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1406290 [2014] RRTA 815 (11 November 2014)

DECISION RECORD

RRT CASE NUMBER:	1406290
COUNTRY OF REFERENCE:	Fiji
TRIBUNAL MEMBER:	Glen Cranwell
DATE:	11 November 2014
PLACE OF DECISION:	Brisbane
DECISION:	The Tribunal affirms the decision not to grant the applicants Protection (Class XA) visas.

Statement made on 11 November 2014 at 1:27pm

Any references appearing in square brackets indicate that information has been omitted from this decision pursuant to section 431(2) of the Migration Act 1958 and replaced with generic information which does not allow the identification of an applicant, or their relative or other dependant.

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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 to refuse to grant the applicants Protection (Class XA) visas under s.65 of the *Migration Act 1958* (the Act).

2. The applicants who claim to be citizens of Fiji, applied to the Department of Immigration for the visas [in] December 2013 and the delegate refused to grant the visas [in] March 2014.

3. The applicants appeared before the Tribunal on 5 November 2014 to give evidence and present arguments. The Tribunal also received oral evidence from [the first-named applicant's father-in-law] and [the applicant's son]. The Tribunal hearing was conducted with the assistance of an interpreter in the Hindi (Fiji) and English languages.

RELEVANT LAW

4. The criteria for a protection visa are set out in s.36 of the Act and Schedule 2 to the Migration Regulations 1994 (the Regulations). An applicant for the visa must meet one of the alternative criteria in s.36(2)(a), (aa), (b), or (c). That is, the applicant is either a person in respect of whom Australia has protection obligations under the 'refugee' criterion, or on other 'complementary protection' grounds, or is a member of the same family unit as such a person and that person holds a protection visa.

Refugee criterion

5. Section 36(2)(a) provides that a criterion for a protection visa is that the applicant for the visa is a non-citizen in Australia in respect of 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).

6. Australia is a party to the Refugees Convention and generally speaking, has protection obligations in respect of 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.

7. 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.

8. There are four key elements to the Convention definition. First, an applicant must be outside his or her country.

9. 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

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conduct (s.91R(1)(c)). Examples of 'serious harm' are set out in 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.

10. 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.

11. 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.

12. 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 being persecuted for a Convention stipulated reason. 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.

13. 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. The expression 'the protection of that country' in the second limb of Article 1A(2) is concerned with external or diplomatic protection extended to citizens abroad. Internal protection is nevertheless relevant to the first limb of the definition, in particular to whether a fear is well-founded and whether the conduct giving rise to the fear is persecution.

14. Whether an applicant is a person in respect of 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.

Complementary protection criterion

15. If a person is found not to meet the refugee criterion in s.36(2)(a), he or she may nevertheless meet the criteria for the grant of a protection visa if he or she is a non-citizen in Australia in respect of 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 applicant being removed from Australia to a receiving country, there is a real risk that he or she will suffer significant harm: s.36(2)(aa) ('the complementary protection criterion').

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16. 'Significant harm' for these purposes is exhaustively defined in s.36(2A): s.5(1). A person will suffer significant harm if he or she will be arbitrarily deprived of their life; or the death penalty will be carried out on the person; or the person will be subjected to torture; or to cruel or inhuman treatment or punishment; or to degrading treatment or punishment. 'Cruel or inhuman treatment or punishment', 'degrading treatment or punishment', and 'torture', are further defined in s.5(1) of the Act.

17. There are certain circumstances in which there is taken not to be a real risk that an applicant will suffer significant harm in a country. These arise where it would be reasonable for the applicant to relocate to an area of the country where there would not be a real risk that the applicant will suffer significant harm; where the applicant could obtain, from an authority of the country, protection such that there would not be a real risk that the applicant will suffer significant harm; or where the real risk is one faced by the population of the country generally and is not faced by the applicant personally: s.36(2B) of the Act.

Section 499 Ministerial Direction

18. In accordance with Ministerial Direction No.56, made under s.499 of the Act, the Tribunal is required to take account of policy guidelines prepared by the Department of Immigration – PAM3 Refugee and humanitarian - Complementary Protection Guidelines and PAM3 Refugee and humanitarian - Refugee Law Guidelines – and any country information assessment prepared by the Department of Foreign Affairs and Trade expressly for protection status determination purposes, to the extent that they are relevant to the decision under consideration.

Member of the same family unit

19. Subsections 36(2)(b) and (c) provide as an alternative criterion that the applicant is a non-citizen in Australia who is a member of the same family unit as a non-citizen mentioned in s.36(2)(a) or (aa) who holds a protection visa. Section 5(1) of the Act provides that one person is a 'member of the same family unit' as another if either is a member of the family unit of the other or each is a member of the family unit of a third person. Section 5(1) also provides that 'member of the family unit' of a person has the meaning given by the Regulations for the purposes of the definition. The expression is defined in r.1.12 of the Regulations to include spouse.

INDEPENDENT INFORMATION

20. An article on the Fiji Government website dated 27 May 2008 describes the opening of Fiji's first Dialysis Centre in Suva in March 2008, established by the Kidney Foundation of Fiji and assisted by donations from both Fiji's Interim Government and foreign donors such as the Indian Government. President of the Kidney Foundation, Dewan Maharaj, claims that the centre "will be able to dialyse about 14 people a day at the very reasonable price of $225 per treatment":

> The opening of Fiji's first kidney dialysis centre has certainly brought a huge sigh of relief for the public especially for those who suffer from chronic kidney disease and their financially stricken families. For many years these unfortunate citizens have been suffering in silence. Their efforts to set up a dialysis centre, which was largely spearheaded by the Kidney Foundation of Fiji, were to little avail. Instead they were forced to spend huge amounts of money travelling abroad for medical treatment. Those who could not afford all the associated costs of travelling were sadly left to literally wither on the quite. However, these people now

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have the Interim Government and the Government of India to thank not only for recognising their plight, but especially, for taking real action.

The Kidney Foundation of Fiji was set up by concerned family members, friends and supporters of the many patients who suffer from kidney disease. Over the years, the Foundation sought support from donor agencies including in particular previous Governments. They tried hard to reason that the cost of sending patients abroad were so overwhelming prohibitive that some people had no choice but to wait until death calls at their doorstep. Precious lives were lost and even for those who were able to travel abroad, many had to return to a life of paying off debts. It was a miserable situation.

One of the main reasons previous Governments were reluctant to support the setting up of a dialysis centre was costs. Firstly, there was the initial cost of setting up the centre and equipping it with both machines and appropriately trained personnel. Secondly, renal machines are said to be among the most expensive of all medical machines. But perhaps the greatest prohibiting cost is the maintenance cost.

Despite these seemingly limiting factors, the Kidney Foundation of Fiji and its supporters worked tirelessly to establish a unit in the country. To them, life was much more precious than the dollar value. In the course of their struggles, they have experienced a rising number of deaths from kidney failure.

Enter the Interim Government

In only a few months since taking on the governance of the country's affairs, the Interim Administration showed its commitment to attending to drastically needy areas. A fresh request from the Kidney Foundation was accepted without hesitation and this resulted in the donation of F$25,000 to assist in the setting up of the first dialysis centre.

Prime Minister Commodore Ratu Voreqe Bainimarama says he was deeply concerned for sometime about people dying from kidney disease.

"My Government wishes to ensure the Kidney Foundation that it will support all initiatives that will allow people with kidney disease to live longer," the Prime Minister said.

While demonstrating its commitment, Government simultaneously called on potential donors to lend a helping hand.

The Government of India was the first of a few other donors to come forward with a donation of $US100,000. In addition to this, the Government of India said it will also assist with the purchase of machines, medicine, equipment and personnel including a Nephrologist, technicians and nurses under the Indian Technical and Economic Co-operation (ITEC) programme. India's contribution was made known by its High Commissioner, Professor Jha during the opening of the dialysis centre in March.

…President of the Kidney Foundation Dewan Maharaj says the Foundation is very grateful to both the Interim Government and the Government of India for their support.

"We are deeply thankful to the Interim Prime Minister, Commodore Ratu Voreqe Bainimarama and the Minister for Health for pushing this initiative. We are also greatly indebted to the Government of India and especially the Indian high Commissioner," Mr Maharaj said.

He said the dialysis centre will be able to dialyse about 14 people a day at the very reasonable price of $225 per treatment. The centre will also be open to tourists and other visitors to the

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country as there are reportedly thousands of people who suffer from kidney disease and who need dialysis treatment.

Mr Maharaj said the Foundation has also received indications of further financial assistance from the Interim Government which could see the further reduction of treatment costs.

"Our ultimate plan is to see the centre fully operational. And one of our goals is to create greater awareness on how people can protect themselves from kidney disease," he said (Chandra, A. M. 2008, 'New Dialysis Centre to Save Lives', Fiji Government website, 27 May http://www.fiji.gov.fj/publish/page_11943.shtml).

21. An interview on ABC Radio Australia on 14 August 2009 describes Fiji's Dialysis Centre which has been operating since March 2008 and has attracted many foreign patients. Although "[t]he centre has eight machines and sees around eight patients a day", it is argued that half of these patients are foreigners, and many locals are unable to afford the $200 per dialysis fee. Head doctor at Fiji's Dialysis Centre, Fimione Voceduadua, advises that "for the uninsured locals who can't afford dialysis treatment, there is nothing that can be done". In addition, Dr Voceduadua claims that there is a waiting list for treatment:

> Many people in the South Pacific suffer disproportionate levels of diabetes and high blood pressure... and that also puts them at increased risk of kidney disease. If they suffer kidney failure, they need dialysis or a kidney transplant to stay alive. Fiji's Dialysis Centre is only a year old but it has already saved the lives of many Fijians. But locals aren't the only people benefiting from the centre; holiday-makers and ex-pats are also taking advantage of the service.
>
> Presenter: Kate McPherson
>
> Speaker: Dr Fimione Voceduadua, senior doctor at Fiji's Dialysis Centre; Dewan Maharaj, President of the Kidney Foundation of Fiji
>
> MCPHERSON: There are several types of dialysis, all of which involves removing waste products and excess fluid from the blood. A person with kidney failure needs dialysis almost every day to stay alive.
>
> Until last year, many Fijians with kidney disease living abroad could not visit their family and friends back home, because Fiji did not have a dialysis machine, that has now changed. Head doctor at Fiji's Dialysis Centre, Fimione Voceduadua.
>
> VOCEDUADUA: Some of them they come to visit relatives, which they don't usually do initially before, but when the centre now is available, now they are able to come across, because they are able to have dialysis, then they go back. There is one gentleman from Australia who comes across, he was working in Nadi, so he comes across to two sessions and he goes back. Some just come when there is a death in the family. They said they are quite happy to see that the centre has been available for them.
>
> MCPHERSON: The centre has eight machines and sees around eight patients a day. Dr Fimione says he has seen more than 50 patients with end-stage kidney disease. But half of them are not local. They come from the United States, Canada and Australia, and he says he's got a waiting list.
>
> VOCEDUADUA: There is one from New Zealand, they will be coming in August, there is one from Canada coming in October, some are on a holiday, some already from Fiji to see their relatives and go back.

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MCPHERSON: Dr Fimione rejects suggestions that foreigners are taking advantage of Fiji's comparatively cheaper dialysis treatment.

VOCEDUADUA: I don't think it's the case. If it was like that, I would have noticed it. They will be here for quite sometime and I would have sensed that they are taking advantage. I don't think they really take advantage of it, no.

MCPHERSON: The President of Fiji's Kidney Foundation, Dewan Maharaj, has also welcomed expats and holidaymakers coming to Fiji for treatment and he says the number is likely to rise.

MAHARAJ: We are non-profit making organisation, so we try to keep it as cheap as we could. The cheapest in Australia is about $400 to $500 I think and that's Australian dollars, and we in Fiji, we charging them $200 per dialysis. Many of them there wanted to come for a break to Fiji. They can do so if they are on dialysis.

MCPHERSON: While wealthy foreigners and expat Fijians can access dialysis, Dewan Maharaj admits the prices being charged are beyond many locals.

MAHARAJ: It's difficult, let me tell you, it's expensive. A country like Fiji, we are developing world. The people who normally have this dialysis problem, some in the urban areas, they can't afford to pay. We are trying to collect some funds here and there. We try to assist them as much as we can.

MCPHERSON: Dr Fimione says for the uninsured locals who can't afford dialysis treatment, there is nothing that can be done.

VOCEDUADUA: Most of our patients once they have been diagnosed, they are just being treated for diabetes and hypertension which we have seen seems to be the most causes of or the two main causes of end-stage kidney disease. There is nothing being done for them.

MCPHERSON: Dr Fimione says he hopes to see the cost of dialysis treatment go down, and more centres opened.

VOCEDUADUA: We all anticipate the cost to go down more and for more help to be given to the centre, so that we can start up other centres in the whole of Fiji so that is available and affordable cost to our local population ('Fiji dialysis centre catering to foreign kidney patients' 2009, *ABC Radio Australia*, 14 August http://www.radioaustralia.net.au/pacbeat/stories/200908/s2655694.htm).

22. In addition, an article in the Vodafone ATH Fiji Foundation's newsletter for April-June 2008 explains that "[f]or dialysis treatment, patients pay $225.00 a session and for most patients three sessions are recommended every week". The Kidney Foundation's honorary secretary, Ms. Resina Koroi, states in the article that "even though it is significantly less than what it would cost for a patient to access this treatment overseas, the treatment is still considered to be expensive in Fiji":

Since its establishment in 2004, the Vodafone ATH Fiji Foundation has continued to make its mark, leading the way in providing assistance to worthy causes that impact the lives of our people.

The Foundation's grant of $140,000 towards the Kidney Foundation of Fiji is one example of the Foundation's role; paving the way toward, and building confidence in, the establishment of Fiji's first Kidney Dialysis Centre.

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As the first local entity to make a financial commitment to the Kidney Dialysis Centre, the Foundation helped create the momentum which led to others in the corporate sector coming forward and pledging support behind what was considered a mammoth project.

In March, all these efforts and contributions were recognised when the Centre officially opened its doors with the help of one of its first patients, renowned journalist and social commentator, Mr. Stan Ritova.

Speaking to Jeevan as he received dialysis, Mr. Ritova was in a jovial mood; greeting old friends who were present at the Official Opening with jokes.

"This is such a blessing for kidney patients in Fiji," he said. "Sickness is a great leveler and this disease affects men and women, adults and children, rich and poor. So many people have had to leave behind their families while they receive treatment in India for example and this centre will at least ensure that patients are close to their support system, their families and friends. Many others have not been so fortunate and passed away before this centre opened."

Kidney Foundation's honorary secretary, Ms. Resina Koroi said the Vodafone ATH Foundation's grant contributed to the purchase of nine haemodialysis machines which patients use before and after kidney transplants and a site rite machine which is used to scan veins.

The centre was opened by the Indian High Commissioner to Fiji, Professor Prabhakar Jha on the 13th of March at the CWM Hospital and is the second such centre in the Pacific after Samoa.

For dialysis treatment, patients pay $225.00 a session and for most patients three sessions are recommended every week to help them cope with life everyday. A session can last up to four hours and is enough to keep their kidneys functioning until their next treatment. The dialysis is a lifelong procedure until the patient receives a kidney transplant that allows their body to function normally.

Ms. Koroi said that even though it is significantly less than what it would cost for a patient to access this treatment overseas, the treatment is still considered to be expensive in Fiji.

The dialysis centre has two qualified dialysis technicians from India to set up the centre, operate the machines and train local staff on the use and maintenance of these expensive life saving equipment ('Vodafone ATH Foundation – Leading the Way' 2008, *Jeevan*, Issue 5, April-June, p. 1 http://www2.vodafone.com.fj/resources/uploads/embeds/file/issue5.pdf).

23. An earlier edition of the same newsletter indicates that prior to the opening of the Dialysis Centre, "[k]idney patients in Fiji [could] only receive peritoneal dialysis which involves the changing of a bag attached to the patient three times a day but which restricts the patient's movements" ('Kidney Dialysis Clinic to open doors in January' 2008, *Jeevan*, Issue 4, January-March, p. 4 http://www2.vodafone.com.fj/resources/uploads/embeds/file/issue4.pdf).

24. A student medical journal article from February 2001 also indicates that during this time, peritoneal dialysis was offered in Fiji, although possibly out of reach for many patients due to cost:

Another common and tragic problem was chronic renal failure, often a complication of diabetes. Haemodialysis and renal transplants are not available in Fiji and can be obtained only at great cost overseas. For the majority of patients who are unable to afford either these or the peritoneal dialysis offered in Fiji, the prognosis is poor. Overall, the basic healthcare facilities are good, but specialist treatment is normally available only to people with

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appropriate financial means (Kuruvatti, J. and Price, H. 2001, 'Life: Planning your elective—Fiji', *Student BMJ*, Vol. 9, February, p. 26 http://archive.student.bmj.com/search/pdf/01/02/life.pdf).

25. In addition, the Daily Hansard of the Parliament of Fiji from 23 November 2001 quotes Dr G. Gounder, who advised that "[p]eople with kidney problems are left to die, because the fluid that we use for peritoneal dialysis is very expensive":

> The Ministry has a limited budget and these people are left to die, Sir. The hemodialysis machines which were functional some years ago, for many years now, they are non-functional and collecting dust in some corner. They need to be brought into service once again (Parliament of Fiji 2001, 'Parliamentary Debates: House of Representatives Daily Hansard', Parliament of Fiji Islands website, 23 November http://www.parliament.gov.fj/hansard/viewhansard.aspx?hansardID=317&viewtype=full).

26. An article in the *Fiji Times* dated 27 June 2009 cites a bio-medical engineer with Fiji's Kidney Foundation, Nehal Kapadia, as stating that "[i]n Fiji, not a lot of people can afford the dialysis treatment, and it's even expensive to have a transplant" ('Bio-engineer joins Hibiscus race' 2009, *Fiji Times*, 27 June http://www.fijitimes.com/story.aspx?id=124377).

27. Similarly, an article dated 6 March 2009 highlights the difficulties faced by local dialysis patients in meeting treatment costs, and states that renal transplant surgery is still currently unavailable in Fiji:

> A 39-year-old father of three from Labasa, diagnosed with kidney failure, needs $40,000 for a kidney transplant in India.
>
> Davendra Kumar Singh was forced to move to Narere in Nasinu to have dialysis treatment three times a week.
>
> The former supermarket sales representative has since struggled to meet the $750-a-week cost for treatment at the Kidney Foundation.
>
> He has been undergoing treatment since last year and has used up all his savings as well as cash given by business houses, relatives and friends.
>
> He found that both his kidneys were failing in August last year when he was diagnosed by doctors in Labasa. Doctor Simione Voceduadua, who is based at the Kidney Foundation, confirmed to the Fiji Times the diagnosis Mr Singh was given. He said Mr Singh needs a transplant if he was to recover but renal transplant surgery is unavailable in Fiji at present.
>
> Mr Singh said he needs to raise $40,000 for the treatment in India.
>
> "I would love to get treated so I could have time with my three children who're in primary school and my wife, so I'm banking on the generosity of the public to help me get a transplant," Mr Singh said (Ratubalavu, U. 2009, 'Kidney patient seeks help', *Fiji Times*, 6 March).

28. An article on the Fiji Government website dated 10 August 2009 quotes Mr Dewan Maharaj, President of the Kidney Foundation for Fiji, who claims that "the [Dialysis] Centre now needs a bigger space to accommodate the increasing demand for dialysis treatment", including large demand from foreign patients:

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The Kidney Dialysis Centre in Fiji officially opened in 2008 by the Prime Minister of Fiji Commodore Voreqe Bainimarama is now attracting kidney patients from as far as Canada and London and the demand for the dialysis treatment is increasing day by day.

This was confirmed by President of the Kidney Foundation for Fiji (KFOF) Mr Dewan Maharaj who said tourists now prefer Fiji as their visit destination not only because of the natural surroundings but because the Dialysis Centre here provides them with better services at a reasonable costs.

"Everyday the demand is increasing, we are getting quite a lot of tourists who are coming to Fiji especially those who are the dialysis dependent people in Canada, America, New Zealand and even from London. These are Fiji residents who have migrated however upon hearing about the dialysis facilities available they return for treatment," Mr Maharaj said.

He said the Centre has also provided Dialysis treatment to patients from the Pacific Islands and these patients prefer Fiji rather than other foreign countries because of the reasonable prices offered here for the treatment.

"Now every one time if you walk in our centre there is somebody from overseas having dialysis and we have opened up our services to the Pacific Islanders. We have Tuvaluan people those who were getting dialysis in New Zealand they were paying huge amount of money but now we provide same kind of services in Fiji to them," Mr Maharaj said.

However, he said the Centre now needs a bigger space to accommodate the increasing demand for dialysis treatment.

"Now we are short of the space the wards are running short now and we have to run services in the weekends as well. I only hope that I need a bit of assistance from the Ministry of Health to give us a bit bigger space so we can cater for the 12 bed dialysis.

For instance Samoa has about 100,000 population and they have a 15 bed dialysis and they running full time."

Mr Maharaj said the Centre has also started training local nurses and doctors to minimise the costs and also empower the labour needed to accommodate the increasing demand.

"Within this year the number of foreign patients will increase and we have started to train our own nurses and by the end of this year or mid June next year we will have developed our own local nurses and we looking at having our own doctors now," he added ('Dialysis Centre attracts foreign patients' 2009, Fiji Government website, 10 August http://www.fiji.gov.fj/publish/page_15641.shtml).

29. Similar information regarding foreign patients seeking treatment at Fiji's Dialysis Centre was reported by the *Fiji Times* on 12 August 2009. The article claims that the Centre to date has 21 patients, however lacks fulltime nephrologists:

FIJI'S dialysis centre for kidney patients is attracting a lot of former Fiji residents and tourists with kidney problems because it is cheaper.

It has been revealed that former Fiji residents living in Australia, New Zealand, the United States, Canada, England and parts of Europe were seeking treatment at the centre.

"These are former Fiji residents who could not return to Fiji because there was no dialysis centre here but now they can come back because there is a centre here," Mr Maharaj said.

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"And of course there are tourists who found out about the centre through the media and other means so they come to the centre to be dialysed while on holiday here," he said.

Opportunities are also open to neighbouring Pacific Island countries.

Kidney Foundation of Fiji president Dewan Maharaj said local and overseas demand for treatment continued to increase because of reasonable costs and the service provided.

There is a difference of about $500 in the cost of the same treatment abroad.

With two Canadian patients when it started in March last year, the centre to date has 21 patients.

"Last month, we had two from the States and one from Adelaide (among other patients) who were dialysed at the centre because they found it reasonable compared to what they pay back home."

Yesterday, the centre diagnosed 12 Fiji residents, and six Tuvaluans who are former Auckland citizens.

However, Mr Maharaj said the only problem was fulltime nephrologists.

"We are talking to the Ministry of Health about it. As it is, we have only Dr Jo Malani who comes and diagnose patients when he is available" (Vula, T. 2009, 'Dialysis centre draws patients', *Fiji Times*, 12 August http://www.fijitimes.com.fj/story.aspx?id=127203).

30. An article in the *Fiji Times* dated 9 August 2009 describes a $14,000 donation made to the Kidney Foundation of Fiji by the Finance Ministry to assist "the development of the foundation":

> THE Kidney Foundation of Fiji received a $14,000 boost from the Finance Ministry. Foundation president Dewan Maharaj said the donation would assist their fundraising drive and the development of the foundation. Commodore Voreqe Bainimarama opened the foundation last year with a $25,000 to assist in the setting up the dialysis centre ('Briefs' 2009, *Fiji Times*, 9 August http://www.fijitimes.com/story.aspx?id=127019).

31. In addition, an article in the *Fiji Times* on 1 August 2008 claims that following receipt of a donated car, the Kidney Foundation were able to increase their efficiency and effectiveness in providing dialysis treatment services. However, concerns remained over how to provide sufficient accommodation for patients at the centre:

> THE Kidney Foundation of Fiji is now able to deliver faster and effective service.
>
> This follows the donation of a car for foundation work.
>
> Foundation president Dewan Maharaj said they were in need of a vehicle since day one of their operations.
>
> "I was using my own vehicle for the runs that were needed," he said.
>
> Mr Maharaj said patients were often transported by staff who used their personal vehicles.
>
> "The new vehicle will also be used to carry items from our bulk in Belo Street to the dialysis centre," he said.

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He said the foundation would be able to save funds with the vehicle.

The car was donated by local Toyota dealer, Asco Motors.

Mr Maharaj howeversaid [sic], the foundation was more concerned about how to accommodate for its incoming patients at the dialysis centre.

The centre he said attended to about 10 dialysis patients a day.

Mr Maharaj said past efforts to setup a centre were hindered by costs constraints.

"If every family in Fiji gives at least $20 in a year, then we will be in a good position to help the kidney patients," he said ('Car firm boosts kidney project' 2008, *Fiji Times*, 1 August http://www.fijitimes.com/story.aspx?id=96684).

32. The proposed establishment of a second dialysis treatment centre planned by the Ministry of Health was outlined in a March 2008 article:

THE Ministry of Health plans to set up a dialysis centre outside the capital to cater for kidney patients who live far from it.

This follows the setting up of a dialysis centre at the Colonial War Memorial Hospital by the Kidney Foundation of Fiji.

The centre will allow patients to undergo dialysis in Fiji instead of raising and paying thousands of dollars to pay for travelling overseas for treatment.

Interim Prime Minister Commodore Voreqe Bainimarama said he would do everything possible to help the centre continue to function and possibly expand its services to the West and to the North in Vanua Levu.

Commodore Bainimarama commended the Kidney Foundation for its effort, saying it would save a lot of lives.

"I fully support the work done by the Kidney Foundation of Fiji and the kidney dialysis centre which has just brought in new dialysis machines for kidney patients," he said.

"I have also visited the centre twice and am very grateful for the wonderful work done so that kidney patients in Fiji can benefit from the new dialysis machines."

The interim PM made the comment in a letter to the International Kidney Foundation.

Commodore Bainimarama congratulated the foundation for launching the international campaign to increase awareness on the importance of kidneys to our lives and to make people realise that kidney diseases are common and harmful but can be treated.

He said Fiji's main challenge was a general ignorance of kidney and kidney diseases and the lack of health facilities for the treatment of kidney patients which result in more than 200 deaths every year from kidney-related diseases.

Commodore Bainimarama donated last year to the Kidney Foundation of Fiji to help set up the first dialysis centre in the country.

Previously, families of patients had to look for money for treatment in New Zealand (Lalakato, A. 2008, 'Plan for another dialysis centre', *Fiji Times*, 15 March http://www.fijitimes.com/story.aspx?ref=archive&id=83910).

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33. In addition, the April-June 2008 Vodafone ATH Fiji Foundation newsletter cited above claims that "[p]lans are also in place to open up dialysis centres in Lautoka and Labasa to make these services available to those in the rural areas and those who cannot travel regularly to Suva" ('Vodafone ATH Foundation – Leading the Way' 2008, *Jeevan*, Issue 5, April-June, p. 1 http://www2.vodafone.com.fj/resources/uploads/embeds/file/issue5.pdf).

34. Although no evidence of existing rural dialysis centres was found in more recent sources, an article on health care reform for 2009 quotes Fiji's Minister of Health, Neil Sharma, who explains that "[r]egional Diabetic/Renal centers will become operational by the third quarter of 2009" (Sharma, N. 2009, 'Healthcare Reform – 2009', Fiji Ministry of Health website, 11 August http://www.health.gov.fj/Articles/august09/august0911.html).

35. A statement from the Permanent Secretary of Fiji's Ministry of Health in 2008 claims that although health services are provided "at either free or at very minimal costs to the public...funding for health remains an ongoing challenge in Fiji". However, the introduction of renal dialysis treatment facilities is noted as a positive development in health care:

> Health and Social services in Fiji are accessed and obtained at either free or at very minimal costs to the public, at the point of delivery. As been mainly a government public health service, funding for health remains an ongoing challenge in Fiji. On an average, Fiji spends around 2.8% of GDP and 9% of whole of government budget on health care and service. Whilst the magnitude of the allocations appears small when compared to other developing countries, it is worth noting that Fiji has a favorable health status outcomes and indicators with good success in its public health programmes.
>
> For clinical services, the recent development in this area worth noting include the introduction of renal dialysis services in partnership with a Non Government Organization, the Kidney Foundation of Fiji. Furthermore, the ongoing development in the area of cardiac catherisation laboratory is new and will definitely improve our care for cardiac patient in 2009 and beyond. Nevertheless our dependence on overseas referral of complicated clinical cases will continue and be offered to the population. Overseas referral accounts for around 0.56% of the total budget of the Ministry (Waqatakirewa, L. 2008, 'Statement of Permanent Secretary', Fiji Ministry of Health website http://www.health.gov.fj/Minister/minAdd2008.html).

36. In addition, an article dated 20 December 2008 indicates that the Fiji Government plans to implement measures to improve health services more generally, based on a report by the National Council for Building a Better Fiji (NCBBF):

> YESTERDAY the people of Fiji were informed, via a press release authorised by the interim Prime Minister's Office, that the President Ratu Josefa Iloilo had given the go-ahead for implementation of the People's Charter.
>
> In the statement, it was said that the President "conveyed his full concurrence" with what was handed to him in the Report of the National Council for Building a Better Fiji (NCBBF).
>
> The report had set out details on the preparation, adoption and implementation of the People's Charter for Change, Peace and Progress.
>
> We were told in the press release that "His Excellency studied the Report which was formally presented to him on Monday 15th December 2008".
>
> We were also told that he asked the interim regime to start implementing the NCBBF recommendations.

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But what exactly has the President agreed to set in motion?

The Report that the President has granted blanket approval to sets out several measures that will be implemented under 11 separate pillars of the NCBBF's People's Charter.

… **Pillar 10**:

* Increasing health financing to 7 percent of GDP within the next 10 years

* Other options for financing such a social health insurance

* Establishing a Health Policy Commission

* Centralising health decision making and decentralising service delivery

* Increasing private sector health service delivery (Foster, S. 2008, 'What Iloilo approved', *Fiji Times*, 20 December http://www.fijitimes.com/story.aspx?id=109386).

CONSIDERATION OF CLAIMS AND EVIDENCE

37. The first named applicant (the applicant) submitted claims for protection. The second named applicant did not make her own claims for protection. For the following reasons, the Tribunal has concluded that the decision under review should be affirmed.

38. The applicant provided the Department with a copy of the identification page of his Fijian passport. It indicates that he was born [in] 1951 in [Town 1], Fiji. The Tribunal is satisfied that the applicant is a national of Fiji and of no other country. The Tribunal has assessed the applicant's claims against his country of nationality, namely Fiji.

39. On the evidence before it, including the applicant's claims that he is not a citizen or national of any other country or that he has the right to enter and reside in any other country other than Fiji, the Tribunal is satisfied that the applicant is not excluded from Australia's protection by s.36(3) of the Act.

40. The applicant made the following claims in his protection visa application (in answers to questions 42-48):

[42] To visit my two children who are both Citizens of Australia.

[44] From 2001 to 2007 we had been badly treated by Fijian neighbours at our location in [Town 2], Fiji. When our two children were living with us we were subjected to some violence and robberies all the time but because our children could protect us, we were somehow protected. However, our last [child] left Fiji to migrate to Australia in 2001 I which is when the Fijian neighbours started hassling us more and commenced badly treating us to a stage where we had to give away our house at a very cheap price. My employment was made redundant and I could also never go back to work because of hatred by the Fijians after the Military Coup. My youngest [sibling's] house was completely burnt down by the Fijians and my younger [sibling] and his family were taken away and left in a different camp for their safety.

[45] We have had no house since 2007 and have been forced to live with friends and fami lies. The last family with whom we stayed cannot provide us accommodation any more. This means we would have to live in Fijian Village surrounds but even this is not possible because we don't have any money. The Government will not give us

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any housing and the Fijians will treat us badly, will hassle us, beat us. Worst of all due to the fact that I have a kidney problem which is, according to the Australian doctors, at a very acute stage. This was not advised to me by my Fiji Doctors and they advised that while I had a slight kidney abnormality, I was ok to live my normal life. This is not correct as when I arrived in Australia and had some complications after which I attended to Australian doctors who instantly diagnosed me with Chronic Kidney failure and suffered a major heart attack here. Worst of all, I have been advised by my doctor that I can't survive without a Kidney Dialysis and therefore the doctors here have commenced me with immediate Dialysis 2 to3 times a week. If I go back to Fiji, I am very worried that due to the medical facilities and lack of proper dialysis facilities and due to my current diagnosis of kidney in addition to heart problems, I will be killed in Fiji without any one realising it. The doctors could not diagnose me and upon my complains many times, the doctors would not let me discuss to higher authorities and government bodies and as such I was lucky to be diagnosed in Australia. I am very worried that if I go back to Fiji the doctors will do the same and I will be killed. In July 2013, I was here in Australia and at [Regional Hospital 2] the doctors diagnosed me with Chronic Kidney Failure and advised to commence dialysis immediately. I was on a holiday here in Australia so decided to go back to Fiji. Upon arriving in Fiji, I provided the letter from [Regional Hospital 2] to my doctor who, upon checking for blood and other things, he decided that there was no need for Dialysis so I relied on his advice. This I think was due to the doctor knowing that there is only one facility for Dialysis in the whole of Fiji and the doctor was bother less about my health.

[46] The Fijian Neighbours/Native Fijians will still hassle me, beat me and torture me being without house and accommodation. Also more importantly the current Fiji medical systems, unqualified doctors who will not attend to my sickness and I will be killed. Furthermore there is only one Kidney Dialysis machine in Fiji and the system there cannot cope with the dialysis from the neck. The hospital won't look after me for Dialysis and furthermore, due to my heart problems, I will be further ham1ed by the same doctors/hospital-unqualified doctors who will basically KILL me. I will have a SILENT death without even my only two children in Australia knowing about it.

[47] Firstly, I have no house and no money, I will be subjected to cruelty by the Native Fijians and will have no accommodation provided to me. Secondly and more importantly, I will die because the medical system and the doctors are unqualified and the medical provision is not to a standard as I was never diagnosed of acute kidney and I was never advised by doctors that I needed Dialysis. I was never diagnosed by Fiji doctors that I have a chronic kidney failure and heart disease. Even when I gave the Fiji doctor my letter from [Regional Hospital 2], it was not taken as seriously and the doctor declined me to go on Dialysis.

[48] The Government will not give me any housing or accommodation. The Governme nt of the day and the Fiji authorities are not up to a standard and pre matured deaths are not highlighted to the public. I know the government of the day will not assist me with any accommodation and worst of all when the doctors badly treat me, I will have no option to proceed to higher authorities.

41. The applicant provided the Tribunal with a copy of the delegate’s decision. This sets out his Australia immigration history as follows: [Visa and travel details deleted.]

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42. The applicant also provided the Tribunal with the following documents:

- Medical report from Dr [A] dated [in] October 2014, confirming that the applicant requires frequent dialysis. It also noted that the applicant required urgent dialysis upon arrival from Fiji in November 2013;
- Various articles relating to the provision of dialysis in Fiji;
- Various articles relating to violence against Indo-Fijians in Fiji;
- Article from 2000 relating to the burning down of a house.

43. At the hearing, the Tribunal asked the applicant why he applied for a protection visa. The applicant stated that it was not safe in Fiji. He was sick as well.

44. The Tribunal asked the applicant why it was not safe in Fiji. The applicant stated that he used to live with his extended family. In the 2000 coup, one of his [sibling's] had his house burnt down. The community started targeting the extended family. He could not travel on a bus without being targeted. His [sibling] lived in a community house for a year. The applicant no longer has his own home. He sold it cheaply to his [sibling's] son as he had no-one to look after him in Fiji. He used the [money] from the sale of his house to come to Australia and return to Fiji every 3 months. His son has supported him once he became sick.

45. The applicant confirmed that he applied for a Parent Migrant visa [in] February 2007. This visa is still in the queue.

46. The applicant also confirmed that since he had lodged the Parent Migrant visa, he had returned to Fiji after visiting Australia on [many] occasions. He stated he was scared so he kept coming back to Australia.

47. The Tribunal asked the applicant if he was scared, why did he keep going back to Fiji. The applicant stated that he was required to go back every 3 months under the conditions of his visa.

48. The Tribunal put to the applicant that if he held a subjective fear for his safety, he might have been expected to lodge a protection visa application on one of his earlier visits. The applicant stated that he was not that sick. It is only since November 2013 that he has been on dialysis.

49. The Tribunal put to the applicant that it appeared to be his need for dialysis, rather than any fear, that prompted his protection visa application. The applicant stated that he used to go back to Fiji, but would only stay 2 or 3 days. However, now he is sick and cannot travel anymore. He was admitted to hospital for [several weeks] in November 2013.

50. The Tribunal again put to the applicant that his need for dialysis, coupled with his failure to lodge a protection visa application earlier, might cause it to conclude that he did not have a

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subjective fear for his safety in Fiji. The applicant stated that he was able to travel in those days so he did not apply. He came and went back. However, he cannot travel anymore.

51. The Tribunal asked the applicant about his ability to obtain dialysis in Fiji. The applicant stated that there were only 2 hospitals offering dialysis. It was difficult to obtain medical treatment.

52. The Tribunal put the gist of the independent information (set out above) to the applicant. The applicant agreed with this.

53. The Tribunal put to the applicant that if he was denied dialysis, it would be on the basis of lack of resources in Fiji. There did not appear to be a Convention reason, or any intentional on the part of the Fijian government, to withhold care from him. The applicant stated that he had said all he wanted to say.

54. The Tribunal asked the applicant where he stayed when he went back to Fiji. The applicant stated he stayed with relatives. However, he was only there for short periods. He could not stay with them indefinitely.

55. The Tribunal put to the applicant that it appeared that the reason he had no accommodation in Fiji was because he used the proceeds of the sale of his house on travel to Australia, rather than to purchase another house. The applicant agreed.

56. The applicant stated that there was nothing else he wished to add.

57. [The applicant's son] gave evidence that he was a supporter of the Labor government and would hold religious gatherings in their house. He gave evidence at length about how his uncle's house was burnt down in 2000, and on the difficulties experienced by Fijian Indians. He moved to Australia [in] 2002. The Tribunal asked him when he was last in Fiji. [He] stated that he went back to Fiji for a wedding in [2014], but stayed in a resort. [He] also made comments on the poor quality of health care in Fiji.

58. [The first-named applicant's] father-in-law gave evidence that the applicant's neighbourhood had deteriorated. The Tribunal asked him when he was last in Fiji. [He] stated that he was last in Fiji in [2014], and had travelled to Fiji every 3-6 months prior to that.

Assessment

59. The Tribunal does not accept that the applicant holds a subjective fear of persecution on account of his race, religion or imputed political opinion arising from his son's activities. It is clear from the applicant's evidence that his protection visa application was prompted by a deterioration in his medical condition. Prior to this, he returned to Fiji from Australia on [many] occasions since he lodged an application for a Parent Migrant visa in 2007, and on a further [several] occasions before that. A perusal of the dates set out above reveals that the applicant's evidence that he stayed only 2 or 3 days on his return trips to Fiji is not correct. Some stays have been for several months. This behaviour is not consistent with a person holding a subjective fear of persecution. Had the applicant held a subjective fear of persecution on account of these reasons, the Tribunal would have expected him to apply for a protection visa well before the deterioration of his medical condition.

60. The Tribunal notes that the High Court held in *Chan v MIEA* (1989) 169 CLR 379 that 'well-founded fear' involves both a subjective and objective element. In *Iyer v MIMA* [2000] FCA

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1788 (Heerey, Moore & Goldberg JJ, 15 December 2000) the Full Federal Court affirmed that once the Tribunal rejects an applicant's claim that there is a subjective fear, it is not necessary to determine whether the non-existent fear was well-founded. On this basis the Tribunal finds that the applicant does not hold a subjective fear of persecution on account of his race, religion or imputed political opinion arising from his son's activities. Accordingly, the Tribunal finds that the applicant does not have a well-founded fear of persecution on this basis.

61. The Tribunal finds that there is not a real chance that the applicant would be denied medical treatment for a Convention reasons. In *Chan v MIEA*, McHugh J stated that:

> The notion of persecution involves selective harassment ... 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, she is "being persecuted" for the purposes of the Convention.[1]

62. The independent information does not indicate or support the proposition that treatment is withheld from individuals for a Convention reason but more likely due to the lack of facilities and staff. This was not disputed by the applicant at the hearing. In particular, no claims were made that the applicant would be denied medical treatment based on his race.

63. The Tribunal does not accept that the applicant would be denied accommodation for a Convention reason. The reason he does not have accommodation in Fiji is that he spent the proceeds of the sale of his house on repeated travel to Australia. Had he retained some of these funds, he would be able to afford housing. In any event, some of the applicant's stays in Fiji since he lodged an application for a Parent Migrant visa in 2007 have been for several months at a time. Despite the applicant's evidence at the hearing that he could only stay with relatives for short periods, based on his past experience the Tribunal finds that the applicant would be able to stay with relatives for longer periods or indefinitely.

64. After considering all the evidence the Tribunal is not satisfied that the applicant faces a real chance of serious harm in the reasonably foreseeable future in Fiji for one of the reasons specified in the Refugees Convention. Therefore the Tribunal is not satisfied that the applicant has a well-founded fear of persecution for a Convention reason.

Complementary protection

65. The Tribunal has considered whether there are substantial grounds for believing that, as a necessary and foreseeable consequence of the applicant being removed from Australia to Fiji, there is a real risk that he will suffer significant harm as defined in s.36(2A) of the Act: the applicant will be arbitrarily deprived of his life; or the death penalty will be carried out on him; or he will be subjected to torture; or to cruel or inhuman treatment or punishment; or to degrading treatment or punishment, all as defined in s.5(1) of the Act.

66. In relation to his medical condition, the Tribunal has accepts that the applicant suffers from medical conditions requiring frequent dialysis. The Tribunal accepts that if the applicant

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[1] *Chan v MIEA* (1989) 169 CLR 225, per McHugh J at 429-430. His Honour supported this proposition by reference to *Periannan Murugasu v MIEA* (unreported, Federal Court of Australia, 28 July 1987), where Wilcox J had stated at 13 '[t]he word "persecuted" suggests a course of systematic conduct aimed at an individual or at a group of people. It is not enough that there be fear of being involved in incidental violence as a result of civil or communal disturbances'.

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returns to Fiji, there would likely be a deterioration in his health as a result of difficulties in accessing medical care in Fiji.

67. As noted above, the terms 'torture', 'cruel or inhuman treatment or punishment', and 'degrading treatment or punishment' are exhaustively defined in s.5(1) of the *Migration Act*. In the case of 'torture' and 'cruel or inhuman treatment or punishment', the definitions each require "an act or omission by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person". In the case of 'degrading treatment or punishment', the definition requires "an act or omission that causes, and is intended to cause, extreme humiliation which is unreasonable".

68. The Tribunal does not accept that severe pain or suffering or extreme humiliation would be inflicted upon the applicant intentionally by any person. On the basis of the independent information, the Tribunal finds that any difficulty in accessing medical care in Fiji is due to insufficient resources to meet the needs of the population. The Tribunal does not consider that any pain and suffering experienced by the applicant as a result of his inability to access any aspect of her medical treatment in Fiji would be intentionally inflicted upon him by the Fijian authorities or any other person. Further, the Tribunal does not accept that severe pain or suffering that the applicant may suffer as a result of difficulties accessing medical treatment would be inflicted upon him for any one of the five specified purposes set out in the definition of torture contained in s.5(1).

69. Similarly, the Tribunal does not accept that there would be any intention on the part of the Fijian authorities or any other person to deprive the applicant of accommodation. Any lack of accommodation would be due to the fact that he has spent the proceeds of the sale of his house on repeated travel to Australia. In any event, as set out above, the Tribunal has found that the applicant would be able to stay with relatives on a long term basis.

70. The applicant also claimed that he would suffer harm on account of his race, religion or imputed political opinion arising from his son's activities. While the Tribunal has found he does not hold a subjective fear on account of these reasons, it is also not satisfied that there is a real risk that he would suffer harm on this account. The applicant pointed to the burning down of his [sibling's] house in 2000 and harassment by their neighbours from 2001 to 2007. However, the applicant was unable to point to any harm that had occurred to him since 2007 during the periods he was present in Fiji and staying with relatives. As the Tribunal has found he would be able to stay with relatives in the future, and as he has not been able to point to any harm in the past 7 years, the Tribunal is not satisfied that there is a real risk that he would suffer harm on account of these reasons in the reasonably foreseeable future.

Conclusion

71. For the reasons given above the Tribunal is not satisfied that any of the applicants is a person in respect of whom Australia has protection obligations. Therefore the applicants do not satisfy the criterion set out in s.36(2)(a) or (aa) for a protection visa. It follows that they are also unable to satisfy the criterion set out in s.36(2)(b) or (c). As they do not satisfy the criteria for a protection visa, they cannot be granted the visa.

Ministerial Intervention

72. At the hearing, the Tribunal canvassed the possibility of the applicant seeking Ministerial intervention. The Tribunal has accepted that the standard of care received by the applicant in

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Fiji would be lower than that in Australia. However, the Tribunal considers it would be appropriate for the applicant to test his eligibility for a Medical Treatment visa before seeking Ministerial intervention.

DECISION

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

Glen Cranwell
Member

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