on for a long time.
3. Since I left East Timor, other members of the Group 1 that I was part of have been injured and some of them have been killed. I believe that members of the Group 2 were responsible.
4. The Tribunal has stated that even if I do face a real chance of persecution in my local neighborhood of Dili and/or where I could be recognized by Group 2 members who attacked my building, it might conclude I could safely relocate to other parts of East or West Timor.

5. I say I cannot relocate to City Z in Indonesian West Timor I cannot work or survive there. The last time I was there I was on a Visa and I was supported by my family in Australia who sent me money. I would not be able to enter and reside and get long term work rights in Indonesia to survive. I also believe I would be victimized by the militia there.
6. I would not be safe if I lived with my other siblings in Dili. East Timor is a very small country and I believe sooner or later the Group 2 will find me.
7. I cannot live with my sibling in Area III as it is a very remote area and I would not be able to get work there. As it is so isolated, I would not be able to travel to work in a nearby area.
8. My sibling in Area III works in transport and I could not share his job, as I have to keep a low profile so that I am not detected by the Group 2.
9. The Tribunal has also asked for medical evidence about my sibling Person B. I attach to my Statutory Declaration letter from a medical professional Person K, from a medical facility dated the early 2000s and Discharge Summary from a medical facility dated the early 2000s.
10. Person B was admitted to a medical facility in the early 2000s because of his/her medical condition.
11. I believe Person B is able to give brief, short evidence to the Tribunal and that if he/she is asked simple questions, he/she will understand.
12. Person B's memory of East Timor is not very good [information deleted: s.431]
13. In East Timor, my family had to constantly run around after Person B to look after him/her. He/she was not diagnosed there and he/she received no medical treatment. If he/she returns to East Timor he/she will not receive medical treatment.
14. Since Person B has been in Australia he/she has received a diagnosis, medical treatment and medication.
15. At first he/she did not feel comfortable in Australia and wanted to return to East Timor but now he/she is comfortable and has settled into Australia.

The medical reports relating to the second named applicant was in the form of a letter from Person K of a medical facility, dated the early 2000s, as follows:

[Information about the medical report amended in accordance with s.431 as it may identify the applicant].

I write with regard to the above person, a recent inpatient of our service who has been discharged to the ongoing care of his G.p, and community worker at a health centre.

Person B is an East Timorese refugee who arrived in Australia with his/her mother in the early 2000s. [Information about Person B's medical condition deleted in accordance to s.431 as it may identify the applicant]

Any help you may be able to offer for this gentleman and his family is greatly appreciated. If you require any further information please do not hesitate to contact me at the details above.

Country Information

- *Magic And Mayhem: Gang Culture Threatens E.Timor*, South China Morning Post, 6 December 2007, accessed from <http://www.etan.org/et2007/december/08/06magic.htm>

The world's youngest country is threatening to slide into chaos as local allegiances and superstitions feed a deepening gang culture, writes Fabio Scarpello

The diminutive Maria Ana Pereira, 28, does not look for excuses. The widow simply accepts that life is tough in Hudi Laram, a neighbourhood southwest of East Timor's capital, Dili, where she is struggling to raise her seven children.

She has a part-time job. And she's also the leader of a local gang called Zero-Zero-One. "The number means that we are neutral," said Mrs Pereira, who was described by her neighbours as a "tough fighter".

Mrs Pereira's gang is one of about 300 outfits thought to be operating in the former Portuguese colony. In Hudi Laram, she said, the reason for her group's existence was obvious. "Look around you," she urged, gesturing towards a neighbourhood consisting mostly of makeshift houses. "There is nothing here. No one is looking after us."

According to Mrs Pereira, only a handful of the 800 people who live in the area have a proper job, and only a few of the young study beyond primary school.

"The gang keeps us together and makes us stronger," said Mrs Pereira, who took control of the group after her husband died in 2004. "My husband was killed by black magic, but his spirit still advises me," she added, showing her husband's grave next to her house.

Mrs Pereira also claimed to have "Jesus Christ on her side" and "a special holy water that, when sprinkled around the houses, protects the neighbourhood".

As she talked, young men gathered around, listening and nodding. Despite her petite frame, Mrs Pereira said she had earned the respect and the leadership of the group with her courage. "The young respect me. They listen to me, and when we are attacked, I am always in front to defend our turf."

She said her group used large stones, machetes, arrows and slingshots in their fights.

But far more deadly weapons have also made their way into the arsenals of the gangs, with international troops and UN police - in East Timor since last year's civil crisis displaced tens of thousands of people - having confiscated homemade pistols and primitive but lethal bombs made from steel fragments packed around an ammonium nitrate core.

Mrs Pereira said her group had done nothing illegal, but reliable sources claimed its members had been involved in a series of minor criminal acts. Some observers said groups such as Zero-Zero-One lived off extortion money, and they were blamed for much of the past year's violence and intimidation, including the burning of Chinese-owned shops in the area in September last year.

Linking Mrs Pereira's turf to the village of Delta 1 is an area locally known as Banana Road, in which some of the capital's most violent gangs operate and where most of the fighting takes place. It is also where Catholic priest Angelo Salsinha spends his nights trying to mediate.

"They are not inherently bad. These are misguided young people who are also manipulated by politicians," he said. "Sometimes they have money, and I am not sure how they get it, since they don't work."

The link between political parties and some of the gangs is well established, although few are willing to talk about it openly, let alone acknowledge that politicians have paid young people to commit crimes.

Last October another priest, Martinho Gusmao, partially broke the silence by telling Australia's Courier-Mail newspaper about the existence of a graded fee scale for rock throwing, burning houses and murder.

The Dili-based priest said he had been told about the list in confessions, and added that gangs were paid to commit violence both before and after the June national elections.

"The gangs claim that if they throw a stone, they get US\$20, if they burn down a house, US\$50, and if they kill a person, US\$100," Father Martinho said.

Father Angelo said that besides organising activities such as sports and basic education programmes, the church could do little. He called for more help from the government to create jobs for young people.

Long-term unemployment is rampant in the impoverished country, with the jobless rate above 50 per cent. In Dili, about 70 per cent of young people are without jobs.

"I can only keep doing what I can," said Father Angelo. "I spend my night talking to the gang members. No one pays attention to them, no one says hello to them, and no one tells them that they are important. The fact that I do makes them feel better already."

Among those who regularly meet Father Angelo are members of two rival gangs, Seven-Seven, and Perguruan Silat Setia Hati, or PSHT.

The leader of the local branch of Seven-Seven is Paul Fernandes, 30, better known to his followers as Dodi. He's a heavily-built man whose house is surrounded by gang members, and approaching without an invitation would be asking for trouble. "It's for protection," said the unemployed father of two.

Seven-Seven is one of the groups that bases its membership on animist beliefs. Established during the Indonesian occupation to fight the invaders, its members believe they can gain magical powers by injecting themselves with a medicine that supposedly makes them invincible and invisible.

It has members throughout the country, identifiable by a scar with seven nodes that runs vertically up their right arms. Several other gangs, such as Colimau 2000 and Sagrada Familia, have similar beliefs.

"I joined this gang in 1999 to defend myself, my family and my community," said Mr Fernandes, whose group is allegedly involved in gambling and extortion rackets. "We have a code of conduct. We do not commit adultery, and we do not steal."

He said he had "never been involved in a fight", but acknowledged that his group was locked in a deadly rivalry with the PSHT. "It started when PSHT killed two of our members a while back," he said.

Only a few hundred metres away, another group of youths linger threateningly around cars near the house of Vincente Lopes, 33, who is recognised as the leader of the local branch of PSHT. "I am just the mediator here," he said, denying he was the leader of the group.

PSHT is one of about 20 martial arts groups in the country, which have an estimated combined membership of about 20,000 people. PSHT originated in Indonesia, and has branches in most of East Timor's provinces.

The gang is widely perceived as being close to the Democrat Party and the Social Democratic Party, and is believed to have heavily infiltrated the security forces. PSHT is also in open rivalry with another martial arts group, Korca, officially aligned with Fretilin, the country's main political party, which was forced into opposition at the last election.

- *In East Timor, a sense of injustice drives chaos*, by Geoffrey York, published on 20 February 2008, by the Globe and Mail, and accessible on the internet (pay per view) from http://www.theglobeandmail.com/servlet/Page/document/v5/content/subscribe?user_URL=http://www.theglobeandmail.com%2Fservlet%2Fstory%2FLAC.20080220.TIMOR20%2FFTPStory%2FTPIInternational%2F%3Fpage%3Drss%26id%3DGAM.20080220.TIMOR20&ord=5847094&brand=theglobeandmail&force_login=true

Passengers arriving at East Timor's airport are greeted with an ominous sign posted by the authorities, warning of the roving gangs of child extortionists who threaten physical harm to anyone refusing their "baggage services.

The drive from the airport is equally unsettling. The road is controlled by gangs of violent youths who routinely hurl rocks at each other. Shops and homes are guarded with razor wire and spiked fences. Arson has destroyed much of the capital, Dili, and the streets are filled with camps of refugees who fled the destruction.

Gang warfare, fuelled by poverty and a collapsing social order, has devastated East Timor But the chaos is also linked to a deeper emotion: the simmering sense of injustice over the thousands of killings during Indonesia's military occupation, and the lack of punishment for the killers. The sense of impunity and injustice has made it easier for the gangs to flourish.

The following extracts are from the report entitled *A Survey of Gangs and Youth Groups in Dili, Timor-Leste* by James Scambury, referred to in the original protection visa application and extracted in the post hearing submissions made on behalf of the applicant. The report was commissioned by AusAID and published on 15 September 2006. It was referred to in the submissions of the applicant's representative, and accessed by the Tribunal on the internet at http://www.timor-leste.org/nation_building/Scambury_Report_Youth_Gangs_Dili.pdf:

The martial arts groups have long been a concern, with some 15-20 martial arts groups, and registered members estimated at around 20,000, almost all male. The alignment of some martial arts groups with different political factions has escalated the current conflict. One group 'Korka is officially aligned with Fretilin, and PSHT is widely identified with the two main opposition parties the PSD and PD. The use of these gangs for political intimidation can be seen from recent serious clashes in Ermera, Gleno, and Suai. The leader of another group, Kung Fu Master, was also killed during clashes between police and army in Tibar, early in the conflict.

The infiltration of martial arts groups into the security forces has further inflamed the situation, in addition to creating a potential for conflicting loyalty. Some martial arts group members interviewed for this study said deference to 'wargas' or martial arts masters take precedence over other loyalties. Abilio Massoko for example, a former resistance leader, was a police commander and leader or 'warga' of PSHT. Massoko, also known as Abilio Audian, was arrested for distributing guns in the recent conflict. PSHT members received guns, although it's not established if they received them from Massoko. Police are also often accused of siding with one group against another during martial arts clashes.

...

Group Typology: Although many groups are hybrids, with connections to other groups from other categories, and individuals having membership of more than one group, there could be said to be seven main types of groups, with three sub-groups.

...

3. Kakalok (magic or mystical) or 'Isin Kanek' (wound) groups such as Seven-Seven, Five-Five and Three-Three. These groups were generally formed as clandestine organisations under Indonesian occupation, but some groups like 12-12 claim to have been in existence in Portuguese times. Group members can be identified by a series of circatrices running longitudinally up their arm, or in clusters, the number corresponding to the group i.e. Seven or 5-5 etc. These groups are feared as they are believed to have magic powers or 'black magic'. The 'Magic Group' members' age ranged between 20-51, with older leadership and generally much younger membership. All groups are said to have some women members. According to most accounts these groups are largely inactive except for the group Seven-Seven, which has reinvented itself as a martial arts group, in addition to alleged involvement in gambling and extortion rackets. Seven-Seven is also believed to be closely linked to Sagrada Familia. Seven appears to have a large number of younger members with some exhibiting fresh scars, suggesting that this group still actively recruits members.

...

ANNEX 01 - DESCRIPTION OF GROUPS

Disaffected Groups:

Martial Arts

03. Persaudaraan Setia Hati Terate (PSHT): Also known Nehek Metan (Black Ants), PSHT are one of the biggest and most controversial groups, and are alleged to have been closely linked to the current violence. PSHT originated in Indonesia, with a number of international branches, but PSHT in Timor Leste say they are independent of the Indonesian branch, and their leader, Jaime Xavier Lopes, is Timorese.

Although not formally affiliated like KORKA, they are widely perceived to be close to the two chief opposition parties the Partido Democratica (PD) and Social Democratic Party (PSD), although PSHT themselves deny any links to any political parties. They have been accused of fomenting problems even in Indonesian times, and one witness said members use the organization to settle family and communal disputes. Another eyewitness report described an attack by PSHT members in the recent crisis on Bebonuk/Comoro, and other attacks in Perumnas and Hudi Laran, resulting in widespread destruction of Easterners homes. They are said to have heavily infiltrated the security forces, and to have received weapons from the police and army.

One ex member said that when they joined PSHT they were given a brochure setting out their principles on non-violence and mutual cooperation, but that the trainer then explained to new recruits that their enemies were Korka, Kung Fu Master, Kera Sakti, Taekwondo, and that PSHT must be stronger than them. As with the other martial arts groups though, PSHT members claim their group is given a bad reputation by the actions of a minority abusing the club's name.

...

'Kakalok' Groups

01. Seven: Seven, also known as Seven Seven, are a former clandestine group formed in Indonesian times. Their tag is the most ubiquitous of all groups, and can be seen all around Dili, but most particularly in the Becora/Taibesse area. The group is believed to have magical powers, by injecting themselves with a medicine that makes them invincible and even invisible to enemies. Their symbol is a longitudinal scar that runs vertically up their right arm with seven nodes (see Figure 07). They also carry a piece of red and black cloth with protective powers. 'Rodak', the original leader of Seven, is claimed to be still alive in the jungle somewhere. The leader of the Sagrada Familia Group 'L7' is said to one of his followers. Seven are apparently linked to Sagrada

Familia, which one ex member likened to a mother organization. Gang leader Lito Rambo is also said to be one of their founders.

Seven are alleged to control the cock fighting and gambling rackets around Taibesse and elsewhere in Dili. According to one allegation, some of their members were also former militia members, and are still in Indonesia. They are also believed to be heavily involved in the recent violence, especially around the Bairopite and Comoro area, but as with other groups, whether this is a group or merely individuals is hard to prove.

The following reports of recent gang violence in East Timor were accessed by the Tribunal from the various websites on 21 April 2008:

- 22 February 2007, *148 arrested over East Timor gang violence* Agence France-Pressé http://www.news.com.au/story/0,10117,21271860-401,00.html?from=public_rss

UN police have arrested 148 people suspected of involvement in a resurgence of street violence in the East Timorese capital, the UN envoy to the troubled country said today.

"In the past three days, the police have arrested 148 people, all related to the security situation in Dili," Atul Khare said.

Seven international UN police officers were injured yesterday in fresh violence on the streets of Dili.

Police had stepped up patrols to tighten security following the recent increase in violence, Mr Khare said.

"I do believe that ... the people of Timor Leste (East Timor) will refrain from (violence), will introspect and will come to the conclusion that attacking the United Nations, which is here to restore peace and calm in their country, is not something which can be praised, it is something that must be condemned," he said.

Mr Khare warned of tough action against those involved in the latest street violence to hit Dili since major unrest in April and May last year left 37 dead.

The street violence, mostly between members of rival martial arts gangs, has beset Dili for the past two weeks.

Australia yesterday warned its citizens against travelling to East Timor due to the "volatile security situation."

"The situation could deteriorate further without notice and Australians could be caught up in any violence directed at others," the department of foreign affairs and trade said.

"There is also an increasing likelihood that Australians and Australian interests may be specifically targeted."

Last year, a protest by disgruntled soldiers rapidly degenerated into clashes between rival security forces and gang wars on the streets of the capital that prompted the deployment of an Australian-led international peacekeeping force.

The UN has deployed some 1300 police to help restore order.

- 20 April 2007, *The clash of gang violence continues, 9 injured*, Action on Solidarity in the Asia Pacific, East Timor News Digest, http://www.asia-pacific-action.org/southeastasia/easttimor/netnews/2007/end_04v6.htm#April%2020,%202007

Gang violence continues in Dili, after it had settled for a couple of weeks during the campaign and presidential Election Day.

Yesterday (19/4), the disturbances between PSHT and 7-7 erupted in Hudi Laran and Quintal Boot. The incident resulted in 9 injured, 4 in Hudi Laran and 5 in Quintal Boot.

The ninth victims got stoned and others were shot. The victims were immediately hospitalized in HNGV Dili for intensive treatment.

UNPol and PNTL dispersed the clash successfully. No one was arrested. (DN and STL)

- 18 Nov 2007 *East Timor man decapitated in suspected gang attack*, Reuters, <http://www.alertnet.org/thenews/newsdesk/JAK21735.htm>

A 29-year-old man was decapitated in an attack thought to be linked to gang violence in East Timor, a hospital official and a relative said on Sunday.

The man was attacked with a sword outside a store near the parliament building in the capital Dili by a group of men waiting in a taxi, a relative of the dead man said.

An official at the national hospital in Dili, where the body was taken, said the victim's head had been severed from his body in the attack and police were investigating.

The former Portuguese colony was plunged into chaos last year after the sacking of 600 rebellious soldiers triggered violence that killed 37 people and drove 150,000 from their homes.

Foreign troops had to be brought in to restore order and security has improved, although sporadic violence, vandalism and arson persist, with an unemployment rate of around 50 per cent helping fan a gang culture among bored youths.

Last week, a man died after an arrow pierced his heart during gang fighting in districts near East Timor's capital.

- 11/03/2008, *East Timor - Gangland Dili*, Foreign Correspondent <http://www.abc.net.au/foreign/content/2008/s2189710.htm>

BORMANN: It was the darling new nation, born from the ravages of occupation. East Timor had become the world's newest country after a quarter of a century of resistance to Indonesia. But six years after independence, it remains a volatile place, propped up by thousands of visiting foreigners and their false economy.

In Dili there are traffic snarls of United Nations' vehicles. Police from thirty-nine nations flood the streets, dozens of aid agencies clamour to do good. But despite all the good will in the world, this is not the new nation most of these people had hoped for. The level of suspicion and distrust on these streets is extraordinary. It's hard to be happy in your homeland when you don't have a home.

This is what's become of the new democracy, one-tenth of the total population of one million, has been chased out of house and home by their own countrymen. This is the story of the part played by a new generation of East Timorese youth and how rather than building their nation, they seem hell bent on destroying the country their fathers created.

After eight years abroad in Portugal and Australia, Alex de Sousa is home and with mates again. His passion is Silat, the martial arts introduced here during Indonesian times.

ALEX DE SOUSA: I came to East Timor and I see a different kind of martial arts and I went to assist one of the trainings and I liked it.

BORMANN: Alex is one of thirty thousand East Timor devotees of PSHT, an organisation that binds its members beyond sporting ties.

ALEX DE SOUSA: [showing emblem] The heart means the brotherhood, it's coming from our hearts. That's what the heart means.

BORMANN: Far from symbolism, PSHT has been at war. It's one of a number of groups involved in an ongoing battle for recruits, land and influence in this fledgling country.

ALEX DE SOUSA: If you kill one of them you will get revenge, that's for sure. That's a Timorese way to solve the problems.

BORMANN: This is fertile recruiting ground for the gangs. There's not much to do here, almost half of young people don't have a job and the UN and aid agencies provide about the only work anyway. It's hardly surprising that seven out of ten young men find their way to the various clubs and gangs.

JOSE LUIS SOUSA SANTOS: It's about family ties. So you know they'll kill for their brothers.

BORMANN: Jose Luis Sousa Santos has also returned from abroad to help rebuild his country. The one time intelligence advisor to the Australian Defence Force, has worked with his Prime Minister and also the United Nations on the gang problem.

JOSE LUIS SOUSA SANTOS: [youth advisor] If political parties require support in regards to demonstrations or in regards to defending themselves or attacking enemies, they utilise the martial arts groups. Out of all the groups in Timor that probably would be the most influential group politically at a high level PSHT.

BORMANN: I've come to meet the next generation of PSHT members. It could be any youth club, but these young people have joined an organisation, which infiltrates the police and army, the public service and high echelons of government.

JOSE LUIS SOUSA SANTOS: Intimidation, burning of houses, violent attacks on individuals. Having such a large number of PSHT masters inside the police force and in the police special groups, means they've got access to... you know, to weapons and to ammunition where most of the population don't.

BORMANN: To find out how these gangs operate and what they do, you need only to go back to the violence of 2006. Six thousand homes were destroyed when those who saw themselves as westerners of East Timor tried to remove those who regarded themselves as easterners. The gangs played a central role as enforcers.

It was a mad scramble to stake a claim, a demonstration that owning a house in East Timor can be a very tenuous proposition. Neighbours can simply burn each other out here and nothing much can be done about it. That's because the land tenure situation is a mess, there's traditional title, title from Portuguese times, from Indonesian occupation, but in the end once you get a place you just hang on to it.

This is what became of Dili's so-called easterners. They live in tents, one third of the city's population, surviving on handouts the government can't afford. The displacement camps spill into hospitals, into the sanctuary of church grounds and even into Dili's fire station.

FINN RESKE-NEILSEN: [UN deputy head of mission] What we are doing here is to create if you like a nation of beggars. We need to get away from this dependency on handouts and move back to a situation where people can actually fend for themselves.

BORMANN: For almost two years this single tent has been home to Estanislao Soares his wife and their seven children. Their home was destroyed as westerners moved in. Now a cut in the rice hand out is about to make life even more difficult.

ESTANISLAO SOARES: It's very hard for us here. It rains heavily, and it's hot living under this tent.

BORMANN: Most people don't have the means to return to their homes and they have genuine fears about what will happen if they try to go back. Estanislao agreed to leave camp to show me his old home, just a few kilometres up the road.

ESTANISLAO SOARES: There's one – the one that was burnt down.

BORMANN: He had three houses here and only one still stands. The new occupier he recognises. This man's son was the one who attacked Estanislao and destroyed his houses, but like every other land dispute here, nothing is clear cut.

It turns out that Estanislao himself had taken over the house years before when its occupants fled unrest in 1999. Both men had been squatters at some stage in this house, neither have any paperwork to prove ownership anyway.

It seems to have been an affable meeting, but Estanislao leaves with a threat ringing in his ear. He's been told it will be the youth of the street who will sort this one out.

Our guide to the gangs, Jose Luis Sousa Santos says he knows what this means.

JOSE LUIS SOUSA SANTOS: When he tries to go back to claim his house, you know there could be a violent reaction from the youth. He'll either get burnt out again or they'll kill him.

JOSE LUIS SOUSA SANTOS: Gang members all back each other up, almost to the death. Other cells will come into it. You know within twenty-four hours you know it'll turn into a street battle of fifteen hundred people.

....

BORMANN: Olderico Campos prays to the Virgin Mary but he also worships the dead and believes he has the power to deflect bullets. He's a member of the ritualist 77 Gang, a clandestine group that once supported the ... Fighters who fought Indonesia.

OLDERICO CAMPOS: [showing scar on his arm] This is a sign, this a sign of importance.

BORMANN: There are twelve thousand followers who each bear the seven scars. Olderico wears a crocodile tooth for divine protection and this arm band.

...

JOSE LUIS SOUSA SANTOS: The current incarnation of 77 is a corruption of East Timorese culture. The usage of almost voodoo rituals is troubling because a lot of these kids do believe you know that once they've joined 77 their life force is now tied to the group, so whenever their master decides to cut them loose, that they'll die so it's a very good way to keep control over unruly kids.

...

BORMANN: But for those disaffected and disenchanting it's the gangs that offer meaning in life. It's hardly encouraging for the nation builders of East Timor but the 77 Gang is at war with PSHT, the organisation followed by young Alex de Sousa.

While he says he doesn't involve himself in trouble, he knows what his fellow members are capable of.

ALEX DE SOUSA: The way I see it's never going to finish. For sure as soon as one of them knows the other is from the different um from PSHT or 77, everyone's going to get involved.

BORMANN: The country torn by politics, family feuds and an east/west rivalry is also racked with gang warfare. The despair of East Timorese is felt most by the real victims of this chaos, the tent dwellers have become refugees in their own city.

United States Department of State Country Reports on Human Rights Practices for 2007, Published on 11 March 2008 and accessed by the Tribunal on 21 April 2008 from <http://www.state.gov/g/drl/rls/hrrpt/2007/100519.htm> includes the following:

The government generally respected the human rights of its citizens; however, some human rights abuses persisted. Serious problems included: politically motivated and extrajudicial killings; police use of excessive force and abuse of authority; arbitrary arrest and detention; inefficient and understaffed courts that deprived citizens of due process and an expeditious and fair trial; and conditions in camps for internally displaced persons (IDPs) that endangered health, security, education, and women's and children's rights. Domestic violence, rape, and sexual abuse were also problems. Societal divisions based on political affiliation and regional origin continued to cause widespread discrimination, segregation, and violence, particularly in the capital.

...

Role of the Police and Security Apparatus

The Dili-based police, which made up more than one-third of PNTL's total complement, disintegrated during the 2006 crisis. UNMIT and the government undertook to reform, restructure, and rebuild the PNTL. A central element was a "screening" to ensure that each of the approximately 3,000 PNTL officers was checked for integrity and any past crimes or misbehavior. Following screening, officers were to go through renewed training and a six-month UNPOL mentoring program. By year's end 1,250 officers had completed the UNPOL program.

Each of the country's 13 districts has a district PNTL commander who normally reports to the PNTL general commander. In spite of improvements due to the UNPOL training, the PNTL as an institution remained poorly equipped and under-trained, subject to numerous credible allegations of abuse of authority, mishandling of firearms, and corruption.

A number of police officers did not pass the vetting process and were on suspension pending further investigation. Outside Dili, 1,804 of 1,949 PNTL officers registered for and were undergoing screening. On April 22, UNMIT facilitated a human rights training session for senior PNTL commanders focused on strengthening accountability within the PNTL. The PNTL remained fragile and in need of UNMIT mentorship.

...

Persons with Disabilities

Although the constitution protects the rights of persons with disabilities, the government had not enacted legislation or otherwise mandated accessibility to buildings for persons with disabilities, nor does the law prohibit discrimination against persons with disabilities. There were no reports of discrimination against persons with disabilities in employment, education, or the provision of other state services; however, in many districts children with disabilities were unable to attend

school due to accessibility problems. Training and vocational initiatives did not address the needs of persons with disabilities. During the year some persons with mental disabilities faced discriminatory or degrading treatment due in part to a lack of appropriate treatment resources or lack of referral to existing resources. Mentally ill persons were imprisoned with the general prison population and denied needed psychiatric care. UNMIT noted that hospital patients were unable to participate in the two rounds of presidential voting, but the electoral administration provided mobile polling stations so that they could vote in the parliamentary elections. An office in the Ministry of Social Solidarity is responsible for protecting the rights of persons with disabilities.

National/Racial/Ethnic Minorities

Tensions between persons from the eastern districts (Lorosae) and persons from the western districts (Loromonu) continued, although not at the heightened levels witnessed during the April and May 2006 national crisis.

Relations were generally good between the ethnic majority and members of several small ethnic minority groups; however, there were occasional reports of discrimination against ethnic Chinese (who constitute less than 1 percent of the population) and ethnic-Malay Muslims.

The Australian Government's Travel advisory warning for East Timor currently includes the following, accessed on 24 April 2008 from <http://www.smarttraveller.gov.au/zw-cgi/view/Advice/East%20Timor>

- We advise you to reconsider your need to travel to East Timor at this time because of the fragile security situation and the risk of violent civil unrest. The situation could deteriorate without warning. There is a possibility that Australians and Australian interests may be specifically targeted.
- On 11 February 2008, East Timor President Jose Ramos-Horta was shot in an attack on his home and Prime Minister Xanana Gusmao's convoy was fired on. Australians are advised to exercise extreme caution at this time and avoid unnecessary local travel. On 22 April 2008, the state of siege and the state of emergency was lifted in all areas of East Timor apart from Ermera district. See the Civil Unrest/Political Tension section for more information.
- Military operations are underway to apprehend those involved in the attacks against the President and the Prime Minister. Australians are strongly advised not to travel to areas where these operations are known or likely to be conducted because of the extremely dangerous security situation. If you become aware of any nearby military activity, you should leave the area immediately. You should remain vigilant and obey all instructions given by authorities and security forces.
- If you decide to travel to East Timor, you should exercise extreme caution. Violence could occur anywhere at any time in East Timor. You should take particular care to avoid demonstrations, street rallies and public gatherings as they may turn violent and you could get caught up in attacks directed at others.
- You should check the security situation with the United Nations Police (UNPOL) by telephone on 112 or (670) 723 0365.
- In Dili, there have been violent disturbances in several areas since May 2006. Violence could erupt without notice. Known trouble spots include Nicolau Lobato Airport and its surrounds, Bebonuk including the Comoro River, Bairo Pite, Tasitolu, Aitarak Laran, the Comoro Market area and internally displaced people's (IDP) camps, including near the Dili port. You should exercise extreme caution if passing through these areas.

- Explosive devices have been detonated in Dili, including at the International Stabilisation Force (ISF) base known as Camp Phoenix on 7 February 2008, in Aitarak Laran on 6 February 2008 and outside the Australian Defence Co-operation House, adjacent to the Australian Embassy on 4 October 2007. No-one was injured in any of these incidents.
- During April 2008, changes to food distribution in Dili may lead to increased tension.
- There have been continuing incidents of gang-related violence, robbery, arson and vandalism in Dili. Australians and other foreigners have been caught up in incidents of armed robbery and assault. Some gangs in Dili have attacked cars with potentially lethal stones and darts fired from slingshots, particularly during the early evening and at night. You should exercise caution if using taxis. You should also avoid armed irregular groups, including martial arts groups, both in Dili and the districts.
- Violent disturbances have occurred outside the city of Dili, most recently in August 2007. Since then, the situation has remained relatively calm. You should be aware that unauthorised road blocks may appear anywhere in East Timor.

The following extracts are from an article entitled *Alarm as E Timor criminals pardoned* which was published by the Australian on 24 April 2008 and accessed the same day from <http://www.theaustralian.news.com.au/story/0,25197,23589926-25837,00.html>:

EAST Timorese President Jose Ramos Horta will pardon a former government minister who armed civilian hit squads during the violence that destabilised the nation in 2006.

Rogério Lobato is one of 80 criminals to be pardoned on the anniversary of East Timor's independence next month.

Analysts have reacted with alarm, saying East Timor's cycle of violence will not end until people are held accountable for their actions.

Lobato, a former Fretilin government minister, was last year jailed for more than seven years on charges of manslaughter and illegally using firearms to disturb public order. A panel of judges said his actions had contributed to the violence and instability that rocked East Timor in 2006.

Lobato has only served about five months of his sentence as he was allowed to fly to Malaysia last August for medical treatment and is yet to return.

Mr Ramos Horta, who last week resumed his duties after recovering from a rebel attack that almost killed him, said East Timor needed to foster a culture of forgiveness if it was to move forward.

"Rogério Lobato will be one of more than 80 beneficiaries of the presidential pardon," Mr Ramos Horta said during a speech to parliament yesterday. "To know how to forgive is a virtue that we need to cultivate in our hearts. Let us recognise the day that our national independence was restored with a day of pardon and clemency among Timorese."

International Crisis Group Southeast Asia project director John Virgoe described the decision as "very unfortunate".

"They have had several rounds of amnesties in East Timor now and there has to come a point where people start being held responsible for their actions," Mr Virgoe said.

"Otherwise you are sending a message that you can get away with this stuff. You can get away with fostering violence for your own political ends if you are a politician; if

you are an ordinary person you can burn down your neighbour's house and you will get away with it. It's a very unfortunate message."

FINDINGS AND REASONS

Country of Nationality

The Tribunal finds, based upon the applicants' entry into Australia on apparently valid passports issued by the government of East Timor, that they are citizens of that country. There is no evidence to suggest that they are nationals of any other country. For the purposes of the Convention, the Tribunal has therefore assessed their claims against East Timor as their country of nationality.

Assessment of Claims

The Tribunal found the first named applicant to be a truthful witness, as his evidence was consistent and forthright, and did not appear to have been exaggerated or clearly at odds with independent country information relevant to his claims. He displayed evident knowledge of the organization, Group 1, of which he claims to have been a member, and showed the Tribunal his physical features consistent with that claim.

The first named applicant's claims were internally consistent, and were presented in a credible and forthright manner. They were confirmed to some extent by the written evidence of the applicant's community worker, which describes the applicants' parent having raised his concerns about the safety of his/her son some time earlier, and also by the first named applicant's account of having sought to avoid the problems by relocating to West Timor on a number of occasions as evidence by entries in his passport. The claims are also highly consistent with the country information with respect to both the characteristics of Group 1, and the influence, behaviour and capabilities of the Group 2 group.

The Tribunal accepts that the first named applicant was a member of the Group 1, and although not personally active in recent years, is still capable of being recognized as such because of the physical features which are clearly visible on his body. The Tribunal also accepts that for this reason the applicant was identified as a Group 1 member when working in a building in a suburb of Dili by a member of the rival Group 2 gang, who later returned with fellow gang members and surrounded the building, taunting and threatening the applicant who in turn called his own fellow gang members for backup, leading to a confrontation between the two groups during which the applicant himself escaped.

The Tribunal is also of the view that the first named applicant is differentially at risk on account of his ethnicity, given that on his own account he was identified as *you Group 1 ethnic minority*. This is also consistent with country information, [information deleted: s.431]. The applicant is therefore a member of a small, visibly distinct ethnic minority who also happens to have been identified and targeted by Group 2 on the basis that he is a member of Group 1.

Convention Nexus

The applicant has claimed to be at risk of *persecution* only on the basis of his membership of a particular social group, namely the Group 1 gang. Although the Convention definition does not encompass those fleeing generalised violence, internal turmoil or civil war (see, eg

Minister from Immigration and Multicultural Affairs v Haji Ibrahim (2000) 204 CLR 1 at [141] per Gummow J; Gleeson CJ and Hayne J agreeing), it would be erroneous to assume that a context of civil disturbances, or civil or clan warfare, which results in a general state of indiscriminate violence or general danger affecting a whole community, necessarily precludes the existence of persecution for a Convention reason.

Where persecution occurs in a context of widespread conflict, it would be wrong to require a claimant to establish a risk of persecution over and above the risks faced by others caught up in the conflict. The principle of “differential impact” was espoused by the House of Lords in *Adan v SSHD* [1998] 2 WLR 702, where it was held that, in circumstances of civil war such as inter-clan fighting in Somalia, the individual or group had to show a well founded fear of persecution *over and above* the risk to life and liberty inherent in the civil war or a fear of persecution for Convention reasons over and above the ordinary risks of clan warfare. However, the High Court of Australia ruled in *Haji Ibrahim* that the “differential impact” principle does not form part of Australian law and should not be used. As Justice McHugh explained at [70]:

It is not the degree or differentiation of risk that determines whether a person caught in a civil war is a refugee under the Convention definition. It is a complex of factors that is determinative – the motivation of the oppressor; the degree and repetition of harm to the rights, interests or dignity of the individual; the justification, if any, for the infliction of that harm and the proportionality of the means used to achieve the justification.

The leading recent Australian authority on the particular social group question is *Applicant S v Minister for Immigration and Multicultural Affairs* (2004) 217 CLR 387 (“Applicant S”). In their majority joint judgment, Gleeson CJ, Gummow and Kirby JJ. set out at paragraph [36] the correct approach to the question of whether a group falls within the scope of the term *particular social group* for the purposes of the Convention:

Therefore, the determination of whether a group falls within the definition of "particular social group" in Art 1A(2) of the Convention can be summarised as follows. First, the group must be identifiable by a characteristic or attribute common to all members of the group. Secondly, the characteristic or attribute common to all members of the group cannot be the shared fear of persecution. Thirdly, the possession of that characteristic or attribute must distinguish the group from society at large. Borrowing the language of Dawson J in *Applicant A*, a group that fulfils the first two propositions, but not the third, is merely a "social group" and not a "particular social group". As this Court has repeatedly emphasised, identifying accurately the "particular social group" alleged is vital for the accurate application of the applicable law to the case in hand

The government has also legislated, in s91S, in order to restrict the availability of the Convention ground of Particular social group. The purpose and implications of s.91S were recently considered by the High Court in *STCB v Minister for Immigration and Multicultural and Indigenous Affairs* [2006] HCA 61; (2006) 231 ALR 556; (2006) 81 ALJR 485, a case involving an Albanian blood feud carried out under what was said to be the customary law of the Kanun the subjects of which, in one of its posited formulations, constituted the particular social group, the Court considered the background to s.91S. At [16] – [20], the majority, Gleeson CJ, Gummow, Heydon and Callinan JJ, observed as follows:

In *Minister for Immigration and Multicultural Affairs v Sarrazola (No 2)* Merkel J (Heerey and Sundberg JJ concurring) held that a family was capable of constituting a particular social group for Convention purposes. It was also held that a Colombian threatened with murder if a debt contracted to underworld figures by her subsequently

assassinated brother were not repaid by her could be seen as being persecuted for a Convention reason, namely membership of a particular social group comprising her family.

The Explanatory Memorandum to the *Migration Legislation Amendment Bill* (No 6) 2001, which, on enactment, inserted s 91S into the Act, said that s 91S:

addresses a recent court finding that a relative of a person facing persecution for a non-Refugees Convention reason, such as pursuit by criminal elements for repayment of debts, is themselves [sic] facing persecution for the Convention ground of membership of a particular social group when the attentions of the agents of persecution turn to them, for example for repayments of the debts. This type of situation falls outside the range of grounds for persecution covered in the <http://www.austlii.edu.au/cgi-bin/sinodisp/au/cases/cth/HCA/2006/61.html?query=refugee%20and%20particular%20and%20social%20and%20group%20and%20criminal%20and%20gang-disp39#disp39>Refugees Convention.

The Explanatory Memorandum then gave a summary of s 91S, and concluded:

The above provisions do not prevent a family, per se, being a particular social group for the purpose of establishing a Convention reason for persecution. However, they prevent the family being used as a vehicle to bring with [sic] the scope of the Convention persecution motivated for non-Convention reasons."

In the Second Reading Speech the Minister for Immigration and Multicultural Affairs said:

"The convention was not designed to protect people who fear persecution for personal reasons that have little or nothing to do with the convention - for example, because they have failed to pay their family's debts.

Yet a recent Federal Court case provides for this very scenario.

The legislation will also prevent people from using elaborate constructs to claim that they are being persecuted as a member of a family and thus under the convention ground of a particular social group, when there is no convention related reason for the persecution.

This will remove a potential avenue for criminal families to claim protection on the basis of gang wars - not those that the government would see as warranting international protection."

Gang wars have resemblances with blood feuds, and it is plain that the Minister's intention was to restrict the capacity to claim visas on grounds of these kinds. The question here, however, is simply whether the language of s 91S applies to the present appellant.

Application of s 91S

Subject to certain contentions of the appellant to be considered below, s 91S is fatal to the appellant's claim that he fears persecution for the reason of membership of a particular social group that consists of his family.

The present case can be distinguished from the scenario considered in *STCB* because the applicant does not rely on his membership of his *family* for the formulation of his particular social group. Consequently, and regardless of any possible criminality the applicant's part (of which there is absolutely no evidence) s.91S does not preclude the applicant from claiming protection on the basis of gang wars by relying on the Convention nexus of his membership of the particular social group of one of the gangs involved.

The evidence before the Tribunal indicates that the Group 1 clearly does meet the criteria identified in *Applicant S*. The country information indicates that members have common characteristics other than a shared fear of persecution, in the form of [information deleted: s431]. The country information also indicates that these attributes distinguish the group from society at large, as the group's identity and the features which differentiate it both from society at large and from other such groups is well documented in the country information. The Tribunal therefore finds that Group 1 constitutes a particular social group for the purposes of the Convention.

Having accepted the applicant's account that he was targeted by a rival gang because he is a member of Group 1, the Tribunal finds that the threats he experienced in the past, and any future harm which he could experience from the rival gang which made those threats, namely Group 2, would be for Convention reason of his membership of a particular social group. The Tribunal notes that the country information indicates that some of these gangs engage in criminal behaviour and violence, apparently almost as a matter of course. However, the applicant's account, which the Tribunal accepts, is that he was threatened by Group 2 not just in some random criminal fashion, but quite specifically targeted when and only when he was identified as a member of Group 1. The Tribunal therefore finds for the purposes of s.91R that the essential and significant reason for the persecution which the applicant fears is his membership of the particular social group of Group 1.

Real Chance of Experiencing Serious Harm in the Reasonably Foreseeable Future

The country information before the Tribunal with respect to the situation in East Timor shows that there continue to be serious law and order problems and outbreaks of violence from which not even the leaders of the country are immune. With respect to the particular type of harm the applicant claims to be at risk of should he return to East Timor, namely persecutory acts by the Group 2 group, the country information reproduced above throws up a number of recent examples of such harm being meted out by Group 2 which group, it seems clear from the country information, is one of the most – if not the most – powerful, politically influential and violent of these groups in East Timor. Recent reports [information deleted: s.431] makes it clear how serious these conflicts are.

In the case of the first named applicant, the Tribunal is of the view that he is differentially at risk of harm because in addition to being a member of Group 1 and recognisable on that basis, he is also a recognisable member of the ethnic Chinese minority, and arguably more vulnerable to identification and targeting than an ethnic Timorese member of the same group.

For these reasons, the Tribunal finds that there is more than a remote chance of the first named applicant encountering serious harm from Group 2 in the reasonably foreseeable future should he return to East Timor.

The Availability of State Protection

The country information before the Tribunal indicates that the protective capacities of the East Timorese state are almost non-existent, and that lawlessness and violence are the order of the day. Furthermore, the country information indicates that the local police and security forces are in fact infiltrated by the very group from whom the applicant fears persecution, namely Group 2.

The evidence shows that the state has had to invite foreign peace-keeping or security forces back into East Timor, and that despite their presence the violence has continued. The recent extension of the UN security mandate, in response to the pleadings of the East Timorese government, clearly acknowledges, in the opinion of the Tribunal, the ongoing nature of this security threat and the inability of the East Timorese authorities to maintain order and protect their own citizens. In any event, the UN peacekeeping force has only a limited capacity to intervene, and the evidence suggests that limitations on its rules of engagement are known to and actively exploited by local groups.

The Tribunal considers that at present, the East Timorese authorities are unable to protect the applicant, to the level which may be expected by international standards, from the risk of harm which he faces. Consequently, the Tribunal finds that state protection is not available to the applicant.

Conclusion on Persecution

In *Minister for Immigration and Multicultural Affairs v Khawar* (2002) 210 CLR 1, Gleeson CJ made the following observation (at p. 13):

Where persecution consists of two elements, the criminal conduct of private citizens, and the toleration or condonation of such conduct by the state or agents of the state, resulting in the withholding of protection which the victims are entitled to expect, 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.

In the present case, the Tribunal finds that the first-named applicant faces a real chance of persecution in East Timor in the foreseeable future for the Convention reason of his membership of a particular social group, namely Group 1, as a result of the combination of Convention-motivated risk of serious harm and a failure of state protection.

Safe Relocation Within East Timor

Given the widespread nature of the problems in East Timor, the small size of that country, the applicant's particularly identifiable characteristics as described above, and the fact that he is now responsible for looking after the second-named applicant, who has a medical condition, the Tribunal finds that relocation within East Timor is neither a safe option for the applicant nor one which is reasonably open to him/her.

Safe Third Country

There is no evidence that the first-named applicant has the right to enter and reside in any other country for the purposes of s.36(3) of the Act such as might legally absolve Australia of its protection obligations to the applicant. Although the evidence indicates that the first-named applicant has, on numerous occasions, avoided the harm he feared in East Timor by travelling to Country X after obtaining the necessary visa, there is no evidence to suggest that he has a legally enforceable right to enter and reside there: see *Applicant C v Minister for Immigration and Multicultural Affairs* [2001] FCA 229 (Carr J, 12 March 2001) at [28], *Kola & Anor v Minister for Immigration and Multicultural Affairs* [2001] FCA 630 (Mansfield J, 30 May 2001) at [36], upheld by the Full Federal Court in *Minister for Immigration and Multicultural Affairs v Applicant C* (2001) 116 FCR 154 and *Kola v Minister for Immigration and Multicultural and Indigenous Affairs* (2002) 120 FCR 170 at [63] respectively.

Consideration of the Claims of the Second-named Applicant

The Tribunal has had regard to the circumstances of the second-named applicant to the extent that they are likely to add to the risk of the first-named applicant experiencing persecution for a Convention reason in the reasonably foreseeable future, and the extent to which they might compromise the extent to which he might reasonably be able to relocate safely within East Timor.

However, recent case law developments which bind the Tribunal make it clear that as the second named applicant has not raised claims of his/her own at the primary stage by completing, or having completed on his/her behalf, Part C of the Form 866, the Tribunal has no jurisdiction to entertain his/her discrete protection claims, no matter how compelling they may be. This is explained in the following extract from *SZJKO & Anor v Minister for Immigration & Anor* [2008] FMCA 370, per Scarlett FM, a judgment delivered on 31 March 2008. The Tribunal has set out a substantial part of the decision on account of its broad significance:

63 The fact that there are different criteria for protection visas is made clear by the wording of s.36 of the Migration Act:

- (1) *There is a class of visas to be known as protection visas.*
- (2) *A criterion for a protection visa is that the applicant for the visa is:*
 - (a) *a non-citizen in Australia to whom the Minister is satisfied Australia has protection obligations under the Refugees Convention as amended by the Refugees Protocol; or*
 - (b) *a non-citizen in Australia who is the spouse or a dependant of a non-citizen who:*
 - (i) *is mentioned in paragraph (a); and*
 - (ii) *holds a protection visa.*

64 It can clearly be seen from the use of the word “or” that the criteria are alternatives. That is not to say, however, that a person cannot qualify under both criteria, but the person must make a separate application.

65 Subclass 866 of Schedule 2 of the Migration Regulations 1994 sets out the criteria to be satisfied at the time of application for a protection visa:

- 866.211** *The applicant claims to be a person to whom Australia has protection obligations under the Refugees Convention and:*
- (a) *makes specific claims under the Refugees Convention; or*
 - (b) *claims to be a member of the same family unit as a person (the **claimant**) who:*
 - (i) *has made specific claims under the Refugees Convention; and*
 - (ii) *is an applicant for a Protection (Class XA) visa.*

66 The authorities make it clear that there is a fundamental difference for the two bases for a protection visa. In *V120/00A and Others v Minister for Immigration and Multicultural Affairs*¹ the applicants were the widow and children of a man who had sought protection visas for himself and his family. The Minister’s delegate refused the application and so the applicant sought review by the Refugee Review Tribunal. The man died shortly before the Tribunal conducted a hearing. The Tribunal affirmed the delegate’s decision. The widow and children sought prerogative relief.

67 Kenny J dismissed the application, holding:

[56] *In the present case, it was the deceased who, at the time of application, sought a Protection (Class AZ) visa and who made the specific claims under the Refugees Convention. His wife and children made application for protection visas solely as members of his family.*

[57] *This is made clear from the different versions of Form 866 completed by the deceased and his family. The deceased completed a Form 866 entitled "Application for an applicant*

¹ (2002) 116 FCR 576

who wishes to submit their own claims to be a refugee". His wife and children completed applications entitled "Application for a member of the family unit", which carried the following notation:

This part is for a member of the family unit who does NOT have their own claims to be a refugee, but is included in this application....

[58] As the respondent's delegate held that the deceased was "not a person to whom Australia has protection obligations under the Refugees Convention", it followed that the delegate found that none of the deceased's family met the criterion in cl 866.222(b) of Schedule 2 of the Regulations. It was this decision that the deceased and his family challenged on review. Was it open to the Tribunal to decide the review application as if each living applicant had made an application for a Protection (Class AZ) visa?

[59] As the Full Court of this Court noted in Li at 535, the Act "places great emphasis on the need for a visa applicant to complete a prescribed application form". The Regulations do not, so it seems to me, permit the Tribunal to treat the applicants as if they had each sought a Protection (Class AZ) visa in her or his own right. As we have seen, the Regulations prescribed the application to be made by a family member of an applicant for a Protection (Class AZ) visa. This is the form that the applicants completed.

[60] In any event, even if it was open to the Tribunal to have considered their applications in this way, a result adverse to the applicants was inevitable. Having completed an application in December 1996 as a family member of an applicant for a Protection (Class AZ) visa (in reliance on criterion 866.221(b)), none of the present applicants would have been able to satisfy the Tribunal that she or he met criterion 866.222(b), since the principal claimant had died without being granted a Protection (Class AZ) visa...²

68 There was a similar factual situation in *NAEA of 2002 v Minister for Immigration & Multicultural & Indigenous Affairs*.³ The applicant's husband had applied for a protection visa and she made an application for a visa as a member of his family. A delegate of the Minister refused to grant them protection visas, so they applied to the Refugee Review Tribunal for review of the decision. Unfortunately, the applicant's husband died before the Tribunal hearing. The Tribunal conducted a hearing but found that it had no jurisdiction to determine the application for review, following the death of the husband, who was the primary claimant for a protection visa. The applicant sought judicial review of the Tribunal decision.

69 Gyles J dismissed the application and agreed with Kenny J's decision in *V120/00A*:

[13] Counsel for the applicant has sought to distinguish the reasoning of Kenny J, which the Tribunal followed, in various ways. It is not necessary to explore all of these arguments, as, in my opinion, one of the strands of her Honour's reasoning is fatal to this application. At all material times, including the time of the original application, the time of the Tribunal decision and the present time, a necessary criterion to be established for the grant of a visa of the type applied for was that the claimant (in this case, the husband) has been granted a protection visa. That criterion has been incapable of fulfilment since the death of the husband on 29 October 2001 (see Kenny J at 590 [60]).

*[14] ...In the present case, it is quite plain that the applicant deliberately applied for a protection visa on the basis that she was a family member of her husband claimant and not in her own right. There is a fundamental difference between the two bases for a protection visa. In my opinion, the Act and the Regulations require separate and specific applications for each. It would not be open for the Tribunal to grant a protection visa to a person who had applied as a family member on the basis that that person was a refugee. I agree with the reasoning of Kenny J in *V120/00A* at [59].*

70 In *SZLGF & Anor v Minister for Immigration & Anor*⁴ Nicholls FM considered where a husband and wife applied for protection visas. The husband submitted claims to be a refugee

² (2002) 116 FCR 576 at [56]-[60]

³ [2003] FCA 341

⁴ [2008] FMCA 254

and the wife applied as a member of her husband's family. The applications were refused by a delegate of the Minister. On review by the Refugee Review Tribunal, the Tribunal rejected the claims of the applicant's husband on credibility grounds. At the hearing, however, the wife advanced claims to be a refugee in her own right. The Tribunal considered those claims and dismissed them, finding that her claims arose from the same facts as those of her husband's claims.

71 Nicholls FM, applying *VI20/00A* and *NAEA of 2002*, found that the Tribunal had committed jurisdictional error. His Honour held:

[52] On the authorities referred to above, the Tribunal was not entitled to proceed in this way. Importantly, however, the Tribunal does not appear to have directed its mind to the relevant criterion relating to the resolution of the applicant wife's application for a protection visa, namely, whether she was a member of the family of a person who had been granted a protection visa because the relevant decision maker had been satisfied that that applicant, in effect, met the Convention definition of "refugee". In my view, had the Tribunal properly addressed this criterion in its analysis, then notwithstanding that it also sought to consider the applicant wife as a refugee claimant in her own right, jurisdictional error may have been avoided.

[53] However, the Tribunal did not address the criteria relevant to the disposition of the applicant wife's application. (Section 36(2)(b) of the Act and cl.866.211(b) and 866.222 of Schedule 2 to the Regulations.) In that sense, the Tribunal has committed jurisdictional error in the way in which it resolved the application of the applicant wife...⁵

72 In my view, the facts in *SZLGF* are similar to the facts in the decision under review and, with respect, I agree with his Honour's reasoning.

73 The Tribunal in the decision under review considered the claims of the First Applicant for refugee status in his own right. The First Applicant made submissions challenging the factual basis of the Tribunal's finding, but in my view the Tribunal's findings were open to it on the evidence. The Tribunal was critical of the credibility of some parts of the First Applicant's evidence, but, again, these findings were open to it. There is no jurisdictional error in the Tribunal's finding.

74 Having found that the First Applicant did not meet the criterion set out in s.36(2)(a) for a protection visa, there was nothing further for the Tribunal to do in respect of his claim.

75 However, the Tribunal then considered the First Applicant under the criterion set out in s.36(2)(b). This was both unnecessary and misconceived. The First Applicant had never applied for a protection visa as a member of his wife's family unit, nor had his wife ever applied for a protection visa as a refugee in her own right. The Tribunal embarked on a futile exercise of considering the First Applicant's eligibility for something for which he had never applied as a family member of a person being considered against for which she had never sought to apply.

76 In the case of the First Applicant, the Tribunal had already addressed the correct criterion under s.36(2)(a), so its subsequent consideration of the First Applicant against the criteria in s.36(2)(b), whilst invalid, is of no effect. I am satisfied, relying on the reasoning of Nicholls FM in *SZLGF* at [52], that there is no jurisdictional error in the way in which the Tribunal resolved the application of the First Applicant.

77 In the case of the Second Applicant, however, the Tribunal approached the matter the other way round. The Tribunal considered the Second Applicant against the criterion in s.36(2)(a), that she was making a claim to be a refugee in her own right. This was an error, because the Second Applicant had never applied as a refugee in her own right, notwithstanding the fact that she gave evidence in support of such a claim before the Tribunal.

⁵ [2008] FMCA 254 at [52]-[53]

78 Whilst the Tribunal then made a finding that the Second Applicant did not meet the “alternative criterion” in s.36(2)(b), but the Tribunal did not, in its reasons, set out that the Second Applicant did meet the criteria in s.36(2)(b) because the person on whom her claim relied was not a person to whom Australia has protection obligations under the Refugees Convention as amended by the Refugees Protocol.

79 Thus, the Tribunal fell into jurisdictional error in dealing with the claim of the Second Applicant.

In the absence of any evidence to the contrary, the Tribunal is satisfied that the second named applicant is a relative (namely a sibling) of the first named applicant. The evidence also suggests that the first named applicant, was until he had to flee to Country X, the only breadwinner, and was effectively the head of the family unit comprising the siblings and their parent. There is no evidence to suggest that the second named applicant has ever married or is widowed, divorced or separated, and the evidence suggests that he/she is usually resident in the first named applicant’s household and, having regard to the medical evidence, is dependent on him for the purposes of r.1.05A(2), on the basis that he/she is substantially reliant on the other person for financial, psychological or physical support.

The Tribunal is therefore satisfied that the second named applicant is a member of the family unit of the first named applicant for the purposes of r.1.12(1).

CONCLUSIONS

The Tribunal is satisfied that the first named applicant is a person to whom Australia has protection obligations under the Refugees Convention. Therefore the first named applicant satisfies the criterion set out in s.36(2)(a) for a protection visa and will be entitled to such a visa, provided he satisfies the remaining criteria.

No specific claims were validly made by or on behalf of the second-named applicant. The Tribunal is satisfied that he is a member of the same family unit as the first named applicant for the purposes of s.36(2)(b)(i) and cl.866.222(a). The fate of his/her application therefore depends upon the outcome of the first named applicant’s application. In the event that application is successful, he/she will be entitled to a protection visa provided he/she satisfies the remaining criteria for the visa.

DECISION

The Tribunal remits the matter for reconsideration with the following directions:

- (i) that the first named applicant satisfies s.36(2)(a) of the Migration Act, being a person to whom Australia has protection obligations under the Refugees Convention; and
- (ii) that the second named applicant satisfies s.36(2)(b)(i) of the Migration Act, being the dependant of the first named applicant.

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. Iward