

071584912 [2007] RRTA 312 (30 November 2007)

DECISION RECORD

RRT CASE NUMBER: 071584912
DIAC REFERENCE(S): CLF2007/60685
COUNTRY OF REFERENCE: Kenya
TRIBUNAL MEMBER: Ms Christine Long
DATE DECISION SIGNED: 30 November 2007
PLACE OF DECISION: Sydney
DECISION: The Tribunal affirms the decision not to grant the applicant a Protection (Class XA) visa.

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

This is an application for review of a decision made by a delegate of the Minister for Immigration and Citizenship to refuse to grant the applicant a Protection (Class XA) visa under section 65 of the *Migration Act 1958* (the Act).

The applicant, who is a citizen of Kenya arrived in Australia and applied to the Department of Immigration and Citizenship for a Protection (Class XA) visa. The delegate decided to refuse to grant the visa and notified the applicant of the decision and her review rights by letter. The delegate refused the visa application because she decided that the applicant is not a person to whom Australia has protection obligations under the Refugees Convention.

The applicant applied to the Tribunal for review of the delegate's decision.

RELEVANT LAW

Under subsection 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.

Paragraph 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).

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 subsection 91R(1) of the Act persecution must involve “serious harm” to the applicant (para.91R(1)(b)), and systematic and discriminatory conduct (para91R(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: subsection 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: para91R(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 applicant, including the delegate's decision record. The Tribunal also has had regard to the material referred to in the delegate's decision. The Tribunal also has before it the applicant's application to this Tribunal for review.

In the protection visa application the applicant states that she was born in Kenya. She states that she belongs to the ethnic group Luo and her religion is Religion X. She states that her profession prior to coming to Australia was "[occupation]". She indicates that her parents, siblings and other family members live in Kenya. She indicates that she was educated in Kenya to university level. She indicates that she lived in Kenya from birth until the mid 2000s and then she lived in Country A for a period of time. She indicates that she was employed in Kenya for approximately 2 years by an international organisation and for two years in another position; she indicates that she was then employed by a company in Country A for approximately 2 years. She indicates that she left her home country using a legal exit permit and that she did not have any trouble getting her travel documents. She states that her travel document was extended in Country A. She states that she left Kenya and left Country A 1 month prior. She indicates that she arrived in Australia. She indicates that she has travelled to Country A, and to 3 other countries in the months prior to arriving in Australia.

The applicant states that she left her country because there was pressure on her from her family to marry her brother in law under the "terre" practice after her sister died. Her family is also forcing her to abandon being a "[religion]" and to get married. She said that a huge amount of money was paid to her parents as a dowry and they cannot afford to repay the bride price as they are very old and have little means of survival. The brother in law has threatened them. She had fruitless discussions with her family and village elders about the marriage and has "evaded" her parents. Her father has sent her emails on a number of occasions while she was in country A and Country B asking her to return to Kenya and she has been visiting several countries to avoid them. She does not want to marry the man as he is old, semi illiterate, a polygamist and she wants to continue her education.

The applicant states that if she returns to her country she will commit suicide as she will have no liberty and will not be able to practise her religion; this is a source of disagreement with her parents who won't let her do this practice. Also she could not continue her further studies and will suffer mentally, psychologically and spiritually. She is practising her religion in the Australian community. The applicant said that if she returns to her country she will have to find love with someone other than her husband as he has several wives and he will not dedicate his whole time to her; this will affect her life and she might get diseases. She also claims that if she returns to her country she will not be able to practice her religion. She states that she was introduced to this religion by her friend in country C but her family was against it which led to conflict.

The applicant said that if she returns to her country she will be mistreated by her dead sister's husband who is arrogant and violent to other wives who have left him; she will have no happiness, she will live in fear and have a "dead" life. The man cannot fulfil his parental responsibilities and her other sisters are responsible for the financial support of his children and other domestic issues. He will take revenge on her. There will be domestic violence and divorce as she is educated and he does not believe in "career women". She will be affected by "chira".

The applicant states that the authorities in her country cannot protect her as every community in Kenya are at liberty to perform their own rites; a relative has been forced to perform the Luo custom of “terre”. Also as the bride price has been paid the village elders will organise a “barasa” and this is the first stage before the issue is sent to the Supreme Court.

Attached to the protection visa application is a copy of the applicant’s passport indicating that her place of residence is Country A and a copy of the applicant’s birth certificate. There is also a copy of two documents described as e mails from the applicant’s father. The former document states that the bride price is paid, that a baraza was held by the village elders and they decided that the applicant must perform the terra ritual and that the brother in law (named) has threatened the family at home. The second document states that the bride price has been sold and the man has threatened to collect the dowry but it is already used to pay for the needs of the grandchildren. It suggests that the applicant should return home so the issue can be solved amicably.

In the application for review the applicant makes no new claims but states that her father has passed away. She attaches a copy of her “previous passport” issued in Kenya, a photograph described as of “the deceased siblings and their father”, a copy of a document described as a permit for burial, a document described as a residence permit for the applicant for Country A, *[details deleted in accordance with s431 as it may identify the applicant]*

The applicant sent the Tribunal a document described as the death certificate of her sister and a newspaper article where she states that her case appeared. She also sent the Tribunal a letter received explaining why her current passport indicates her place of residence is Country A and stating that she was not a permanent resident of Country A but had resident permit for there at the time she applied for the passport. She also said that she was only in Country D for a short time and another country for a short period when her flight to Australia was postponed. She also states that the majority of followers of Religion X face discrimination from family and society and that there is a place to practice her religion in Australia She said that she fears persecution in her country for ethnic and religious reasons and fled from her family because of discrimination and severe persecution. She said, “I have voluntarily returned to Kenya. I had missed my family due to my separation with them since the year [year]” but she could not bear the discrimination and persecution and an attempt at suicide before she came to Australia failed. She said that she thought about where she could go and agreed Kenya provides for freedom of movement. She had worked in Nairobi before she went to Country A but her family would have followed her to City 3 It is not correct that she is financially stable as she has been unemployed for a long period.

The applicant appeared before the Tribunal to give evidence and present arguments. The applicant indicated that she did not require an interpreter for the hearing. The applicant produced to the Tribunal a copy of her current Kenyan passport issued by passport control in Nairobi, and a copy of her prior passport copies were placed on the Tribunal file. She also produced to the Tribunal copies of documents, including documents previously produced and described as- a Certificate of Death in relation to her sister, a copy of a registered post international customer receipt addressed to the Country A Police Force (presumably in relation to a request by her for information for the character assessment for the purposes of her application for visa); a permit for burial for her sister; a residence permit for Country A for the applicant, indicating that the applicant was permitted to reside in Country A for the purposes of (employment with) a named company *[details deleted]*

In answer to questions from the Tribunal the applicant stated that she arrived in Australia some days after she left Nairobi but her travel was held up.

The applicant said that she went to Country A because she wanted peace of mind; she said that she got a job and then went to immigration to get her residence permit and her permit allowed her to work there. She said that she left home and got to Country A some days later. She said that she stayed continually in Country A for approximately 2 years. She said that she left there as she had already applied for her visa by then and her parents were “bugging her” because of the problem with her brother in law. She said that she left Country A because of family pressure and resigned her job there. She knew that she already had her visa for Australia when she left Country A but she had problems with her family. Her family was under pressure because the brother in law put pressure on them. The applicant said that she left Country A and travelled to Country D; she stayed in Country D for a short period in transit after travelling there. She said that she was also in Country B for approximately one month. Her father had asked her to return to her village and she stayed in Country B to decide what to do; she was with a friend from Kenya. She said that she left Country B and went back to her village as she wanted to know what her father was suggesting for her. She wanted to see her family as she missed them and she thought she could come to a conclusion about things; her father was there and she wanted to talk to him. *[details deleted]*

The applicant explained that her sister died in the early 2000s; she said that she made a mistake with that on her application. There was a dowry paid for her sister. Under local custom when her sister died this gave the sister’s husband the right to take her, the wife’s sister. She explained that her sister was married to this man and they had children together. She took some of the children into her custody before she went to Country A; they stayed with her when she lived in Nairobi. The applicant said that she lived in Nairobi but went to school/university in a rural part of Kenya. The applicant said that she graduated and then she worked in Nairobi for approximately 2 years. The applicant said that she did some work for one person and then she got a job with an organisation. When her contract expired she stayed in the city and then went to Country A. She said that after high school she moved away from her parents and she lived in Nairobi with her sister from the late 1990s until she went to Country A.

The applicant told the Tribunal that she returned to her local rural village in the month before she travelled to Australia for a number of days. She stayed with her parents and spoke with them. The rest of the time she stayed with her sister. The applicant confirmed that essentially she lived in Nairobi, went to Country A to work for two years, returned to Nairobi and then spent some days with her parents before coming to Australia.

The Tribunal asked the applicant how she was supporting herself financially just before she came to Australia. The applicant said that she was paid well and saved a lot. She said that she wanted to come to Australia for further education. She said that she decided not to return to Kenya when she went to Country A; this was because of the mental stress she suffered because of the custom of terre; she was not ready to get married and she wanted to get educated.

The applicant said that the problem with the terre started the year after her sister’s death. She took some of the children when her sister died and looked after them until she went to Country A. The children went back to her mother in the rural village when she went to Country A. The Tribunal pointed out to the applicant that she claims that the terre started in the year after her sister’s death but she did not go to Country A until the following year. She

said that she was trying to work things. The Tribunal asked her what caused her to go to Country A. The applicant said that she was with a boyfriend. She said it was tough for her and the day she left for Country A her family did not know and they knew about it after she left. The applicant said that her father and mother came to the house with another leader/elder. Her father tried to explain to the brother in law that she was not ready to marry. There are a lot of rituals. In the previous year a number of people came to take her back by force but she refused. This also happened 2 months later and happened three times altogether. She then stayed with her boyfriend who was in a pace which was approximately an hour away. This was not just a family dispute but a community dispute. The Tribunal asked the applicant how it was that she managed to avoid getting taken by force in these circumstances. She said that she reported this to police but they said it was domestic and she should sort it out. She said that then the elders organised the baraza.

The applicant said that when she returned to her village she thought they could sort it out; she was afraid but wanted to talk to her mother. She did not want to go through the rituals. The Tribunal asked her why she returned to her village if she was afraid of harm for the reasons that she claims. She said that her sister said that she should go home and see what happens.

The applicant said that she stayed roughly a month. She said that she applied for her visa for Australia six months earlier. The applicant said that she knew she had her visa before/when she left Country A. The Tribunal asked her why if she had a passport and visa she returned to Kenya and to her village. She said that her father had said there were lots of problems. The Tribunal asked the applicant why she applied for her visa and she said because of the threats from her brother in law.

The Tribunal told the applicant that it had some concerns about her claims. Although she claims that she left her country because she feared harm there from her brother in law/the family/the community after her sister died, she was living and working in Nairobi according to her oral evidence, she went to Country A and then she returned to her country and her village prior to travelling to Australia. The applicant said that her father was sick and she had love for him. The Tribunal asked the applicant whether it was her intention to leave her country and come to Australia to seek protection before she went back to Kenya after she had her visa for Australia. She said that she decided to apply to be a refugee after being here a short period. She thought she would have peace of mind here and knew the visa she had was for three months. She did not know that she could apply here; she just went to the web site.

The applicant said that she also is not Christian. Her boyfriend introduced her to religion X. She practises that religion in Australia. She goes regularly when she has time. She last went a week ago.

The Tribunal asked her what happened to her in her country because of her religion. She said that her family regarded it as a cult and her family refused for her to come home. The Tribunal pointed out that she did in fact go home and she said that she always wanted to explain. The Tribunal asked her if anything else happened to her in her country because of her religion. She said that she tried to commit suicide as her life had no meaning; she has misplaced the note from her doctor.

The Tribunal referred to the copy of the document described by the applicant as the newspaper article where her case appeared in the “[publication name]” this was sent to the Tribunal by the applicant. The Tribunal asked the applicant why this would be published at this time so long after the events arising from the early 2000s. She said that it was when she

tried to commit suicide. The Tribunal noted that the article did not mention her suicide and she is not named. She agreed.

The applicant told the Tribunal that the photograph that she had sent to the Tribunal was with the brother in law and his children.

The Tribunal asked the applicant what she fears harm from should she return to her country. She said that she fears her brother in law; he threatened her parents and then her mother. The Tribunal pointed out to the applicant that her evidence is that her parents essentially remained living in the village where they always lived. She said that her brother in law is in another village; she agreed that her parents did stay in her village.

The Tribunal asked the applicant why she cannot return to Nairobi where she previously lived. She said there will be the same problem and her life will be in danger and there will be trouble. The Tribunal reminded the applicant that she had stayed there after her sister's death for a number of years when she went to Country A and then returned there even though she had her passport and visa for Australia. She said that she had fear and she wanted to have space.

The applicant said that she cannot go anywhere in her country as she cannot hide and they will catch her and she will still be in trouble.

The applicant said there is a police report when her parents and other people came to get her and take her by force. She said that she needs to get it and did not get it before as she thought it was not important because the police said it was a domestic issue. The applicant also told the Tribunal that she wanted some time to get a note from her doctor about her suicide attempt in Kenya and the Tribunal allowed her time to provide additional information.

The Tribunal received further information from the applicant in support of her claims. There is a photocopy of a document headed "[police record]" and stamped Kenya Police and dated. It refers to a report of an assault on the applicant "by her parents and other extended family" due to her refusing to marry her brother in law and it describes injuries to her and her appearance, concluding, "the father claims this is a family affair. We advise them to solve the matter amicably as it is domestic". In the report there is a description of her appearance at the time as covered in dust and injuries to her are described. There is a further document described as a medical report in relation to the applicant from a named medical centre stating that she presented at the medical centre and had difficulty breathing, convulsions, loss of mind, dizziness and nausea and that she was under medication for a number of days and was referred for "frequent counselling".

COUNTRY INFORMATION

The Tribunal considered the following country information.

Country Reports on Human Rights Practices, 2006, in relation to Kenya
released by the Bureau of Democracy, Human Rights, and Labor
March 6, 2007. This document refers to the following-

"Wife inheritance, in which a man inherits the widow of his brother or other close relative, was commonly practiced in certain communities. On January 15, the Nation reported that men felt it was their responsibility to marry HIV-positive widows to spare other men from

being infected. Although poor and uneducated women were more likely to be inherited or suffer from property and inheritance discrimination, prominent and educated women sometimes were victims. Forced marriages were also common.”

BBC News Online: World: Africa

Monday, June 7, 1999 Published at 15:49 GMT 16:49 UK

Aids forces change on Kenya's Luo people

By East Africa Correspondent Cathy Jenkins

Millicent Akinyi Dula lives in Asembo Bay, a small fishing community on the shores of Lake Victoria in Western Kenya.

She is a member of the third largest tribe in the country, the Luo, which is known for strong customs including polygamy and lavish burial ceremonies.

A few months ago Millicent's husband died, leaving her with six children.

According to Luo custom, Millicent was expected to marry her brother-in-law, regardless of how many wives he already had. The practice, known as wife inheritance, is the traditional Luo way of looking after the economic needs of a widow.

But Millicent refused. As a strong Christian she did not believe in polygamy.

And with her work as a midwife, she also felt economically independent. So, at her husband's funeral, she stood in front of the coffin and informed the mourners that she was going to remain single.

It was not an easy announcement to make. Many of the people present simply did not believe her. Even now, many in her community expect her to change her mind.

Because of her decision, Millicent has had difficulties in her work. Some women refuse to let her deliver their babies because they believe that a widowed woman who remains single brings death into a house.

Fear of Aids

Millicent had another very practical reason for refusing to remarry. She does not know exactly what her 44-year-old husband died of, but she is aware of the possibility of Aids.

She has not had herself tested, but she would not want to risk spreading the HIV infection through her brother-in-laws' family, or indeed, of becoming infected herself. She has no idea of the sexual history of the man she was expected to sleep with.

Western Kenya has one of the highest rates of HIV infection in the country.

The disease is cutting a swathe through communities like Asembo Bay And the tradition of wife inheritance is being blamed as one of the contributing factors.

Faced with this, the custodians of Luo customs have themselves begun to question their age-old traditions.

Over the past months, Luo elders have been holding discussions with various sections of the community, such as womens' groups and students' associations.

They are trying to see whether they can modify the custom of wife inheritance to bring it into line with the realities of modern life.

Search for consensus

Professor Gilbert Ogutu teaches at Nairobi University, and is a Luo himself. He says that on the question of wife inheritance, it is elderly Luos, traditionally the most conservative, who may have provided the way forward.

In discussions with the Luo Council of Elders, several old people remembered examples of a widow being symbolically remarried to a brother-in-law.

No sex was involved, but the community knew that the widow was now part of a new family and her economic needs would be looked after.

For many young, urban, educated Luo, wife inheritance already belongs to the past. But in the rural areas around Lake Victoria, old customs are hard to change.

In Asembo Bay there is an Aids information Centre which is trying to inform people about how the disease is spread.

It is an uphill struggle because many people believe that Aids is a result of what the Luo call "Chira" - a punishment for something done wrong.

The Luo elders want to reach a consensus within the next few months on the issue of wife inheritance.

Known to be exceptionally proud of their customs, no-one is suggesting that by bringing in a modification, the Luo will lose any of their identity.

FINDINGS AND REASONS

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

The applicant claims that she left her country, and fears to return there because of harm she suffered/will suffer due to her ethnicity, because she is being forced to marry under Luo custom, and because of her religion. She claims that she was harmed, and fears further harm from, her brother in law, her parents and family members and the community/elders because she refused and continues to refuse to follow local Luo custom and marry her brother in law following her sister's death; she refuses for various reasons including because her brother in law is old, semi illiterate, has many wives, disapproves of career women, she will not be able to study further and that she will be subjected to "chira".

She claims that her brother in law is also threatening her parents/mother because he has paid a "bride price" which they cannot repay. The applicant also said that she cannot return to her country because of her religion. She claims that she is not Christian and commenced the practice of religion X which she continues to practice regularly in Australia. She claims that she will suffer discrimination from her family and society in her country because of her religion, that she is not free to practise her religion in Kenya if she returns there, and that her family regard her religion as a cult and have refused to allow her to come home. She claims that because of this she attempted suicide in her country as her life had no meaning. The applicant claims that she cannot get protection from the harm she fears in her country because police say that the dispute about the marriage to her brother in law is a domestic matter and because every community in Kenya is at liberty to perform its own customs/rites.

The Tribunal accepts that the applicant is of the ethnicity that she claims to be. Although the Tribunal has located country information about the custom of "wife inheritance" in Kenya, it has not been able to locate country information to support the applicant's claims about a Luo

custom that calls for a single female relative of a deceased wife being forced to marry the male widower. It accepts however, from the information that it has consulted, that forced marriages of the kind the applicant refers to are common in Kenya. The Tribunal accepts and finds that "women who are subjected to forced marriages" constitutes a particular social group for the purposes of the Convention. Clearly however the Tribunal must determine whether the applicant before it has a genuine fear founded upon a real chance of persecution for a Convention reason if she returns to her country.

The Tribunal accepts that: "applicants for refugee status face particular problems of proof as an applicant may not be able to support his statements by documentary or other proof, and cases in which an applicant can provide evidence of all his statements will be the exception rather than the rule." The Tribunal also accepts that: "if the applicant's account appears credible, he should, unless there are good reasons to the contrary, be given the benefit of the doubt". (The United Nations High Commissioner for Refugees' *Handbook on Procedures and Criteria for Determining Refugee Status*, Geneva, 1992 at para. 196). However, the Handbook also states (at para 203): "The benefit of the doubt should, however, only be given when all available evidence has been obtained and checked and when the examiner is satisfied as to the applicant's general credibility. The applicant's statements must be coherent and plausible, and must not run counter to generally known facts"

It is for the Tribunal not only to consider inconsistencies but also to determine what evidence it finds credible (Nicholson J. in *Chen Xin He v MIEA*, 23 November, 1995 (unreported) at p.11). The Tribunal does not have to accept uncritically all statements and allegations made by an applicant. (Beaumont J in *Randhawa v MIEA*, 124 ALR 265 at p.278). "The mere fact that a person claims fear of persecution for reasons of political opinion does not establish either the genuineness of the asserted fear or that it is well-founded or that it is for reasons of political opinion.[it is] for the Applicant to persuade the reviewing decision-maker that all of the statutory elements are made out." (*MIEA v Guo and Anor* (1997) 144ALR 567 at 596).

The applicant has produced to the Tribunal a copy of her Kenyan passport and the Tribunal accepts that the applicant is a national of Kenya and is who she claims to be. The Tribunal accepts the applicant's oral evidence that after she completed high school she left home and lived with her sister in Nairobi, that she was educated at a place outside Nairobi, that she graduated and that she worked as she claims in Nairobi for a number of years. The Tribunal accepts that the applicant had a residence permit to live and work in Country A for a number of years. It accepts and finds that she went to Country A for work, that she stayed living in there for a couple of years. Having regard to her oral evidence and the details in her passport the Tribunal also accepts that the applicant left Country A and returned to Kenya recently, via Country B where she stayed for about a month. It accepts that the applicant lived again with her sister in Nairobi until she left Kenya to come to Australia. The Tribunal also accepts and finds that the applicant returned to her local rural village in Kenya and stayed with her parents for a number of days.

Having regard to the applicant's evidence and the details in her passport issued in Kenya the Tribunal finds that the applicant's visa for Australia was granted before she returned from Country A to Kenya.

The Tribunal accepts that the photograph submitted by the applicant is of the persons named on the back of that photograph.

The Tribunal accepts that the applicant's sister died as she claims and that the applicant cared for some of the deceased sister's children before she went to Country A. Not without some doubt about the matter the Tribunal also accepts that the applicant's family members including the brother in law wanted the applicant to marry the brother in law and look after the children and put some pressure on her to do so and that this caused distress to the applicant who wanted to pursue her studies. The Tribunal accepts that the applicant refused to comply with her family's wishes and resisted the family's pressure for her to marry. It accepts that she went to work in Country A because she wanted "peace of mind" from the pressure put upon her by her family.

The Tribunal does not accept as true that the applicant left Kenya and fears to return there because she suffered or feared/fears harm, amounting to serious harm, for the reasons that she claims. The Tribunal finds that the pressure put upon the applicant by her family to marry does not amount to serious harm for the purposes of the Convention. In the Tribunal's view it is not consistent with the applicant's claims, namely that she left her country and fears to return there because she was/will be harmed there as she claims by her family, including her brother in law and community members/elders following her sister's death, that she continued to live, and also work, in Nairobi, where she had been living and working for some time, for the period after her sister died and until she went to Country A to work. The Tribunal does not accept as true that the applicant's parents, family members or anyone else tried to take her by force when she was living in Nairobi and that she was injured at that time as she claims. The Tribunal considers that the applicant has embellished her claims by these details to assist her application for protection. The Tribunal does not accept that the copy of the police report is reliable evidence of the facts in it; the applicant told the Tribunal at the hearing that she had not produced this report before and had not done so because the police reported that the incident was a domestic incident. In the Tribunal's view, given the potentially corroborative value of this document for the applicant's claims about what happened to her in her country, if the report were genuine the applicant would have produced it before she did. She delivered it to the Tribunal after the Tribunal hearing.

In the Tribunal's view it is also not consistent with the applicant's claims, namely that she feared/fears harm amounting to serious harm in her country, that she returned there, not only to Nairobi but also to her parents' village and home and then stayed in Nairobi until she left to come to Australia. At the time she returned to Kenya she had her passport and a valid visa to come to Australia. In the Tribunal's view if she truly feared the harm that she claims to fear in her country, for the reasons that she claims, she would not have returned and stayed there. In the Tribunal's view the applicant's explanation for this, that she wanted to talk to her father and see what he was proposing for her and that she missed her family, do not reasonably explain why she would return to her country and her parents' village if she truly feared the harm there that she claims.

The Tribunal does not accept as true that the applicant's brother in law has threatened her parents/her mother as she claims for the reasons that she claims. In the Tribunal's view this claim is not consistent with the applicant's evidence to the Tribunal that her parents, remained living in the village as they always had done when the applicant went to Country A. The applicant's explanation for this is not reasonable or plausible, namely that they could do this because the brother in law lived in a different village.

The Tribunal accepts that the applicant took up the practice of religion X and that she practises in Australia but it does not accept as true that she feared or suffered harm amounting to serious harm in her country because of her religious practice or that she abandoned her

practice in her country because of fear of harm. As referred to above, her oral evidence to the Tribunal is that she lived and worked in Nairobi at the time she took up the religion and that she returned to live there, including visiting her village and her parents, until she came to Australia. The Tribunal does not accept as true on the evidence before it that the applicant cannot return to her country because she fears harm there because of her practice of her religion, in either her country or in Australia, and because she is not Christian. The Tribunal does not accept as true that the applicant's family will not let her go home because of her religion as her evidence is that she visited her parents before she came to Australia. The Tribunal accepts that the applicant's family does not approve of her religion but in the Tribunal's view this disapproval does not amount to serious harm for the purposes of the Convention. The Tribunal accepts that the applicant may be discriminated against by some members of society in her country because of her religious practice and because she is not Christian, but in the Tribunal's view the evidence before it does not support the claim that this amounts to serious harm for the purposes of the Convention and that she was or will be persecuted because of her religion. When the Tribunal asked the applicant what happened to her in her country because of her religion she told the Tribunal that her parents would not let her go home and also that she tried to commit suicide as her life had no meaning; after the hearing she provided the Tribunal with a medical report in support of the latter claim. Not without some doubt about the matter the Tribunal accepts that the applicant had the symptoms as set out in the report and needed counselling; the report however makes no mention of suicide or a suicide attempt. The applicant was clearly well enough to leave her country and embark on an international flight as indicated by the entry in her passport produced to the Tribunal. The Tribunal does not accept as true that the applicant attempted suicide in her country because she suffered of feared persecution there for the reasons that she claims.

Because the Tribunal considers that the applicant's claims are not consistent with her remaining in her country and also returning to her country and her village prior to coming to Australia, and because it considers that she has given untruthful evidence to the Tribunal to embellish her claims in order to assist her application for protection, the Tribunal does not consider that the newspaper article and the two e mails, which she has produced in support of her claims, are reliable evidence of the facts in them. The Tribunal also does not consider that the applicant has provided a reasonable explanation of why a paper would publish such an article, and about her abandonment of her religion; she stated that the paper published the article at this time because it was when she attempted suicide but there is no mention of this in the article.

In the Tribunal's view there is no plausible evidence before it that the applicant fears persecution, or has suffered or will suffer persecution in Kenya, because of her ethnicity, her religion, because she is a member of a particular social group or for any Convention reason, either now or in the reasonably foreseeable future, if she returns to her country. There is also no plausible evidence before the Tribunal that the applicant cannot get protection from harm in her country for a Convention reason, including because of her ethnicity, because of her religion or because she is a member of a particular social group. Having regard to the above the Tribunal is not satisfied, on the evidence presently before it, that the applicant has a well-founded fear of persecution in Kenya within the meaning of the Convention.

CONCLUSIONS

Having considered the evidence as a whole, the Tribunal is not satisfied that the applicant is a person to whom Australia has protection obligations under the Refugees Convention.

Therefore the applicant does not satisfy the criterion set out in para.36(2)(a) for a protection visa.

DECISION

The Tribunal affirms the decision not to grant the applicant a Protection (Class XA) visa.

<p>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 <i>Migration Act 1958</i>. Sealing Officer's I.D. PRDRSC</p>
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