

0802390 [2008] RRTA 300 (30 July 2008)

DECISION RECORD

RRT CASE NUMBER: 0802390

COUNTRY OF REFERENCE: Malaysia

TRIBUNAL MEMBER: Lisa Ward

DATE DECISION SIGNED: 30 July 2008

PLACE OF DECISION: Perth

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

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

1. This is an application for review of 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). Person A is referred to as the applicant below. Person B is the applicant's child. Together the applicant and her child are referred to below as the applicants.
2. The applicants, who claim to be citizens of Malaysia arrived in Australia and applied to the Department of Immigration and Citizenship for Protection (Class XA) visas. The delegate decided to refuse to grant the visas and notified the applicants of the decision and their review rights by letter.
3. The delegate refused the visa application on the basis that the applicants are not persons to whom Australia has protection obligations under the Refugees Convention.
4. The applicants applied to the Tribunal 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.

RELEVANT LAW

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

8. 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.

9. 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.
10. 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.
11. There are four key elements to the Convention definition. First, an applicant must be outside his or her country.
12. 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.
13. 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.
14. 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

15. 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.
16. 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.
17. 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

18. The Tribunal has before it the Department's file relating to the applicants. The first named applicant appeared before the Tribunal to give evidence and present arguments. The Tribunal also received oral evidence from the applicant. The applicant's child did not attend the hearing as he/she was not available.
19. The applicants arrived in Australia in the early 2000s. They have not departed Australia since their arrival.

Protection visa application

20. The applicant applied to the Department of Immigration and Citizenship for a Protection (Class XA) visa. The applicant stated that she was born in Country C. She speaks, reads and writes English and Malaysian. She claims that she belongs to ethnic group X and that her religion is Christian and that she is a Muslim apostate. [Information deleted under section 431 of the *Migration Act 1958* as it may identify the applicant].
21. The application for protection was refused by the delegate.

Review application

22. The applicant applied to the Tribunal on 21 September 2007 for review of the delegate's decision.
23. The Tribunal wrote to the applicant and advised that it had considered all of the material which she had provided, but it was unable to make a favourable decision based

on that information alone. Therefore the Tribunal invited the applicant to give oral evidence and present arguments at a hearing.

24. The Tribunal received the completed Response to Hearing Invitation. The applicant indicated that she would be attending the hearing. She also stated that her child 'is unable to attend because [information deleted: s.431]. Please consider this as a joint response.'

Hearing

25. The applicant's sworn evidence at hearing included the following, in summary:

[Information amended: s.431]

- She was born in Country C. Her parent, Parent 1 was born in Country D. Parent 1 is now deceased. Her parent, Parent 2 was born in Country C. Parent 2 is also deceased. She has three siblings. All of her siblings live in Malaysia.
- When she was young, her family moved to Malaysia She said that her family decided to move to get away from their relatives in Country C. She said that her relatives in Country C like to match make family members with cousins.
- Parent 1 was employed.
- She was educated in Malaysia.
- On [date & year specified] she became a Malaysian citizen. She became a Malaysian citizen because it was difficult to get a job or study otherwise in Malaysia She does not hold any other Citizenship or have any rights to live elsewhere.
- She was born into Muslim family. Her siblings are all practising Muslims. [Information deleted: s.431].
- When she was growing up she said that her family were not really practising Muslims. Parent 1 would go to the mosque occasionally. However, Parent 1 believed that she could only marry a Muslim or someone who converted to Islam.
- When she left school she worked in Malaysia in various jobs. She liked to visit Buddhist temples. Eventually she decided to leave Malaysia.
- She went to live and work in City E. She left eventually as she found the work boring and the people unfriendly in City E. Also, she did not enjoy the weather in Country F.

- Between the late 1980s and the early 1990s she lived and worked in Country G. She found the people friendly in Country G. [Information deleted: s.431].
- While she was living on Country G, she had a brief relationship with a man from Country H. The couple spoke to each other in language Y. Her child was born from this relationship in Country G. The father of her child does not speak English. Her child's father was a Catholic. The applicant has not been in a relationship with her child's father since the early stages of her pregnancy. While living in Country G she says that on [date & year specified] she heard the Holy Father call her name. On [date & year specified] she was baptised. Her child was christened at the same time.
- In the early 1990s she returned to Malaysia to live as it became difficult to get jobs in Country G.
- Between the early 1990s and the late and 1990s she lived in City M She did not contact her family during this time. She spent some time proving to the authorities that she was Malaysian and that she was eligible for a new passport.
- In the late 1990s she lived and worked in Town I. In [year specified] her child became a Malaysian citizen. Her child got a passport before being required to have a MyKad.
- In the early 2000s she lived in State J. She moved to State J as the population is mostly Chinese and she thought that it would be easier to live there as a single mother and as a Christian. She said that Malay people are very nosey and would ask questions like where is her child's father. [Information deleted: s.431].
- She said that she would not change her name as she is proud of her family name.
- In [year specified] she resumed contact with her family. She had not seen any of them since [year specified]. She said that she did not contact her family earlier, as she wanted to sort out the problems she was having with ensuring that her child got Malaysian citizenship.
- In [month & year specified] she moved to State K. She wanted to move away from people who knew her name, because it is a Muslim name.
- Her child was required to have a Malaysian ID card, known as a MyKad. The National Registration Department in Malaysia issues MyKad. However she did not want to apply for one as she would need to show her child's religion. She has a Muslim name and therefore her child's religion must be shown as Muslim. She does not want his/her religion to be shown as Muslim because

he/she is a Christian and also because he/she will then be required to attend religious classes.

- [Information deleted: s.431].
- She is concerned for child's future and she wants to be able to support herself. As a Christian she finds it easier to live within a Judeo Christian country.
- In Australia she attends church a couple of days a week.
- [Information deleted: s.431]
- While she lived in Malaysia, she and her child went on holidays to Country L and to Country C. They did not have any problems entering or leaving Malaysia. The applicant said that this was because Malaysian passports do not show their religion.
- She no longer has any right to live in Country C She has no right to reside in Country G. Also as her child's father was not a Country Y national, her child does not have any rights to reside there.
- She last saw her family during a Muslim festival. She said that she loves her family very much. Since being in Australia she has not had any contact with her family. This is because her sibling asked that if she left the country, "then please don't call us." This was because her family would feel that she has rejected them. It is the duty of the family to bring her back to Islam. [Information deleted: s.431] Her family do not know that she has converted to Christianity, although they sense a change in her outlook. Her child will be required to live with her relatives and be brought up as a Muslim if she returns to Malaysia and her conversion to Christianity is discovered.
- [Information deleted: s.431]
- She fears that if she returns to Malaysia the Islamic Religious Department will separate her from her child and force her to attend an Islamic Re-education Centre. They will do this if they find out that she has converted to Christianity. They will try and 're-educate' her back to being a Muslim. She said that she knew that such a centre existed in Malaysia A Christian who had visited the centre as an observer told her that in the centre she would be required to pray to Allah five times a day and recite the Koran and that emotional blackmail was also used. The blackmail was in the form of telling you that you are ungrateful for the way that your parents brought you up. She said that she was told that you could be kept in the centre for up to three years and that you come out as a vegetable. Her child would be sent to an Islamic Religious School and may have to go and live with her relatives.

- The Islamic Religious Department is a government department, so the Malaysian state will not offer her any protection. The Department does not have any police powers; however it treats apostasy as an unforgivable sin.
- She said that relocation was not an option for the family because apostasy is a crime throughout Malaysia.
- She knows other Christians in Malaysia. She is not aware of any of her fellow parishioners having any experience with the Islamic Religious Department. Although she knows a Christian couple in State J The husband applied to renounce his Muslim religion as he had been baptised in City M His MyKad application was rejected because he had renounced his Muslim religion and the Government did not recognise his conversion.
- She is very concerned for her child's future. [Information deleted: s.431]. He/she is able to get a MyKad, however the authorities will show his/her religion as Muslim, due to his/her name. She will choose not to get the card for her child as she is shown as Muslim on her card due to her last name. The Muslim religion was allocated to her on her card automatically, based on her name. [Information deleted: s.431]. In her case the authorities will want to know her child's father's name. However his name is not on her child's birth certificate and so they will then look at her name, which is a Muslim name.
- If her child applies for an ID card then he/she will get it and it will have his/her religion as Muslim, based on his/her mother's name. He/she will then be required to attend Islamic religious classes. Her child is a Christian and he/she should not have to attend these classes. These classes are held daily for 40 minutes.
- [Information deleted: s.431].
- She does not have any family in Australia. In Country C she has relatives, all of whom are Muslims.
- She does not want her child to be educated in Country C, as she likes the Western way of education. For example students can undertake drama. Students are educated in an all round manner and are encouraged to express their feelings in a healthy way.
- In Malaysia there are 45-50 children in a class. The classes are streamed according to ability and most students have private tuition after school. This is because the class teachers have no time to teach. Students do not receive any personal attention from teachers. Students are not encouraged to think for themselves.
- The applicant said that she wanted to stay in Australia. She wants to start her life, her life in Australia. Her family lives in Malaysia and it was not easy to

uproot herself. She did it for her child and because she does not want to live at someone else's mercy. She doesn't want to burden any one else with her problems.

- She would like to study in Australia. However, she has not applied for a student visa because it is too expensive.
- [Information deleted: s.431].

26. An officer copied the applicant and her child's passports on the day of the hearing. The applicant's passport includes the following details:

- Her full name, date of birth and place of birth; and
- Details of where and when the passport was issued.

27. The passport of the applicant's child includes the following details:

- His/her full name, date of birth and place of birth; and
- Details of where and when the passport was issued.

28. At the hearing of the application for review the applicant informed the Tribunal that an officer from a non-government organisation would forward certain relevant country information to the Tribunal office in City N. Accordingly, on [date & year specified] the Tribunal wrote to the applicant and invited her to provide any country information relevant to her claims. The applicant responded to the Tribunal's request and provided the following documents to the Tribunal, namely:

- A covering letter from the applicant stating that a person from the non-government organisation will be sending country information directly to the Tribunal. The applicant also stated that she will definitely post more information to substantiate her claims;
- A submission from the applicant [date & year specified] which stated that:

My [child] ... and I don't want to lead double lives in Malaysia. My [child]'s safety and our mental well being is of the utmost importance to us. The Islamic scholars are 'big' bullies. They resort to emotional threat /blackmail to coerce one to return to Islam. A mother's weakness is her child. My [child] and I have well grounded fear of persecution. We left Malaysia, our families in order to have a peace of mind, and to worship THE LORD without fear from anyone.

We pray that the Tribunal will grant our Protection Visa, and I'll be given my working rights. By God's grace, I plan to study.....

- Print outs of news items from the internet regarding various instances of ‘rehabilitation’ being imposed by Muslim authorities on those who renounce Islam. One article notes that the Islamic and constitutional legislation are often in conflict. For example the Constitutional law grants freedom of religion, while Islamic law prohibits conversion from Islam. Another article is about Revathi Masoosai who was born to Muslim parents and married a Hindu. Ms Masoosai went to the Sharia court and sought permission to leave Islam and to legally change her name. She was then charged with apostasy and sent for rehabilitation for 180 days.
29. The Tribunal received additional print outs from various internet news sites regarding religion in Malaysia.
 30. The applicant sent a letter to the Tribunal and the following additional materials including:
 - An article headed ‘Apostasy & Islamic Civil Society in Malaysia’ from ISIM Review Autumn 2007;
 - Printout from an unknown website regarding Lina Joy.

COUNTRY INFORMATION

31. In assessing the applicant’s claims against the Convention grounds, the Tribunal considered information from a range of authoritative external sources regarding the issue of treatment of Muslims who convert to Christianity in Malaysia but who do not officially change their religion.
32. Sources indicate that converting from Islam to Christianity in Malaysia is very difficult, if not illegal and impossible. The US Department of State’s *International Religious Freedom Report 2007 – Malaysia* states that “Muslims may generally not convert to another religion” and that the Federal Court’s decision to refer all apostasy cases to Sharia courts “effectively precludes any legal right of Muslims to convert to another religion”. A 2007 article in the *Asian Journal of Comparative Law* provides a state-by-state overview of laws of apostasy in Malaysia, and suggests that although some states are more willing than others to consider allowing Muslims to convert to other religions, others imprison and/or administer corporal punishment to apostates. A 2006 interview with a lecturer in Islamic law, published in *Malaysia Today*, provides information on the low numbers of official applicants to Sharia courts seeking to convert from Islam to another religion, and provides more information on the various state regulations regarding apostasy (for an overview of religious freedom in Malaysia, see: US Department of State 2007, *International Religious Freedom Report for 2007 – Malaysia*, September 14 –; for a state-by-state overview of apostasy laws in Malaysia, see: Adil, M. 2007, ‘Law of Apostasy and Freedom of Religion in Malaysia’, *Asian Journal of Comparative Law*, Vol. 2 Issue 1 <http://www.bepress.com/asjcl/vol2/iss1/art6> – Accessed 25 March 2008; for a legal opinion on the numbers of people requesting to leave Islam, see: Aziz, F. 2006, ‘Apostasy: Official numbers are minimal’, *Malaysiakini* website, 11 November <http://www.malaysiakini.com/news/59420> – Accessed 25 March 2008).

33. The US Department of State's *International Religious Freedom Report 2007 – Malaysia* suggests that although religious freedom is guaranteed under the Federal Constitution of Malaysia, in practice “Muslims may generally not convert to another religion” because approval is required from a Shari’a court, and this is highly unlikely to be granted:

State authorities impose Islamic religious laws administered through Islamic courts on all ethnic Malays (and other Muslims) in family law and other civil matters... Muslims may generally not convert to another religion... Although article 11 of the Federal Constitution guarantees religious freedom, the country’s highest court ruled during the reporting period that Muslims wanting to convert to another religion must first obtain approval from a Shari’a court. The court’s decision effectively precludes the conversion of Muslims, since the Shari’a courts have granted only a handful of requests to convert to another religion in recent years... In practice Muslims are not permitted to convert to another religion... On May 30, 2007, the Federal Court ruled that Muslim individuals must obtain an order from the Shari’a Court stating that they have become an ‘apostate’ (they have renounced Islam) before they can change their national identity card. As apostasy grants (grants of permission to convert to another religion) by the Shari’a Court are extremely rare, the court’s decision effectively precludes any legal right of Muslims to convert to another religion (US Department of State 2007, *International Religious Freedom Report for 2007 – Malaysia*, September 14).

34. In 2006 *BBC Radio 4* reported on the case of ‘Maria’, a Malaysian convert from Islam to Christianity who must keep her Christianity secret from her family and community. The report states that “only a tiny number of people have converted from Islam in Malaysia”:

Abandoning Islam for Christianity is such a sensitive issue in Malaysia that many converts find themselves leading a secret, double life. “If people know that I’ve converted to Christianity, they might take the law into their own hands. If they are not broadminded, they might take a stone and throw it at me.”

Maria – not her real name – is a young Malaysian woman who has lived a secret and sometimes fearful life since she converted from Islam to Christianity. Apostasy, as it is known, has become one of the most controversial issues in Malaysia today. Maria became a Christian over a decade ago when she was 18. She says no-one forced her to convert, that she made the decision after studying different religious texts.

Conversion is deemed so sensitive in Malaysia that even the priest who baptised her refused to give her a baptismal certificate. And, even now, the church she attends asked her to sign a declaration stating the church is not responsible for her conversion. “My church says if the authorities come, they are not going to stand up for me. I have to stand up for myself,” she said.

Not even Maria’s family know she has converted. “If my family find out I am no longer a Muslim they will completely cut me off. That means my name in the family will be erased. I could migrate, but the problem is I want to stay in Malaysia, because this is my country. And I love my family. I just want to live peacefully.”

Malay-Muslims make up 60% of Malaysia's population. The rest are mostly Christians, Hindus and Buddhists. But many Malaysian Muslims believe that people like Maria pose a threat to Islam. And the debate between those who say Maria should have the right to officially convert, and those who are against apostasy has become so heated that the prime minister has asked both sides not to discuss sensitive religious questions in public.

Fearful of what could happen, Maria would only talk to us on the phone from the privacy of her car. She is very aware of the possible consequences of her decision to become a Christian if she is discovered. "If the authorities find out, I will be in big trouble. They will create hell between me and my family, and hell in my life so that I will no longer get any privileges or employment." Her fears are not unfounded. Another convert – Lina Joy – has been forced to go into hiding since her case went to court. And at least one of the lawyers involved in that case has had a death threat against him.

Both Lina Joy and Maria want to make their conversion legal. That means changing the identity cards that state they are Muslim. Until now, the state has refused to do this until an apostasy order is granted from the Sharia court. But both women claim they are no longer Muslim, so why should they go to the Sharia court?

For Maria there is a lot at stake. She has a boyfriend who is also a Christian and knows she is too. The couple want to get married. But while Maria is still officially a Muslim, the only way they could wed in Malaysia would be if he converted to Islam. And Maria's family – unhappy with her choice of partner – are pressuring him to do just that.

Maria is tired of living a double life. "It's very frustrating," she tells us tearfully. "It means I have to limit my scope with friends. I have to be able to completely trust someone before I dare to reveal myself. I know some other secret converts, but I never keep in touch with them. I can't let my network widen, because you don't always know who you are dealing with."

Only a tiny number of people have converted from Islam in Malaysia But the coming months will be crucial for them because a decision is expected in the case of Lina Joy. The outcome of that case may well determine whether Maria will be able to live the life she dreams of – to be married to her boyfriend and live openly as a Christian. Right now she can't imagine it.

"I feel that I am all alone in this struggle," she says, "and I am frightened because I am alone against the odds" (Pressly, L. 2006, 'Life as a secret Christian convert', *BBC Radio 4 'Crossing Continents'*, 16 November
http://news.bbc.co.uk/2/hi/programmes/crossing_continents/6150340.stm

FINDINGS AND REASONS

Country of Reference

35. The applicants claim to be a national of Malaysia Copies of the applicant's passport and her child's passport have been provided to the Tribunal. The Tribunal is satisfied that both applicants are outside the country of their nationality, namely Malaysia.
36. The applicant does not claim to have residence rights in any other countries. Since becoming a Malaysian citizen she says that she no longer has any right to reside in Country C Also, her child has no right to reside in Country G, where he/she was born, as neither of his parents were Country Y citizens. The Tribunal is satisfied that the

applicant and her child do not have effective protection in a third country under section 36(3) of the Act.

Claims made by the applicant and made by her child

37. The applicant claims that as she has converted from Islam to Christianity she will now be liable to be separated from her child and sent to an Islamic re-education facility if the authorities find out about her conversion.
38. The claims made on behalf of the applicant's child are that he/she is a Christian and that he/she should not be classified as a Muslim, simply because his/her mother (the applicant) has a Muslim name. It is claimed that the applicant's child will be required to apply for a MyKad if he/she returns to Malaysia. The MyKad is a mandatory requirement for all citizens in Malaysia who are over 12 years of age. The MyKad shows the holder's religion. The applicant claims that her child's religion will be shown on the MyKad as Muslim, simply because his/her mother (the applicant) has a Muslim name. Once the applicant's child is formally registered as a Muslim then he/she will be required to attend Islamic religious classes, even though he is a practising Christian.

Credibility of the applicant

39. The applicant gave consistent evidence throughout the hearing. Her evidence at the hearing was also consistent with the claims she made in her application for a protection visa. She gave her evidence before the Tribunal in a straight forward manner. The applicant is an articulate person and appeared to be very genuine with her claims.

Convention ground

40. As set out above, 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. In this case, the applicant claims that she and her child will be persecuted in Malaysia based on discrimination against them due to their religion, that is they have deserted Islam.

Well founded fear of persecution

41. On the basis that the Tribunal has found that the applicant is a credible witness; the Tribunal accepts that the applicant was born a Muslim in Country C and that she and her family then moved to Malaysia. She left Malaysia some years later. The Tribunal accepts that on [date & year specified] she was baptised in Country G and thereby joined the Christian religion and that her child was also baptised as a Christian.
42. In [year specified] the applicant and her child returned to live in Malaysia. During this period of return the applicant says that she attended Christian Churches. In Malaysia she has not spoken publicly about attending Church and it seems that only other churchgoers would know that she attended regularly. She worked throughout to support her child and

herself. She renewed her Malaysian passport during this period and she obtained a MyKad. Her MyKad shows her religion as Islam. She has not officially declared her religion to be Christian in Malaysia. The applicant's evidence indicates that she does not intend declaring her Christian religion officially in Malaysia as she spoke in terms of, 'if the authorities find out' about her conversion to Christianity.

43. The Tribunal notes that the applicant and her child moved location many times in Malaysia. The applicant has changed location a number of times due mainly to her work situation or [information deleted: s.431]. Throughout that period the applicant has attended Church and maintained her Christian religion without incident.
44. The applicant has not sought to try and officially renounce Islam in Malaysia. This is because she fears being separated from her child and being sent to a religious rehabilitation camp. She claims that in effect she is leading a double life in Malaysia and she is taking steps to avoid persecutory harm as she has not disclosed her change of religion to her family or to the State. She claims that she is very close to her family, however if she told them that she had become a Christian then her family would be bound to try and 'bring her back to Islam'.
45. The applicant's child has lived in Malaysia for many years. He/she has attended school in Malaysia and obtained a Malaysian passport. He/she has not applied for a MyKad as yet. This is because he/she is a Christian with a Muslim name and the applicant claims that she does not wish his/her religion to be shown on his/her MyKad as Muslim.
46. The Tribunal must now assess whether the applicant has a well founded fear of harm and whether the harm feared could be constituted as "serious harm". Subsections 91R(1) and (2) of the *Migration Act 1958* provide guidance on the meaning of 'serious harm'. The Tribunal accepts that having a child removed due to a parent's religious belief may constitute serious harm.
47. The Tribunal accepts that the applicant genuinely does not wish to practise the Islam faith, and that she has not done so since at least [year specified], when she was baptised. In addition, if it were possible she would convert away from Islam so that she could practise her Christian religion. However, based on the information provided by the applicant and from independent sources, an official conversion is not possible without the fear of having her child removed from her and her being sent to a rehabilitation camp. The Tribunal accepts based on the information above that apostates are sent to re-education facilities. The Tribunal also accepts that the applicant's child does not wish to obtain a MyKad because he/she does not wish to be identified as a Muslim, when in fact he/she is a Christian.
48. The Tribunal accepts that the applicant has a genuine subjective fear of persecution on return to Malaysia if she is identified as a Muslim who has converted to Christianity and also that her child will be required to apply for a MyKad which would display his/her religious denomination as Islam. Once this occurs then the Tribunal accepts that the applicant's child will be subject to the Sharia law and he/she will be required to undertake Islamic religious studies, among other obligations.

49. The applicant is also implicitly fearful of seeking official approval to convert away from Islam as there is a real chance that if she did so she could be sent to a rehabilitation camp and would be accused of being an apostate, which is a criminal offence in many states in Malaysia. The applicant has provided ample country information to the Tribunal which supports the claim that she cannot legally convert from being a Muslim in Malaysia. The highly publicised case of Lina Joy demonstrates also that seeking to renounce Islam in Malaysia could lead to threats from Islamic extremists and threats to a person's liberty. The applicant's inability to change her religion from Muslim is a denial of a fundamental human right. If the applicant exercised her right to change her religion, then she would be sent by agents of the State to a rehabilitation camp against her wishes. Such treatment would clearly be a threat to her liberty.
50. The Tribunal notes that persecution is not limited to actual punishment for exercising such rights, but it may also take the form of a threat of punishment or a prohibition on the exercise of rights. In this case it could be argued that it would be open to the applicant to continue to act discreetly in Malaysia so that her Christian beliefs and attendance at Church is not revealed publicly. Also, it could be argued that it would be open to the applicant's child to register with the MyKad scheme and comply. However, in the High Court case of *Appellant s395/2002 v MIMA* (2003) 216 CLR 473, the underlying principle that asylum seekers are not required and nor can they be expected; to take reasonable steps to avoid persecutory harm was set out.
51. In this case, the Tribunal notes that the applicant cannot officially change her religion from Muslim or indeed proclaim herself publicly as a Christian, because to do so is against the law and will attract the attention of the state such that she will be required to attend a rehabilitation camp and have her child removed from her care. Further, the applicant's family all of whom live in Malaysia will also try and 'bring her back to Islam' if she reveals to them that she is, in fact, a Christian. The essential principle in *Appellant s359* is applicable to this case as neither the applicant nor her child is at liberty to be who they want to be, that is a Christian. The applicant is taking strong measures to conceal her adopted Christian religion and so is her child by not taking out a MyKad identity card.
52. The Tribunal accepts that the applicant and her child have attended Church regularly in Australia and that they are supported by the Church in Australia. The Tribunal must decide if their conduct in Australia is subject to section 91R(3) of the Act. Section 91R(3) provides that any conduct engaged in by the applicant in Australia must be disregarded in determining whether he or she has a well-founded fear of being persecuted for one or more of the Convention reasons unless the applicant satisfies the decision maker that he or she engaged in the otherwise than for the purpose of strengthening his or her claim to be a refugee within the meaning of the Convention.
53. In view of the applicant's evidence before the Tribunal and her consistent claims throughout the application process, the Tribunal accepts that the applicant is a committed Christian and that she has genuinely converted from Islam. In making this finding the Tribunal has had regard to s.91R(3) and is satisfied that the applicant is involved in the Church in Australia because of her genuine faith in Christianity and not for the purpose of strengthening her refugee claims. It is also satisfied that she would

continue to wish to practise her Christian faith if she were to return to Malaysia. On that basis, the Tribunal is satisfied that s.91R(3) of the Migration Act does not apply to the applicant. The Tribunal therefore finds that the applicants face a real chance of persecution if they were to return to Malaysia now or in the reasonably foreseeable future.

54. The Tribunal has also considered the view that persecution for a Convention reason is difficult to establish where the conduct in question is directed at achieving a legitimate state objective and that the conversion laws are, in effect, laws of general application in Malaysia and do not constitute systematic and discriminatory conduct. The principle that the non-discriminatory application of generally applicable laws does not constitute persecution applies whether or not a particular law is oppressive or repugnant to the values of our society. In *Applicant A & Anor v MIEA & Anor* (1997) 190 CLR 225, Dawson J agreed with the observations of the Full Federal Court in that case that:

Since a person must establish well-founded fear of persecution for certain specified reasons in order to be a refugee within the meaning of the Convention, it follows that not all persons at risk of persecution are refugees. And that must be so even if the persecution is harsh and totally repugnant to the fundamental values of our society and the international community. For example, a country might have laws of general application which punish severely, perhaps even with the death penalty, conduct which would not be criminal at all in Australia. The enforcement of such laws would doubtless be persecution, but without more it would not be persecution for one of the reasons stated in the Convention.

55. Whether a law is properly characterised as a law of general application turns on identifying those members of the population to whom it applies. The applicant is a person who has converted from Islam to Christianity. The member of the population the applicant belongs to is Muslims who convert to Christianity in Malaysia. The applicant's child belongs to the population which includes people with a Muslim name and a Christian faith living in Malaysia. The Tribunal considers, however, that the conduct of the religious authorities constitutes systematic and discriminatory harm to a particular group of persons. The Tribunal considers that the denial of fundamental human right, such as the lack of religious freedom, may constitute persecution within the meaning of s.91R(1)(b) of the *Migration Act 1958*, as well as under the Convention.
56. The Tribunal has also considered whether the applicant and her child would be offered state protection and whether they could relocate somewhere else in Malaysia but considers that these are not reasonable options. This is because, as recently demonstrated by the federal civil courts in Malaysia in the case of Lina Joy, the civil administration refuses, in the instance of Muslims, to intervene in issues affecting their daily lives and that they consider that redress should be sought in the Sharia courts. The state is therefore unable to protect the applicants as the state controls the national MyKad system and considers the applicant and her child to be Muslim, against their will.
57. The persecution feared by the applicants is not localised and involves State actors and authorities. Therefore relocation is also neither practical nor effective as each state has

its own Sharia court and because the applicant and her child would be identified as deserting Islam they would be unable to escape the religious authorities.

CONCLUSION

58. The Tribunal is satisfied that the applicants are persons to whom Australia has protection obligations under the Refugees Convention. Therefore the applicants satisfy the criterion set out in s.36(2)(a) for a protection visa and will be entitled to such visas, provided they satisfy the remaining criteria

DECISION

59. The Tribunal remits the matter for reconsideration with the direction that the applicants satisfy s.36(2)(a) of the Migration Act, being persons to whom Australia has protection obligations under the Refugees Convention.

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

Sealing Officer's ID: ntreva