

0903027 [2009] RRTA 1102 (28 October 2009)

DECISION RECORD

RRT CASE NUMBER: 0903027

DIAC REFERENCE(S): CLF2009/1354

COUNTRY OF REFERENCE: Kenya

TRIBUNAL MEMBER: Mila Foster

DATE: 28 October 2009

PLACE OF DECISION: Sydney

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

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

1. This is an application for review of a decision made by a delegate of the Minister for Immigration and Citizenship to refuse to grant the applicant a Protection (Class XA) visa under s.65 of the *Migration Act 1958* (the Act).
2. The applicant, who claims to be stateless and formerly resident in Kenya, arrived in Australia [in] December 2008 and applied to the Department of Immigration and Citizenship for a Protection (Class XA) visa [in] December 2008. The delegate decided to refuse to grant the visa [in] March 2009 and notified the applicant of the decision and her review rights by letter dated [in] March 2009.
3. The delegate refused the visa application on the basis that the applicant is not a person to whom Australia has protection obligations under the Refugees Convention. The applicant applied to the Tribunal [in] April 2009 for review of the delegate's decision.
4. 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 applicant has made a valid application for review under s.412 of the Act.

RELEVANT LAW

5. 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.
6. 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).
7. 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'

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.
18. The focus of the Convention definition is not upon the protection that the country of nationality might be able to provide in some particular region, but upon a more general notion of protection by that country: *Randhawa v MILGEO* (1994) 52 FCR 437 per Black CJ at 440-1. Depending upon the circumstances of the particular case, it may be reasonable for a person to relocate in the country of nationality or former habitual residence to a region where, objectively, there is no appreciable risk of the occurrence of the feared persecution. Thus, a person will be excluded from refugee status if under all the circumstances it would be reasonable, in the sense of “practicable”, to expect him or her to seek refuge in another part of the same country. What is “reasonable” in this sense must depend upon the particular circumstances of the applicant and the impact upon that person of relocation within his or her country. However, whether relocation is reasonable is not to be judged by considering whether the quality of life in the place of relocation meets the basic norms of civil, political and socio-economic rights. The Convention is concerned with persecution in the defined sense, and not with living conditions in a broader sense: *SZATV v MIAC* [2007] HCA 40 and *SZFDV v MIAC* [2007] HCA 41, per Gummow, Hayne & Crennan JJ, Callinan J agreeing.

CLAIMS AND EVIDENCE

19. The applicant’s refugee claims and the evidence the Tribunal has considered in assessing her review application are as follows.

Protection visa application

20. The Tribunal has before it the Department’s file relating to the applicant’s protection visa application. The file contains a copy of the delegate’s decision. The Tribunal has had regard to the material referred to in the delegate’s decision.
21. According to the applicant’s protection visa application she was 31 years old at the time of her application, she was a Kenyan national at birth but was stateless at the time of application because she was unable or unwilling to return to Kenya. She belonged to the Luo ethnic group. She arrived in Australia [in] December 2009 on a visitor visa issued [in] July 2008 and using a Kenyan passport issued to her [in] June 1999. Her passport was extended [in] January 2005. She had lived in Nairobi from 1983 until she left Kenya, briefly in a IDP (Internally Displaced Persons) camp in Kibera. The applicant had 14 years of education in Kenya, acquired a diploma in 2003 and was employed from January 2006 until December 2008 as an Administrative Assistant. She indicated in her protection visa application that she received assistance from UNHCR, stating “IDP, Kibera Internal Displaced persons camp [a date in]2008”.
22. The applicant stated in her protection visa application that the reason she left Kenya were:
Since December 2007, myself and the rest of my family has been persecuted because we are of Luo nationality and belong to a “wrong” political party in Kenya.

My brother [Person A] was shot and has since left Kenya for Uganda together with [Person B]. I too had to leave because of the harassment meted out to me.

23. The applicant stated that she would be persecuted and tortured if she returned to Kenya mainly by the Kikuyu people but also other tribes because of her Luo “nationality” and because she belonged to the ODM political party. The applicant stated that the Kenyan authorities would not protect her from such harm because she would need around the clock police protection and that is not “invisible (sic) let alone imaginable”.
24. The applicant subsequently provided following the documents to the Department in support of her application:
 - a. A photocopy of some pages of her Kenyan passport
 - b. A statement dated 24 December 2008.
 - c. News reports downloaded from the internet dated 27 December 2008, 2, January 2009, and 30 January 2009 about events in Kenya.
25. In her written statement the applicant made the following claims:
 - a. She was born and raised in Mombasa, in the Eastern Province.
 - b. Her parents were members of KANU, the major political party before 2002, until they started voting for the ODM political party in 2007. Her father was not always home due to his political work. Her parents had moved to [Town A] in Western Kenya.
 - c. Some “nationalities” or tribes mainly the Kikuyu are openly hostile to the Luo. The Luo are treated almost as if they are not Kenyans especially at elections. As a Luo she had endured taunts and major harassment with occasional rude treatment in many areas of her social life whilst growing up.
 - d. Her grandparents disappeared in late 1993 during a “similar upheaval” Nobody in her family knew whether or not they were alive, where they went, who was responsible for their disappearance or whether they were just missing persons but it was assumed that they were decimated by political or tribal opponents.
 - e. Prior to their disappearance her grandparents had rental properties in the suburbs of Nairobi. Kikuyu and Kalejins were a “pain in the neck” when it came to paying rent. Mainly during elections they swore and threatened not to pay their rent while brandishing machetes. When her grandfather pursued them for unpaid rent they turned violent and threatened to hack her grandparents because they were Kikuyus and had stolen a lot of their money. Some tenants left without paying their outstanding rent. She later learnt that the political crisis was used to eliminate her grandparents. Their elimination had a lot to do with the Kikuyu and Ukambani tenants and the fact that they were Luo and had to be done away with. Her grandparents fled to Nairobi but did not get beyond the Rift Valley and were done away with.

- f. She and her brothers inherited the properties and she managed them but the tenants continued to behave as they did. She found out from reliable sources that the tenants had hatched a plan to eliminate all of them as they had their grandparents.
- g. To survive, she secured a job with the Electoral Commission of Kenya as a tally officer, initially on a part- time basis and then on a full time basis. She was responsible for overseeing the counting of votes after which she would call in the result. She complained on many occasions to her head tally officers that the votes she sent in were being manipulated and a different result was announced. At times she was threatened with the sack if she continued to champion that cause and she was not paid any wages as she was told her appointment was under review. What finally uprooted her and her brothers from their home and then their country was what occurred at the [Suburb B] polling station [in] December 2007.
- h. As a Luo her tenants and other Kenyans automatically thought she was on the side of the ODM Presidential Candidate, Oginga Odinga. However she was a supporter due to her political beliefs not rescue she was Luo. She was told that the President of Kenya was “as good as already being known” and thus she never complained again. In late December 2007 rumours were rampant in Kenya that Mwai Kibaki would be announced as President whether he won or not. On election night, tally officers accused each other of “infidelity” and others said it was a factor frustrating Mr Kibaki’s effort to assume power.
- i. In the same month hell broke lose and more than 600 people, mainly Luo and a large number of Kikuyu were murdered and more than 320,000 were displaced inside and outside Kenya She and her brothers had not returned to their home since [a date in] December 2007.
- j. After being sick of staying in one of the IDP centres a friend arranged for her to be accommodated with his aunt. The aunt was prepared to host her brothers as well but they could not be reached. Two of her brothers were in Uganda and the other two were in Tanzania.
- k. She could not understand why being Luo or a different nationality to the Kikuyu and Kalenjin and occasionally the Kiisi was such a big deal.
- l. Her Kikuyu “masters” made sure she was not paid her salary, verbally assaulted her and physically abused her whenever the opportunity arose.
- m. She was harassed by army and police interrogators connected to Mr Kibaki because of her view about how tallying was done as well as her immediate boss, [Person C], about her activities in the elections on more than one occasion during the years she served as a tally officer.
- n. She fell fleeing the tribal and political clashes in Nairobi , fracturing her right knee.

- o. Her real trouble started when she was born a Luo. From that time other Kenyans mainly Kikuyu and Kalenjin tenants and others never failed to molest her parents, brothers or herself. They denied them access to their property.
- p. She had no alternative but to leave Kenya. She arrived in the IDP camp in Kibera and heard that refugees from other parts of Kenya planned to poison the Luo.
- q. Before she left for the camp a tenant had taken her handbag, verbally harassed and abused her. He locked her in the house and subjected her to false imprisonment on many occasions, twice in 2006 and several times in 2007.
- r. The Kenyan police received credible reports of the harassment she was subjected to but could not enter “their premises” and could not charge anyone due to the “automatic cover” surrounding “them” and her case. The police did take a statement from her but it was never provided to her or used in any prosecution. She felt persecuted and traumatised.
- s. When she asked her employer about her treatment at work, he denied the matter and only admitted there was a problem between her and the other staff which he did not know how to resolve.
- t. Her tenants believed she had reported them to the police to harass them and were now furious and vengeful. They have taken over her home and property.
- u. President Kibaki had many interests in Kenya and many loyal soldiers. He did not want to leave or share power especially with Raila Odinga in the real sense. That was the type of autocratic authority her detractors and opponents wielded in Kenya and therefore it would be lethal and suicidal for her to risk returning.
- v. Further, her tenant’s circle of friends and contacts including those in the Kenyan government and the GSU, a paramilitary outfit, were used by the sitting president and those close to the president to silence their enemies.
- w. In light of the above facts she did not wish to return to Kenya and would not be offered protection. It would require around the clock protection just for her which would never happen.

Delegate’s interview

- 26. The applicant was interviewed by the delegate [in] March 2009. The Tribunal has listened to an audio recording of the interview and the following is a summary of the interview.
- 27. The applicant stated that she was no longer as national of Kenya. The delegate noted that she had a Kenyan passport and thus according to Kenyan and international law she was a national of Kenya. The applicant then stated that she was a citizen of Kenya. She confirmed she was a member of the Luo tribe.
- 28. She was born on Mombassa and moved to Nairobi in 1983 and lived in a suburb called [Suburb C] until 2008 in difference residences. She confirmed that she completed secondary school and post secondary education at college in Kenya The applicant confirmed that she

had worked until December 2008 prior to leaving Kenya as a receptionist for [Company L]. The applicant said she was an Anglican Christian.

29. The applicant said she had not left Kenya prior to coming to Australia. The delegate noted that the applicant had obtained a Kenyan passport in 1999. The applicant said she obtained it in case she obtained a scholarship overseas. The delegate noted that the passport was renewed in January 2005. The applicant said the law required passports to be renewed every five years.
30. The delegate reviewed the claims made by the applicant in her written statement. The applicant confirmed that her family had experienced problems because they were Luo and belonged to a political party and her brother, [Person A], was shot. She said he was shot in December 2007 because he worked for the Electoral Commission and as a Luo he was suspected of supporting the opposition party. The applicant confirmed that [Person A] left Kenya about two weeks later with [Person B] and went to Uganda when the clashes erupted. The incident was not reported to the police. The applicant said she did not know why her brother did not go to the police. It was reported in the newspaper but nothing was done. She said that the last time she spoke to them they were in Uganda. [Person B] left with [Person A] because they were living together and the Luo were being targeted.
31. The applicant confirmed that she had been harassed in Kenya and feared being harmed by Kikuyu people due to her support for the ODM. Asked how she supported ODM, she said she supported them because she felt it was a party of integrity and fair go. She did not vote in the election as she was working part time tallying votes. Asked what she did to support ODM, the applicant said she discussed politics with neighbours, she said politics were in the headlines at the time and they discussed which party they preferred.
32. The applicant confirmed that her grandparents disappeared in 1983 when she was 16 years old when they were living in the mountain area of the Rift Valley area. The delegate noted that she claimed that her grandparents tried to flee but could not get past the Rift Valley. The applicant said she was told this. Asked how she could inherit properties if it was not known whether her grandparents were dead, the applicant said the properties went from her grandparents to her parents to her. She said there were about 12 properties made of iron sheets located in [Suburb B], Nairobi She said Kikuyu and Kalejin tenants had hatched a plan to eliminate her. Asked what she meant by this the applicant said that she was Luo and the area where the properties were was for the Kikuyu She said she received threats, the first threat occurred in June 2007. Asked when the tenants stopped paying rent the applicant said she had different tenants and most refused to pay rent and some left without paying. Most stopped paying in June 2007. Asked if she took measures to evict the tenants she claimed that was when the threats were made. She said she reported the tenants' failure to vacate the premises to the police but nothing happened. Asked about the plan to eliminate her, she said when she asked for the rent they had a plan to finish her. She had heard about the plan from the neighbours. The applicant said she did not return to the properties after June 2007.
33. The applicant confirmed that she complained of vote rigging many times and was threatened with the sack. She was not sacked but neither was she paid. She explained that the election occurred in December and they were usually paid in February but she was not paid, she believed, because of the complaints she had made.
34. She confirmed that she had not returned to her home since the political upheaval in December 2007/January 2008. She lived in rental property in [Suburb D] prior to the election as it was

closer to her work and in an IDP for two weeks and after that she returned to [Suburb C] and lived at a friends' place. She lived with her friend until she left for Australia.

35. She confirmed she had two brothers living in Tanzania. She said her parents were living up country in Kenya.
36. The delegate noted that her masters verbally assaulted and physically abused. She said this occurred during her employment with the Electoral Commission. Asked to describe the physical abuse, the applicant stated that there were two instances, one when she was locked in a room for minutes and on another her bag was pulled.
37. The delegate noted that she was molested by tenants. In relation to the false imprisonment claim referred to in her written statement, the applicant said her youngest brother, [Person D], was falsely imprisoned by the police after a Kikuyu boy complained that her brothers had assaulted him. The applicant stated that she had never been imprisoned. The delegate noted that she stated in her written statement that a tenant had falsely imprisoned her on several occasions. The applicant responded that she had not been imprisoned. Asked to explain the reference to false imprisonment in her written statement, the applicant said tenants made false claims. She said she was locked in a room when she worked for the Electoral Commission and indicated she had not been imprisoned on any other occasion
38. The delegate referred to the written claim that the police received credible reports about harassment but that no prosecution occurred. Asked if the claim was true, the applicant responded "my brother".
39. Asked if she feared persecution for any reason other than being Luo and supporter of ODM, the applicant replied that she did not want to return to Kenya due to the general political situation and threats she had received from Kikuyus when trying to collect rent in 2007.
40. The delegate noted that the applicant had held a Kenya passport since 1995 which was renewed in 2005 and she claimed terrible events occurred in aftermath of December 2007 but did not lodge her tourist visa application until 8 July 2008. The delegate questioned the delay. The applicant responded that applying for the visa entailed a lot of planning and money. The delegate noted that she did not leave Kenya until December 2008. The applicant said she did not have money for a ticket.
41. The delegate told the applicant that according to her visitor visa application she had enough funds for her trip to Australia. The applicant replied that the funds she had were not even enough for her ticket and after she was granted the visa she had to have vaccines.

Medical examination

42. The Department's file contains a form the applicant completed in February 2009 for the purposes of a medical examination conducted in connection with her protection visa application. In the form the applicant stated that she fell in January 2008 whilst fleeing tribal and political clashes in Nairobi and fractured her right knee and that as a result she had two operations, still required medical treatment and felt pain as result of her injury.

Psychological Assessment

43. According to documents on the Department's file the applicant applied for [assistance] on the basis of financial hardship and inability to work. She claimed that her family in Kenya was

unemployed and unable to support her and that she could not work in Australia due to the effects of torture and trauma. Submitted in support of the application was a psychological assessment conducted by an intern clinical psychologist from [Welfare Agency A] which stated:

Thank you for your referral of [the applicant]. I conducted an assessment on [date]. [The applicant] reports and displays a range of symptoms associated with depression. These symptoms include: a depressed mood, poor and disturbed sleep, irritability and decreased ability to concentrate and remember instructions.

As a consequence of this symptomatic presentation, [the applicant] is currently not capable of undertaking paid employment...

Review application

44. The applicant did not submit any supporting evidence or material with her review application.

Tribunal hearing

45. The applicant appeared before the Tribunal [in] July 2009 to give evidence and present arguments. The applicant's migration agent did not attend the hearing.

Protection visa application

46. The applicant told the Tribunal that she and her migration agent completed the protection visa application together and she told her migration agent her claims and he prepared the written statement submitted to the Department.

Passport

47. The applicant stated that her migration agent had her passport but she produced a copy of her passport to the Tribunal.

Nationality

48. The Tribunal noted that in her protection visa application the applicant stated that she was stateless as at [a date in] December 2008 because she was unable and unwilling to return to Kenya. The applicant stated that she had been a Kenyan national until that point. The Tribunal explained that a country's law determined who was a national of the country and that it had referred to the Constitution of Kenya and Kenyan law relating to the renunciation and deprivation of Kenyan citizenship and it did not seem that the applicant could have renounced her Kenyan citizenship or been deprived of her Kenyan nationality for the reason she had given. The Tribunal thus put to the applicant that she was not stateless but a national of Kenya. The applicant had no comment to make. Asked what her migration agent's opinion about her nationality was the applicant replied he was of the view that she was stateless.

Personal details

49. The applicant confirmed that she was born in Mombasa and then moved with her family to Nairobi in 1983. The Tribunal obtained some personal details which the applicant had omitted from her protection visa application. She stated that she had lived in [Suburb B] in Nairobi for about 6 years before spending about 2 ½ weeks in an IDP camp in January 2008. After which she lived in [Suburb C] in Nairobi for 6 to 8 months prior to coming to Australia.

50. The applicant told the Tribunal that between November 1995 when she finished her secondary education and January 2006 when she obtained her permanent full time job with [Company D] she had various casual jobs. She said she studied evenings whilst working in 2003 and 2006/2007.

Family members

51. The applicant stated that her parents moved to the Western Province in about 1996 because her mother wanted to farm. They were still there. The applicant told the Tribunal that prior to moving her father was an immigration officer and her mother had a small business selling fish.
52. The applicant confirmed that two of her brothers were in Tanzania and two were in Uganda. She claimed that all four brothers left Kenya on the day the elections results were announced and the violence erupted. She said she could not go then as she fractured her leg during the violence and thus her movements were limited.
53. The Tribunal asked the applicant why she chose to come to Australia once she decided to leave Kenya, rather than any other country such as Uganda or Tanzania which was closer to Kenya and her brothers were there. The applicant responded that was the opportunity that arose. Questioned further the applicant stated that she feared being sent back if she went to a neighbouring country and was in pain for some time. The Tribunal queried the applicant's response given that her brothers had not been sent back to Kenya. The applicant claimed that the Ugandan government supported the party that rigged the elections and sent troops to hospitals in Kenya and harmed patients there. The Tribunal told the applicant that it had read numerous reports about the post-election violence but had not read any reports that the Ugandan government had sent troops into Kenya. The applicant stated that she could not recall the date but it had been in the news.

Support for ODM

54. The applicant told the Tribunal she had been a supporter of the ODM since 2006. She said she supported the party by attending rallies. Asked why she supported the party, the applicant responded that she felt it was a fair party, a party of integrity, a 'fair go' party.
55. Asked what she could tell the Tribunal about the history and formation of the party, the applicant stated that its leader was Raila Odinga, its headquarters were in Kilimani, its symbol was the orange, it had the highest number of members of parliament and two of its MPs died in 2008. Asked the relevance of the orange symbol, the applicant stated that it was for good health.
56. Asked who the ODM parliamentary candidate was for her constituency in the 2007, the applicant stated it was [Person E] and her constituency was [details deleted. 431(2)].

Tally officer work

57. The applicant told the Tribunal she was a tally officer for a couple of days during the elections of 2007. She said she did it for the extra money and took leave from her full time job to do it.
58. The Tribunal noted that the applicant claimed to have complained of vote rigging and asked her to detail who she complained to, when she complained and what happened after she

complained. The applicant responded that she complained to the Presiding Officer whose name she could not recall. She told him she felt like not all votes were being counted. He did not want to hear what she had to say and told her to continue with her work and that he was not ready to look into the matter. The Tribunal asked the applicant how she formed the impression that something was not right when she had only done the job for a couple of days. The applicant replied that was how the votes were counted. Asked to elaborate, the applicant demonstrated how ballots for some parties were held in the air (to be counted) and others were not.

59. The applicant testified that she had approached the Presiding Officer on the second day of polling and at the end of that day the results for that polling station, [details deleted: s.431(2)], were announced and she finished her job as a tally officer at the end of the second day.

Post election violence

60. The applicant told the Tribunal she was caught up in the violence that erupted when the general results were announced on 29 December. She said she was out shopping when a neighbour said the results were being announced so they were heading home when she saw smoke and heard shooting and some houses were burnt.

Property

61. The applicant gave evidence that she and her siblings inherited property from her grandparents in about 2006. She said her grandparents were still alive when they passed on the property to them. She said the property was in [Suburb B] and consisted of 11 rooms which were rented out.
62. Asked to tell the Tribunal about the problems she had with the tenants, the applicant stated that they refused to pay on time and others would move out and leave unpaid rent. Asked how this was relevant to her claim that she was a refugee, the applicant responded that the tenants were Kikuya. She said the Kikuyu claimed that the Luo stole from them and the Luo claimed that the Kikuyu stole from them. There was an enmity between the tribes. Asked why then she rented to Kikuyu people, the applicant stated that she was not tribalistic and treated everyone equally. She said not all Kikuya failed to pay their rent. Asked what made her believe that those who failed to pay their rent did so because they felt enmity towards Luo people, the applicant said she felt they believed that the Luo had stolen from them.
63. The applicant told the Tribunal that she still owned the property, and that the rooms were being managed by her mother who kept the income.

Persecution faced in Kenya

64. Asked what persecution she faced in Kenya the applicant stated that she still had fear within her that something else would happen. She said that since she was injured physically she felt traumatised and at times could not accept that it had happened. She said it haunted her. Asked what she feared would happen given her injury occurred over a year ago, the applicant responded that the BBC had reported that there could be electoral violence at the next elections in 2012.

65. Asked whether her parents had been safe where they lived, the applicant said they had. The Tribunal put to the applicant that it seemed reasonable for her to move there given they were safe and were able to earn a living there. The applicant stated that it was a farm in a rural area and good education was not available there. The Tribunal noted that the applicant had had an education. The applicant stated that in terms of growth it would not compare to the city where, if she wanted to, she could return to school.

Issues

66. The Tribunal questioned why if the applicant feared persecution she did not seek protection from the UNHCR which according to information the Tribunal had obtained had established the IDP camps. The applicant stated that she did not have the confidence to do so.
67. Asked why she did not leave Kenya sooner if she was afraid given she had a valid passport, the applicant replied that she was not feeling well and it took time to apply for her visa. She stated that she was hospitalised for four days in January 2008 and then became unwell again some months later. She returned to work two or three months after her injury. The Tribunal put to the applicant that if she was able to return to work it seemed her injury would not have prevented her leaving Kenya. The applicant replied that she had to plan her trip. She said she applied for her visa in July 2008.
68. The Tribunal noted that according to her passport the visa was granted in July 2008 and questioned why then she did not leave until December 2008. The applicant stated she had to raise money for the airfare. The Tribunal queried that it would have taken so long given she was working and earned income from the property. The applicant said she could not borrow from her family. She said she borrowed money from friends to put into an account to show that she had money to get visa because she was desperate.
69. The Tribunal told the applicant that a number of aspects of her evidence caused the Tribunal to doubt whether she had been truthful. Firstly, when the Tribunal asked about the history and formation of her party she did not provide any information and when she was asked why she joined she gave very general reason. The applicant responded that she forgot things.
70. The Tribunal put to the applicant that the account she had given at the hearing about the tally officer position was different to her written statement. The Tribunal noted that in her written statement the applicant said it was a part time job but had testified at the hearing that it was a job she did for a couple of days. The applicant said she had not said anything different and that her reference to the job being part time meant that it was for a short time. She said she had planned to apply for a full time job. The Tribunal noted that in her written statement she said that she had been promised a job. The applicant commented that she had already applied. The Tribunal queried whether she had applied or planned to apply. The applicant replied that she had applied.
71. The Tribunal noted that the applicant had only described one occasion on which she complained of vote rigging but in her written statement she stated that she complained over and over. Asked why she had only described complaining on one occasion, the applicant replied that she did not know.
72. The Tribunal observed that at the hearing the applicant testified that a consequence of her complaint was that she was told to keep working however in her written statement she

claimed that she was threatened with the loss of her job, that her job was under review and she was not paid. The applicant said she forgot things possibly because she was traumatised.

73. The Tribunal noted that in relation to her problems with the tenants the applicant told the Tribunal at hearing that they sometimes did not pay their rent or left without paying their rent. The Tribunal questioned why the applicant did not mention at hearing the other treatment she had received from the tenants which she had referred in her written statement. The applicant responded that she could not recall everything.
74. The Tribunal put to the applicant that in her oral evidence she stated that her grandparents were alive in 2006 when they gave her the rental properties but in her written statement she stated they had been “done away with” by their tenants in late 1993. Asked whether she could explain the inconsistency, the applicant said she could not explain it.
75. The Tribunal told the applicant that for a number of reasons it appeared that she could return to Kenya without facing persecution. Firstly, any danger she faced from the post election violence no longer existed because according to reports the Tribunal had read the violence that had occurred at that time was unprecedented and ended some time ago when a political power sharing agreement was signed in late February 2008, the crisis brought about by the elections were resolved with the swearing in of the Grand Coalition Cabinet which established a power sharing government between the two main opposing parties on 17 April 2008 and by 24 April 2008 President Kibaki of the PNU and Prime Minister Odinga, a Luo from the ODM were working together. The Tribunal suggested to the applicant that it did not seem there was a real chance that the violence would reoccur in the future. The applicant commented that she did not feel confident as the BBC had reported that there was still a significant risk of violence at the next election.
76. The Tribunal put to the applicant that she may have had problems as a tally officer but the elections were over and given she had other employment and 14 years education it seemed she could earn a livelihood and thus not being able to work as a tally officer in the future would not amount to persecution. The applicant told Tribunal she had no comment to make.
77. The Tribunal put to the applicant that even if it were true that her family properties had been taken from her and she was unable to obtain legal redress this amounted to a financial loss that was not serious enough to amount to persecution as she was still able to earn an income through some form of employment or other means given her 14 years education and prior work experience. The applicant stated that she feared the tenants.
78. In relation to her claim that she faced discrimination as a Luo, the Tribunal told the applicant that according to information the Tribunal had obtained there were numerous ethnic tribes in Kenya and not one was in the majority, whilst the Kikuyu was the largest making up about 21% of the population the Luo was the third biggest forming about 12 % of the population. The Tribunal put to the applicant that this suggested that the Luo were not a minority and although ethnic based discrimination and occasional violence was frequent in Kenya the Tribunal doubted that the applicant had suffered serious harassment constituting persecution given she had been able to complete 14 years of education and obtain employment, and her family had owned property from which they earned an income. The Tribunal put to the applicant that whilst the applicant may have experienced some discrimination it had not been nor would be serious enough to amount to persecution. The applicant responded that even though discrimination existed before it became more serious during and after the election.

79. The Tribunal noted that the applicant claimed that mainly the Luo were affected by the post 2007 election violence but according to information the Tribunal had obtained the Kikuya bore the brunt of the violence. The applicant commented that the Kikuyu felt they were targeted most and the Luo felt they were.
80. Asked if she had any further evidence, the applicant told the Tribunal that she still held a fear and owing to that fear she was not willing to return (to Kenya).

Independent evidence

81. The Tribunal has considered information from other sources in making its decision.
82. Chapter VI of The Constitution of Kenya deals with Kenyan citizenship including the deprivation of citizenship (<http://kenya.rcbown.com/consitution/>).
83. The UK Home Office gave the following account of the December 2007 elections in Kenya:
 - 2.6 In December 2007, local, parliamentary, and presidential elections were held. The two main candidates in the Presidential elections were Mwai Kibaki (PNU – Party of National Unity) and Raila Odinga (ODM – Orange Democratic Movement). It was reported that Kibaki depended heavily on the votes of Kikuyus, the largest ethnic group in the country and Odinga, from the Luo community, has a fairly wide support base ethnically. ⁶ In the run-up to the elections, the 2 main parties reformed into large coalitions. In August 2007, Orange Democratic Movement-Kenya – formed after the November 2005 referendum - split into the larger Orange Democratic Movement (ODM) led by Raila Odinga, and the smaller Orange Democratic Movement-Kenya, led by Kalonzo Musyoka. In September the ruling party NARC-Kenya became the Party of National Unity. ⁷
 - 2.7 The election proved to be the closest – and most bitterly - fought in the multi-party era. Initial reports were that the poll was largely free and fair. The ODM coalition took the largest number of Parliamentary seats, and official exit polls pointed to a win by the opposition Presidential candidate Raila Odinga (ODM). But a delay in announcing the Presidential contest raised doubts about the overall conduct of the election. Despite growing concerns, on 30 December 2007 the Electoral Commission of Kenya (ECK) announced that the incumbent Mwai Kibaki had won the Presidential race by a margin of 231,728 votes. The opposition candidate Raila Odinga rejected the result outright. The Chair of the ECK, Samuel Kivuitu has since stated that he made the announcement of Kibaki’s win ‘under duress’. The European Union Election Observer Mission noted that the presidential elections lacked credibility, and fell short of international standards. ⁸
 - 2.8 On 10 January 2008, President Kibaki announced his new cabinet. The opposition considered the decision to be inflammatory. ⁹ Kofi Annan was asked by the African Union to lead a panel of Eminent African Personalities to help negotiate a power-sharing deal between Odinga and Kibaki. ¹⁰ Talks were arranged a number of times between January and February 2008. President Kibaki offered a power-sharing deal on 5 January that was not acceptable to the opposition. The opposition mounted public rallies in Nairobi and other cities between 16 and 18 January that ended in violence. They then switched to a boycott of shops and services perceived to be Government-supporter owned. ¹¹

- 2.9 An agreement was signed on 28 February 2008, which was welcomed by the international community.¹² The power-sharing talks were suspended on 8 April 2008 and violent clashes resumed.¹³ In the serious communal violence following Kibaki's re-election – especially between rival ethnic groups - and a strong response by government security forces; over 1,000 people have been reported killed, and an estimated 300,000 people displaced.¹⁴
- 2.10 On 17 April the Grand Coalition Cabinet was sworn in, in the final step to establishing the power-sharing government and bringing an end to the post-election crisis.¹⁵ By 24 April 2008, President Kibaki and Prime Minister Odinga were working together, conducting a joint tour of the Rift valley trouble spots.¹⁶ On 23 July, the UK Prime Minister, Gordon Brown, stated that he “welcomed the commitment to power sharing and the strenuous efforts made by all sides to live up to the expectations of the Kenyan people” and that “Kenya’s leaders have the will and determination to take all the steps necessary”.¹⁷ Lord Malloch-Brown congratulated Prime Minister Raila Odinga and President Mwai Kibaki for the good start that they had made to Kenya's political and economic recovery. In six months, there was already progress on stability and security, and “...Kenya is now open for business.”¹⁸ (UK Home Office, *Operational Guidance Note Kenya*, 15 September 2008)

84. This year the US Department of State reported on inter tribal animosity, discrimination and violence in Kenya, the December 2007 elections and the after math of the post election violence.

The population is divided into more than 40 ethnic groups, among whom discrimination and occasional violence were frequent. The 1999 census indicated that Bantu ethnic groups constituted approximately 67 percent of the population, of which the Kikuyu and closely related Embu and Meru accounted for 32 percent, the Luhya 16 percent, and the Kamba 10 percent; Nilotic groups constituted 30 percent, of which the Kalenjin accounted for 12 percent and the Luo 11 percent; and Cushitic groups--mainly Somalis--constituted 3 percent of the population. The Kikuyu and related groups dominated much of private commerce and industry and often purchased land outside their traditional home areas, which sometimes resulted in fierce resentment from other ethnic groups. The numerically small and shrinking South Asian community controlled a disproportionate share of commerce.

...

During the year postelection violence often had an ethnic component. Interethnic violence increased during the year after the December 2007 announcement of the presidential election results. In January mobs in opposition strongholds, such as the Rift Valley and the western provinces, violently targeted ethnic Kikuyu and others suspected of supporting the incumbent president. In retaliation, Kikuyu mobs perpetrated vigilante attacks on non Kikuyu residents in Central Province, Nakuru, Naivasha, and areas of Nairobi. The violence continued until the signing of a political power-sharing agreement in late February.

For example, in early January, a mob set fire to a church where Kikuyu residents sought sanctuary, killing 35 people, mostly women and children. On January 4, a Kikuyu mob stopped and burned a bus traveling to the western region of the country, killing all the passengers. The passengers were members of a tribe that supported the opposition. In late January Kikuyu mobs in Nakuru and Naivasha attacked non-Kikuyu residents of the town, killing 90 persons. NGOs and the media estimated that a total of 1,500 persons were killed, and the UN estimated that 500,000 persons were

displaced during the postelection violence. In September KNCHR issued a report which concluded that much of the violence was organized and financed by politicians.

Through the provincial administrations, the government held public meetings to promote reconciliation in communities affected by the postelection violence and to establish a forum for dialogue and peaceful resolution of conflicts. NGOs reported that implementation of reconciliation efforts was not uniform. During the year NGOs and church organizations were also involved in attempts to reconcile communities affected by postelection violence. Land conflicts during the year took place between the Maasai and Kipsigis in southern Rift Valley Province in June and between Maasai and Kikuyu in Naivasha in September.

Many factors contributed to interethnic conflicts: longstanding grievances over land tenure policies and competition for scarce agricultural land, the proliferation of guns, the commercialization of traditional cattle rustling, the growth of a modern warrior/bandit culture (distinct from traditional culture), ineffective local political leadership, diminished economic prospects for groups affected by a severe regional drought, political rivalries, and the inability of security forces to adequately quell violence. Conflict between land owners and squatters was particularly severe in Rift Valley and Coast provinces, while competition for water and pasturage was especially serious in the northern districts of Rift Valley and Eastern Provinces and in North Eastern Province.

In private business and in the public sector, members of nearly all ethnic groups commonly discriminated in favor of other members of the same group. Some neighborhoods, particularly in slum areas of the capital, tended to be segregated ethnically, although interethnic marriage had become fairly common in urban areas. (US Department of State, *2008 Human Rights Report: Kenya*, 15 February 2009)

85. Other sources reported similarly upon violence:

At the start of 2008, Kenya was in the grip of its worst crisis since independence. The violence following the December 2007 election was unprecedented. It continued for weeks and posed a real threat to the unity of the nation. The initial spark was the contested presidential result, where the incumbent Mwai Kibaki – candidate of the Party of National Unity (PNU) – claimed victory, and was swiftly sworn in, amid claims of widespread poll-rigging. But the unrest quickly took on an ethnic dimension.¹

The Kikuyus – the group which has dominated Kenya economically since independence in 1963 – bore the brunt of the violence. They were perceived to be the backers of Mwai Kibaki – a Kikuyu – and his Kikuyu-dominated PNU alliance.² The worst unrest was around the Northern Rift Valley town of Eldoret where Kalenjins mobilised against Kikuyu, driving them away and burning their property.³ But there was also serious violence in the Southern Rift, with Kalenjin attacks on Kisii communities over land ownership issues, and in Western Kenya, particularly in the town of Kisumu, where Luo supporters of the opposition Orange Democratic Movement (ODM) were shot by the Kenyan police.⁴ In the Rift Valley towns of Naivasha, Molo and Nakuru, the Mungiki, a Kikuyu outlawed militia, attacked ODM supporters.⁵ Families from the minority Ogiek hunter-gatherer community close to Nakuru had their houses burnt down and their property destroyed by Kikuyu villagers. By the time the powersharing deal was struck on 28 February 2008, bringing together the ODM and the PNU,⁶ approximately 1,500 Kenyans⁷ had been killed, over 400,000 displaced⁸ and an unknown number of women had been raped.⁹

Ishbel Matheson, *Kenya six months on: A new beginning or business as usual?*
Minority Rights Group International, August 2008

Amid widespread allegations of rigging, President Kibaki and his Party of National Unity claimed victory in the closely-fought elections – an outcome vehemently disputed by the opposition Orange Democratic Movement. The fault-lines in Kenyan society were exposed, when competing political interests over-lapped with ethnic differences. President Kibaki and his close associates are Kikuyu, while his main rival Raila Odinga is a Luo. The Luos – making up 12 % of the Kenyan population – have long seen themselves as being denied the leadership of the country. Kikuyus making up 21 % of the population, have dominated the country politically and economically since independence, and have traditionally been the target of widespread resentment. Alarming, post-election anger has mutated into the settling of old scores.

In the Rift Valley, historic grievances against land allocations led to the mass targeting of Kikuyu by the Kalenjin (around 11 % of the population), who regard the land in the Rift Valley as theirs. In Western Kenya, the Kikuyu also found itself under attack, with many fleeing for fear of their lives, whilst dozens of Luo in the main Western Kenya town of Kisumu were shot dead by the Kenyan security services, and women – including elderly ones – were raped, again allegedly by security forces. The Kikuyu criminal militia, Mungiki, struck back around the town of Naivasha in the Rift Valley, targeting ethnic groups believed to support the Opposition. The Ogiek – a hunter-gatherer indigenous group - living close to Lake Nakuru, were attacked by gangs of Kikuyus from neighbouring villages, backed up by armed Kikuyu police officers.

In February, under intense international pressure, Kibaki and Odinga agreed to a power-sharing deal, but tumultuous talks on the formation of a joint cabinet lasted into April. The result was the largest cabinet in Kenya's history – one that nicely served the interests of elites on both sides of the conflict. By the time the power-sharing deal had been struck on the 28th February 2008, bringing together the ODM and the PNU, approximately 1500 Kenyans were killed, over 400,000 displaced and an unknown number of women had been raped. However, deep scars remained among the people of the Rift Valley in particular.

Six months on, although the majority of the displaced have been moved out of the IDP camps, many are still in 'transit' camps, essentially tented camps, close to their original farms. Ethnic tensions simmer, whilst the government has raised only a fraction of the money for resettlement of the IDPs. The reconciliation effort has been mostly driven by international and national NGOs, backed up by many community-based organisations. But it has lacked a government and national focus: overall, the conclusion seems to be that, as in previous bouts of ethnic violence, Kenyans will have to get on with re-building their own lives, with little assistance from the State coffers. Without a long-term effort to address ethnic divisions at either a national or local effort, the prospect of conflict flaring again is real. (Minority Rights Group International, *World Directory of Minorities and Indigenous Peoples: Kenya: Overview*, July 2008, <http://www.unhcr.org/refworld/docid/4954ce2a30.html>)

86. In a comprehensive report on the internal displacement situation in Kenya, the Internal Displacement Monitoring Centre reported on the displacement of persons following the December 2007 election:

Victims of the violence fled to major towns in the Rift Valley and Central Province and to Nairobi's western outskirts. An estimated 600,000 people were displaced from

their homes into camps, mostly in the Rift Valley (OHCHR, March 2008). Displacements in Western, Nyanza, and Central were on a smaller scale. The displaced in Nairobi initially took refuge in Jamhuri Park and City Park and at the compounds of chiefs and District Commissioners. These camps were among the first to be shut down by the government despite protests from humanitarian agencies and the displaced themselves (Daily Nation, 21 January 2008; UNICEF, 25 January 2008).

...

At the height of the post-election crisis, humanitarian agencies put the number of displaced people at between 500,000 and 600,000, living in some 300 camps. About 12,000 Kenyans also fled to seek refuge in Uganda (OCHA, 25 February 2008; ODI, April 2008). (Internal Displacement Monitoring Centre (IDMC), *Kenya: No durable solutions for internally displaced yet*, 23 December 2008, <http://www.unhcr.org/refworld/docid/4950b7c82.html>)

FINDINGS AND REASONS

Nationality

87. The applicant claims to have been a citizen of Kenya from birth until [a date in] December 2008 when she became stateless because she had left Kenya and was unwilling to return there. The *Hague Convention on Certain Questions Relating to the Conflict of Nationality Laws 1930* (the Hague Convention) sets out the international law relating to nationality. According to the Hague Convention it is for each State to determine under its own law who are its nationals (Article 1) and any question as to whether a person possesses the nationality of a particular State shall be determined in accordance with the law of that State (Article 2).
88. The applicant has held a Kenyan passport since 1999. A passport indicates that a person is a national of the country which issued the passport. Chapter IV of the Kenyan Constitution deals with Kenyan citizenship. There is nothing in the Kenyan constitution nor has the Tribunal found any other Kenyan law which would deprive the applicant of her Kenyan citizenship because she is unable or unwilling to return to Kenya. Thus, on the basis of the applicant's passport, the Tribunal finds that she is a Kenyan national and not stateless.

Membership of Luo tribe

89. The applicant claims that she is a member of the Luo tribe in Kenya. There is no evidence before the Tribunal to contradict this claim thus the Tribunal accepts that the applicant is Luo.

Injury sustained during post election violence

90. The independent evidence referred to above indicates that the violence which occurred after the December 2007 elections was unprecedented and resulted in 1,500 people being killed and hundreds of thousands of people displaced. It is reported that areas of Nairobi were affected by violence. The applicant claims she was caught up in the violence in Nairobi and injured her leg as a result. She referred to the injury in the medical examination form she submitted to the Department this year. The applicant's oral evidence about her injury was credible. Thus, the Tribunal accepts that the applicant injured her right knee as she claims.

Time in IDP camp

91. The applicant claims that she spent 2 ½ weeks in an IDP camp following the post election violence. The independent evidence indicates that hundreds of thousands of people were displaced into camps including in Nairobi as a result of the violence. Given the massive scale of the displacement of persons it is plausible and thus the Tribunal accepts that the applicant lived in a displacement camp as she claims.

Tally officer position

92. The applicant claims that she was employed as a tally officer by the Electoral Commission of Kenya. In her written statement the applicant claimed she had been a part-time tally officer however at the Tribunal hearing she indicated that she had only worked as a tally officer for a period of two days during the December 2007 elections. When this apparent inconsistency was put to the applicant at the hearing she indicated there was no inconsistency because by saying that she worked part time she meant she had worked for a short time. However, this does not accord with her written statement in which she referred to serving as a tally officer for years. The Tribunal does not accept the explanation the applicant gave at the hearing and finds that her evidence about the period of her employment as a tally officer was inconsistent.
93. In the oral evidence the applicant gave the Tribunal the applicant indicated that she complained of vote rigging on one occasion during her employment as a tally officer. This is in contrast to the claim in her written statement that she complained of vote rigging over and over again. She testified at the hearing that as a result of complaining she was simply told to keep working whereas as in her written statement she claimed that she was threatened with losing her job and told her job was under review. Invited to explain the variation in her evidence the applicant told the Tribunal she forgot things “possibly” because she was traumatised. By that point in the hearing the applicant had given considerable testimony about her claims. If the applicant had difficulty recalling past events then the Tribunal expects this would have been apparent to her prior to the hearing or certainly during the course of the evidence she had given before the Tribunal raised concerns about her testimony and thus she would have brought her forgetfulness to the Tribunal’s attention before the hearing or earlier in the hearing. The fact the applicant only raised the possibility that her ability to recall was affected by trauma after the Tribunal began putting potentially adverse issues to her undermines her suggestion that her ability to recall was impaired.
94. The Tribunal is mindful that past experiences of trauma can adversely affect a person’s ability to give evidence and present arguments at a hearing. The Tribunal takes this into account in how it conducts its hearings when claims of trauma are made. The questions the Tribunal asked the applicant in relation to her refugee claims were straightforward and concise and the applicant was given ample time to consider and answer the questions. The applicant was invited at the beginning of the hearing to seek clarification of any of the Tribunal’s questions and she did so on occasion without any hesitation but did not indicate she had problems recalling matters until confronted with possible flaws in her evidence.
95. In light of the applicant’s claim that her ability to recall may have been affected by trauma the psychological assessment she submitted to the Department is relevant and the Tribunal has had regard to it. Whilst the assessment states that the applicant reported and displayed certain symptoms it is not apparent from the assessment how the applicant was able to display some of the symptoms such as a decreased ability to concentrate and remember instructions especially as it appears the assessment was based on one consultation with the

applicant. Further, the assessment was made about four months before the Tribunal hearing. The assessment does not indicate nor does the Tribunal believe that the applicant would not be able to recall significant events she personally experienced such whether she worked as a tally officer two days or part time over a period of years, whether she complained of vote rigging on one occasion or many occasions, and whether she threatened with the loss of her tally officer job and her position placed under review because she complained. Thus, the Tribunal does not accept that the applicant's ability to give evidence and present arguments at the hearing was affected by any trauma and in light of the inconsistencies in her evidence does not accept that she worked as a tally officer for the Electoral Commission of Kenya. Thus, the Tribunal does not accept the claims she made her written statement that she was harassed by the army and police interrogators connected to Mr Kibaki and her immediate boss, [Person C].

ODM supporter

96. The applicant was able to correctly identify the name of the leader of the ODM party and provided the name of the 2007 ODM parliamentary candidate for her electorate and named her electorate without any hesitation. However, despite claiming to have been a supporter of the party and to have attended rallies the reasons she gave for supporting the party were very vague. Even when the Tribunal subsequently noted that her reason was general she failed to elaborate any further and stated that she forgot things. The Tribunal believes that a person would be able to identify with some specificity why they supported a particular party and does not consider it plausible that they would forget why they supported a particular party. Thus, the Tribunal does accept that the applicant was a supporter of the ODM.

Problem with tenants

97. The applicant claims that her grandparents owned properties which they rented out and that they experienced various problems with the tenants because her grandparents were Luo and the tenants belonged to other tribes. In her written statement the applicant claimed her grandparents disappeared in 1993 having been "done away with" by their tenants. The applicant claimed that she inherited her grandparents' properties. However, contrary to this claim in her written statement, the applicant testified at the Tribunal hearing that her grandparents were still alive in 2006 when she inherited the properties from them. When she was given the opportunity to explain the inconsistency between her oral evidence and her written evidence that they disappeared in 1993, the applicant said she could not explain it.
98. Further, the applicant claimed that, like her grandparents, she experienced various problems with the tenants. In her written statement she claimed that they had hatched a plan to eliminate her as they had her grandparents and molested her; she claimed that one tenant took her handbag, verbally harassed and abused her, and locked her in her house on many occasions, and that the tenants had taken over her home and property after she reported them to the police. However, when she was asked to describe the problems she had with her tenants at the Tribunal hearing the applicant only referred to the tenants not paying their rent and moving out and leaving outstanding rent. Asked to explain why she had not mentioned the problems she had referred to in her written statement the applicant said she could not recall everything. In her written statement the applicant claimed she had been subjected to far more serious mistreatment by her tenants than merely not being paid rent she was owed. The Tribunal does not accept that the applicant could fail to recall the serious threats and abuse she claimed to have been subjected to her in written statement if they were true.

99. Hence, the Tribunal does not accept that the applicant's grandparents have been "eliminated" by their tenants or that the applicant inherited their rental properties or that she was harmed by her grandparent's tenants as she has claimed because she is Luo, due to her imputed political opinion or family membership. The Tribunal thus does not accept that she reported any problems with the tenants to the police. Therefore, the Tribunal finds that she does not face a real chance of harm from the tenants in the reasonably foreseeable future.

Discrimination

100. In addition to the above claims of harm because she is Luo and for reasons of imputed political opinion, the applicant referred in her written statement to the general negative treatment of Luo people by other tribes. In relation to herself in particular she stated that she endured taunts and major harassment with occasional rude treatment whilst growing up and was "molested" by other tribes people. The independent evidence indicates that inter tribal discrimination and conflict occurs in Kenya but that there is no one major tribe in Kenya and the Luo people are the third largest tribe in Kenya. The fact the applicant was able to complete 14 years of education and gain employment indicates that she was not subjected to serious harm amounting to persecution because she is Luo in relation to her employment and education.
101. The applicant told the Tribunal that the discrimination was worse after the elections and indicated that she feared further election violence in the future because the BBC predicted future electoral violence. The Tribunal believes that the applicant fears a reoccurrence of violence at election time however, the independent evidence referred to above indicates that the violence which occurred after the December 2007 elections was unprecedented and ended some time ago when a political power sharing agreement was signed in late February 2008 and the crisis brought about by the elections was resolved with the swearing in of the Grand Coalition Cabinet which established a power sharing government between the two main opposing parties on 17 April 2008. Thus, whilst there is a risk of post election violence in the future, the Tribunal finds that there is not a real chance of the degree of violence which occurred after the December 2007 reoccurring in the reasonably foreseeable future and not a real chance that the applicant will be persecuted in the reasonably foreseeable future during such violence.

Relocation

102. The applicant told the Tribunal that her parents had moved to the Western province of Kenya in 1996 where they had been safe. This, combined with the independent evidence referred to in the preceding paragraph, indicates that even if the applicant was harmed in the past because she is Luo, or for reasons of imputed political opinion or family membership she does not face a real chance of persecution in that area of Kenya. When the Tribunal suggested that it seemed the applicant would be safe there and thus it was reasonable for her to relocate there the applicant did not indicate that she faced persecution there for any reason rather she stated it was not reasonable for her to relocate there because it was a rural area where good education was not available and in terms of growth it would not compare to the city where she could return to school if she wanted to. The Tribunal accepts the applicant would have more opportunities in a city compared to a rural area but given she has had 14 years of education already and prior work experience the Tribunal does not consider it unreasonable for her to relocate to a part of Kenya where she would not face persecution

Well-founded fear

103. In light of the above findings, the Tribunal finds that the applicant does not have a well-founded fear of persecution in Kenya for reasons of her race, membership of a particular social group, political opinion or any other Convention reason.

CONCLUSIONS

104. The Tribunal is not satisfied that the applicant is a person to whom Australia has protection obligations under the Refugees Convention. Therefore the applicant does not satisfy the criterion set out in s.36(2)(a) for a protection visa.

DECISION

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

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

Sealing Officer's I.D. prrt44