

DECISION RECORD

RRT CASE NUMBER: 0906559

DIAC REFERENCE(S): CLF2009/102754; CLF2009/65106

COUNTRY OF REFERENCE: Malaysia

TRIBUNAL MEMBER: Rosa Gagliardi

DATE: 12 November 2009

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 and third named applicants satisfy s.36(2)(b)(i) of the Migration Act, being members of the same family unit as the first named applicant.

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

1. 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).
2. The applicants, who claim to be citizens of Malaysia and applied to the Department of Immigration and Citizenship for Protection (Class XA) visas [in] May 2009. The delegate decided to refuse to grant the visas [in] August 2009 and notified the applicants of the decision and their review rights by letter [on the same date].
3. 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
4. The applicants applied to the Tribunal [in] August 2009 for review of the delegate's decisions.
5. 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.
6. Please note that in this decision the terms "first named visa applicant" and "visa applicant" are used interchangeably for ease of reference.

RELEVANT LAW

7. 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.
8. 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).
9. Section 36(2)(b) provides as an alternative criterion that the applicant is a non-citizen in Australia who is a member of the same family unit as a non-citizen (i) to whom Australia has protection obligations under the Convention and (ii) who holds a protection visa. Section 5(1) of the Act provides that one person is a 'member of the same family unit' as another if either is a member of the family unit of the other or each is a member of the family unit of a third person. Section 5(1) also provides that 'member of the family unit' of a person has the meaning given by the Migration Regulations 1994 for the purposes of the definition.
10. Further criteria for the grant of a Protection (Class XA) visa are set out in Part 866 of Schedule 2 to the Migration Regulations 1994.

Definition of 'refugee'

11. 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.
12. 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.
13. 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.
14. There are four key elements to the Convention definition. First, an applicant must be outside his or her country.
15. 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.
16. 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.
17. 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.

18. 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.
19. 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.
20. 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

21. 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, including those submitted by the applicant.
22. The applicants appeared before the Tribunal [in] November 2009 to give evidence and present arguments. The Tribunal hearing was conducted with the assistance of an interpreter in the Tamil and English languages.
23. The applicants were represented in relation to the review by their registered migration agent. The representative attended the Tribunal hearing.
24. The applicant is a 42 year old married female, born in Selangor, Malaysia. She declares her ethnic group to be Indian Muslim. She has four children, two sons and two daughters, and is estranged from her husband. The applicant has indicated that she has completed her primary and secondary education in Kuala Lumpur and lists her profession as [details deleted: s.431(2)].
25. The applicant arrived in Australia [in] April 2009 as the holder of a Class UD subclass 976 Electronic Travel Authority (Visitor) visa valid until [a date in] July 2009. [In] May 2009 the applicant applied for a Class XA subclass 866 Protection visa and was granted an associated Bridging A Visa. [In] August 2009 the applicant added her two daughters (listed as Applicant Two and Applicant Three – secondary applicants) to her Protection application on the basis of their membership of her family unit. The secondary applicants arrived in Australia [in] August 2009 as the holders of Class UD subclass 976 Visitor visas.
26. The applicant's claims were outlined in a statutory declaration dated [in] July 2009, and can be summarised thus:

- In 1988 she was forced to enter into an arranged marriage with [Person 1], a Muslim man of Indian ethnicity;
- In Malaysia, women, particularly Muslim women, are treated as second-class citizens;
- Her husband controlled and abused her verbally and psychologically soon after they were married;
- In 1995 when the applicant moved out of her family's village, her husband's behaviour dramatically worsened. He began drinking heavily and regularly assaulted her both verbally and physically;
- She felt that she could not tell anyone about the way her husband treated her as she was humiliated, she was frightened of her husband, she was aware that marital domestic violence was tolerated in Malaysian society and she did not have any eye witness to verify her account which the police required;
- She feels she will be discriminated against and denied protection by the police because she was an Indian Muslim and the police would assume she was Hindu because of her skin colour;
- On one occasion her husband poured boiling oil on her arm. She felt she could not seek medical treatment for this injury as her husband would beat her if he discovered she had told people about the abuse she suffered;
- She told her father and siblings about the abuse, however they could not protect her;
- She regularly travelled to Singapore, South Africa, Indonesia and Thailand with her employer between October 2001 and December 2002. Most trips were less than nine or ten days long and her husband permitted her to travel as she was paid well. She did not consider investigating protection in these countries as she was committed to caring for her disabled employer and too busy to investigate how she could remain in these countries;
- In approximately 2003 her husband publicly accused her of infidelity, alleging she was sleeping with a Christian man. She was humiliated and feared social ostracism as she was seen to be diverging from strict Muslim beliefs relating to relationships with people of different faiths;
- Her husband has also sexually assaulted her;
- She stayed in Singapore between July 2003 and January 2005 after she obtained a job in a nursing home;
- In early 2005 her husband promised to treat her more humanely but continued to become increasingly violent and abusive;
- In March 2005 her husband burnt her with a hot iron and stabbed her, threatening to kill her for dishonouring him. She asked a neighbour to take her to hospital and remained in hospital for one month;

- She reported the incident to the police, however, they did not take her report seriously, indicating “*these sorts of fights were common in marriage and it wasn’t something you came to the police about*”. No police report was filed but the police indicated that she could call them and they would come to her house if her husband was abusive again;
- She is discriminated against because of her Indian background. Malay Muslims in Malaysia treat her as an Indian Hindu and Indian Hindus discriminate against her as she is Muslim. The Government in Malaysia does not recognise her as Malay because of her Indian background and deny Indian Muslim government assistance;
- Between 2005 and 2009 her husband continued to abuse her and began hitting her eldest daughter;
- In April 2009 she decided to leave Malaysia for Australia;
- She cannot return to Malaysia as her husband will find her and kill her;
- She cannot relocate to a different area of Malaysia as she will face severe discrimination from the community and will not receive assistance from the government as she is an Indian Muslim. Her husband also has contacts all over Malaysia and will find her;
- Men in Malaysia commonly view women as possessions and her husband’s pride will be at stake if she seeks an independent life in Malaysia;
- She cannot divorce her husband in Malaysia and it is extremely difficult for Muslim women to obtain a divorce in Malaysia and she and her husband would have to undergo marriage counselling for approximately two years while residing together. Her husband would kill her during this period;
- The authorities in Malaysia could easily be bribed by her husband to withdraw any protection offered to her; and
- Her husband has threatened her children in Malaysia and has stated he will kill her and burn the entire family.

27. In the statutory declaration above, the visa applicant also states:

I am petrified that [Person 1] is going to find me here in Australia like he found me in Singapore. I am also severely distraught about leaving my children behind in Malaysia, particularly my youngest daughter. This causes me severe mental anguish. I feel very guilty about leaving my children in Malaysia, but I felt as if had to save my life and that I could one day bring my children to safety as well by fleeing from [Person 1]. I knew that if I stayed in Malaysia with [Person 1] I would have committed suicide or be killed by [Person 1] and that would have been worse for my children. The only thing that kept me from killing myself during my marriage was my children.

I, the above named person, wish to make a police report against my husband [Person 1]. On [date]/03/05 at approximately 8pm, my husband came home in a drunken state with two friends. He suddenly started hitting me until I almost lost consciousness. He then brought a hot iron towards me and part of my right thigh was burnt. I tried to fight off his attack but without success. He then threatened to kill me with a knife and said I was better off dead.

When he attacked me with the knife I again fought off his attack and I received a cut under my right armpit. After that he brought his friends into the house, they were all drunk. I have 4 children, 2 girls and 2 boys. I fear for the safety of my children. My husband only comes home if he feels like it and he is always asking me for money. When I did not hand over the money he will beat the children and me. Whenever he beats me he says he just wants me to die.

29. [Name deleted: s431(2)], Psychologist,[organisation deleted: s431(2)], Victoria, provided the following letter in support of the applicant receiving assistance under the [welfare organisation deleted: s431(2)]:

...this 42 year mother of 4 presented for psychiatric assessment by myself at the [welfare organisation]. She arrived in Australia with her girlfriend in April 2009 and is seeking asylum. She is living in a boarding house and is suffering severe PTSD. She has a long history of serious domestic violence perpetrated against her from an alcoholic husband. These abuses include frequent serious assaults, stabbings, burnings, threats on her life and sexual assault. She has 'escaped' to Australia, but has serious emotional and psychological repercussions of her long-term abuse. Further she has real fears for the safety of her four children who are in the care of her elderly parents in Malaysia.

[The applicant] has a full syndrome of symptoms consistent with PTSD. She is extremely traumatized and her symptoms and presentation were clearly consistent with the account she gave. I have enormous concerns for her well being. Further to her mental health problems, she has no source of income and is very isolated....

30. The applicant has also submitted her admission records for [hospital deleted: s431(2)], Emergency Department, Victoria, illustrating that the applicant had intended to self harm. Psychiatrist [name deleted: s431(2)] who saw the visa applicant on admission has made entries in her reports dated [in] October 2009 stating that the applicant is suffering Adjustment Disorder, Situational Crisis, Chronic PTSD and multiple psychological stressors. She is currently seeking assistance from the [welfare organisation deleted: s.431(2)] concerning her mental health difficulties.

Evidence at hearing

31. The Tribunal stated at hearing that it had ample evidence before it that the visa applicant had suffered domestic violence in Malaysia and that given her psychiatric reports and history that it was not in the best interests of the applicant to relive the abuse by recounting her experiences to the Tribunal. In short, the Tribunal accepted the visa applicant's claims of having suffered domestic violence at the hands of her estranged husband. Given the documented nature of her claims regarding domestic claims, and given her presentation at hearing in which the applicant appeared to be disorientated and remote, the Tribunal gave consideration to the applicant falling within the meaning of the *Guidance on Vulnerable Persons* issued by the Refugee Review Tribunal on 5 June 2009.
32. The Tribunal stated that it wanted to carefully consider, however, whether domestic violence in itself attracted protection under the Refugee Convention, particularly in light of the efficacy of state protection and that if in considering all the material before it, the Tribunal came to the conclusion that it did not, it would consider making a referral for Ministerial Intervention under section 417 of the *Migration Act 1958*, on the basis of the applicant having

endured domestic violence and developing serious psychological reactions as a result of that violence.

FINDINGS AND REASONS

33. The Tribunal does not have any information before it to suggest that the visa applicants are not Malaysian citizens. They entered Australia on Malaysian passports and there is no evidence that they have the right to enter and reside in a safe third country under section 36(3) of the *Migration Act 1958*.

Primary decision

34. The Departmental delegate at primary decision also found that the applicant had a genuine fear of harm from her husband. The delegate considered it appropriate to find that the applicant belongs to the particular social groups comprising “women in Malaysia” and “married Muslim women” and that the Convention grounds of membership of a particular social group and ethnicity are the essential and significant reasons for the harm feared as outlined in subdivision AL of the *Migration Act 1958*.
35. The delegate also found that the harm feared, that is possible death and serious assault, involved serious harm and systematic and discriminatory conduct as also outlined in subdivision AL of the *Migration Act 1958*.
36. The delegate was not satisfied, however, that State protection was not available to her and that it would be withheld for a Convention reason. The delegate was also not satisfied that there was a real chance of Convention related persecution occurring and found that the applicant’s fear of persecution, as defined under the Refugees Convention was not well founded.

Particular social group and Convention nexus

37. Before a decision can be made that a person is a refugee by reason of his or her membership of a particular social group, the Tribunal must be satisfied that:
- there is a relevant social group of which the applicant is a member, and
 - the persecution feared is for reasons of membership of the group.
38. The Tribunal does accept that the visa applicant is a member of a particular social group which sets that group apart in society and is not distinguishable simply by a common fear of persecution. The Tribunal’s finding in relation to the composition of the particular social group within which the visa applicant falls differs from that of the Department, however. The Tribunal does not accept that “Malaysian women” or “married Muslim women in Malaysia” accurately reflect the particular social group to which the visa applicant belongs. In taking this very broad approach it reduces the ability of the visa applicant to meet the definition of a refugee within the Convention, when the evidence clearly points to the applicant’s claims being multifaceted and including integers concerning ethnicity. In other words, it leaves out the “something more”. Indeed the visa applicant’s representative has also posited claims that the threats to her life are a consequence of her membership of one or more particular social groups variously described as:
- (a) Malaysian women victims of domestic violence; and/or
 - (b) Malaysian women who are separated; and/or

- (c) Malaysian women who are also of Indian ethnicity;
- (d) Malaysian women who are separated and who initiated the separation; and/or
- (e) Malaysian women without male protection; and/or
- (f) Malaysian women; and/or
- (g) Malaysian women who suffer from psychological illness as a result of domestic violence.

39. Having considered the various possible particular social group to which the visa applicant could belong, the Tribunal considers that “Malaysian Women of Indian/Muslim ethnicity who suffer domestic violence” appropriately categorises and encompasses the particular social group to which the visa applicant belongs. The Tribunal finds, as did the Department, that that the Convention grounds of membership of a particular social group and ethnicity are the essential and significant reasons for the harm feared as outlined in subdivision AL of the *Migration Act 1958*, although the Tribunal considers it important to also include the Indian aspect of the visa applicant’s ethnicity.

40. In *Applicant S* the High Court emphasized the relevance of cultural, social, religious and legal factors or norms in a particular society in determining whether a posited group is a particular social group in the society. In this decision, Gleeson CJ, Gummow and Kirby JJ gave the following summary of principles for the determination of whether a group falls within the definition of particular social group at [36]:

...First, the group must be identifiable by a characteristic or attribute common to all members of the group. Secondly, the characteristic or attribute common to all members of the group cannot be the shared fear of persecution. Thirdly, the possession of that characteristic or attribute must distinguish the group from society at large. Borrowing the language of Dawson J in *Applicant A*, a group that fulfils the first two propositions, but not the third, is merely a “social group” and not a “particular social group”.

41. In *Applicant S*, Justice McHugh went on to explain that the collection of persons who comprise a particular social group must share a certain characteristic or element which unites them and enables them to be set apart from society at large. That is to say, not only must such persons exhibit some common element; the element must unite them, making those who share it a cognisable group within their society:

The use of [the term “membership”] in conjunction with “particular social group” connotes persons who are defined as a distinct social group by reason of some characteristic, attribute, activity, belief, interest or goal that unites them. If the group is perceived by people in the relevant country as a particular social group, it will usually but not always be the case that they are members of such a group. Without some form of internal linking or unity of characteristics, attributes, activities, beliefs, interests or goals, however, it is unlikely that a collection of individuals will or can be perceived as being a particular social group. Those indiscriminately killed or robbed by guerrillas, for example, are not a particular social group.

42. The applicant has submitted detailed and invariably consistent accounts during various situations, including her hospitalisation, of the threats, oppression and violence in many forms, including the emotional, mental, physical and sexual abuse she underwent in Malaysia. The visa applicant is arguing that the reason for the abusive behaviour by her husband relates to the status of women generally in Malaysian society and in particular the role of “wife”. The visa applicant continued to endure the abuse because of a fear of losing her children but more fundamentally because she felt that her role required and there was a societal expectation, that she would submit to such abuse, because it was a “private” matter and it was

considered an inherent right of a husband to perpetrate such marital violence without impunity.

Domestic violence

- 43 Independent country information indicates that domestic violence in Malaysia remains a problem. The 2008 US Department of State report on human rights practises in Malaysia indicates that:

The penal code states that rape is punishable by a prison term of up to 30 years, caning, and a fine. The government enforced the law effectively. According to the police, 1,651 rapes were reported during the first half of the year. Spousal rape is not a crime, although a husband may be charged for causing harm to his wife while attempting to force sexual relations with her.

The courts may decide the minimum jail term for a man convicted of statutory rape of a girl age 15 years or less. The law also prohibits a person in authority from using his position to intimidate a subordinate into having sexual relations.

Violence against women remained a problem. Reports of rape and spousal abuse drew considerable government, NGO, and press attention. Under the Domestic Violence Act, anyone who willfully contravenes a protection order by using violence against a protected person may be punished by imprisonment of up to one year and a maximum fine of RM2,000 (approximately \$588). In extreme cases involving "grievous hurt" inflicted using a deadly weapon, the maximum imprisonment increases to 20 years. Women's groups criticized the act as inadequate and called for amendments to strengthen it. In their view the act fails to protect women in immediate danger because it requires that separate reports of abuse be filed with both the Social Welfare Department and the police, causing delay in the issuance of a restraining order. Cases also require visible evidence of physical injury, despite its interpretation to include sexual and psychological abuse.

Many government hospitals had crisis centers where victims of rape and domestic abuse could make reports without going to a police station. NGOs and political parties also cooperated to provide counseling for rape victims, but cultural attitudes and a perceived lack of sympathy from the largely male police force resulted in many victims not reporting rapes. According to the Ministry of Women, Family, and Community Development (MWFCDD) and a leading women's NGO, only 10 percent of rape cases were reported to police. Women's groups noted that while some rapists received heavy punishments, including caning, other rapists received inadequate punishments.

Although the government, NGOs, and political parties maintained shelters and offered other assistance to battered spouses, activists asserted that support mechanisms for victims of domestic violence remained inadequate. There was a sexual investigations unit at each police headquarters to help victims of sexual crimes and abuse. Women's rights activists claimed that police needed additional training in handling domestic abuse and rape cases.

Some Shari'a experts urged Muslim women to become more aware of the provisions of Shari'a that prohibit spousal abuse and provide for divorce on grounds of physical cruelty. Provisions in state Shari'a laws, however, generally prohibit wives from disobeying the "lawful orders" of their husbands and presented an obstacle to women pursuing claims against their husbands in Shari'a courts. Muslim women were able to file complaints in civil courts.

44. An Immigration and Refugee Board of Canada response to information requested dated 22 August 2005 includes the following information on domestic violence in Malaysia:

Malaysia has enacted the Domestic Violence Act (1994) (Malaysia 1994; *The Daily Star* 7 Jan. 2005), has ratified the United Nations (UN) Women's Convention (with some reservations) but as of 2005 had not yet signed the Optional Protocol to the UN Women's Convention (AI 2005). Please see the attachment for a copy of the Domestic Violence Act of Malaysia 1995. Moreover, according to *Country Reports 2004*, the Domestic Violence Act addresses only violence perpetrated against women in the home, a restriction which women's groups believe makes the act inadequate (28 Feb. 2005, Sec. 5). *Country Reports 2004* also cited the Women's Aid Organisation (WAO) as stating in June 2004 that legal protection was hindered due to a lack of cooperation between police, the social welfare department, and the judiciary (28 Feb. 2005, Sec. 5).

Several sources have noted a rise in the number of domestic violence cases in Malaysia (Malaysian Bernama 2 Aug. 2005) and have stated that violence against women is a problem in Malaysia (Freedom House 2005; *Country Reports 2004* 28 Feb 2005, Sec. 5). On the other hand, statistics of domestic violence cases released by the Royal Malaysian Police show that there were 3,468 reported cases of domestic violence in 2000, 3,107 in 2001, 2,755 in 2002, 2,555 in 2003, and 1,207 in the first five months of 2004 (WCC n.d.a). For further details on the yearly number of reports of domestic violence by state, ethnicity, or age, please consult the Website of the Women's Centre for Change: <<http://www.wccpenang.org/dvstats.html>> (WCC n.d.a).

The Human Rights Commission of Malaysia has reportedly complained that there is a shortage of "adequate, well-funded and safe shelter homes for victims of domestic violence in [the states of] Sabah and Sarawak" (Malaysian Bernama 2 Aug. 2005). Citing activist organizations, *Country Reports 2004* indicated that the support network for victims of domestic violence was deemed inadequate, and that police required additional training to handle cases of violence against women, despite recent improvements in this area (28 Feb. 2005, Sec. 5).

Citing the WAO, AFP claims that of the 700 cases of domestic violence that it addresses annually, a tenth complain of spousal rape, although many more cases apparently go unreported (23 Aug. 2004). According to Malaysian law, spousal rape is not a criminal offence, and despite the fact that a man who rapes his wife could in theory be charged with assault, *Country Reports 2004* claimed that as at the end of 2004 no man had been convicted under this clause (28 Feb. 2005, Sec. 5). The Malaysian Human Rights Commission (AFP 23 Aug. 2004; BBC 23 Aug. 2004) and the Joint Action Group Against Violence Against Women (AFP 27 Aug. 2004) have called on the government to criminalize marital rape (*ibid.*; *ibid.* 23 Aug. 2004), a position that has met with opposition from some of the country's leading Muslim clerics (AFP 23 Aug. 2004; *ibid.* 27 Aug. 2004; BBC 23 Aug. 2004). The mufti of Perak state, Harussani Zakaria, feels that making marital rape a crime is against Islam (*ibid.*; AFP 23 Aug. 2004), and publicly stated that "[a] husband has the right to be intimate with his wife and the wife must obey" (AFP 27 Aug. 2004; BBC 23 Aug. 2004). Some Islamic lawyers supported the mufti's view, claiming "a woman may only refuse her husband sex if he has a sexually transmitted disease" (*ibid.*). This, in turn, led to the outrage of women's groups (*ibid.*) (Immigration and Refugee Board of Canada 2005, *MYS100433.E – Malaysia: Recourse available to women who are victims of sexual or physical abuse (January 2003 – August 2005)*).

45. The Tribunal accepts that domestic violence in Malaysia can be perpetrated without it being visible because of cultural attitudes women are encouraged to hold about their subjugated place in society and their lack of fundamental human rights and freedoms. Even if domestic violence does come to the attention of the authorities, the above country information makes it clear that there are very few prosecutions of perpetrators and that police are often reluctant to follow up on "private" matters with any vigour. The Domestic Violence Act remains,

therefore, more a matter of form rather than substance which without effective enforcement reinforces to the perpetrators that the matter of domestic violence is not of public interest, particularly as it reflects the views of the “correct” relationship between husband and wife, that is, wife being subservient and the property of the husband. Criticisms from women’s groups about the approach of the authorities to domestic violence include that the emphasis of the authorities is to keep families together and not to protect the victims. The emphasis on physical violence also reduces the Act’s efficacy as police often consider that domestic violence victims must present with severe injuries, meaning that anyone who has been abused emotionally, psychologically and sexually is not taken into consideration.

Indian/Muslim Ethnicity

46. Country information is consistent in highlighting that Indians are a minority in Malaysian society, comprising only 8% of the population – a minority which is unable to wield any political or economic authority. In his 2000 article, *‘Decades of official discrimination have turned Malaysia’s ethnic Indians into a disgruntled underclass’*, Anthony Spaeth describes the Indian Malays’ view as follows:

.. Race is the big divide in Malaysia, as it has been ever since the watershed race riots of 1969. In his 20 years in power, Prime Minister Mahathir Mohamad has tried to uplift the Malays, who make up 55% of the 22 million population, and guarantee them a large percentage of available business opportunities. The second-largest group, the Chinese, were supposed to lose their disproportionate grip on the country's economy. But it may be the Indians who were the real losers. Most were imported a century ago to work the rubber plantations and tin mines, and they still dominate the bottom rungs of the social ladder. "Indians have neither the political nor the economic leverage to break out of their vicious cycle of poverty," says Selvakumaran Ramachandran, an Indian-Malaysian academic who works for the United Nations Development Program. "If their problems are not arrested and reversed, it is almost certain they will emerge as an underclass."

Already, Indians have the lowest share of the nation's corporate wealth: 1.5%, compared to 19.4% for the Malays and 38.5% for the Chinese. Not surprisingly, Indians claim the highest rate of suicide of any community. Violent crime is becoming Indian turf. In 1994, 128 of the 377 murders committed in Malaysia were by Indians. Some 15% of the Indians in the capital are squatters. "I have a feeling," says P. Ramasamy, a political science professor at the National University, "that if something is not done soon, something is going to really blow."

The Indians' main problem is numerical. With only 8% of the country's population, they don't have enough clout to alter pro-Malay business or employment policies, or even stand up to Malay chauvinism of the sort exhibited at the Bujang Valley museum...

One area in which Indians have prospered is the professions, particularly medicine and law, and Indian names stud the rolls of professional societies. Many of this group hail from white-collar families who worked in Malaysia when it was a British colony. Yet even with that background, an Indian Malaysian can find it difficult to become a doctor or lawyer. Local university seats and scholarships to study overseas are all awarded by a racial quota system. Even when someone gets a degree, discrimination is frequent. Indian doctors, for instance, complain that they are increasingly excluded from the lists of approved doctors whom civil servants or company employees can use. "I wish you Americans would invade—just for a while," a small-town Indian doctor tells a visitor. "Then I would have a fairer chance of working in this country of ours."

So far, Indians have resigned themselves to their plight. But some rumbles are being heard. Last October, five Malaysian men were attacked and killed one night in the town of Kampar,

150 km north of Kuala Lumpur Their charred remains were found in a torched pickup truck. The police arrested 13 cattle ranchers of Indian descent. The ranchers had complained for two years of people poaching their cows, but apparently the local police had done nothing to help. The 13 ranchers have yet to be tried, and poaching has reportedly ceased in that area. The defendants are quietly regarded as heroes among the Indian community. "Malaysia cannot afford to have about 8% of its population feel alienated," warns R.V. Navaratnam, a prominent businessman. "Malaysian unity can be as strong only as its weakest link—which is the Malaysian Indian community." (Spaeth, Anthony 2000, 'Decades of official discrimination have turned Malaysia's ethnic Indians into a disgruntled underclass', *Time Asia*, 21 August <http://www.time.com/time/asia/features/ontheroad/malaysia.dilemma.html> - Accessed 9 November 2009.

47. Referring to the treatment of ethnic Indians in Malaysia, the US Department of State comments that:

.. In February SUARAM listed 57 books banned by the government. Among the banned books is a Tamil-language book, *March 8*, which discussed the 2001 Kampung Medah racial clashes between Malays and Indians...

On November 25 [2007], the Hindu Rights Action Force (HINDRAF), a small activist NGO, organized a demonstration in Kuala Lumpur with the intent to present the British High Commission with a memorandum asking for Queen Elizabeth II's intervention on their behalf. HINDRAF's leaders intended to highlight the marginalization of the country's Indian minority. Approximately 20,000 demonstrators gathered at multiple points around the city in defiance of warnings from government officials and the police. Police actively dispersed the crowds of demonstrators over a period of six hours, repeatedly using tear gas and water cannons. During and after the rally, the police arrested approximately 400 persons. The police released the majority of those detained, but the attorney general charged 31 demonstrators with, among other things, the attempted murder of a police officer, illegal assembly, and destruction of property. Human rights activists, opposition leaders, and other civil society leaders condemned the attempted murder charges as politically motivated and meant to intimidate others from participating in future demonstrations. The attorney general dropped the attempted murder charge in December...

The law and government policy provide for extensive preferential programs designed to boost the economic position of bumiputras. Such programs limited opportunities for nonbumiputras in higher education, government employment, business permits and licenses, and ownership of land. According to the government, these programs were necessary to ensure ethnic harmony and political stability. Ethnic Indian citizens, who did not receive such privileges, remained among the country's poorest groups (US Department of State 2008, *Country Reports on Human Rights Practices: Malaysia*, 11 March).

- 48 The US Department of State report on human rights practices in Malaysia for 2007 indicates that "[t]he constitution defines all ethnic Malays as Muslims and stipulates that Islam is the official religion." The report also indicates that "[t]he constitution provides for equal protection under the law and prohibits discrimination against citizens based on sex, religion, race, descent, or place of birth. However, the constitution also provides for the "special position" of ethnic Malays and the indigenous groups of the eastern states of Sabah and Sarawak (collectively, bumiputras), and discrimination based on this provision persisted. Government policies and legislation gave preferences to bumiputras in housing, home ownership, awarding of government contracts and jobs, educational scholarships, and other areas. Nonbumiputras regularly complained about these preferences, arguing that government subsidies for disadvantaged persons should be dispensed without regard to race." The report

also indicates that the “extensive preferential programs designed to boost the economic position of bumiputras... limited opportunities for nonbumiputras in” areas including “business permits and licenses”. According to Malaysia’s government, the “programs were necessary to ensure ethnic harmony and political stability. Ethnic Indian citizens, who did not receive such privileges, remained among the country’s poorest groups” (US Department of State 2008, *Country Reports on Human Rights Practices for 2007 – Malaysia*, March, Sections 2(c) & 5).

49. The applicant is also claiming powerlessness within her family because she is a woman and Muslim and that her Islamic background has placed her in a position of vulnerability. The visa applicant can be seen, therefore, as a marginalised person within an already marginalised group. A Muslim woman’s rights within marriage are curtailed and notions of male honour make it difficult for women to leave violent marriages without serious repercussions. The website of Karamah: Muslim Women Lawyers for Human Rights, contains an article entitled ‘*Women’s Rights Within Islamic Family Law in Southeast Asia*’, which offers information on the relationship between Malaysian federal and state law regarding women’s rights:

The legal system in Malaysia is a dual system, based on both English common law and Islamic law. Civil courts have jurisdiction over the majority of laws, including contracts, torts, property, crime, and constitutional and administrative matters. The *Syariah* courts, which are established and regulated by the states, have jurisdiction over Islamic family law matters. Article 121(1A) of the Federal Constitution, introduced in 1988 by constitutional amendment, states that the civil courts have no jurisdiction in matters that fall within the *Syariah* court jurisdiction.

Islamic law applies only to Muslim citizens and includes only matters specified in the State List of the Federal Constitution such as matrimonial law, charitable endowments, bequests, inheritance, and offences that are not governed by federal law (matrimonial offences, *khalwat* (close proximity), and offences against the precepts of Islam). The power to legislate these matters lies with each state legislature and state Sultan, with the Federal Parliament only legislating such matters for the Federal Territories of Kuala Lumpur, Labuan and Putrajaya. Because there are 13 states and one federal jurisdiction, there are 14 different sets of Islamic laws in Malaysia.

In 1984, the Federal Parliament enacted the Islamic Family Law (Federal Territories) Act 1984 (Act 303) for the Federal Territories that was designed to be a model law for the other states. Many of the states have adopted slightly altered versions of this model law, but several states, specifically the states in the northern part of the country, have adopted their own family law enactments that restrict women’s rights in marriage and divorce much more than the Federal Territories Act. The Islamic Family Law (Federal Territories) Act 1984 was amended in 1994, and many activists and scholars consider some of the amendments to be regressive in terms of women’s rights. This paper focuses on the Islamic Family Law (Federal Territories) Act 1984 and contrasts it with the Kelantan Islamic Family Law Enactment 1983 from the northeastern state of Kelantan.

Malaysia acceded to CEDAW in July 1995 “subject to the understanding that the provisions of the Convention do not conflict with the provisions of the Islamic Sharia’ law and the Federal Constitution of Malaysia.” Based on this understanding, the Government declared that it was not bound to several key sections of the Convention, including Article 16 related to marriage and family matters. In 1998, the Government withdrew its reservations in respect of several articles of the Convention, including some of the Article 16 provisions. Malaysia’s Federal Constitution was amended in 2001 to prohibit discrimination against citizens on the basis of gender. http://www.karamah.org/docs/Womens_rights_%20SEA.pdf

- 50 Other evidence which points to Muslim women's rights in marriage being restricted and the consequences of any perceived "deviation from Islam" is illustrated by a case reported by the United States Department of State *International Religious Freedom Report 2007* for Malaysia:

One such case involved 29-year-old Revathi Masoosai who was raised as a Hindu by her grandmother, although she was born to Muslim parents and registered at birth as a Muslim. Revathi filed a statutory declaration in 2001 that identified herself as a Hindu. After she married a Hindu man in 2004, worshipped as a Hindu, and gave birth in December 2005, the Malacca Islamic Religious Department (MAIM) accused Revathi of deviating from Islam and demanded custody of her newborn daughter. Revathi refused. On January 8, 2007, Revathi was taken into custody under a Shari'a Court order. Despite the objections of Revathi and her husband, MAIM placed the couple's daughter in the care of Revathi's Muslim mother... As of June 30, 2007, Revathi remained in detention, and the High Court had not heard her husband's habeas corpus application (US Department of State 2007, *International Religious Freedom Report for 2007 – Malaysia*, September 14).

The visa applicant's psychological state

- 51 The Tribunal has considered the visa applicant's mental condition which is extremely fragile as evidenced by her medical reports obtained in Australia and that this in itself should be a consideration for not returning her to her home country. In this regard, the Tribunal has taken into consideration the findings of (*SBTF v MIMIA* (2007) and *SCAT v MIMIA* (2003) which found that psychological harm can in some circumstances amount to persecution. Having accepted that the visa applicant has been subjected to serious harm in the past and that the applicant's mental and emotional condition would have been adversely affected, that there is a real chance that she would be subject to psychological harm in the future were she to return to Malaysia now or in the reasonably foreseeable future.

State protection

- 52 The effectiveness of Malaysia's law enforcement mechanisms generally in protecting women and society as a whole is hampered by problems of police abuse and corruption despite an independent commission's recommendations for sweeping changes. An Associated Press Newswires article dated 15 June 2007 states:

"Human rights continue to deteriorate," Yap Swee Seng, executive director of local organization Suaram, said at a meeting of human rights groups. "The culture of impunity is growing."

...A royal commission, set up in 2004, made 125 recommendations for changes in the police force to reduce crime, stop corruption and observe human rights.

Last year, Prime Minister Abdullah Ahmad Badawi announced that 81 recommendations had been implemented, 19 more would be implemented and 25 were still being studied.

But Suaram and Amnesty International Malaysia said few of the recommendations on human rights have been implemented. The implementation of the others has been unsatisfactory, they said.

...Opposition leader Lim Kit Siang, who also joined the panel discussion, said politicians pointed fingers at each other instead of cracking down on police abuse and corruption.

...But Denison Jayasooria of the Human Rights Commission of Malaysia expressed cautious optimism. “The progress has been slow and in some cases extremely slow ... (But) The police tone has changed... There are changes. There is light, even if it’s just twinkles” (Zappei, Julia 2007, ‘Malaysian groups say police abuse, corruption continue despite calls for change’, *Associated Press Newswires*, 15 June).

- 53 Whilst it is clear that “no country can guarantee that its citizens will at all times and in all circumstances, be safe from violence” [see *MIMA v Respondents s152/2003* Gleeson CJ, Hayne and Heydon JJ] the *MIMA v Respondents* judgment refers to the obligation of the state to take “reasonable measures” to protect the lives and safety of its citizens, including “an appropriate criminal law, and the provision of a reasonably effective and impartial police force and justice system”, indicating that the appropriate level of protection is to be determined by “international standards”, such as those considered by the European Court of Human Rights in *Osman v United Kingdom*. Thus, an unwillingness to seek protection will be justified for the purposes of Article 1A(2) where the state fails to meet the level of protection which citizens are entitled to expect according to “international standards” [*MIMA v Respondents S152/2003* (2004) 222 CLR at [27]-[29].
- 54 In the *Khawar* decision, the High Court held that the ‘serious harm’ involved in persecution could be inflicted by persons who were not state agents, that is, private individuals (at 576-583 per Gleeson CJ). The Court found that failure to offer protection from harm itself satisfies the Refugees Convention. Once a claim meets the threshold of serious harm as has occurred in this case, the relevant consideration is whether effective state protection is available for the gender and ethnic based violence to which the visa applicant was subjected by her husband. *Khawar* emphasized that it is not necessary that the harm is inflicted by the state, rather, the emphasis is on the nexus between the harm suffered and the state’s ability or inability to protect the applicant. The authorities’ disinclination to take any steps to investigate or intervene in family violence cases in Malaysia underscores the lack of official protection afforded to women even if they lodge a formal complaint.
- 55 The country information illustrates a Muslim Indian woman’s standing in marriage in Malaysia places her in a vulnerable position to the extent that in the instances of domestic violence, there is a real chance that state protection would not be forthcoming as occurred in the case of the visa applicant. Whilst Domestic Violence laws have been enacted it appears that implementation of the laws is hampered by societal values about the “correct” place of women in society and that such attitudes lead to less reporting of such instances as it is simply accepted as a part of family life. Furthermore, rape in marriage continues not to be outlawed. The visa applicant has submitted evidence of having approached the police but she was dismissed because she did not have an eye witness to take the matter to prosecution. As such, whilst the state was not the perpetrator of the serious harm, the state allowed it and indeed even enabled it to happen.

Internal relocation

- 56 The Tribunal finds that it would not be reasonable, given the psychological harm suffered by the visa applicant, that she would be able to re-build a life as a single mother in Malaysia, in circumstances where as stated by the visa applicant herself, her husband would be able to locate her and continue to persecute her.

57 In conclusion, the Tribunal finds that the visa applicant has a well founded fear of serious harm on return to Malaysia. The Tribunal also finds that on the basis of the information above, given the visa applicant's membership of the multifaceted social group to which she belongs, that there is more than a remote chance, that is, a real chance, that she will face persecution were she to return to Malaysia now or in the reasonably foreseeable future.

CONCLUSIONS

58. 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 she satisfies the remaining criteria for the visa.
59. The Tribunal is not satisfied that the other applicants are persons to whom Australia has protection obligations. Therefore they do not satisfy the criterion set out in s.36(2)(a) for a protection visa. The Tribunal is satisfied that the first named visa applicant's children, visa applicant two and three are members of the same family unit as the first named applicant for the purposes of s.36(2)(b)(i). As such, the fate of their application depends on the outcome of the first named applicant's application. As the first named applicant satisfies the criterion set out in s.36(2)(a), it follows that the other applicants will be entitled to a protection visa provided they meet the criterion in s.36(2)(b)(ii) and the remaining criteria for the visa.

DECISION

60. 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 and third named applicants satisfy s.36(2)(b)(i) of the Migration Act, being members of the same family unit as 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: PRMHSE