

1100143 [2012] RRTA 246 (25 March 2012)

DECISION RECORD

RRT CASE NUMBER:	1100143
DIAC REFERENCE(S):	CLF2009/111869
COUNTRY OF REFERENCE:	France/[Country 1]
TRIBUNAL MEMBER:	Giles Short
DATE:	25 March 2012
PLACE OF DECISION:	Sydney
DECISION:	The Tribunal affirms the decision not to grant the applicants Protection (Class XA) visas.

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

1. This is a review of a decision made by a delegate of the Minister for Immigration and Citizenship on [date deleted under s.431(2) of the *Migration Act 1958* as this information may identify the applicant] December 2010 refusing an application by the applicants for Protection (Class XA) visas. The applicants were notified of the decision under cover of a letter dated [December] 2010 and the application for review was lodged with the Tribunal on [January] 2011. I am satisfied that the Tribunal has jurisdiction to review the decision.
2. The first-named applicant last arrived in Australia [in] May 2004 travelling on a French passport in the name [Alias A]. He claims, however, to be [Mr B], a citizen of Algeria. The second-named applicant, his de facto partner, is a citizen of [Country 1] who last arrived in Australia as a student [in] January 2009. The third-named applicant is their daughter, born in Australia [in] October 2009.
3. The first and second-named applicants applied for Protection (Class XA) visas [in] August 2009. The third-named applicant was added to the application after her birth in accordance with regulation 2.08 of the Migration Regulations 1994 (the Regulations). [In] July 2011 the applicant's representative informed the Tribunal that the first and second-named applicants had had a second child [in] June 2011. However, since she was born after their application was decided, she was not included in the decision under review and the Tribunal has no jurisdiction in relation to her.

RELEVANT LAW

4. In accordance with section 65 of the *Migration Act 1958* (the Act), the Minister may only grant a visa if the Minister is satisfied that the criteria prescribed for that visa by the Act and the Migration Regulations 1994 (the Regulations) have been satisfied. The criteria for the grant of a Protection (Class XA) visa are set out in section 36 of the Act and Part 866 of Schedule 2 to the Regulations. Subsection 36(2) of the Act provides that:
 - (2) A criterion for a protection visa is that the applicant for the visa is:
 - (a) a non-citizen in Australia to whom the Minister is satisfied Australia has protection obligations under the Refugees Convention as amended by the Refugees Protocol; or
 - (aa) a non citizen in Australia (other than a non citizen mentioned in paragraph (a)) to whom the Minister is satisfied Australia has protection obligations because the Minister has substantial grounds for believing that, as a necessary and foreseeable consequence of the non citizen being removed from Australia to a receiving country, there is a real risk that the non citizen will suffer significant harm; or
 - (b) a non-citizen in Australia who is a member of the same family unit as a non-citizen who:
 - (i) is mentioned in paragraph (a); and
 - (ii) holds a protection visa; or

- (c) a non citizen in Australia who is a member of the same family unit as a non citizen who:
 - (i) is mentioned in paragraph (aa); and
 - (ii) holds a protection visa.’

Refugee criterion

5. Subsection 5(1) of the Act defines the ‘Refugees Convention’ for the purposes of the Act as ‘the Convention relating to the Status of Refugees done at Geneva on 28 July 1951’ and the ‘Refugees Protocol’ as ‘the Protocol relating to the Status of Refugees done at New York on 31 January 1967’ Australia is a party to the Convention and the Protocol and therefore generally speaking has protection obligations to persons defined as refugees for the purposes of those international instruments.
6. Article 1A(2) of the Convention as amended by the Protocol relevantly defines a ‘refugee’ as a 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.’
7. The time at which this definition must be satisfied is the date of the decision on the application: *Minister for Immigration and Ethnic Affairs v Singh* (1997) 72 FCR 288.
8. The definition contains four key elements. First, the applicant must be outside his or her country of nationality. Secondly, the applicant must fear ‘persecution’. Subsection 91R(1) of the Act states that, in order to come within the definition in Article 1A(2), the persecution which a person fears must involve ‘serious harm’ to the person and ‘systematic and discriminatory conduct’. Subsection 91R(2) states that ‘serious harm’ includes a reference to any of the following:
 - (a) a threat to the person’s life or liberty;
 - (b) significant physical harassment of the person;
 - (c) significant physical ill-treatment of the person;
 - (d) significant economic hardship that threatens the person’s capacity to subsist;
 - (e) denial of access to basic services, where the denial threatens the person’s capacity to subsist;
 - (f) denial of capacity to earn a livelihood of any kind, where the denial threatens the person’s capacity to subsist.
9. In requiring that ‘persecution’ must involve ‘systematic and discriminatory conduct’ subsection 91R(1) reflects observations made by the Australian courts to the effect that the notion of persecution involves selective harassment of a person as an individual or as a member of a group subjected to such harassment (*Chan Yee Kin v Minister for Immigration and Ethnic Affairs* (1989) 169 CLR 379 per Mason CJ at 388, McHugh J at 429). Justice McHugh went on to observe in *Chan*, at 430, that it was not a necessary element of the concept of ‘persecution’ that an individual be the victim of a series of acts:

‘A single act of oppression may suffice. As long as the person is threatened with harm and that harm can be seen as part of a course of systematic conduct directed for a Convention reason against that person as an individual or as a member of a class, he or she is “being persecuted” for the purposes of the Convention.’

10. ‘Systematic conduct’ is used in this context not in the sense of methodical or organised conduct but rather in the sense of conduct that is not random but deliberate, premeditated or intentional, such that it can be described as selective harassment which discriminates against the person concerned for a Convention reason: see *Minister for Immigration and Multicultural Affairs v Haji Ibrahim* (2000) 204 CLR 1 at [89] - [100] per McHugh J (dissenting on other grounds). The Australian courts have also observed that, in order to constitute ‘persecution’ for the purposes of the Convention, the threat of harm to a person:

‘need not be the product of any policy of the government of the person’s country of nationality. It may be enough, depending on the circumstances, that the government has failed or is unable to protect the person in question from persecution’ (per McHugh J in *Chan* at 430; see also *Applicant A v Minister for Immigration and Ethnic Affairs* (1997) 190 CLR 225 per Brennan CJ at 233, McHugh J at 258)

11. Thirdly, the applicant must fear persecution ‘for reasons of race, religion, nationality, membership of a particular social group or political opinion’ Subsection 91R(1) of the Act provides that Article 1A(2) does not apply in relation to persecution for one or more of the reasons mentioned in that Article unless ‘that reason is the essential and significant reason, or those reasons are the essential and significant reasons, for the persecution’ It should be remembered, however, that, as the Australian courts have observed, persons may be persecuted for attributes they are perceived to have or opinions or beliefs they are perceived to hold, irrespective of whether they actually possess those attributes or hold those opinions or beliefs: see *Chan* per Mason CJ at 390, Gaudron J at 416, McHugh J at 433; *Minister for Immigration and Ethnic Affairs v Guo* (1997) 191 CLR 559 at 570-571 per Brennan CJ, Dawson, Toohey, Gaudron, McHugh and Gummow JJ.

12. Fourthly, the applicant must have a ‘well-founded’ fear of persecution for one of the Convention reasons. Dawson J said in *Chan* at 396 that this element contains both a subjective and an objective requirement:

‘There must be a state of mind - fear of being persecuted - and a basis - well-founded - for that fear. Whilst there must be fear of being persecuted, it must not all be in the mind; there must be a sufficient foundation for that fear.’

13. A fear will be ‘well-founded’ if there is a ‘real chance’ that the person will be persecuted for one of the Convention reasons if he or she returns to his or her country of nationality: *Chan* per Mason CJ at 389, Dawson J at 398, Toohey J at 407, McHugh J at 429. A fear will be ‘well-founded’ in this sense even though the possibility of the persecution occurring is well below 50 per cent but:

‘no fear can be well-founded for the purpose of the Convention unless the evidence indicates a real ground for believing that the applicant for refugee status is at risk of persecution. A fear of persecution is not well-founded if it is merely assumed or if it is mere speculation.’ (see *Guo*, referred to above, at 572 per Brennan CJ, Dawson, Toohey, Gaudron, McHugh and Gummow JJ)

Complementary protection criterion

14. An applicant for a protection visa who does not meet the refugee criterion in paragraph 36(2)(a) of the Act may nevertheless meet the complementary protection criterion in paragraph 36(2)(aa) of the Act, set out above. 'Significant harm' for the purposes of that definition is exhaustively defined in subsection 36(2A) of the Act: see subsection 5(1) of the Act. A person will suffer 'significant harm' if they will be arbitrarily deprived of their life, if the death penalty will be carried out on them or if they will be subjected to 'torture' or to 'cruel or inhuman treatment or punishment' or to 'degrading treatment or punishment'. The expressions 'torture', 'cruel or inhuman treatment or punishment' and 'degrading treatment or punishment' are further defined in subsection 5(1) of the Act.

Member of the same family unit

15. As set out above, paragraphs 36(2)(b) and (c) of the Act provide a further alternative if an applicant is a member of the same family unit as a non-citizen mentioned in paragraph 36(2)(a) or (aa) who holds a protection visa. Subsection 5(1) of the Act provides that one person is a 'member of the same family unit' as another if either is a member of the family unit of the other or each is a member of the family unit of a third person and that 'member of the family unit' has the meaning given by the Regulations for the purposes of the definition.

CLAIMS AND EVIDENCE

16. The applicant named first on the cover sheet (referred to in these reasons for convenience as 'the applicant') and his de facto partner made specific claims under the Refugees Convention as amended by the Refugees Protocol. Their daughter claimed to be a member of their family unit and her application was combined with their applications as permitted by the Regulations.
17. The Tribunal has before it the Department's file CLF2009/111869 relating to the applicant. The applicant appeared before the Tribunal to give evidence and present arguments [in] March 2011. The Tribunal was assisted by an interpreter in the Arabic and English languages. The applicant was represented by [their] registered migration agent. [This migration agent] attended the hearing.

The applicant's original application

18. The applicant claims to be an Algerian national, [Mr B], born on [date deleted: s.431(2)] in [Town 2] in Algeria. In his original application he said that he had completed six years of primary school and one year of secondary school in Algeria and that he had worked as a shop assistant in [Town 2] from 1997 until 2003.
19. The applicant first arrived in Australia [in] October 2003 travelling on a French passport in the name [Alias A], born on [date deleted: s.431(2)] in [Town 3] (see the copies of pages from that passport at folios 88 and 90-92 of the Department's file). His passport was examined on arrival and no irregularities were detected. He was interviewed and maintained that he intended a genuine visit. He applied for and was granted further visitor visas in that identity enabling him to remain until [April] 2004. He left Australia [in] April 2004 and he said in his protection visa application that he had travelled to [Country 4] in order to apply for a working holiday-maker visa offshore. He returned to Australia travelling on that visa on [May] 2004. He remained in Australia unlawfully after that visa expired [in] May 2005.

20. In a statement accompanying his original application the applicant said that he recalled very little about his parents but that he clearly remembered his anti-government feelings and officers coming to his home to take his father frequently. He said that in 1990 his father had been shot and killed by the authorities and that in 1991 his mother had died during attacks in Algeria. He said that his older [brother] had worked to support him. The applicant said that when he had been 16 or 17 he had been depressed, lost and scared. He said that he had been ideal bait for the many fundamentalist Salafist groups in Algeria. He said that he had become involved in potentially dangerous groups and that he had been taken to the police station on a few occasions for questioning.
21. The applicant said that his maternal uncle had seen that he had been brainwashed by the fundamentalists and had arranged for him to travel to Australia on the passport of his cousin, [Alias A]. He said that after he had come here a man named [name deleted: s.431(2)] and other people in the Algerian community had advised him not to apply for a protection visa. He said that he had seen an agent whom he named as [name deleted: s.431(2)] who he said had advised him to apply for a working holiday-maker visa offshore.
22. The applicant said that he had been arrested but acquitted due to psychological instability. He said that in July 2008 he had met his current partner, a [Country 1] student, who was now pregnant with their child. He said that now he could not return to Algeria because he was in a relationship with a Buddhist and he was no longer a practising Muslim. He said that his relationship was not acceptable in Algeria nor was his religious opinion which he said was against the practice of Islam. He said that he would also be detained for having left Algeria without a passport.

The applicant's de facto partner's original application

23. The applicant's de facto partner is a citizen of [Country 1]. In her original application (lodged with the Department [in] January 2010) she said that she had completed 12 years of schooling in [Country 1] in 2003 and that she had worked in a clerical capacity for a [company] in [Country 1] from 2003 until August 2007. She said that she had come to Australia [in] October 2007 as a student. She said that she had begun a de facto relationship with the applicant in August 2008 and that they had a child, born in October 2009. The applicant's de facto partner said that she could not return to [Country 1] because the applicant was an Arab and their child was a 'half caste'. She said that the [people from Country 1] did not accept mixed marriages and a mixed marriage involving an Arab was even less acceptable. She said that they would be discriminated against and their daughter would be persecuted at school.

The applicant's evidence at the Departmental interview

24. The applicant was interviewed by the primary decision-maker in relation to his application [in] October 2009. He maintained that he had been born in Algeria. The primary decision-maker referred to the fact that, as set out above, when the applicant had arrived in Australia he had said that he was a citizen of France, born in that country. The applicant said that his cousin was a French citizen and he had used his cousin's passport to travel to Australia. He said that the photograph of him in the passport was his cousin's photograph and that they looked very similar. He said that he had obtained the documents he had produced in evidence of his claimed identity from his brother in Algeria.

25. The primary decision-maker noted that according to one of the documents which the applicant had had with him when he had first arrived in Australia his father's name was [name deleted: s.431(2)] and his mother's name was [name deleted: s.431(2)]. She noted that the birth certificate which he had produced in proof of his claimed identity likewise gave his father's name as [name deleted: s.431(2)] and his mother's name as [name deleted: s.431(2)]. The applicant said that these were common names in Algeria. The primary decision-maker noted that the applicant had also opened a bank account in Australia in the name [Alias A]. The applicant said that he had only had to produce his French passport to open this bank account.
26. The applicant said that his uncle had sent him to Australia because he had had no future in Algeria. He said that if his elder brother had looked more like his cousin his elder brother might have been sent here instead. He said that at that time in Algeria everybody had wanted to go. He said that he had been able to go anywhere but France. He said that they had planned for him to go to Australia because it was the furthest place for him to go.
27. Asked why he had not been able to remain in Algeria the applicant said that his older brother had seen what had happened to their father and had thought that it was very possible that he (the applicant) was going to end up like his father. The applicant said that his father had been a Salafist and he had been killed by the government. He said that there had been a Salafist mosque in his street. Asked if the group with which his father had been involved had had a name the applicant said that he did not know the political motivation but that the group had been called FIS.
28. The applicant said that he had not really been involved himself because of his age but they had already been putting him on their files. He said that the people at the mosque had treated him like a son and his older brother had noticed this. He said that he had not really stopped associating with this group before he had left Algeria but he said that the more he had seen the less he had been interested. He said, however, that he had had to keep going. He said that at the mosque they would just sit and talk. He said that he had been 18 when he had left Algeria and that he had not gone to the mosque for about a month before he had left because he had had to meet his cousin elsewhere.
29. Asked about his claim that he had been taken to the police station for questioning the applicant said that the police would sometimes take him or his brother or some other neighbours in the same situation and warn them and try to get information from them. He said that he had been kept at the police station for a few hours. He said that he had never been charged with anything nor had his brothers. He said that he had been taken to the police station five or six times between the age of 14 and 17. The applicant said that his older brother was still in [Town 2] and he had still not been charged with anything.
30. Asked why he could not return to Algeria the applicant said that he had escaped. He said that he would be in a situation where he had to take sides. The primary decision-maker noted that the applicant's brother was still living in [Town 2]. The applicant said that he did not talk to his brother much but his brother might be taking sides. He said that if he went back to Algeria he would be arrested and if they knew about his father and his family past he would definitely be abused. He said that if he went back home the FIS who lived in the area would definitely put him in a situation to take sides with them. He said subsequently that if he went back he would be forced to join the army for three years and he would be put in the front line to fight against the Mujahideen. He said that if they asked him to join he would definitely try to escape again.

31. Asked why he had not applied for protection when he had first arrived in Australia he said that he had been told that he must not get arrested in the airport. He said that he had wanted to apply but he had been told by people here that he might be sent back. Asked if he feared persecution for any other reason he said that he was married to a Buddhist woman. He then said that they were not married. He said that he had not returned the passport which he had used to travel to Australia to his cousin as he had claimed in his original application. He said that he had lost the passport and all the documents which he had had when he had come to Australia when he had moved house.
32. The applicant said that it would be impossible for him to go back to where he came from in Algeria and to say that he had no belief. He said that he would be an unbeliever or someone who had converted from the faith and he was married to an unbeliever. He said that this would make it legal for them to kill him because it would be 'adultery and stuff like that'. The applicant's representative submitted that the applicant's child would not automatically become a [Country 1] national because under [Country 1] law it was only children with a [Country 1] father who became [Country 1] nationals by birth.

The applicant's evidence at the hearing before me

33. At the hearing before me the applicant's representative said that the applicant's wife did not intend to give evidence. I asked the applicant whether he had had the assistance of an interpreter when he had prepared his original application to the Department of Immigration for a protection visa. The applicant said that he had filled in the application with the assistance of his representative who understood Arabic. He said that so far as he was aware all the answers in that application were correct and complete. He said that the statement accompanying his original application had not been read back to him in his own language. He said that he understood what was in that statement because he had read it in English. He said that the statement accurately reflected his claims for refugee status.
34. I noted that in his statement the applicant had said that after he had arrived in Australia he had been arrested and acquitted due to psychological instability. The applicant said that he had been a victim in that incident. He said that he had been hit by a security guard in a pub and when he had tried to hit the security guard back the security guard had arrested him and had called the police to detain him. He confirmed that he had had to appear in court and that he claimed he had been acquitted due to psychological instability. The applicant said that he had been an alcoholic and he used to harm himself.
35. The applicant confirmed that he had been charged with assaulting the security guard. He said that he had been told that the two security guards with whom he had had a problem had resigned from that company and did not want to appear in court. He said that this had been why he had been acquitted on the same day. I put to the applicant that this suggested that the charge had simply been dismissed. The applicant said that the reason was that the two security guards had not appeared in court and also that he had been having some psychological problems. He said, however, that he had never sought treatment nor had he been hospitalised for his psychological problems.
36. The applicant confirmed that he claimed to be [Mr B], born on [date deleted: s.431(2)] in [Town 2] in Algeria. I noted that in support of his claimed identity he had produced copies of a birth certificate issued [in] May 2009 and a Certificate of Residence issued [in] May 2009. I asked the applicant if he had any other evidence of his claimed identity and he said that he did not.

37. I asked the applicant what he feared would happen to him if he went to Algeria. The applicant said that when he had left Algeria he had been very close to the age at which he would have been required to do his military service. He said that if he went back to Algeria now he would be arrested, first because he had left Algeria illegally and second because he had not done his military service when he had been 19 years old. The applicant said that, after he had been arrested for not doing his military service they would find out his identity, his family history and who his father and mother had been. He said that his father had been one of the first people who had been killed by the regime after the military Islamic group or movement had started in Algeria. He said that he had been being watched by them and he had managed to leave Algeria without them knowing about it. He said that this would cause him a problem as well.
38. The applicant said that his father had not been involved in politics but his father had been hoping that there would be Islamic rule in Algeria one day and he had been a member of the FIS, the Islamic Salvation Front. The applicant said that he had been very young at the time and he had not been aware of what had been going on. He said that his brother had given him an understanding of what had been going on. He said that his father had been one of the most important members of FIS in [Town 2], not politically, but he had been one of those people who had been enthusiastic about Islamic rule in Algeria. He said that, according to what had been explained to him, his father had not had political principles, he had had religious principles. He said that his father had been very religious and had been one of the first people who had been killed, even before the second elections. He said that his father had been well-respected by the leaders of FIS and had been one of the biggest supporters of that movement.
39. I asked the applicant why he had not mentioned his father's involvement in FIS in the statement accompanying his original application. The applicant conceded that he had not referred to his father being a member of FIS before. He said that he used to say that his father had been a Salafist. I noted that he had not said this in his original application either. All he had said had been that his father had been shot and killed by the authorities. The applicant said that his father had been killed in a protest held by FIS in [Town 2].
40. I put to the applicant that he had not said this in the statement accompanying his original application. The applicant said that when he had left his country he had not been fully aware about such information because he had just wanted to stay away from his country and what had happened in the past. He said that when he had come here he had started talking to his brother and he had asked his brother to give him some information about his father. He said that this had not happened when he had first come to Australia: it had only happened recently. He said that when he had first come to Australia all he had known had been that his family had not had a good relationship with the police or with the government.
41. I put to the applicant that what he had said in the statement accompanying his original application had been that his uncle had decided to send him out of Algeria because he had been ideal bait for the many fundamentalist Salafist groups in Algeria. The applicant said that they had a lot of mosques in [Town 2] but in the street where he had lived there had only been one small mosque. He said that after his father had passed away the people at this mosque had treated him like their son and they had taught him that this government was unlawful and that they had to get rid of this government.
42. The applicant said that he had been programmed this way or that he had been raised in this way of thinking. He said that he had left school at a very early age and he had been spending

most of the time in this *musalla* or small mosque. He said that he had been like a member and they used to teach him that this regime was an enemy and that they had to get rid of it. He said that it had been obvious that the regime had been his enemy because they had killed his father. He said that he had just been listening to what they had taught him in this mosque.

43. I asked the applicant what problems he claimed he himself had had with the authorities in Algeria when he had been growing up. The applicant said that the police had known about the people who used to go to this mosque. He said that some of them had been arrested and some of them had managed to escape. He said that sometimes people would say that this person had been killed, that this person had been arrested or that this person had gone to the mountains, meaning that they had joined people who had been fighting the government and who had been staying in the mountains.
44. The applicant said that the government had been aware that this place represented danger for them and at the same time they had known that most people were against the government and that the government had not been in control of the country. He said that they had known that his time would come but they had been busy with people who had been more dangerous than him. He said that at the same time they had let him know that he was in the queue and that his turn would come.
45. The applicant said that he had been staying in the mosque and he had been like a servant in the mosque. He said that he had bought things for people in the mosque and sometimes the police had arrested him illegally and had taken him to the police station. He said that the police in Algeria were like criminals. He said that at this time the police had patrolled the area in two cars, covering their faces. He said that they used to call them 'ninjas' He said that they had patrolled the area with machine-guns, arresting people. He said that they had sometimes had the bodies of people whom they had killed in the cars just to frighten people. He said that if people saw them take someone in one of these cars they would assume that this person would be killed.
46. I noted that the applicant had said that he had been arrested. The applicant said that they had known that his time would come and they had just been watching him and leaving him until his time came. He said that when he had been 14 or 15 they had started giving him serious warnings. He said that in Algeria it was very easy to get slapped by a police officer and it was not something that people considered to be illegal or something that could not be tolerated.
47. I noted again that the applicant had said that he had been arrested. The applicant said that when they arrested you they took you to the police station but on the way they abused you, bashed you, spat on you and threatened you. He said that when you got to the police station they put you in a room or something like that and they left you there. He said that they left you there for an hour or two hours in a dark room with a very bad smell and then they came to you to question you. He said that after that they released you. He said that after the third time this had happened to him he had been feeling that his heart was going to stop when he had seen the police.
48. The applicant said that in Algeria they had the police and they also had the national security. He said that most of the officers whom you saw on the street were the national security. He said that you rarely saw police officers. I asked the applicant if the people who had arrested him had been from the police or the national security. The applicant said that in Algeria they just called them 'the government' He said that they used to think that these people were the

police but they had actually been the national security. He said that in Algeria they called people who carried arms 'the government' He said that sometimes you would see people with 'national security' written on their uniforms in cars with police written on them.

49. The applicant said that the people whom they used to call 'ninjas' sometimes used plain cars and sometimes used police cars. He said that he did not think there was a difference between the police and national security. I put to the applicant that he had just told me that they had rarely seen police officers and that most of the officers they had seen on the street had been from the national security. The applicant said that when he had been in Algeria the streets had been full of these national security. He confirmed that he had in fact known that they were from the national security and he said that the people who had arrested him had been from the national security. He said that this had been printed on their uniforms.
50. I asked the applicant why he had said in his statement that he had been arrested by the police. The applicant said that he had thought that they were the same. I put to him that he had just told me that they had been from the national security and that they had had 'national security' written on their uniforms. The applicant said that they used to think that the police was the national security. He said that all he wanted to say was that there was no difference between the police and the national security. He said that they used to do the same work that the police used to do: they stopped cars and they checked identity cards. I put to the applicant that he had said that he hardly ever saw the police. The applicant said that they had had 'national security' printed on their uniforms but they had been driving cars with police written on the cars. He asked how one could differentiate between the two.
51. I put to the applicant that he had been differentiating between the two. He had told me that he had known that these people were national security because they had had 'national security' written on their uniforms. The applicant said, laughing, that he had really only just realised the difference now. I put to him that I did not believe this. I put to him that if he had grown up in this environment where he had been seeing the national security all the time, he would have been very clear about the difference between the national security and the police and he would not have used the word police to refer to the national security.
52. I put to the applicant that it appeared to me that his evidence had undergone very great changes since the Departmental interview. I put to him that it appeared that he had decided to invent a lot of new claims in an attempt to make his problems in Algeria much more significant. I put to him that he had claimed originally that he had sometimes been taken down to the police station for a few hours for questioning but now he was claiming that he had been taken to the police station by the national security.
53. The applicant said that by way of response that he had no problem if I wanted him to call them police or if I did not want him to mention the term 'national security'. He said that last night he had been thinking about his situation and recalling things that had happened to him in the past. The applicant laughed again. I put to him that this was a serious matter. It was a hearing in relation to his application for a protection visa. I put to the applicant that it was not a matter of what I preferred to call these people: it was what he had called them. I put to him that he had never mentioned the national security before the hearing. The applicant said that last night when he had started recalling things from the past he had realised that they were the national security. He said that sometimes they did not wear uniforms: they just wore plain clothes. He said that he had never thought that there was a difference between the police and the national security because they just did the things that the police did.

54. I asked the applicant whether there were any other problems which he feared he would have if he went to Algeria apart from the problems he claimed he would have because he had evaded military service and the problems he claimed he would have because of his father's involvement in FIS and his own involvement in a Salafist mosque. The applicant said that he was now in a relationship with a Buddhist girl who did not believe in God or anything and they had a [child] and they were expecting another child in about three months. He said that there was a huge difference between his religious beliefs now and back then. He said that apart from the problems he was going to have with the government he was going to have problems with people. He said that in Algeria 99 per cent of the population were Sunni Muslims. He said that even Christians were having problems in Algeria and they were just hiding themselves in the mountains. He said that they would think that he was not married to this girl because it was not allowed in their religion to get married to a Buddhist girl.
55. I noted that on the evidence before me the applicant and his de facto partner were not married. The applicant said that it was not allowed to have a relationship with a girl without being married to the girl. He said that he could lie about this and tell them that he was married to the girl but the problem was that the girl was Buddhist. He said that they would consider his wife an unbeliever, they would consider him an unbeliever because of that relationship and they would consider his daughter as an unbeliever as well. He said that anyone who converted from Islam could be killed legally.
56. I put to the applicant that on the evidence before me he had not converted from Islam. The applicant said that for them, if you led your life outside Islamic teaching, this would make you liable to be killed and if you committed adultery you would also be punished for that. He said that he had been committing adultery all his life with this girl. I put to the applicant that it was not adultery unless she was married to someone else. The applicant said that in Islam there was no relationship other than marriage. He said that any relationship other than marriage was regarded as adultery. I put to the applicant that it might be prohibited but it was not regarded as adultery. The applicant said that any sexual relationship with a girl outside marriage was regarded as adultery.
57. The applicant said that they knew that he was not married to this girl because he had not fulfilled the marriage requirements. He said that one of the requirements was that she should be either a Muslim or a person 'of the Book', that is, Christian or Jewish. I put to the applicant that, as I understood it, he and his de facto partner had not attempted to get married at all. The applicant said that he could not marry the girl legally in this country because he did not have the documents required for that. I asked the applicant what he meant by this and he said that he did not even have an identity card.
58. I noted that he and his partner had managed to register the birth of their child. I asked him why he thought he could not register a marriage. The applicant said that they had not tried to have their marriage registered because they did not know what was going to happen in the future. He said that his partner was actually refusing to change her name from her family name to his family name. I put to the applicant that marriage in this country did not require the female partner to change their name. This had nothing to do with being married. The applicant said that up until now they had not tried this and they did not have enough information about this. He said that he was only talking about the religious aspect of their marriage: if they were going to go back to Algeria they were not allowed to get married if she kept her religion and stayed as a Buddhist.

59. I asked the applicant if he was saying that no one had sex outside marriage in Algeria. The applicant confirmed that this was correct. I asked him if he was claiming that there was no prostitution, for example, in Algeria. The applicant conceded that there was. I asked him how this could happen if no one had sexual relations outside marriage. The applicant said that brothels were protected by the police in Algeria. He said that he knew of a such a place in [Town 2] which was protected by the police. I put to him that he was telling me that he would be killed because he had had sexual relations outside marriage. The applicant said that he had just told me about the extreme limit of what might happen to him if he went back to Algeria.
60. The applicant said that he thought that they would live a very difficult life with no protection. He said that they would have to live underground without interacting with anyone and their lives would be in danger. He said that he might have to ask his partner to wear a *burqa* or an *abaya* or something just to cover herself and they would have legal difficulties as well. The applicant said that when he had claimed that he would be killed he had meant that this might happen and that he would be living in danger but he was not sure if it was going to happen or not. He said that 99 per cent of the Algerian population were fully convinced that if you lived in a sexual relationship with a girl without being married to that girl it was all right for you to be killed for that reason.
61. I put to the applicant, with regard to the situation of his de facto partner, that she was a national of [Country 1] and that I therefore had to assess her claims in relation to [Country 1]. I put to the applicant that, because his de facto partner was a national of [Country 1], on the basis of the information available to me their daughter was also a national of [Country 1] [country information deleted: s.431(2)], Section 6, Discrimination, Societal Abuses, and Trafficking in Persons - Children). I noted that the applicant's de facto partner had said in her application that she feared that their daughter would experience some discrimination as a child of mixed race in [Country 1]. I put to the applicant that I was not aware of any information to suggest that there was a real chance that their daughter would be persecuted for that reason in [Country 1].
62. I put to the applicant that if his de facto spouse were to be removed from Australia she would be removed to [Country 1]. I put to him that this meant that she would not be accompanying him. I put to him that on the material before me she had no right to go to Algeria and he had no right to go to [Country 1]. I put to the applicant that I was not aware of any information to suggest that he would be persecuted in Algeria because he did not practise his religion. I noted that it was true that, as he had said, Algeria was 99 per cent Sunni Muslim, but, as had been referred to in the decision under review, the available information suggested that Algeria was one of the more relaxed countries so far as religious observance was concerned ('Algerian moderates fear hardening Islamic law', *The Canadian Press*, 5 November 2008, CX213579). The applicant asserted that 250,000 people had been killed for religious reasons in Algeria.
63. I referred to the applicant's claim that he would be detained for having left Algeria without a passport and that he would be forced to join the army for three years. The applicant said that he only claimed that he would have to join the army for two years. I put to him that the information available to me suggested that he would only have to complete 18 months' military service (UK Home Office, *Country of Origin Information Report - Algeria*, 29 March 2010, paragraph 10.01). The applicant said that it was 24 months but he said that he was not aware if they had changed the law.

64. I put to the applicant that the information available to me also indicated that people who evaded their military service by going abroad were detained on their return, handed over to the military authorities and sent to carry out their military service. I put to him that the information available to me suggested that there was no other punishment (UK Home Office, *Country of Origin Information Report - Algeria*, April 2004, paragraph 5.104; Australian Department of Foreign Affairs and Trade (DFAT) Country Information Report No. 177/00, dated 30 March 2000, CX41263). The applicant said that personally he thought this was a punishment. He said that the army considered his father as a terrorist and he would be the son of a terrorist in the army. He asked how he was going to join the army which had killed his father, then he amended this to claim that the army had killed both his parents. The applicant said that he had lived all his life with no family and now he had a family. He asked how he could leave his family and go to a country which had war and other problems.
65. I put to the applicant that, as I had explained at the beginning of the hearing, the definition of a refugee looked at whether he had a fear of being persecuted for one of five particular reasons. I put to him that the Algerian Government was not requiring him to do military service because he held a particular political opinion. I put to him that it was an obligation which was imposed on everyone (UK Home Office, *Country of Origin Information Report - Algeria*, 29 March 2010, paragraph 10.01). The applicant said that in the army there were people who were assigned to monitoring the borders and to anti-terrorism forces because they just wanted to get rid of them. He said that they knew that he would be against them all his life because they had killed his parents.
66. I referred to the applicant's evidence that his father had been involved in FIS and had been killed in 1990. I put to the applicant that I found it difficult to accept that the authorities in Algeria would be interested in him because of his father's involvement 20 years previously in FIS. The applicant said that he was not of interest to them just because they had killed his father. He said that it was because he had been raised to hate them and to be against them and they were aware of that.
67. I put to the applicant that he had said to me that his beliefs had changed completely since he had left Algeria. I put to him that if he were telling me that he would be going to go back to Algeria and to become involved in a Salafist mosque then I could understand that the authorities might be interested in him, but he was telling me that he no longer practised his religion. The applicant said that he did not consider himself as a practising Muslim now but the problem was whether they were going to accept this or to understand this. He asked what his situation would be if they tried to harm him or to do something to him. He said that he feared that he would be in a situation in which he would be unable to defend himself or to find a way out of that situation.
68. I indicated to the applicant that I was going to raise some information with him and that I would also write a letter to him after the hearing in relation to this information. I put to the applicant that, as he was aware, he had travelled to Australia on a French passport in the name [Alias A], born on [date deleted : s.431(2)] in [Town 3] in France, although of Algerian background. I put to him that his passport had been examined when he had arrived in Australia and no irregularities had been detected.
69. I put to the applicant that at the interview with the officer of the Department in relation to his application for a protection visa he had said that the photograph in his passport was his cousin's photograph and that they looked alike. He had said that he had been able to go anywhere on this passport but France. The applicant confirmed that this was correct. I put to

him that the boarding pass which he had had with him when he had arrived in Australia indicated that he had begun his journey to Australia at Charles de Gaulle Airport in Paris (see folio 78 of the Department's file CLF2009/111869). The applicant agreed.

70. I put to the applicant that he had been interviewed at the airport when he had arrived in Australia. He had said that he and one of his brothers were French citizens because they had been born in France and the rest of their family had residence in France. He had said that he himself had been living in France for six years. I put to him that [in] January 2004 and [February] 2004 he had applied for further visitor visas stating that his name was [Alias A], born on [date deleted: s.431(2)], and that he was a French citizen. I put to the applicant that he had said that he had then travelled to [Country 4] in order to be granted a working holiday-maker visa.
71. I put to the applicant that he had returned to Australia [in] May 2004, still travelling on the French passport and saying that he was [Alias A]. I put to him that in his application for a protection visa he had said that he had returned the French passport to its owner but that when he had been interviewed by the officer of the Department in relation to his application for a protection visa he had said that he had lost it. The applicant said that this was correct. I put to him that both statements could not be correct. The applicant said that there had been a misunderstanding between him and his representative. He said that he had in fact lost all his documents.
72. I put to the applicant that all of this information was relevant to the review because I might conclude on the basis of the evidence before me that he was in fact a citizen of France, that his name was [Alias A], and that he had been born on [date deleted: s.431(2)] in [Town 3] in France. I noted that the Department had made what it referred to as an effective protection check but this check had merely confirmed that someone by the name of [Mr B], born on [date deleted: s.431(2)], was not a French national (see folio 137 of the Department's file CLF2009/111869). I put to the applicant that I considered it clear on the evidence before me that [Alias A], born on [date deleted: s.431(2)] in [Town 3] in France, was a French national and that the real question was his true identity.
73. I put to the applicant that he had maintained in his dealings with the Department that he was [Alias A]. I put to him that I might conclude that this was his true identity and that I might therefore not accept that he was [Mr B], born on [date deleted: s.431(2)] in [Town 2] in Algeria. I put to the applicant that since he had not made any claims that he feared being persecuted for a Convention reason if he returned to France I might conclude that he was not a refugee. The applicant said that he understood. He said that he was Algerian, from Algeria, that his name was [Mr B] and that he had explained to me the story of the French passport which he had used to travel to Australia.
74. I indicated to the applicant that all I had to prove that [Mr B] even existed was copies of two documents. I noted that he had said that [Alias A] was his cousin and that he had borrowed his cousin's passport but this passport was very good evidence that [Alias A] was a French national and he had repeatedly maintained that he was [Alias A]. He had only claimed to be [Mr B] when he had applied for a protection visa. The applicant said that he did not know what to say. I noted that, as I had indicated, I would be writing a letter to him so he and his representative would have a further opportunity to respond to this issue.
75. The applicant's representative submitted that, although the applicant had not specifically referred to FIS in the statement accompanying his original application for a protection visa,

he had referred to his anti-government feelings (although she suggested that this was her mistake and the statement should have referred to the applicant's parents' anti-government feelings). She said that she had not gone into details with regard to the Salafist movement but 'it was mentioned further on that it was the Salafist groups'.

76. The applicant's representative submitted that the applicant had been trying to convey that he had become 'an orphan of the mosque' She asserted that the word for 'police' in Arabic was usually used to refer to anybody that carried a gun other than the army. She submitted that people did not normally distinguish between the police and the national security. I put to the applicant's representative that in his evidence at the hearing the applicant had drawn a distinction between the police and the national security. The applicant's representative said that in normal conversation it was the same.
77. The applicant's representative submitted that it had been offensive of me to refer to prostitution in Algeria because she asserted the applicant had understood this as drawing a parallel. I put to the applicant's representative that she might have understood it this way but that the applicant had claimed in his evidence that you could not have sex outside marriage in Algeria. The applicant's representative submitted that prostitution was quite different from the situation of two partners who were not married. I put to her that the applicant was talking about men have sex with people to whom they were not married. The applicant's representative said that this was correct but that the situation of the applicant's partner was quite different from that of a prostitute. I put to the applicant's representative that I had not suggested that the applicant's partner was a prostitute. The applicant's representative denied that she was submitting that I had insinuated that the applicant's partner was a prostitute.
78. The applicant's representative submitted that if you went to a lot of the Islamic countries where people were stoned they did not necessarily have to be married to commit the offence of *zina* in Islamic terms. She submitted that a lot of people had been stoned in Iraq and Saudi Arabia. I indicated to the applicant's representative that if she wished to make this argument she would have to produce evidence with regard to the situation in Algeria.
79. The applicant's representative submitted that the documentary evidence did not establish conclusively that the applicant was [Alias A]. She submitted that if a person had previously suffered significant trauma it could be considered 'under the refugee law' if that person were to be returned to the place where they had suffered significant trauma. She said that she had had a case like this in the past. I indicated to the applicant's representative that in the first place this would depend on whether I found that the applicant was [Mr B], as he claimed, or [Alias A], in which case he was a French national and I did not have any evidence that he had been traumatised by anything in France.
80. The applicant's representative conceded that if the applicant's partner and their daughter were to be removed to [Country 1] this would not amount to serious harm. She said that this would be an issue for the Minister. She asked that I identify the basis upon which I considered that the applicant was more likely to be a French national rather than an Algerian national. She repeated that she did not consider the documentary evidence to be conclusive either way. She said that, just because the French Embassy had established that there was a person [with the first name of Alias A] born in France in that particular year, this did not necessarily indicate that this was the applicant's true identity.
81. I indicated to the applicant's representative that the question was the applicant's true identity. I noted that, as I had said, I considered that the evidence was clear that there was a person,

[Alias A], who was a French national. I noted again that the applicant had repeatedly claimed to be [Alias A] in his dealings with the Department. He had signed applications saying that this was his identity. I indicated that this was the basis but it was a finding of fact for me to make. The applicant's representative submitted that the applicant had also signed a document saying that he was not [Alias A] so the evidence was not conclusive either way. I noted that this was why I had to make a decision on the issue.

82. The applicant said that when he had been saying that he was [Alias A] he had not had any other options. He said that he had been holding a passport in the name [Alias A] so he had not been able to claim to be [Mr B]. He said that he had been fleeing the country for his safety. I noted that people arrived in Australia on false passports all the time and if this was detected they admitted to who they really were. I put to the applicant again that his passport had been examined at the airport and it had been found to exhibit no irregularities at all. The applicant said that the passport which he had used to travel to Australia had not been a false passport and at that time he had not trusted anybody and he had thought that if they discovered his true identity they would send him back to [Town 2] which he had not wanted to happen. He said that he had had to lie about his identity.

Section 424A letter and response

83. [In] March 2011 the Tribunal wrote to the applicants in accordance with section 424A of the Act inviting them to comment on or to respond to certain information which the Tribunal considered would, subject to their comments or response, be the reason, or a part of the reason, for affirming the decision under review. The information in question was substantially the same as the information discussed at the hearing on 22 March 2011 as set out above.
84. In a response dated [April] 2011 the applicant's representative said that it appeared that the Tribunal had not tested whether the applicant could be [Mr B]. She noted that, as referred to in the Tribunal's section 424A letter, the applicant had said when he had been interviewed at the airport on his arrival in Australia that he had been living in France for six years (see the notes at folio 100 of the Department's file CLF 2009/111869) and she submitted that the Tribunal should have asked the applicant basic questions about Algeria, for example geographical questions, to establish the likelihood that he was in fact Algerian and not necessarily French.
85. The applicant's representative said that the applicant had obtained copies of his family census certificate, his father's and grandfather's birth certificates and his parents' death certificates. She submitted that these confirmed verbal evidence provided by the applicant but they did not necessarily confirm that the applicant was actually [Mr B]. She did not submit these documents, saying that they would only be translated and submitted if the Tribunal required them. She also said that the applicant had agreed to undertake DNA testing to establish that his siblings were in Algeria and to provide evidence that they were of Algerian nationality. She said that she would await the Tribunal's 'instructions' if it was believed that a DNA test would assist the applicant.

FINDINGS AND REASONS

The applicant's claims

86. I accept that, as Beaumont J observed in *Randhawa v Minister for Immigration, Local Government and Ethnic Affairs* (1994) 52 FCR 437 at 451, 'in the proof of refugeehood, a liberal attitude on the part of the decision-maker is called for'. However this should not lead to 'an uncritical acceptance of any and all allegations made by suppliants'. As the Full Court of the Federal Court (von Doussa, Moore and Sackville JJ) observed in *Chand v Minister for Immigration and Ethnic Affairs* (unreported, 7 November 1997):
- 'Where there is conflicting evidence from different sources, questions of credit of witnesses may have to be resolved. The RRT is also entitled to attribute greater weight to one piece of evidence as against another, and to act on its opinion that one version of the facts is more probable than another' (citing *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 259 at 281-282)
87. As the Full Court noted in that case, this statement of principle is subject to the qualification explained by the High Court in *Minister for Immigration and Ethnic Affairs v Guo* (1997) 191 CLR 559 at 576 per Brennan CJ, Dawson, Toohey, Gaudron, McHugh and Gummow JJ where they observed that:
- 'in determining whether there is a real chance that an event will occur, or will occur for a particular reason, the degree of probability that similar events have or have not occurred for particular reasons in the past is relevant in determining the chance that the event or the reason will occur in the future.'
88. If, however, the Tribunal has 'no real doubt' that the claimed events did not occur, it will not be necessary for it to consider the possibility that its findings might be wrong: *Minister for Immigration and Multicultural Affairs v Rajalingam* (1999) 93 FCR 220 per Sackville J (with whom North J agreed) at 241. Furthermore, as the Full Court of the Federal Court (O'Connor, Branson and Marshall JJ) observed in *Kopalapillai v Minister for Immigration and Multicultural Affairs* (1998) 86 FCR 547 at 558-9, there is no rule that a decision-maker concerned to evaluate the testimony of a person who claims to be a refugee in Australia may not reject an applicant's testimony on credibility grounds unless there are no possible explanations for any delay in the making of claims or for any evidentiary inconsistencies. Nor is there a rule that a decision-maker must hold a 'positive state of disbelief' before making an adverse credibility assessment in a refugee case.
89. In the present case, as I put to the applicant in the course of the hearing before me, I consider that he changed his evidence very significantly in the course of the processing of his application. In his original application, although he mentioned officers coming to his home to take his father frequently and said that his father had been shot and killed by the authorities in 1990, he did not mention that, as he claimed at the hearing before me, his father had been one of the most important members of the FIS, the Islamic Salvation Front, in [Town 2] and that his father had been killed in a protest held by FIS in [Town 2].
90. The applicant conceded at the hearing before me that he had not mentioned in the statement accompanying his original application for a protection visa that he claimed that his father had been a member of FIS. He said that he used to say that his father had been a Salafist but, as I noted, he did not say this in his original application either. I accept that the applicant said at the Departmental interview that his father had been a Salafist and that the group with which his father had been involved had been called FIS but I consider that if the applicant's father

had in fact been one of the most important members of the FIS in [Town 2], and if his father had been killed in a protest held by FIS in [Town 2], as he now claims, he could have been expected to have mentioned this in the statement accompanying his original application.

91. The applicant said that when he had first come to Australia all he had known had been that his family had not had a good relationship with the police or with the government. He said that when he had come here he had started talking to his brother and he had asked his brother to give him some information about his father. He said that this had not happened when he had first come to Australia: it had only happened recently. However this does not explain why he did not mention his father's claimed membership of FIS in his original application. The applicant's representative submitted that although the applicant had not specifically referred to FIS in the statement accompanying his original application for a protection visa he had referred to his anti-government feelings (although she suggested that this was her mistake and the statement should have referred to the applicant's parents' anti-government feelings). She said that she had not gone into details with regard to the Salafist movement but 'it was mentioned further on that it was the Salafist groups'.
92. I accept that the applicant said in the statement accompanying his original application for a protection visa that he had been ideal bait for the many fundamentalist Salafist groups in Algeria and that his maternal uncle had seen that he had been brainwashed by the fundamentalists. However I do not consider that this explains the fact that he now claims that his father was one of the most important members of FIS in [Town 2] and that his father was killed in a protest held by FIS in [Town 2], particularly given that he claims that he will be targeted if he goes to Algeria because the army considered his father as a terrorist.
93. As I likewise put to the applicant, I consider he changed his evidence with regard to who it was he claimed had arrested him in Algeria. In the statement accompanying his original application for a protection visa the applicant said that he had been taken to the police station on a few occasions for questioning. At the Departmental interview he said that the police would sometimes take him or his brother or some other neighbours in the same situation to the police station and warn them and try to get information from them.
94. When I asked the applicant at the hearing before me about the problems he claimed he himself had had with the authorities in Algeria when he had been growing up, he said that the police had known about the people who used to go to the *musalla* or small mosque in his street. He said that the police had arrested him illegally and had taken him to the police station. He said that the police in Algeria were like criminals. He said that at this time the police had patrolled the area in two cars, covering their faces. He said that they used to call them 'ninjas' He said that they had patrolled the area with machine-guns, arresting people. He said that they had sometimes had the bodies of people whom they had killed in the cars just to frighten people. He said that if people saw them take someone in one of these cars they would assume that this person would be killed.
95. The applicant then said that in Algeria they had the police and they also had the national security. He said that most of the officers whom you saw on the street were the national security. He said that you rarely saw police officers. After I asked him if the people who he claimed had arrested him had been from the police or the national security, he said that they used to think that these people were the police but they had actually been the national security. However he then said that he did not think there was a difference between the police and national security. After I put to him that he had just told me that they had rarely seen police officers and that most of the officers they had seen on the street had been from the

national security, the applicant said that when he had been in Algeria the streets had been full of these national security. He confirmed that he had in fact known that they were from the national security and he said that the people who had arrested him had been from the national security. He said that this had been printed on their uniforms.

96. After I put to the applicant that I considered that he had changed his evidence significantly, the applicant said that he had no problem if I wanted him to call them police or if I did not want him to mention the term 'national security'. However, as I put to the applicant, it was not a matter of what I preferred to call these people: it was what he had called them. As I put to him, he had never mentioned the national security before the hearing. The applicant said that last night when he had started recalling things from the past he had realised that they were the national security.
97. The applicant's representative asserted that the word for 'police' in Arabic was usually used to refer to anybody that carried a gun other than the army. She submitted that people did not normally distinguish between the police and the national security. However, as I put to the applicant's representative, it was the applicant himself who drew a distinction between the police and the national security in the course of his evidence at the hearing before me. The applicant's representative said that in normal conversation it was the same. That may or may not be the case but the fact remains that the applicant initially claimed that he had been arrested by the police, then he said that in Algeria they had the police and they also had the national security and that most of the officers whom you saw on the street were the national security. He said that you rarely saw police officers and that the people who had arrested him had actually been the national security.
98. I consider that these changes in the applicant's evidence go to whether he is in fact telling the truth about the problems he claims to have had in Algeria. I consider that they also go to his overall credibility. However, as I put to the applicant in the course of the hearing before me, and as referred to in the Tribunal's section 424A letter, I consider that the fundamental issue in the review in relation to the applicant's application for a protection visa is his true identity.
99. As discussed at the hearing, and as referred to in the Tribunal's section 424A letter, the applicant travelled to Australia on a French passport in the name [Alias A], born on 22 October 1983 in [Town 3] in France (see the copies of pages from that passport at folios 90-92 of the Department's file CLF2009/11869, copies of which were attached to the Tribunal's section 424A letter). His passport was examined when he arrived in Australia and no irregularities were detected (see the Immigration Inspector's Report at folio 109 of the Department's file, a copy of which was likewise attached to the Tribunal's letter).
100. As discussed at the hearing, and as referred to in the Tribunal's section 424A letter, at the Departmental interview the applicant said that the photograph in his passport was his cousin's photograph and that they looked alike. He said that he had been able to go anywhere on this passport but France. At the hearing before me the applicant confirmed that this was correct. However, as I put to him, and as referred to in the Tribunal's letter, the boarding pass which he had with him when he arrived in Australia (see folio 78 of the Department's file, a copy of which was likewise attached to the Tribunal's letter) indicates that he began his journey to Australia at Charles de Gaulle Airport (code CDG) in Paris. The applicant agreed at the hearing before me that this was correct.
101. As discussed at the hearing, and as referred to in the Tribunal's section 424A letter, when the applicant was interviewed at the airport on his arrival he said that he and one of his brothers,

[Mr C], born on [date deleted: s.431(2)], were French citizens because they had been born in France. He said that the rest of his family (his parents and younger brothers and sisters) had residence in France but that they had returned to Algeria because they were happier there. He said that he himself had been living in France for six years.

102. As discussed at the hearing, and as referred to in the Tribunal's section 424A letter, [in] January 2004 and [February] 2004 the applicant applied for further visitor visas stating that his name was [Alias A], born on [date deleted: s.431(2)], and that he was a French citizen. He said in his 'Form 80 - Personal particulars for character assessment' which he submitted along with his protection visa application that he had travelled to [Country 4] in 2004 in order to be granted a working holiday-maker visa. He returned to Australia travelling on the French passport in the name [Alias A] [in] May 2004.
103. As discussed at the hearing, and as referred to in the Tribunal's section 424A letter, in the applicant's application for a protection visa he said that he had returned the French passport to its owner but at the Departmental interview and again at the hearing before me he said that this was a misunderstanding between him and his representative and that he had in fact lost this passport.
104. As discussed at the hearing, and as referred to in the Tribunal's section 424A letter, I consider that all of this information is relevant to the review because I may conclude on the basis of this evidence that the applicant is a citizen of France named [Alias A], born on [date deleted: s.431(2)] in [Town 3] in France. As discussed at the hearing before me, and as referred to in the Tribunal's letter, the Department made what it referred to as an 'effective protection check' but this check merely confirmed that someone by the name of [Mr B], born on [date deleted: s.431(2)], was not a French national. As I put to the applicant in the course of the hearing before me, and as referred to in the Tribunal's section 424A letter, I may conclude on the basis of the passport which the applicant used to travel to Australia that Mr [Alias A], born on [date deleted: s.431(2)] in [Town 3] in France, is a French national. The question for the Tribunal is whether this is the applicant's true identity.
105. As discussed at the hearing, and as referred to in the Tribunal's section 424A letter, until the time when the applicant made his application for a protection visa he had consistently maintained in his dealings with the Department that he was Mr [Alias A], born on [date deleted: s.431(2)] in [Town 3] in France, and that he was a French national. As I put to the applicant in the course of the hearing before me, and as referred to in the Tribunal's section 424A letter, I may conclude that this is the applicant's true identity.
106. At the hearing before me, the applicant's representative submitted that the documentary evidence did not establish conclusively that the applicant was [Alias A]. After I noted again that the applicant had repeatedly claimed to be [Alias A] in his dealings with the Department and that he had signed applications saying that this was his identity, the applicant's representative submitted that the applicant had also signed a document saying that he was not [Alias A] so the evidence was not conclusive either way.
107. The applicant himself said that when he had been saying that he was [Alias A] he had not had any other options. He said that he had been holding a passport in the name [Alias A] so he had not been able to claim to be [Mr B]. He said that he had been fleeing the country for his safety. I noted that people arrived in Australia on false passports all the time and if this was detected they admitted to who they really were. I put to the applicant again that his passport had been examined at the airport and it had been found to exhibit no irregularities at all. The

applicant said that the passport which he had used to travel to Australia had not been a false passport and at that time he had not trusted anybody and he had thought that if they discovered his true identity they would send him back to [Town 2] which he had not wanted to happen. He said that he had had to lie about his identity.

108. However, even if it were to be accepted that the applicant had feared when he first arrived in Australia that if he had said that he was really from Algeria he would have been sent back there, this does not explain his subsequent course of conduct in applying for further visas in what he now says is not his true identity and travelling out of Australia and then returning on a working holiday-maker visa, again using the French passport which he now claims is not in his true identity. In the statement accompanying his original application the applicant claimed that a man named [name deleted: s.431(2)] and other people in the Algerian community had advised him not to apply for a protection visa and that an agent whom he named as [name deleted: s.431(2)] had advised him to apply for a working holiday-maker visa offshore. However the fact remains that the applicant embarked upon what he now says was a sustained course of deception intended to conceal what he claims is his true identity and nationality from the Department.
109. As discussed at the hearing before me, and as referred to in the Tribunal's section 424A letter, the only evidence which the applicant has produced to the Tribunal in support of his claim to be Mr [Mr B], born on [date deleted: s.431(2)] in [Town 2] in Algeria, is a copy of a birth certificate issued [in] May 2009 and a copy of a Certificate of Residence issued [in] May 2009.
110. In her response to the Tribunal's section 424A letter, dated 18 April 2011, the applicant's representative said that it appeared that the Tribunal had not tested whether the applicant could be [Mr B]. She noted that, as referred to in the Tribunal's section 424A letter, the applicant had said when he had been interviewed at the airport on his arrival in Australia that he had been living in France for six years and she submitted that the Tribunal should have asked the applicant basic questions about Algeria, for example geographical questions, to establish the likelihood that he was in fact Algerian and not necessarily French.
111. The applicant's representative said that the applicant had obtained copies of his family census certificate, his father's and grandfather's birth certificates and his parents' death certificates. She submitted that these confirmed verbal evidence provided by the applicant but they did not necessarily confirm that the applicant was actually [Mr B]. She did not submit these documents, saying that they would only be translated and submitted if the Tribunal required them. She also said that the applicant had agreed to undertake DNA testing to establish that his siblings were in Algeria and to provide evidence that they were of Algerian nationality. She said that she would await the Tribunal's 'instructions' if it was believed that a DNA test would assist the applicant.
112. The circumstances of this case are somewhat unusual in that, as referred to above, the applicant said at the airport interview that, although he and one of his brothers, [Mr C], were French citizens because they had been born in France, the rest of his family had returned to Algeria because they were happier there. Under these circumstances I do not consider that DNA testing to establish that the applicant's siblings are in Algeria would assist, nor do I consider that the additional documents to which the applicant's representative referred would assist because, as she herself noted, they would not confirm that the applicant is actually [Mr B] as he claims.

113. It is also apparent on the evidence before me that, if the applicant is [Alias A], he is a French citizen of Algerian background most of whose family members live in Algeria. Under these circumstances I do not believe that there are questions I could have asked him that would have determined that he was really [Mr B], an Algerian national born in Algeria, rather than [Alias A], a French citizen of Algerian background.
114. Having regard to the problems I have with the applicant's credibility as referred to above, and having regard to all of the evidence before me, I do not accept that the applicant is [Mr B], born on [date deleted: s.431(2)] in [Town 2] in Algeria, as he has claimed for the purposes of his application for a protection visa. I consider that his true identity is that in which he travelled to Australia, namely [Alias A], a French citizen born on [date deleted: s.431(2)] in [Town 3] in France. I give weight in this context to the fact that the applicant did not merely maintain that he was [Alias A] when he first arrived in Australia but he maintained that he was [Alias A] in his subsequent dealings with the Department. I accept that, as his representative has said, he now claims to be [Mr B], but I consider that he has made this claim for the purposes of his application for a protection visa.
115. As discussed at the hearing before me, and as referred to in the Tribunal's section 424A letter, the applicant has made no claims that he fears being persecuted for one or more of the five Convention reasons if he returns to France. Having regard to my conclusion that he is in fact a citizen of France named [Alias A], born on [date deleted: s.431(2)] in [Town 3] in France, I do not accept that he has a well-founded fear of being persecuted for one or more of the five Convention reasons if he returns to France now or in the reasonably foreseeable future. I conclude that he is not a person to whom Australia has protection obligations under the Refugees Convention as referred to in paragraph 36(2)(a) of the Act. There is likewise nothing in the evidence before me to suggest that he is a person to whom Australia has protection obligations under paragraph 36(2)(aa) of the Act.

The applicant's de facto partner's claims

116. The applicant's de facto partner is a citizen of [Country 1] and her claims therefore fall to be assessed in relation to [Country 1]. As I put to the applicant in the course of the hearing before me, because his de facto partner is a national of [Country 1], on the basis of the information available to me their daughter is also a national of [Country 1] [country information deleted: s.431(2)]
117. In her application the applicant's de facto partner said that she could not return to [Country 1] because the applicant was an Arab and their child was a 'half caste'. She said that the [people of Country 1] did not accept mixed marriages and a mixed marriage involving an Arab was even less acceptable. She said that they would be discriminated against and their daughter would be persecuted at school. The applicant's de facto partner elected not to give evidence at the hearing before me. As I put to the applicant, on the material before me he does not have a right to go to [Country 1] and I am not aware of any information to suggest that there is a real chance that their daughter will be persecuted for reasons of being a child of mixed race in [Country 1]. The applicant's representative conceded that if the applicant's partner and their daughter were to be removed to [Country 1] this would not amount to persecution involving serious harm as required by paragraph 91R(1)(b) of the Act.
118. I do not accept on the evidence before me that there is a real chance that either the applicant's de facto partner or their daughter will be discriminated against in such a way or to such an extent as to amount to persecution for the purposes of the Refugees Convention either

because the applicant's de facto partner is in a relationship with someone whom I have found to be a French citizen of Algerian background or because their daughter is a child of mixed race. I do not accept on the evidence before me, therefore, that either the applicant's de facto partner or their daughter has a well-founded fear of being persecuted for a Convention reason if they go to [Country 1] now or in the reasonably foreseeable future. It follows that I do not accept that either the applicant's de facto partner or their daughter is a person to whom Australia has protection obligations under the Refugees Convention as referred to in paragraph 36(2)(a) of the Act. There is likewise nothing in the evidence before me to suggest that either the applicant's de facto partner or their daughter is a person to whom Australia has protection obligations under paragraph 36(2)(aa) of the Act.

Ministerial discretion

119. The applicant's representative suggested that this would be a case in which the Minister might consider substituting a more favourable decision for that of the Tribunal in accordance with section 417 of the Act. However I do not believe on the evidence before me and on the basis of my findings above that this is a case which it would be appropriate to refer to the Minister for the exercise of his discretion. I note that this does not of course prevent the applicant's representative from seeking that the Minister should intervene in this case if she so chooses.

CONCLUSIONS

120. For the reasons given above, I am not satisfied that either the applicant or his de facto partner or their daughter is a person to whom Australia has protection obligations. Therefore neither the applicant nor his de facto partner nor their daughter satisfies the criterion set out in paragraph 36(2)(a) or (aa) of the Act for a protection visa. It follows that they are also unable to satisfy the criterion set out in paragraph 36(2)(b) or (c). As they do not satisfy the criteria for a protection visa, they cannot be granted the visa.

DECISION

121. The Tribunal affirms the decision not to grant the applicants Protection (Class XA) visas.