

**0905690 [2010] RRTA 201 (17 March 2010)**

**DECISION RECORD**

**RRT CASE NUMBER:** 0905690

**DIAC REFERENCE:** CLF2009/50382

**COUNTRY OF REFERENCE:** Malaysia

**TRIBUNAL MEMBER:** Megan Hodgkinson

**DATE:** 17 March 2010

**PLACE OF DECISION:** Melbourne

**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 (the delegate) 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 a citizen of Malaysia, arrived in Australia [in] March 2009 and applied to the Department of Immigration and Citizenship (the Department) for a Protection (Class XA) visa [in] April 2009. The delegate decided to refuse to grant the visa [in] July 2009 and notified the applicant of the decision and his review rights by letter dated [in] July 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.
4. The applicant applied to the Tribunal [in] July 2009 for review of the delegate's decision.
5. The Tribunal finds that the delegate's decision is an RRT-reviewable decision under s.411(1)(c) of the Act. The Tribunal finds that the applicant has made a valid application for review under s.412 of the Act.

### CLAIMS AND EVIDENCE

#### The primary application

6. The Tribunal has before it the Department's file relating to the applicant. The Tribunal also has had regard to the material referred to in the delegate's decision, and other material available to it from a range of sources. The present application was combined with the review of the protection visa application lodged by the applicant's mother, [Mrs A] (RRT reference 0900895).
7. The applicant lodged an *Application for an applicant who wishes to submit their own claims to be a refugee* [in] April 2009. The application stated that the applicant had lived in [City 1] from January 2002 to March 2008. From March 2008 to March 2009 he lived with his father and was unsure of his address. He attended [School 1] from Standard One until Standard Three and [School 2] for year 4.
8. A statutory declaration sworn by the applicant's mother [in] April 2009 accompanied the application. This set out:
  1. I make this Statutory declaration on behalf of my son, aged [years], in his application for a protection visa. I fear that if my son is returned to Malaysia he will face persecution on account of his Hindu religion, his Tamil ethnic group, and because he is a member of my family group. I fear that my son will face persecution at the hands of religious extremists, members of the predominate Malay Muslim community and the authorities. I fear that the authorities will not protect my son from the harm that he fears on account of his Hindu religion his Tamil ethnic group and because he is my son.

2. I have provided this Statutory declaration in a very big rush because I have been advised that my son's 45 days expires tomorrow. Therefore I would like the opportunity to provide further information in support of my son's case.

9. Further documents submitted in relation to the application included:

- A statutory declaration which was provided to the Tribunal for the purposes of the review application lodged by the applicant's mother. In a letter dated [in] September 2009 to the Tribunal, the applicant's representative requested that the submissions made by his mother in relation to the discrimination that Hindus and Tamils face be considered in the applicant's case. The full statutory declaration includes sensitive information in relation to the applicant's mother's case which has not been detailed here. The parts of the statutory declaration which are relevant to the present application set out:

1. I was born in [Town 2] in Malaysia on [date]. My religion is Hindu and my ethnic group is Tamil. I make this Statutory Declaration in order to add further detail to the information I provided in my application for a Protection Visa before my hearing at the Refugee Review Tribunal. I fear persecution for reasons of my belief and practice of the Hindu religion, my ethnic Indian Tamil ethnicity, and my gender if I am forced to return to Malaysia.

...

3. In Malaysia, ethnic Indians or Tamils and Hindus are treated as second class citizens. Nearly all Tamil people in Malaysia are Hindu and therefore the discrimination against Tamils and Hindu normally goes hand in hand. There is a preferential treatment of ethnic Malays and longstanding discrimination against ethnic Tamils. Islam is regarded in law and practice as superior to other religions and Hindu people are discriminated against and their Temples destroyed. In or about November 2007 on the eve of the Hindu festival Deepavali I witnessed Hindu women being chased out and beaten when they tried to defend a temple that was nearly one hundred years old. I saw these women bleeding and the police beating them. This horrified me. But human rights abuses against those who practise minority religions are unpunished and condoned by the Malaysian authorities. As I have referred to in my Form 866C, in or about November 2007 there was a meeting held in Kuala Lumpur regarding the discrimination against the people of Hindu religion in Malaysia. I mentioned this on my form as a way to indicate that the problem is becoming worse and worse in Malaysia and necessitated such a meeting by the Hindu people.

4. I am identifiable as an ethnic Indian or Tamil because of the colour of my skin, and the way I look. I also often wear markings related to my Hindu religion such as the 'vibuthi' which is the mark on my forehead, and therefore I am readily identifiable as a Hindu person.

5. I am now divorced but I was married in or about 1998. [The applicant's mother described domestic violence in her relationship with the applicant's father and her inability to obtain police protection as a Tamil].

6. I felt that I had no choice but to leave my husband soon after this and I stayed with my aunt in [Town 3]. The marriage had been a customary marriage and it was not registered and therefore we did not need a civil divorce. However one day my husband came looking for me at my aunt's

house with a machete and demanded his son. Fortunately my son and I and my aunt were inside and my husband could not get in. My aunt and I shouted for help and all the neighbours came and my husband left. I fear that if the neighbours had not come I would have been killed on that day. After that incident I went to the same police station, [name], this time with my uncle. Instead of going to speak with my husband or investigate the matter further, they just called my husband and said something like, don't disturb your wife. Fortunately soon after this my husband became remarried and he left me alone.

7. I live in [City 1] which is a predominately Muslim state. Although the treatment of Tamils and Hindus is bad throughout Malaysia, given the predominance of Muslims in [City 1] the treatment of Tamils and Hindus is particularly bad. Malaysia is also becoming increasingly Islamic and Muslims are becoming more extreme in their views, which makes it dangerous for many people of the Hindu religion.

8. ... [The applicant's mother detailed the sensitive claims which were related to her own protection visa application]

...

30. As I have mentioned, I have a son. When I was completing my forms I was in a huge rush as I have explained, and I must have misunderstood the question where it asked about members of my family unit overseas and neglected to put down my son's details. However I have my son's birth certificate that states that I am his mother. After ... [the events in Malaysia] ... and I started to have problems my former husband started to care for my son. However approximately three months ago my husband had a child. My ex husband's wife decided that she did not want my son around and started treating my son badly. After I came here to Australia I rang my son and spoke to him - he was crying and telling me that the baby had been born and this woman was being abusive towards him. I spoke to my ex husband who told me that since I was now in a safe place they did not want the child any longer and therefore I should bring him to Australia. My son arrived in Australia in or about March 2009. ...

31. ... [The applicant's mother detailed fears in relation to her own protection visa application]

- A police report and translation from [City 1] district in relation to the applicant's mother's case;
- A letter and translation from the president of the Malaysia Hindu Association in [City 1] in relation to the applicant's mother's case;
- A letter from the applicant's mother's claimed employer;
- Copies of letters from HSA and the ASRC in relation to the applicant's mother's mental state; and
- A copy of the representative's submissions in relation to the applicant's mother's RRT application.

10. The delegate refused the application [in] July 2009 on the basis that the delegate accepted neither that the applicant was targeted for serious harm amounting to persecution due to being an ethnic Tamil nor that he would be denied State protection.

### **Application to the Tribunal**

11. The applicant applied for review of the delegate's decision [in] July 2009. [In] September 2009 a statutory declaration was provided which was sworn by the applicant's mother on [the previous day] and set out;

1. I make this Statutory Declaration on behalf of my son, aged [years], in relation to his review application for a protection visa. I wish to provide further information in relation to why my son will face serious harm if he is returned to Malaysia. I fear that if my son is returned to Malaysia he will face persecution on account of his Hindu religion, his Tamil ethnic group, and because he is a member of my family group.

2. I fear that if my son is returned to Malaysia he will continue to face discrimination on account of his Tamil ethnicity. In Malaysia, Tamil people are severely discriminated against. Our people are oppressed from expressing our political opinion against the government and the government's treatment of those of Tamil ethnicity. People of Indian or Tamil ethnicity discrimination in all aspects of life and our Tamil language and ability to recognise our culture and customs is repressed. The Malaysian government have for many years been trying to enforce their own language and traditions on Tamil people and to oppress us and our culture.

3. I want my son to grow up in a country where he is treated as an equal human being. My son is now attending [Town 4] Primary School in [Town 4] in [State] and he enjoys this very much. No one bullies him or mistreats him because of the colour of his skin or his ethnicity or his religion. He is so much happier here and less fearful than he was in Malaysia when he went to school.

4. In Malaysia, Tamil children face serious discrimination in relation to obtaining an education. Firstly, I would rather send my child to a Tamil school, so that he can learn about his own culture and language. However schools for only Tamil children are so under resourced that the children cannot even learn. There are not even enough tables and chairs for the children in those schools and they are often flooded when it rains too much. The Malaysian government ultimately want to eliminate Tamil schools and so they do not provide them with any assistance. Accordingly I felt that sending my child to a Tamil school was not an option.

5. I also knew that sending my child to a government school was not really an option either for him to obtain an education. Tamil children in Malay government schools are not permitted to speak their Tamil language and again Tamil culture is oppressed, and they are severely discriminated against in relation to obtaining an education to the extent that they do not obtain an education, and furthermore they are not protected from bullying. In addition, textbooks are provided free to Malay and Chinese students, but Tamils have to pay for their text books. This happened to me when I went to school and it happened to my son In addition Tamil students are not provided with a coupon for food at the canteen as the Malay and Chinese students are once a week. For these reasons, when my son first attended school in Malaysia I sent him to a private school for which I had to pay 6000 ringgits per year. He went to the [School 1] private school for one and a half years, however after this I could not longer afford to send him to that school. It is only because of my son's education at

that private school for those 1.5 years that he can communicate in English so well here in Australia.

6. As I could not afford to keep sending my child to the private school, I had no choice but to send my son to the [School 2] in [Town 5]. I note that there is a mistake on my Form 866C in that I did not mention that half way through Standard 2 my son went to a Government school. I don't know why this wasn't mentioned I thought I mentioned this to my adviser. On the day we prepared the application for my son we were in a very big rush to lodge the application as it was the 45th day.

7. As I have said, half way through Standard Two my son went to [School 2] in [Town 5] My son was then at school at this school until end of 2008 when his step mother decided to stop sending him to school as he was living with her and I had left the country. As I expected, my son had problems at this school. Firstly my son was not educated. In Malaysia there are levels of classes according to standard of intelligence. However Tamil Hindus are not even assessed, they are immediately sent to the lowest class. In the lowest class they are not taught properly. There are never any Malay or Chinese ethnic students in the lowest class. In the lowest class, the teachers turn up and just do their own work and do not even conduct a class because they do not care about teaching the Tamil students. This also happened to me when I was at school and this also happened to my cousin whom I very close to and who is about ten years younger than me. Because my cousin's parents were not educated I had tried to help my cousin when she was at school. On one occasion I actually called up my cousin's teacher and asked why she was not in a higher class given she had excellent Malay and English (which she had learned in a private kindergarten) and she had received high marks in her exams. I was told that there was not enough room in the higher classes for her. However from that time onwards until she finished her education she remained in the lowest class. She lost her English skills and she is now in my opinion, uneducated. I do not want this to happen to my son but whilst he was in Malaysia he remained in the lowest class and was not taught properly.

8. Malay students also bully children of Tamil/Indian ethnicity at school and call them "Kling" My son would sometimes come home crying because he had been bullied and harassed. On one occasion, when my son was in grade three a Malay boy poked a pencil into his son's head. It bled and the wound looked like it was deep. I took him to a private clinic and it was cleaned up. The next day I went to the school and complained to the teacher. The teacher said that it was just a kid's fight and my son never complained to her. I said that my son complained to me not to her because he was only a young child. She said she would look into it but I never heard anything again. I was constantly fearful that if my son was ever beaten up he would not be protected by the teachers at school.

9. I continue to fear that my son will grow up without being able to freely express himself within his culture nor express his beliefs. I fear that my son will face a life ahead of not being able to practise his Hindu religion and that he will always face discrimination on account of his religion for the rest of his life.

10. I fear that if my son is returned to Malaysia and something happens to me, as I have outlined that I fear in my own application for a protection visa, that he will be without a mother. I fear very much that something will happen to me in Malaysia.

11. I fear that as my son grows up he will be targeted by extremist gangs who hate Hindus and ethnic Indians/Tamils.

12. I fear that my son will never be able to obtain employment on account of his Indian/Tamil ethnicity and his Hindu religion. I do not want him to grow up in a world of such discrimination and unequal rights.

13. Only last week I listened to the Malaysian news through the Internet on a Tamil Malaysian radio station, THR, and heard a report about how some Tamils had a meeting in Perak in Ipoh about Tamil's rights. They said there were a lot of Tamil people who wanted to speak up about their rights but they were oppressed by the government from doing so. This is yet another example of how Tamils in Malaysia are considered to be third class citizens and will always be discriminated against by the authorities. Nothing is going to change in Malaysia in this regard.

### **The Tribunal's hearing**

12. The Tribunal convened a hearing [in] September 2009 which was combined with a second hearing in the applicant's mother's application to the Tribunal (case reference 0900895). The applicant and his mother appeared at the hearing. The Tribunal confirmed with the representative that the applicant's mother would give evidence on the applicant's behalf in relation to his protection visa application.
13. The applicant stated that he liked Australia better than Malaysia because the teachers were good and people were nice in Australia. The little boys were mean in Malaysia and used abusive terms. They were constantly taunting him because he is Tamil. One of the Malay boys in his class poked him in the back of the neck with a sharp pencil but the teacher did not take any notice. He was a good student and studied well but he had been placed in the lowest class. That class consisted entirely of Tamil students and the teaching was sloppy.
14. The applicant stated that his father had married again. He had gone to his father's house and they would not send him to school. All he did was housework. His father and his step-mother had a baby and he had accidentally erased the pictures of the baby from the camera. They had burned him with a hot rod.
15. The applicant's mother continued the evidence on the applicant's behalf. The applicant's mother stated that if the applicant returned to Malaysia she feared that, due to her religion, there would be the possibility that he would be harassed. Additionally, education was so poor for children like him, she had sent him to an International school. After a time she could no longer afford it so she sent him to live with her husband. Even from Kindergarten she had sent him to an International school but her husband had put him into the government school and he was placed in the last class and lost his English ability. He had gone to live with his father in March 2008 and was placed in a government school in April or May of 2008. The Tribunal noted that the applicant had stated that his father had not sent him to school. The applicant's mother stated that the applicant went to school for a while because his step-mother was pregnant. He had not attended school after the vacation in October 2008.
16. When they had registered him in school they had given two addresses, one of which was her mother's address. A letter had been sent to her mother stating that he had not been to school for 90 days.
17. The international school was in [Town 6]. The applicant had been commuting from [City 1]. The government school was in [Town 5].

18. The applicant's mother stated that the applicant had not been banned from school as a Tamil. However the free text book scheme was denied to Tamil children and her mother had to find money to buy text books. She did not know whether his father had bought books for him. The applicant's mother stated that she had not enrolled the applicant in Tamil school because the schools were ordinary. The applicant had been taunted for being Tamil and called "Kling" which was a derogatory term for a Tamil.
19. He had been injured with a sharp pencil by a Malay boy in April 2008. They had told the teacher and gone to the school to see the boy and the teacher, but it had been shrugged off. She had taken the applicant to the clinic and had a medical certificate to show the teacher. The wound needed medical attention because the lead needed to be removed. The Tribunal asked why the incident had occurred. The applicant's mother stated that the applicant said he was always bullied. The school was predominantly Malay and only two percent Tamil. They did not have the same problems at the International school where the care was of a higher standard. People with money sent their children there, as did some Tamils, and there were not many Malays. The education was of a high standard with two teachers per class and the applicant's English was good. They did not offer Tamil language but they offered Chinese as an additional language. English was the only language used at the international school.
20. The applicant's mother stated that her main concerns for the applicant were due to his race and religion. Malays hate Tamils and they prevented the advancement of Tamils. The applicant had suffered bullying and he would continue to suffer as he grew up.
21. The applicant's mother stated that he was also at risk due to his membership of her family. She faced a dangerous situation and feared for her life and he could also be in danger. No threats had been made against the applicant. She had sent him to live with his father for his own safety but he was not safe there. His father lived near [Town 5] and her mother and sister were still living in [Town 5], which was why they had been given as school contacts, however the applicant's father did not like his ex-mother in law. The applicant loved his grandmother.
22. The Tribunal noted that there was country information to indicate that ethnic Malays in Malaysia received preferential treatment, but there was nothing in the country information to indicate that Tamils' treatment at school would constitute serious harm such to amount to persecution and it would be necessary for the Tribunal to consider whether the treatment to which the applicant claimed to be subjected at school constituted persecution for a Convention reason.
23. The applicant's mother stated that, as a Tamil, the applicant had no access to good education. His safety was also affected because there were so many recent incidents against Tamils and there was no guarantee he would be protected and he would also not have any protection because he was her son.
24. In relation to the abuse against the applicant at his father's house, the applicant's mother stated that the applicant had no recourse. He did not know where to go or what to do. His stepmother had done it and his father had stood by. The applicant had told her about it over the telephone. His father had said that he knew nothing about it and that she should take the applicant away. The applicant was constantly scolded and expected to do housework. His step mother also had two children from a previous marriage. His father would spend more time with the other children.



25. The Tribunal asked where the applicant would live if they returned to Malaysia; with his mother or with his father. The applicant's mother stated that she would be worried to have him with her. Her mother had financial difficulties and did not have enough money to look after the applicant. Additionally, the applicant's father would not allow him to live with his grandmother and it would create trouble.

### **Further enquiries following the hearing**

26. Following the hearing, the Tribunal made further enquiries in relation to the applicant's mother's case and allowed time for the applicant's mother to respond to the information. [In] December 2009 the applicant made submissions in the applicant's mother's case which the representative requested that the Tribunal take into account in both cases:

We refer to the applicant's comments in relation to her son, (and applicant before the Tribunal) [the applicant]. We note that country information supports the applicant's claims that her son will not be protected from domestic violence in Malaysia at the hands of his step mother if the applicants were returned to Malaysia. The United Nations Committee on the Rights of the Child, 'Consideration of Reports Submitted by States Parties under Article 44 of the Convention - Concluding Obligations Malaysia' reports as follows:

*'The Committee notes with grave concern that domestic violence, including violence against children in the family, remains a serious human rights problem in the State party. The Committee notes with concern that due to the strong social and cultural taboos victims and witnesses rarely report these cases, although there are established mechanisms to receive reports on child abuse and neglect, including a toll-free helpline "Teledera" which is, however, only limited to reporting on child abuse cases. It also notes with concern that corporal punishment in the home is lawful.*

UNICEF also report as follows in relation to Malaysia:

*Reports of violence against children and young people, including sexual abuse, are increasing. UNICEF estimates that around 950,000 children are abused each year in Malaysia.*

*Only the most extreme child abuse and neglect stories are reported, often involving tragic elements of disturbing injuries, sexual abuse or even death. International experience however suggests that reported cases are likely to represent only 10 per cent of total cases perpetrated as most victims and their families remain too ashamed or unable to report the violations against them.*

Amnesty International also reports as follows:

*While there is some protection for children enshrined in the Child Act 2001 enforcement and reporting remain problems. The Malaysian government has instigated a number of mechanisms and bodies to address these problems and details of such efforts are contained in United Nations Study on Violence Against Children 'Response to Questionnaire Received from the Government of Malaysia.'*

Youssauf Oomar, United Nations Children's Fund (Unicef) Representative to Malaysia, also said that the reported cases on abused children including in Malaysia is only 'the tip of the iceberg', involving people who took the courage to report: "How many cases are not being reported?" is it three times, four times or more? We need to look at some of the laws and its enforcement.

27. The representative provided a letter from [a welfare organization] in relation to counseling for the applicant as well as a referral to the Child and Adolesc. Mental Health Unit from [Dr A] which indicated that the applicant had claimed that he was abused by his step mother, physically and mentally. He was noted to be staring blankly, not sleeping well, not eating and claimed to be bothered by the experience (he claimed to be burned on the skin). He was referred for Adjustment Disorder and Post Traumatic Stress Disorder. A Mental Health Plan for the applicant outlined the same information.
28. [In] January 2010, the Tribunal affirmed the delegate's decision to refuse to grant a protection visa to the applicant's mother, on the basis that the Tribunal found that she did not have well founded fear of persecution in Malaysia if she were to return in the reasonably foreseeable future.
29. By letter dated [in] February 2010 addressed to the applicant's authorised recipient, the Tribunal invited comment on the above information. In response on [a date in] February 2010 the representative submitted:

We request that in addition to the applicant's claims regarding his mother's inability to care for him which the Tribunal has rejected, the Tribunal carefully consider the applicant's claims regarding the discrimination and past persecution he has personally suffered as an ethnic Indian Tamil in Malaysia and on account of his Hindu religion, outlined in his Statutory declaration of claims.

In addition the Tribunal should carefully consider country information regarding the lack of state protection for women and children in Malaysia, and hence the risk that if the applicant's father did want his child to live with him, his mother would have little recourse to the authorities to complain, or to regain custody of the Child. Hence in our submission, regardless of whether the Tribunal accepts that the applicant's mother will face harm in Malaysia, the applicant still faces a real chance of harm in the form of domestic violence at the hands of his abusive step mother.

30. On 23 February 2010 the representative provided a letter from [Person A] of [Town 4] which stated:

I ... have known [the applicant's mother] since they moved here into [address deleted: s.431(2)].

[The applicant] has become very special to me, in conversation, though he has emotional problems to deal with. When he speaks to me about what happened to him in Malaysia. He speaks to me about being mistreated and bullied whilst living in Malaysia. He is very shy with people he doesn't know, as I believe he stands back to see if he is going to be mistreated. He is very open and honest with me, about what he has endured in Malaysia. He does not have to endure discrimination here in [Town 4] and is accepted here.

I believe he will advance in his learning here in Australia because he is very intelligent and learns very fast. I hope that [the applicant's mother] and her son [the applicant] will be able to stay in Australia as I fear what might happen to them, if they return to Malaysia.

## **RELEVANT LAW**

31. 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.

32. 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).
33. 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’**

34. 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.
35. 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.
36. 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.
37. There are four key elements to the Convention definition. First, an applicant must be outside his or her country.
38. 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.
39. 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.

40. 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.
41. 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.
42. 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.
43. 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.

#### *Particular social group*

44. The meaning of the expression 'for reasons of ... membership of a particular social group' was considered by the High Court in *Applicant A's* case and also in *Applicant S*. In *Applicant S* Gleeson CJ, Gummow and Kirby JJ gave the following summary of principles for the determination of whether a group falls within the definition of particular social group at [36]:

... First, the group must be identifiable by a characteristic or attribute common to all members of the group. Secondly, the characteristic or attribute common to all members of the group cannot be the shared fear of persecution. Thirdly, the possession of that characteristic or attribute must distinguish the group from society at large. Borrowing the language of Dawson J in *Applicant A*, a group that fulfils the first two propositions, but not the third, is merely a "social group" and not a "particular social group". ...
45. Whether a supposed group is a 'particular social group' in a society will depend upon all of the evidence including relevant information regarding legal, social, cultural and religious norms in the country. However it is not sufficient that a person be a member of a particular social group and also have a well-founded fear of persecution. The persecution must be feared for reasons of the person's membership of the particular social group.

## **FINDINGS AND REASONS**

46. The applicant's representative provided a copy of the applicant's passport which is issued by Malaysia. The Tribunal accepts that the applicant is a national of Malaysia and that he does not have the right to enter and reside in any other country. Consequently the Tribunal will consider his claims against Malaysia.
47. The applicant is a child of [years] of age. The Tribunal recognises that it is difficult for a child to give evidence in circumstances such as those presented at the Tribunal's hearing. Accordingly the Tribunal considered that it was appropriate for his mother to give evidence on his behalf and the Tribunal has taken his mother's stated fears for the applicant to be also his subjective fears. The Tribunal has taken into account both the evidence given by the applicant and that given by his mother on his behalf, as well as the further evidence provided by the representative, the medical evidence and the letter from [Person A].
48. The evidence in [Person A]'s letter in relation to the applicant's intelligence and shyness is supported by the Tribunal's impression of the applicant at the hearing. Considering his evidence at the hearing and the information in [Person A]'s letter the Tribunal accepts that the applicant prefers going to school in Australia and is doing well.
49. However the question for the Tribunal in relation to an application for a protection visa is whether the applicant meets the definition of a refugee as set out in the Refugees Convention and as further defined in the *Migration Act*. The Tribunal is required to consider the applicant's claims and the claims made on his behalf in this context.

### **Mistreatment by his step-mother**

50. At the Tribunal's hearing, the applicant stated that he had been mistreated by his step-mother while living with his father. He had accidentally deleted the photographs of the new baby from the camera and his step-mother had burned him with a rod. The representative provided a mental health plan and a referral for the applicant on the basis of his claims of abuse by his step-mother. The applicant's mother stated that his father did not protect him and preferred the other children over him.
51. Although his mother's statutory declaration of [a date in] September 2009 does not refer to abuse at the hands of his stepmother, there is a reference to the applicant being mistreated in the statutory declaration of [a date in] April 2009 and the applicant has also stated that he was mistreated by his step-mother according to the medical documents which have been provided. The Tribunal accepts that the applicant was mistreated by his step-mother whilst living with his father in the past.
52. However it was also his evidence and his mother's evidence that his father sent him to live with his mother in Australia and did not want the applicant to live with him in Malaysia. The representative submitted that if the applicant's father wanted the applicant to live with him, the applicant would have little recourse to prevent this. However it has not been claimed that the applicant's father has made any attempt to obtain custody of the applicant since he remarried and even when the applicant did live with his father, his father preferred the other children. Based on past conduct and the applicant's mother's evidence that the father did not want the applicant to live with him anymore, the Tribunal finds that the chance that the applicant's father would seek custody of the applicant if he were to return to Malaysia in the reasonably foreseeable future is remote. The Tribunal is not satisfied that the applicant faces

a well founded fear of persecution for a Convention reason in the reasonably foreseeable future on this basis.

53. The applicant's mother stated in her statutory declaration of [a date in] November 2009 that she was concerned that if she returned to Malaysia with her son and she was targeted and harmed and unable to look after him, he would have no choice but to live with his father where he would continue to be abused by his step mother. However, the Tribunal has found in the applicant's mother's application [0900895] that the applicant's mother does not have well founded fear of persecution for a Convention reason in Malaysia and the Tribunal does not accept that the applicant's mother faces a real chance of being targeted and/or harmed and unable to look after him. Consequently the Tribunal finds that the applicant would not be required to live with his father and his step-mother and so there is not a real chance that he would face domestic violence at the hands of his step-mother if he returns to Malaysia now or in the reasonably foreseeable future. The Tribunal is also not satisfied that the applicant faces a well founded fear of persecution for a Convention reason on this basis.

### **Harassment**

54. The applicant stated that he had been bullied at the government school which he had attended and that a pencil had been stuck into his neck, which required medical attention. The Tribunal accepts that this might have occurred and that the teacher might not have taken action against the perpetrators. The Tribunal also accepts that the applicant fears being harassed on return due to his Tamil race and Hindu religion.
55. The Tribunal must consider whether the treatment described is persecution. In accordance with s 91R of the Act, the Tribunal must also consider whether it involves serious harm to the applicant.
56. In *Chan v MIEA*, Mason CJ held that serious punishment or penalty, or the imposition of some significant detriment or disadvantage, for a Convention reason will amount to persecution and that harm short of interference with life or liberty may still amount to persecution. His Honour stated that:

...the Convention necessarily contemplates that there is a real chance that the applicant will suffer some serious punishment or penalty or some significant detriment or disadvantage ... Obviously harm or the threat of harm as part of a course of selective harassment of a person, whether individually or as a member of a group subjected to such harassment by reason of membership of the group, amounts to persecution if done for a Convention reason. The denial of fundamental rights or freedoms otherwise enjoyed by nationals of the country concerned may constitute such harm ..

57. In the same case, McHugh J stated:

...to constitute "persecution" the harm threatened need not be that of loss of life or liberty. Other forms of harm short of interference with life or liberty may constitute "persecution" for the purposes of the Convention and Protocol. Measures "in disregard" of human dignity may, in appropriate cases, constitute persecution.

...the denial of access to employment, to the professions and to education or the imposition of restrictions on the freedoms traditionally guaranteed in a democratic society such as freedom of speech, assembly, worship or movement may constitute persecution if imposed for a Convention reason.

58. A non-exhaustive list of examples of what constitutes serious harm is set out in subsection 91R(2). These include a threat to the person's life or liberty, significant physical harassment of the person, significant physical ill-treatment of the person, significant economic hardship that threatens the person's capacity to subsist, denial of access to basic services, where the denial threatens the person's capacity to subsist and denial of capacity to earn a livelihood of any kind, where the denial threatens the person's capacity to subsist.
59. The applicant was poked with a pencil on one occasion which required medical treatment. However the Tribunal does not consider this incident and the claimed instances of low level harassment to be sufficiently severe to constitute serious harm amounting to persecution. Therefore the Tribunal finds that the applicant does not have a well founded fear of persecution for a Convention reason if the applicant were to return to Malaysia in the reasonably foreseeable future.

### **Hindu religion and Tamil race**

60. The Tribunal will consider the matters in relation to the applicant's Hindu religion and Tamil race together as they have been presented as interlinked and overlapping claims.
61. The applicant's mother claimed that the applicant would face persecution on account of his Hindu religion and Tamil ethnic group

### *Exercise of religion*

62. The 2008 US Department of State report on human rights practices in Malaysia found that despite some restrictions on religious freedom, the current Malaysian government continues to emphasise religious tolerance, and 'Non-Muslims...were free to practise their religious beliefs with few restrictions.' The report relevantly states that:

The constitution provides for freedom of religion; however, the constitution and the government placed some restrictions on this right. The constitution defines all ethnic Malays as Muslims and stipulates that Islam is the official religion. The government significantly restricted the practice of Islamic beliefs other than Sunni Islam. Article 11 of the constitution states, "Every person has the right to profess and practice his religion," but it also gives state and federal governments the power to "control or restrict the propagation of any religious doctrine or belief among persons professing the religion of Islam."

...

Non-Muslims, who constitute approximately 40 percent of the population and include large Buddhist, Christian, Hindu, and Sikh communities, were free to practice their religious beliefs with few restrictions. According to the government, it allocated RM428 million (approximately \$125.9 million) to build Islamic places of worship and RM8.1 million (\$2.4 million) to build Christian, Buddhist, Hindu, and other minority religions' places of worship between 2005 and the end of the year.

...

The government generally respected non-Muslims' right of worship; however, state governments have authority over the building of non-Muslim places of worship and the allocation of land for non-Muslim cemeteries. State authorities sometimes granted approvals

for building permits very slowly. Minority religious groups reported that state governments sometimes blocked construction using restrictive zoning and construction codes.

..

(US Department of State 2009, Country Reports on Human Rights Practices for 2008: Malaysia, released on 25 February 2009).

63. This has been confirmed by the Immigration and Refugee Board of Canada in a response to an information request dated 15 November 2007, which stated that '[s]ources consulted indicate that Islam is the official religion of Malaysia and that other religions enjoy 'freedom of worship' according to the constitution'.
64. The representative's written submissions refer to the US State Department International Religious Freedom Report of 2008. Since that time the 2009 Religious Freedom Report has been released (on 26 October 2009) however this states that there was no change in the status of respect for religious freedom by the Government during the reporting period:

Government policies promoted Islam above other religions. Minority religious groups remained generally free to practice their beliefs; however, over the past several years, many have expressed concern that the civil court system has gradually ceded jurisdictional control to Shari'a courts, particularly in areas of family law involving disputes between Muslims and non-Muslims. Religious minorities continued to face limitations on religious expression and alleged violations of property rights. The Government restricts distribution of Malay-language Christian materials in peninsular Malaysia and forbids the proselytizing of Muslims by non-Muslims.

There were few reports of societal abuses or discrimination based on religious affiliation, belief, or practice.

The U.S. Government discusses religious freedom with the Government as part of its overall policy to promote human rights. Embassy representatives maintained an active dialogue with leaders and representatives of various religious groups, including those not officially recognized by the Government.

...

According to religious groups and local NGOs, approval processes for building permits for places of worship were sometimes extremely slow. Minority religious groups also reported that state governments sometimes used restrictive zoning and construction codes to block construction or renovation of non-Muslim places of worship.

Local authorities sometimes demolished non-Muslim places of worship, some more than 100 years old, located on government land or plantations converted for development. However, in some cases state governments allocated land elsewhere and covered the cost to construct new places of worship.

...

#### Abuses of Religious Freedom

In October 2008 the Government banned the Hindu Rights Action Force (HINDRAF), an unregistered umbrella organization for various NGOs focused on ethnic Indian concerns. Although not a religious organization, HINDRAF appealed



for redress of perceived government marginalization of ethnic Indians, including the demolition of some Hindu temples. Waytha Moorthy, HINDRAF director, remained abroad citing a fear of arrest if he returned to the country. The Government utilized the Internal Security Act (ISA) to arrest five HINDRAF leaders in December 2007, claiming that their involvement in organizing protests during the previous month served to upset interracial harmony and thus threatened national security. The Government released two of the men in April 2009 with restrictive conditions, including not participating in press conferences, not leaving their area of residence without police permission, and regularly reporting to the police. The other three HINDRAF prisoners who initially refused to accept the conditions and remained detained under the ISA were subsequently released in May 2009.

In April 2009 the Government announced plans to relocate 29 Hindu temples in and around Kuala Lumpur to alternative locations. The Government issued a 30-day notice to temple caretakers to move to the new locations before the existing temples were destroyed. Many of these structures had been constructed on private plantations prior to the country's independence.

65. The Tribunal has had regard to the claims which has been made by the applicant and his mother, the representative's submissions and the relevant country information. On the basis of the country information the Tribunal finds that there is not a real chance that the applicant would be prevented from practicing his Hindu religion in Malaysia if he were to return in the reasonably foreseeable future. Consequently the Tribunal finds that the applicant does not have a well founded fear of Convention persecution on this basis.

#### *Access to education*

66. The applicant's mother stated that the applicant would be persecuted in relation to being able to receive an education due to his Hindu religion and Tamil race.
67. According to the 2008 USDOS Human Rights Report, ethnic Malays (or Bumiputra) do receive a greater proportion of benefits in relation to education and job opportunities in Malaysia:

#### Section 5 Discrimination, Societal Abuses, and Trafficking in Persons

The constitution provides for equal protection under the law and prohibits discrimination against citizens based on sex, religion, race, descent, or place of birth. However, the constitution also provides for the "special position" of ethnic Malays and the indigenous groups of the eastern states of Sabah and Sarawak (collectively, bumiputras), and discrimination based on this provision persisted. Government policies and legislation gave preferences to bumiputras in housing, home ownership, awarding of government contracts and jobs, educational scholarships, and other areas. Nonbumiputras regularly complained about these preferences, arguing that government subsidies for disadvantaged persons should be dispensed without regard to race.

...

#### National/Racial/Ethnic Minorities

The law and government policy provide for extensive preferential programs designed to boost the economic position of bumiputras. Such programs limit opportunities for nonbumiputras in higher education, government employment, business permits and licenses, and ownership of land. Businesses are subject to race-based requirements

that limit employment and other economic opportunities for nonbumiputra citizens. According to the government, these programs are necessary to ensure ethnic harmony and political stability.

Despite the government's stated goal of poverty alleviation, these race-based policies are not subject to upper income limitations and appeared to contribute to the broadening economic disparity within the bumiputra community. Ethnic Indian citizens, who did not receive such privileges, remained among the country's poorest groups. Another goal of this policy is for bumiputras to hold 30 percent of the nation's wealth. According to several studies, the program reached or exceeded this target; however, official government figures placed bumiputra equity at 18.9 percent. The government did not respond to public requests to make its methodology available.

In 2006 the minister of higher education stated that the nation's 17 public universities employed few nonbumiputra deans. At the Universiti Malaya, 19 of 20 deans were bumiputras; in many other universities, deans were exclusively bumiputras. They also accounted for more than 90 percent of the country's almost 1.15 million civil servants at the end of the year. The percentage has steadily increased since independence in 1957.

68. In relation to education in Malaysia, according to [www.absoluteastronomy.com](http://www.absoluteastronomy.com) ([www.absoluteastronomy.com/topics/Education\\_in\\_Malaysia](http://www.absoluteastronomy.com/topics/Education_in_Malaysia) (downloaded 14 September 2009)):

In January 2003, a mixed medium of instruction was introduced so that Standard 1 students would learn Science and Mathematics in English whilst other subjects are taught in Malay. Chinese and Tamil vernacular schools generally conduct classes in mandarin and Tamil respectively, Recently, Tamil schools have also begun to employ English for teaching Science and Mathematics ...

The division of public education at the primary level into national and national-type school has been criticized for allegedly creating racial polarization at an early age. ... Non-Malays, Chinese in particular, avoid national schools due to said schools being Malay-dominated, and especially in recent years, having an overwhelmingly Muslim atmosphere.

69. According to the UN Convention on the Rights of the Child Consideration of Reports submitted by States Parties (20 December 2006) (paragraphs 77 – 78):

77. Upon accession to the CRC, Malaysia made a declaration to Article 28(1)(a) of the CRC as follows:

“With respect to Article 28 paragraph 1(a), the Government of Malaysia wishes to declare that in Malaysia, even though primary education is not compulsory and available free to all, primary education is available to everybody and Malaysia has achieved a high rate of enrolment for primary education ie at the rate of 98 percent enrolment.”

78. With respect to the development of a child, the Education Act 1996 [Act 550] was amended in 2002 to provide for compulsory primary education. It stipulates that every parent is obliged to enroll their child upon attaining the age of six years in primary school and the child shall remain as a pupil in a primary school for the duration of the compulsory education for six years. Although education is compulsory by law, the current policy in Malaysia still requires students to pay a certain amount of fees upon enrolment in primary school. Although a minimal fee is

imposed, financial assistance is provided by various Government agencies to needy children to ensure their rights to education.

70. The Tribunal also has regard to the UN General Assembly Human Rights Council *Report of the Special Rapporteur on the right to education – Mission to Malaysia* 20 March 2009 which sets out:

**2. Accessibility**

**(a) Cost-free education**

30. Although the Education Act 1996 was amended in 2002, making primary education compulsory, cost-free status has not yet been guaranteed. The Special Rapporteur is concerned at the fact that enrolment and other education-related costs, such as uniforms, transport, teaching materials, etc. are obstacles hampering access to education for all children, especially those of limited means.

...

**3. Acceptability**

**(a) Languages of instruction**

50. ... the language of instruction in national schools in Malay. However in type C primary schools it is Mandarin and in type T schools Tamil. In secondary schools, the language is Malay; however, in both lower and upper secondary schools it is possible to study Mandarin and Tamil, as well as Iban (an indigenous language) as an optional subject. Moreover, the language of instruction at all levels for mathematics and sciences is English

51. The Special Rapporteur noted the concern by the Chinese and Tamil communities of the fact that their primary schools (type C and type T) receive less funding than national schools. He was also informed that, despite the increased population density of some urban areas inhabited by people of Chinese origin, it has not been possible to establish new type C schools. He was told that a number of Tamil schools have been closed, despite having students in attendance. In this connection, the Special Rapporteur requests the Government to take account of the provision in the Convention on the Rights of the Child to the effect that education shall be directed to development of respect for the child's own cultural identity, language and values.

71. It is clear from the information above that education is available to the applicant in Malaysia, although the Tribunal accepts that Tamil schools are not as well funded as national schools. The applicant is able to attend the national schools, even if as claimed by his mother, he is required to purchase text books whereas Malay children are not. The Tribunal is not satisfied that the discrimination described by the applicant's mother in relation to education is sufficiently severe to constitute serious harm amounting to persecution for a Convention reason. The Tribunal is not satisfied that the applicant faces a well founded fear of persecution for a Convention reason in the reasonably foreseeable future on this basis

### **Claimed fear of persecution on the basis of his membership of his mother's family**

72. The applicant's mother stated that she feared that the applicant would be harmed as a member of her family. It is well established that a family is capable of constituting a particular social group within the meaning of the Convention. However, as set out above, the Tribunal has found in the applicant's mother's case that the applicant's mother does not have well founded fear of persecution for a Convention reason in Malaysia. Consequently, the Tribunal does not accept that the applicant would face a real chance of persecution on the basis of being a member of his mother's particular social group and the Tribunal finds that the applicant does not have a well founded fear of Convention persecution on this ground

### **Cumulative claims**

73. The Tribunal has also considered the applicant's claims cumulatively but still finds that they together do not constitute serious harm amounting to persecution.
74. Consequently the Tribunal finds that the applicant does not face a real chance of persecution for a Convention reasons if he returns to Malaysia now or in the reasonably foreseeable future. Therefore the Tribunal finds that the applicant does not have a well-founded fear of persecution for a Convention reason.

### **CONCLUSION**

75. 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**

76. 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: PRMHSE