

**1219418 [2013] RRTA 444 (2 July 2013)**

**DECISION RECORD**

**RRT CASE NUMBER:** 1219418  
**DIAC REFERENCE:** CLF2012/110170  
**COUNTRY OF REFERENCE:** Fiji  
**TRIBUNAL MEMBER:** Megan Deane  
**DATE:** 2 July 2013  
**PLACE OF DECISION:** Sydney  
**DECISION:** The Tribunal affirms the decision not to grant the applicants Protection (Class XA) visas.

Any references appearing in square brackets indicate that information has been omitted from this decision pursuant to s.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 dependent.

## **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 are citizens of Fiji, applied to the Department of Immigration for the visas on [date deleted under s.431(2) of the *Migration Act 1958* as this information may identify the applicants] June 2012 and the delegate refused to grant the visas [in] November 2012.
3. The applicant wife and applicant husband appeared before the Tribunal [in] June 2013 to give evidence and present arguments. The applicant child did not attend the hearing.
4. The applicants were represented in relation to the review by their registered migration agent.

### **CONSIDERATION OF CLAIMS AND EVIDENCE**

#### **Summary of claims**

5. The applicant wife left Fiji because she and her family faced discrimination and harm due to their ethnic identity as Indo-Fijian. The applicant wife claimed that she was particularly targeted for supporting the Fiji Labour Party. Her family traditionally supported the Fiji Labour Party because the Fiji Labour Party works for the rights of Indo-Fijians.
6. Her family were squatters and their place was surrounded by native Fijians. They threatened the family to make them leave because they claimed that Fiji belongs to them and they did not have any right to stay there. They were attacked and forced to leave their settlement. She feared that she would be targeted for supporting the Fiji Labour Party and holding a political opinion against the military government.
7. She feared threats and harm in Fiji due to race (Indo-Fijian), religion (Hindu) and for holding a political opinion against the present military government.
8. Due to her ethnicity, religion and political opinion, she would be targeted and harmed and might be killed. She also feared that her family would be targeted and harmed.
9. The delegate refused the application on the basis that the delegate was not satisfied that the applicant wife's political profile was sufficiently high for her to face a real chance of harm for her political opinion or for reasons of overstaying her visa in Australia or seeking asylum. In relation to the applicant wife's claims on the basis of race, the delegate found that the applicant had received the protection of the authorities of Fiji in the past and that such protection would not be withheld for a Convention reason. The delegate also found that state protection would be available in relation to her claims on the basis of religion and membership of a particular social group. The delegate also was not satisfied that there was a real risk that the applicant wife would suffer significant harm if she returned to Fiji.

## **The relevant law**

10. In order to meet the criteria for a Protection visa, the applicants must be persons in respect of whom Australia has protection obligations. In the applicants' case, there are three ways that they might meet this requirement.
11. Firstly protection obligations will exist if they are found to meet the definition of a refugee 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): s.36(2)(a) of the *Migration Act 1958* (the refugee criterion). A refugee is relevantly defined in the Refugees Convention as any person who, owing to well-founded fear of being persecuted for reasons 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.  
  
Secondly, if the Tribunal finds that the applicants do not meet the refugee criterion, they might nevertheless be persons in respect of whom Australia has protection obligations if there are substantial grounds for believing that, as a necessary and foreseeable consequence of the applicants being removed from Australia to Fiji, there is a real risk that they will suffer significant harm: s.36(2)(aa) ('the complementary protection criterion'). 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, which include 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)(c) of the *Migration Act 1958*.
12. Thirdly, the applicants, as members of each other's family unit, will be persons in respect of whom Australia has protection obligations if one of the applicants meets the refugee criterion or the complementary protection criterion.
13. A further explanation of the law which applies to these criteria is set out in the attachment to this decision.

## **Issues**

14. The Tribunal discussed the applicants' claims with the applicant wife and applicant husband at a hearing. The issues which need to be considered by the Tribunal for the purposes of this review are:
  1. Under the refugee criterion: whether the applicant or the applicants has/have a well-founded fear of persecution for a Convention reason on return to Fiji; and if not
  2. Under the complementary protection criterion: Whether there are substantial grounds for believing that, as a necessary and foreseeable consequence of the applicants being removed from Australia to Fiji, there is a real risk that any of them would suffer significant harm.

## Findings and reasons

### 1. Under the refugee criterion: whether the applicant or the applicants has/have a well-founded fear of persecution for a Convention reason on return to Fiji

#### *The applicant wife*

15. The applicant wife confirmed that she was speaking on behalf of the applicant child at the hearing. The applicant husband stated that he had his own claims.

#### Political and community activities

16. In her written evidence to the Department, the applicant wife stated that in January 1999 she had joined the Fiji Labour Party (FLP) and was involved with administration work. Her father was also actively involved with the FLP. She was a polling and counting agent during the elections as well as part of the policing community network. After the 2000 Military coup, the FLP was forced to stop all of its activities because the military government was against their ideals. In 2005 the FLP re-grouped and formed a new political party called the National Federation Party (NFP). Her father was still actively involved with the NFP. Her father received a lot of abuse from the indigenous Fijians because of his involvement with the NFP.
17. The applicant wife told the Tribunal that in 2000 she started being active with the FLP; undertaking administration, registration, and translating from Hindi and Fijian about the party. Her father had always been active with the NFP and the applicant had accompanied him. They had helped [name deleted] (FLP) in his campaign because he was a relative. She designed IDs for the party in 2006. The 2006 election was fair. SDL won fairly and then there was another coup which brought instability.
18. The applicant wife stated that she feared being tortured because she believes in free speech. The Tribunal noted that there were no reports of low profile FLP supporters being detained or tortured. The applicant wife stated that it was happening but it was not reported. There were Fijian guys threatening her house and throwing stones at her house in 2008 because they believed that she had lured them to the FLP. The Tribunal asked whether the applicant wife thought that they were throwing rocks because of her political opinion. The applicant stated that it was also because of the PCN. Many of the indigenous Fijians had lost their houses because of the relocation.
19. The applicant wife stated that she would be harmed by the military officers and the police. Any time she made a complaint to the police it was not taken seriously. Even if she was a victim she was treated like she was the offender.
20. She was with the PCN (People's community network) from 2008 – 2012 and she was with the policing community network from 2006 – 2009. After the hearing, the applicant provided a photograph of herself when she was involved with the policing community network.
21. She had also been slapped by a Fijian woman at work and poked by Fijian boys as she was walking by (these incidents are considered further below). As a result she started moving away from politics but she continued with her work, because her dad told her that she had to be part of it. She tried to leave but they saw that she had stood up for the party.

22. If she goes anywhere, she would still be identified as a person holding a political opinion. No one is allowed to have a political opinion. The Tribunal noted that this did not accord with the country information before the Tribunal.
23. In relation to the elections in 2014, the applicant wife stated that people had been beaten up. If they found out that she had a political opinion and that she had been absent from Fiji for this long, they would think that she must have done something against the government.
24. The Tribunal noted that the FLP and the NFP had both registered for the election. Although Mahendra Chaudry had spoken out, there was no evidence to indicate that there was a real chance that grassroots supporters would be harmed. The applicant stated that Mahendra Chaudry has the money to leave any time.
25. The Tribunal noted that the country information appeared to indicate that Fiji was heading towards a democratic government. The applicant stated that no one could guarantee that. If the government is elected Fiji would remain in the hands of the regime. Elections had previously been scheduled for 2009, 2010 and now in 2014. The election still might not go ahead. Things might change.
26. The Tribunal noted that the applicant was not a candidate and appeared to have a low profile. Her father also was not a candidate. The applicant stated that she would be targeted because she's being monitored. She spoke on behalf of the parties. She might be taken in for questioning. Mahendra Chaudry is already under the spotlight.
27. The applicant told the Tribunal that she had not ever been detained by the authorities in Fiji. She and her father were threatened in 2008 when they were doing the party's policy. Two men came and told him to stop what he was doing. They did not stop but she did very little with her dad after that, she designed IDs and worked behind the scenes.
28. She also worked in administrations and accounts for [employer deleted] from 2010 until she came to Australia. Prior to that she worked in publications in accounts and administration.
29. She had never been put in gaol or tortured by the regime, but she was not treated well by the police when they were rude to her when they questioned her.
30. In written submissions to the Tribunal, the applicant wife also referred to her work with Father Kevin Barr in Fiji. She included an article from *The Australian* newspaper dated 18 January 2013 which reported that Father Barr had been refused an extension to his visa in Fiji because Commadore Bainimarama had taken offence when Father Barr had joked in a letter to the Fiji Sun that the Union Jack on the Fiji flag would be replaced with a small version of the Chinese flag to show Fiji's new allegiance to China.
31. At the Tribunal's hearing, the applicant wife stated that whatever Father Barr did was monitored. She was part of his community network. They used to go to social events as well. He is now in the spotlight. He wrote the letter as a joke. The regime had sent him abusive texts. He mentioned to her dad that her dad might be monitored. He told her father to change his email address and that he might be monitored because he is also a retired policeman.

32. The Tribunal put to the applicant wife that Kevin Barr was asked to leave Fiji as a result of the letter that he wrote to the Fiji Sun, not because of his work with the People's Community Network, and there is no information to suggest that anyone who might have worked with him has been or would be targeted. He had previously been a Bainimarama supporter.
33. The applicant wife stated for Father Barr, the letter had been a joke but the regime found it offensive. The government had been funding the PCN but it might stop. The Tribunal noted that the only ramification was that the regime was not renewing Father Barr's visa; no serious harm had been inflicted on him. The applicant wife stated that he was a big man, everything would be known. If she came to harm, it would be behind the scenes. Bainimarama will stand behind the police.
34. At the hearing, the Tribunal noted that the incidents which were described by the applicant occurred in 2008 and 2009 (and are considered further below) however the applicant wife and her family did not leave Fiji until 2012 so it might not appear that the situation was serious. The applicant wife stated that they had been saving up and considering whether to move elsewhere. They thought about moving to Labasa or somewhere else that was safe. They thought they might be going from the frying pan to the fire. It might be worse. She was thinking of her [child]. They saved up and her uncle came in 2011 and that they should come to Australia as a democratic country. They realised that they took the wrong step in overstaying their visa. When DIAC came to talk to them they lodged the protection visa because they had been in this situation.
35. At the end of the hearing, the applicant wife stated that she was still afraid of returning due to the present situation. Most cases are reported to the police and other people find out but in some cases things happen which are not reported. She knows that she is grassroots but that background has created a profile as a person with a political opinion against the regime and if she returns it will affect her and her family.
36. The Tribunal noted that there were no reports of NFP and FLP supporters being subjected to harm. The applicant asked whether the Tribunal had the report which stated that in March 2013 members the FLP had been arrested after a grog session. The Tribunal noted that there were reports of an FLP gathering in July in 2012 which was broken up for allegedly holding a political meeting without a permit and even then they were released without being charged.<sup>1</sup> The Tribunal noted that the USDOS Human Rights Reports stated that a permit for meetings was no longer required.
37. The applicant wife stated that even though the public emergency regulations have been removed, the regime still closely monitors many dissident activities. Activities were still monitored by military in civilian clothes. They don't know who is listening in. If she mentioned anything anti-government she would be suspected and detained.
38. The Tribunal accepts that the applicant has been involved in grassroots politics with the FLP and the NFP. The Tribunal also accepts that the applicant's father was a retired [occupation deleted] and he was also involved in grassroots politics. The Tribunal accepts that the applicant translated between the Indigenous and Indo-Fijian populations and that she was also active with both the people's community network and the policing community

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<sup>1</sup> USDOS 2012 Country Reports on Human Rights Practices: Fiji, 19 April 2013; CX290960: FIJI:Police arrest FLP members , Fiji Times, The, 13 July, 2012.

network. On the basis of the description of Father Barr's activities with the Lagilagi Jittu Estate in Suva and the people's community Network in Fiji, the Tribunal also accepts that the applicant wife knew Father Barr in Fiji.<sup>2</sup>

39. However there is no evidence that anyone who has been associated with Father Barr is being harassed by the authorities in Fiji. The applicant wife stated that Father Barr had warned her father that he might be monitored and she was concerned that she might be also; however, even if this were to occur, the Tribunal is not satisfied that it constitutes harm which is sufficiently serious to amount to persecution. Article 1A(2) does not apply under s 91R(1)(b).

40. The NFP and the FLP have recently been registered as political parties in the lead up to the 2014 election.<sup>3</sup> The applicant's representative provided a copy of an article regarding the arrest of FLP members in Lautoka. Although under the Public Order Amendment Decree (POAD) permits were required for political meetings in public and private venues, the requirement for a permit for meetings of more than three people was lifted in July 2012.<sup>4</sup> According to the 2012 USDOS Human Rights Report, the POAD provisions were suspended which restricted freedom of assembly, except for meetings in large public venues, for the stated purpose of allowing citizens to meet freely to formulate and express their views regarding a new constitution, although it was report that many persons feared to offer their opinions because police officers were sitting in on the constitutional consultation meetings and noting names and the content of submissions.<sup>5</sup>

41. In October 2010, DFAT provided information regarding the treatment of persons "who are not activists or political or religious leaders but who are nevertheless known to be opposed to the military regime." DFAT stated that they were "not aware of reports of ordinary individuals who are 'known' to be opposed to the regime being subject to harm unless they have also publicly express [*sic*] opposition to or criticism of the regime."<sup>6</sup> In July 2010, DFAT also provided the following information in relation to this same category of persons:

We are not aware of reports of ordinary individuals who are 'known' to be opposed to the regime being subject to harm unless they have also publicly express opposition to or criticism of the regime.

It would be difficult to identify such individuals unless they were associated with a particular political group or organisation. They would also be identifiable if they have publicly expressed opposition to or criticism of the regime.

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<sup>2</sup> CX304247 FIJI:Fiji dictator's abusive texts to Aussie priest, Australian, The, 18 January, 2013, , <http://www.theaustralian.com.au/national-affairs/foreign-affairs/fiji-dictators-abusive-texts-to-aussie-priest/story-fn59nm2j-1226556156360>; CX298752 FIJI:\$8.7m for proposed housing project, FijiLive, 1 July, 2012, , [http://www.fijilive.com/realestate/index.php/properties/view\\_news/82](http://www.fijilive.com/realestate/index.php/properties/view_news/82); CX236961 FIJI:In Paradise Lost, where dissent fears to tread, Sydney Morning Herald, The, 28 November, 2009, , <http://www.smh.com.au/world/in-paradise-lost-where-dissent-fears-to-tread-20091127-jwwz.html>

<sup>3</sup> CX303676 FIJI:Deadline for Fiji party registration passes, Radio Australia (ABC), 15 February, 2013, , <http://www.radioaustralia.net.au/pacific/2013-02-15/deadline-for-fiji-party-registration-passes/1088978>

<sup>4</sup> CX291510 FIJI:Cautious welcome as Fiji lifts private meeting ban , Radio Australia (ABC), 20 July, 2012, , <http://www.radioaustralia.net.au/asia/2012-07-19/cautious-welcome-as-fiji-lifts-private-meeting-ban/983378>

<sup>5</sup> USDOS 2012 Country Reports on Human Rights Practices: Fiji, 19 April 2013

<sup>6</sup> DIAC Country Information Service 2010, *Country Information Report No. 10/63 – CIS Request No. FJI10739: Fiji Information*, (sourced from DFAT advice of 27 October 2010), 27 October

Non-vocal opponents of the regime could potentially be subject to monitoring and intimidatory threats. If the individual is a public servant, harm could also involve reduced opportunities for promotion or other career development, or possibly demotion or dismissal. Harm is less likely to include detention and/or restrictions on travel as these are generally only applied in limited cases to high profile individuals.<sup>7</sup>

42. The Tribunal has considered the applicant wife's claims against the relevant country information. Although there are restrictions on freedom of speech in Fiji, there are no reports of grassroots FLP or NFP supporters being harmed or harassed and the Tribunal is not satisfied that there is a real chance that the applicant wife would be subjected to harm as a FLP or NFP supporter if she were to return to Fiji now or in the reasonably foreseeable future.
43. The applicant wife stated that she would want a career in politics in Fiji but she was afraid. She stated that she was afraid of the indigenous Fijians because they considered that she had brought them across to the NFP. However she was unable to say where they considered that she had brought them from. Although the applicant might feel insecure in the settlement and rocks might have been thrown at her roof, there is no evidence that retribution is being taken out on members of the policing community network or the people's community network. Additionally, the applicant remained in Fiji for four years after she claimed that she and her father were threatened and after she claimed the lemon tree incident occurred (considered further below) but did not experience any harm.
44. The Tribunal is not satisfied that there is a real chance that the applicant would face serious harm for reasons of her involvement with the NFP or the FLP or her involvement with the People's Community Network or the Policing Community Network in Fiji.
45. The Tribunal finds that the applicant does not have well-founded fear of persecution on this basis for reasons of her political opinion or any other reason if she returns to Fiji now or in the reasonably foreseeable future.

Indian race and particular social group as an Indo-Fijian woman

46. In the protection visa application, the applicant wife stated that they had left Fiji because she and her family faced discrimination and harm due to their ethnic identity as Indo-Fijian. Her family were squatters and their place was surrounded by native Fijians. They threatened the family to make them leave because they claimed that Fiji belongs to them and they did not have any right to stay there. They were attacked and forced to leave their settlement.
47. In the statutory declaration which accompanied her application, the applicant wife stated that she and her family had lived in Suva at the [location deleted]. They were discriminated against and called "kai dia";
10. We have experienced ongoing incidents with Fijians which we consider discriminatory. The following are examples:
11. In February 2003, a Fijian boy picked up a plank from our walk way and I told him not to do that but he spoke back saying "I can do whatever I want to do" and pushed me so that I fell on a bottle and cut my knee. I reported the incident to the

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<sup>7</sup> Department of Foreign Affairs and Trade 2010, *DFAT Report No. 1167 – Fiji: RRT Information Request: FJI36727*, 6 July



police, but the policeman explained that it was no good charging the boy because it would take time and I would be wasting my time coming to the station every now and then.

12. From 2004-2011 it was a kind of pattern, the Fijians would steal other people's clothes from elsewhere and force us to buy it. We had no say in the matter as they were very bold. The worst part was when they were high on drugs or had been drinking, when they became very violent and aggressive and if we said anything to them, they abused us and assaulted us. It has happened to us over and over again.

13. In February 2009 another incident occurred with the Fijians. We always have a sacred place for worship where we pray. But the Fijians come over and pee there, they laugh and throw stones at the house, saying that we pray to the stones. We had planted a lemon tree there which 3 — 4 boys climbed and started breaking the lemons. My Mom told them that if they wanted lemons, they were supposed to ask us. As soon as my mom said that, they started throwing lemons at my mom, which hit her on the eye which created a fight and they came down and started throwing punches at us.

14. That same day, we had visitors come home so my mom asked my husband to buy grog (kava) Fijian drink. While my husband was on the way to buy the kava, he was confronted by the same boys who kicked and punched him up.

15. In May 2008 I was assaulted by a Fijian lady who slapped, punched and bit me because I asked what she did with the money I had given her to organize a function. To date my report of the incident still remains at the police station but no action has ever been taken. Who cares if Indians are killed, punched or kicked, we don't have any say there. Firstly, we can't talk against the government even if we know that what happening is wrong let alone talking against the Fijians. The Fijians even took over two rooms in our house which explains that the houses are joined.

16. It's a very tense environment: our house gets stoned almost every night without any reason. On top of that we cannot even enjoy our own cultural festivals like Diwali. On this occasion we cook a lot of food, so the Fijians keep asking us for sweets that we prepare, but as they come in groups we pack them in groups for them to share, but they start swearing at us. They say, "Boko na chena Kama na vale" meaning as soon as your house lights go off, watch out we will burn your house,"

17. We have considered many times moving out and settling elsewhere, but all over the country it's the same story and we think, what if we end up from the frying pan straight into the fire since we will always be Indians no matter which part of Fiji we move to.

48. The applicant wife told the Tribunal that her mother and father were separated but still lived in the same house where she had grown up in [Location 1]. There is no evidence that they had been expelled by the native Fijians. She and her husband and their child had also lived there when they were in Fiji. Half of her family's house had been demolished in the new building works at [Location 1], but then they had built a sitting room. Her father was also on a list to obtain a new house in the redevelopment of the settlement, but the applicant was not because the house did not belong to her.

49. The applicant wife stated that as an Indian woman she cannot stand up and speak in front of Fijians. The Tribunal noted that she had told the Tribunal that she had been doing exactly that for six years as she was lobbying for the NFP. The applicant wife stated that as

an Indian woman she feels that she cannot speak to Fijians. The Tribunal noted that this had not prevented her from doing so. The applicant wife stated that the situation had gone from bad to worse. The Tribunal noted that nothing has changed to prevent her from speaking to Fijians if she returned to Fiji. The applicant stated that they were being monitored. The Tribunal noted that if so, this had nothing to do with her being an Indo-Fijian woman.

50. The applicant wife said she might be raped. She had not ever been raped in the past, she had been harassed. Fijian boys would poke her with their fingers as she tried to get by. The applicant wife demonstrated and stated that she had been reticent to describe this to the delegate with her husband in the room. The Tribunal noted that her husband was not present and the applicant confirmed that she was comfortable speaking at the hearing.
51. The Tribunal noted that if she was so unfortunate as to be the victim of rape in Fiji, she had also provided an article to the Tribunal demonstrating that rape charges for a woman in [Location 1] had been pursued by the police in the Fiji High Court which indicate that the woman's claims were taken seriously and that police protection was available. There was also no indication that the person in that article was attacked for reasons of her Indo-Fijian race or that she was Indo-Fijian.
52. The Tribunal asked the applicant wife what she thought might happen as a result of race if she returned to Fiji now. The applicant wife stated that women are always treated differently in Fiji. She might get slapped or told not to take part in politics. The Tribunal noted that it did not appear that the applicant would listen to such advice. The applicant stated that she had wanted a political career. It was hard when she was living with Fijians.
53. The Tribunal noted that there appeared to have been some harassment in the past, and she was slapped in the workplace because she questioned an indigenous Fijian woman in relation to some missing money, however this did not appear to be so serious as to amount to persecution for a Convention reason. Additionally, if she did not pursue her police report, there was little evidence to suggest that the police failed in their duty to protect her.
54. The Tribunal put to the applicant that although the 2012 USDOS Human Rights reports state that rape and other types of violence are significant problems in Fiji, there was no indication that there was a real chance of this happening to the applicant. The applicant stated that if it happens, you lose your dignity. If it happened to her, she would not pursue it because she was Indo-Fijian.
55. Indigenous Fijians comprise approximately 57% of the Fijian population, and Indo-Fijians 38%.<sup>8</sup> The US Department of State (USDOS) estimated in 2011 that the religious demography of Fiji's population is 52% Christian and 30% Hindu.<sup>9</sup> Freedom House reported in 2011 that indigenous Fijians "receive preferential treatment in education, housing, land acquisition, and other areas".<sup>10</sup>
56. The Tribunal put to the applicant wife that a 2012 interview with a local Indo-Fijian man painted a different picture of the current administration. He states that the situation for

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<sup>8</sup> Hindu American Foundation 2011, *Hindu Human Rights in Fiji: Excerpts from HAF's 2011 Report* <http://www.hafsite.org/human-rights-issues/hindu-human-rights-fiji-excerpts-hafs-2011-report>

<sup>9</sup> US Department of State (USDOS) 2012, *Background Note – Fiji*, 15 February <http://www.state.gov/r/pa/ei/bgn/1834.htm>

<sup>10</sup> Freedom House 2011, *Freedom in the World 2011 – Fiji* <http://www.freedomhouse.org/report/freedom-world/2011/fiji>

Indo-Fijians has improved since Bainimarama took control in 2006. Before the latest coup stones were thrown at his roof “every second night” and “you could hardly walk down the road – they punch you, they spat on old ladies but under Bainimarama he made the police be very strict” The article further states that new laws give the government “sweeping powers of arrest and detention”, which the government is using to crack down on religious groups and trade unions. However, according to one report, many Indian Fijians “support the coup government because it brought stability and is less corrupt”.<sup>11</sup> The Tribunal noted that this might indicate that the situation might be improving for Indo-Fijians. The applicant stated that it was not for her, because she has talked to Fijian communities on the behalf of the FLP. She is politically active in all the groups.

57. The Tribunal has considered the applicant wife’s claims in light of the relevant country information. Although it is clear that there is discrimination in favour of indigenous Fijians in Fiji, the Tribunal is not satisfied that such discrimination is so serious to amount to persecution, and Article 1A(2) of the Convention does not apply in accordance with s 91R(1)(b) of the Act.
58. The Tribunal has also considered the applicant’s claim to have been slapped by an indigenous Fijian woman at her work place. However, the applicant stated that this only occurred once and the Tribunal is not satisfied that this incident is so serious to amount to persecution. Article 1A(2) of the Convention does not apply in accordance with s 91R(1)(b) of the Act.
59. Additionally, the applicant wife’s description of the poking incident was plausible and Tribunal accepts that the applicant has been harassed by indigenous Fijians, as an Indo-Fijian woman. However, on this point also, the Tribunal is not satisfied that the harassment was so serious to amount to persecution, and Article 1A(2) of the Convention does not apply in accordance with s 91R(1)(b) of the Act.
60. The Tribunal has considered these incidents cumulatively; however even together the Tribunal is not satisfied that these isolated incidents constitute serious harm for the purposes of s 91R(1)(b) and they are not persecution. They also do not indicate that the applicant would have well-founded fear of persecution for reasons of her race or membership of any particular social group if she were to return to Fiji now or in the reasonably foreseeable future.
61. In relation to the applicant’s fears of being raped, although the 2012 USDOS Human Rights Report for Fiji notes that rape and other types of violence against women were significant problems in Fiji, there is no evidence that there is a real chance that this would happen to the applicant if she returns to Fiji now or in the reasonably foreseeable future.
62. The Tribunal finds that the applicant does not have well-founded fear of persecution for reasons of her race or membership of any particular social group of “Indo-Fijian women” if she returns to Fiji now or in the reasonably foreseeable future.

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<sup>11</sup> Welch, D 2012, ‘Fiji’s military regime inspires loyalty, even in the midst of a crackdown’, Sydney Morning Herald, 13 January, FACTIVA

## Hindu religion

63. In relation to her claims of persecution as a Hindu, the applicant stated that their prayer place was always being targeted. Indigenous Fijians would urinate on it, which was embarrassing. They mentioned it to the police. It was a small statue outside the house and they used to put water in it. The shrine was to Shiva and it was good luck to put it outside. It was not in their compound. No other Hindus prayed there; most Hindus had their own shrine. The applicant did not know if this happened to all the Hindu families. It happened to them because they were involved in the activities in the communities. The boys always came in groups and it made it harder to deal with. They made calls to the police about it. The police came and made the rounds and went back. They did not catch anyone. She got tired of calling them.
64. The Tribunal noted that there were reports of desecration of some Hindu temples and materials. A temple was reportedly broken into and robbed in 2011.<sup>12</sup> However, in its 2011 report the Hindu American Foundation stated that “although the number of attacks on Hindus and Hindu temples has decreased, Fijians of Hindu descent continue to face a number of challenges”. The report further notes:
- Although the Bainimarama regime has been accused of human rights abuses and constitutional violations, conditions for the ethnic Indian and Hindu populations have generally improved since he took power. On the other hand, under previous democratically elected governments, minorities, especially Hindus, faced widespread discrimination and violent attacks.
65. The applicant stated that if you have a political opinion no one will stand up for you.
66. The Tribunal has considered the applicant’s account in relation to the indigenous Fijian boys urinating on the family’s shrine to Shiva. The Tribunal accepts that this was embarrassing for the applicant wife. In her first statutory declaration the applicant also said that indigenous Fijian boys throw stones at their house, saying that they pray to the stones and that the indigenous Fijians insisted that they buy clothes and provide sweets in a particular way at Diwali. The Tribunal accepts that if she and her family return to [Location 1], it might happen again. However the Tribunal does not consider such behaviour to be harm which is sufficiently serious to amount to persecution and Article 1A(2) does not apply under s 91(1)(b) of the Act.
67. The Tribunal finds that the applicant does not have well-founded fear of persecution for reasons of her religion if she returns to Fiji now or in the reasonably foreseeable future.

## Particular social group – returning asylum seeker

68. The applicant’s previous migration agent had made submissions that the applicant feared harm on return to Fiji on the basis of being perceived to have sought asylum in Australia. At the Tribunal’s hearing, the applicant stated that at the moment there are not reports of people informing as to what has happened; however, based on how long she’s been away and her past political activities she might be on a black list. The Tribunal noted that if she was on a black list, she would have been prevented from leaving Fiji so she was not on a black list. The applicant stated that immigration has a list of over stayers and might ask her

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<sup>12</sup> Hindu American Foundation 2011, Hindu Human Rights in Fiji: Excerpts from HAF’s 2011 Report <http://www.hafsite.org/human-rights-issues/hindu-human-rights-fiji-excerpts-hafs-2011-report>

what she was doing in Australia. The Tribunal asked whether she would tell them that she had applied for asylum. The applicant stated that she could not because she would be questioned and she might be investigated detained and beaten. In Fiji, investigations take a long time.

69. The Tribunal noted that in June 2012, the Department of Immigration and Citizenship (DIAC) asked the Department of Foreign Affairs and Trade (DFAT) if they were aware of “any instances where Fiji Customs, Immigration, Police or RFMF personnel staffing Fiji’s international airports or seaports, have questioned and/or detained any Fijian nationals in the belief that the national in question has applied for asylum in a foreign country.” In response, DFAT advised that it had “no information”.

70. In October 2010, DFAT stated that they were “not aware of cases where unsuccessful protection visa applicants have been subject to harm by the regime unless they are also otherwise high profile regime opponents.” DFAT also stated that they were “not aware of cases where individuals have been subject to harm simply as a result of travelling abroad, including to Australia.”

71. In addition, DFAT provided information to the Tribunals in July 2010 in which it referred to the treatment of unsuccessful protection visa applicants after their return to Fiji:

We are not aware of cases where unsuccessful protection visa applicants have been subject to harm by the regime unless they are also otherwise high profile regime opponents. Given applications for protection visas are confidential, it would be difficult for the regime to become aware of these individuals unless the applicant chose to reveal information about their application to others in the Fiji community.

In the event unsuccessful applicants were identified, they would most likely be subject to monitoring and intimidatory threats and potentially restrictions on travel.

72. The applicant stated that there were no reported cases because nobody has reported it. The Tribunal noted that the DFAT information indicated that any chance that she would be harmed as a returning former asylum seeker would be remote. The applicant wife stated that her father had told her that he was now under suspicion. He is afraid that she will be identified and has told her to change her email address.

73. Australia’s protection visa processes are confidential. The applicant wife indicated that she would not inform the authorities of her application for a protection visa. The Tribunal has found that the applicant does not have a profile that would result in her being harmed if she returned, and the Tribunal finds that there is not a real chance she will face serious harm as a result of having applied for asylum in Australia if she returns to Fiji. The Tribunal finds that the applicant does not have well-founded fear of persecution for a Convention reason on this basis if she returns to Fiji now or in the reasonably foreseeable future.

#### Representative’s submissions

74. The Tribunal noted that the new representative had submitted:

[The applicant wife] has individually suffered an array of persecution, detention, incarceration, torture, denial of their human rights, work opportunities that have had devastating impact upon both parties.

75. The Tribunal explained that this was why it had asked whether she had ever been detained, put in jail or tortured or denied human rights or work opportunities and the representative's submissions did not appear to reflect the applicants' actual claims. The applicant wife stated that she had been denied human rights and work opportunities because she wanted to pursue her political career but when her dad was warned they decided to move back and she continued behind the scenes. She said that she wouldn't stop her politics, but if they found out that she has this political opinion and after she's overstayed she would be detained. The Tribunal noted that the applicant had not been denied work opportunities if she intended to pursue them on return to Fiji. The applicant wife stated that her father was already under suspicion.
76. The Tribunal noted that the representative had stated:  
This has led to a constant barrage of punitive actions thrust upon the family to the extent that they have individually suffered the wrath of punitive actions and barbaric treatment from the local regime authorities.
77. The applicant wife acknowledged that this had not happened.
78. The Tribunal has considered the applicant wife's claims in relation to her political activities above.

*Conclusion on the refugee criterion for the applicant wife*

79. The Tribunal has considered the applicant's claims individually and cumulatively. Although there are several incidents which have been described by the applicant wife, these took place over a number of years and the Tribunal is not satisfied that even cumulatively, they amount to harm which is sufficiently serious to amount to persecution. The Tribunal is not satisfied that the applicant wife has suffered persecution in the past. The Tribunal is also not satisfied that there is a real chance that the applicant wife would face persecution if she were to return to Fiji now or in the reasonably foreseeable future. The Tribunal finds that the applicant wife does not have well-founded fear of persecution for a Convention reason if she returns to Fiji now or in the reasonably foreseeable future and the applicant wife does not meet the refugee criterion.

*Applicant husband and child*

80. The applicant wife described an incident in 2008 (or 2009 according to her first statutory declaration provided to the Department) when a boy took a lemon from their tree and threw it in her mother's eye, which started a fight ("the lemon tree incident"). They live in tin sheds so there are no gates so they started coming towards her mother and then the applicant wife and husband arrived. The applicant husband was punched. Later on the same day, her husband went to buy grog and they targeted him.
81. At the hearing, the applicant wife stated that the applicant husband used to drive members of the parties around in a borrowed vehicle in 2008 and also possibly during the elections in 2006. In 2006, the Fijian boys targeted his vehicle because they saw him as part of that party and associated with her as a family. He never wanted to be part of it and it was because of her that he was involved. He was bleeding on the face and had bruises on his body. They went to the hospital for medical assistance but the police treated them like the criminals so they did not pursue it. He did not know who it was who beat him up.

82. The Tribunal noted that in her first statutory declaration which she provided to the Department, the applicant had stated at paragraph [8];
- In 2005, my husband joined the NFP and I encouraged him to join. He was a driver for the candidates and members. He would drive the candidates and members to meetings and different venues. He had a public service vehicle licence that allowed him to drive a heavy vehicle.
83. The Tribunal noted that there was no mention of the applicant husband being beaten up for driving. The applicant stated that she was referring to paragraph [14] of the statutory declaration, in relation to the lemon tree incident (as set out on page 9 of this decision).
84. The applicant husband stated that he was afraid. He was getting punched by the boys and that might happen to their [child] also. When he went to the shop, they would drag him in the bushes and try to punch him. The Tribunal asked when this had happened. The applicant husband stated that it was before they came to Australia. He was not sure which year, possibly 2011, but he was not sure which month. He was beaten because he was going to the shop to buy some grog for his father in law. Nothing else had happened on that day. When the officer came they asked for a police report they asked him different questions about why he had taken that road and why he took a short cut. When he took a walk with his father in law, the Fijian boys from the shop that sold coconuts said that they would burn his house down.
85. When he reported the incident to the police, he knew which boy had punched him. After that he fell on the ground. He had a nose bleed. The police looked around and said that there were no boys there. They told him to get medical checks but the applicant told them that the boys were still there.
86. He did not know why the boys had attacked him. They asked where he was going. He told them he was going to buy grog. They grabbed him. He had no idea why. The Tribunal asked whether he was in the wrong place at the wrong time and they were looking for someone to pick on. The applicant husband said that his mother-in-law had said the same thing, maybe he was there at the wrong time. The Tribunal asked whether it might have happened to anyone at that time. The applicant stated that a guy ran to their house and told his parents-in-law that someone was punching him. He reported it and the police came and told him to go to court but then they told him to drop the charges.
87. The Tribunal asked whether it was just once that he had been punched by the Fijian boys. The applicant stated that on another occasion in the same year, he was turning off the meter and a guy had asked for a dollar and he said he didn't have it and the guy punched him in the face and ran off. He was not sure who it was, maybe [name deleted]. He did not report it to the police because after the grog incident, people see his face every time when he crosses the road and talk about him and he was worried that they look at him when he is dropping his father in law to the office. He does not know why.
88. The Tribunal asked whether the applicant husband had told the account about being punched when he turned off his meter previously in the course of the protection visa application. The applicant husband stated that he had just told about what happened when he went to buy grog. The Tribunal noted that the applicant husband had many opportunities to give the information prior to the Tribunal hearing and asked why he had not mentioned it yet. The applicant husband stated that he was not a smart talker.

89. The Tribunal asked if the applicant husband was worried about anything else if he returned to Fiji. The applicant husband stated that he was worried about what his [child] might see and doesn't want his [child] to see him being beaten up. He does not want to live in fear.
90. The Tribunal noted that the applicant husband had also stated that he had been a driver for the FLP and asked whether he wanted to say anything about that. He used to drive his father in law which might be why people look at him. He dropped him about 50 meters from the office. Most of them were Fijian. Everyone knows that his father in law works for the Committee and if someone attacks him then they will all get punched. The Tribunal noted that the FLP was a multiracial party. The applicant husband stated that his father-in-law was also a member of Father Barr's committee. He did not know its name.
91. The Tribunal put to the applicant husband that there were elections in 2014 and the FLP and the NFP had both registered for the elections. Fiji appeared to be heading towards a more democratic government and people who were involved at politics did not appear to be at risk. The applicant husband stated that Fiji was not like before, it was changing day by day. The president said things but did not follow them up, and there were no changes where he lived. The Tribunal noted that housing was being built in [Location 1] and people would have greater housing security.<sup>13</sup> The applicant husband stated that he had been there for ten years and nothing changed.
92. The Tribunal asked what the applicant husband thought would happen to him if he returned to Fiji now. The applicant stated that he was more worried about his [child] if anything happens to him. The Tribunal noted that he had lived there for 10 years and apart from these two incidents where he claimed to have been punched there did not appear to be any other incidents that would indicate he would be in danger if he returned. The applicant husband stated that anything could happen anytime. There was no future for his [child] in Fiji.
93. The applicant wife stated that she could not change what had already happened and it would impact on her husband and her [child]. Her dad was already a known face in the community and then she was following his way and then her [child] would not like to be part of it but staying in the same household [their child] would be targeted the same way that they had been targeted.
94. The Tribunal has considered the applicant husband's claims. The applicant husband stated that he was punched on two separate occasions and he felt like he was marked because he had driven his father in law and other FLP members.
95. Although the applicant wife stated that the lemon tree incident occurred in 2008 or 2009, the applicant husband stated that it happened in 2011. The applicant husband first raised the incident when he was turning off the meter at the hearing, but also stated that this occurred in 2011. The Tribunal will give the benefit of the doubt and accept that the incidents occurred. However, the applicant husband was not able to say why these incidents occurred. His mother in law thought that he might have been in the wrong place at the wrong time. The Tribunal is not satisfied that the essential and significant reason for either of the incidents was a Convention reason and Article 1A(2) of the Convention does not apply in accordance with s 91R(1)(a) of the Act.

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<sup>13</sup> [Information deleted: s.431(2)]



96. Additionally, the Tribunal does not accept that the two incidents described by the applicant involve systematic and discriminatory conduct and Article 1A(2) of the Convention does not apply in accordance with s 91R(1)(c) of the Act.
97. The applicant husband claimed that he was targeted because of being a driver for the FLP. However nothing happened to him in Fiji for that reason, even though he had commenced driving for the FLP in 2006. The Tribunal finds that even if the applicant felt he had been noticed, this is not harm, much less harm sufficiently serious to constitute persecution, and Article 1A(2) of the Convention does not apply in accordance with s 91R(1)(b) of the Act.
98. The Tribunal finds that the applicant husband has not suffered persecution in the past. For the reasons set out above in relation to the applicant wife, the Tribunal also does not accept that there is a real chance the applicant husband would be harmed for reasons of his membership of his wife's family or due to any political opinion which might be imputed to him or for having applied for asylum in Australia or for any other reason if he returns to Fiji now or in the reasonably foreseeable future.
99. In relation to the applicant child, the applicant wife stated that [the child] would be targeted in the same way that she had been targeted as a member of the household. However, the Tribunal has not accepted that the applicant wife has been targeted or that there is a real chance that she will be targeted if she returns to Fiji. The Tribunal also does not accept that there is a real chance the applicant child would be harmed for reasons of [their] membership of [the] family or due to any political opinion which might be imputed to [the] family or [the child] or for having applied for asylum in Australia or for any other reason if [the child] returns to Fiji. The Tribunal finds that the applicant child does not have well-founded fear of persecution for a Convention reason if the family returns to Fiji now or in the reasonably foreseeable future.

*Conclusion on the refugee criterion*

100. The Tribunal is not satisfied that there is a real chance that the applicant husband or the applicant child would face persecution if they were to return to Fiji now or in the reasonably foreseeable future. The Tribunal finds that the applicant husband and the applicant child do not have well-founded fear of persecution for a Convention reason if they return to Fiji now or in the reasonably foreseeable future and they do not meet the refugee criterion.

**2. Under the complementary protection criterion: Whether there are substantial grounds for believing that, as a necessary and foreseeable consequence of the applicants being removed from Australia to Fiji, there is a real risk that any of them would suffer significant harm.**

101. The Tribunal accepts that if the applicants return to Fiji and return to [Location 1], there is a real risk that indigenous Fijians might urinate on their Hindu statues and throw rocks at their house again. They might also continue the treatment regarding the sweets at Diwali and try to sell them clothes. They might be discriminated against and called "kai dia". However, the applicant wife and husband lived in [Location 1] for ten years and claimed that these events happened frequently.
102. The Tribunal has considered whether incidents such as these, cumulatively, would constitute significant harm if the applicants returned to Fiji. The applicant stated that the

treatment of their statue was embarrassing. The Tribunal accepts that the rocks being thrown at the house be frightening and the treatment during Diwali would be annoying. However the Tribunal is not satisfied that even cumulatively such treatment would constitute any of the first four types of significant harm (arbitrary deprivation life; the death penalty torture or or to cruel or inhuman treatment or punishment) as defined in the Act.

103. The Tribunal is also satisfied that such treatment would not constitute degrading treatment or punishment. Such treatment is defined to mean an act or omission which causes, and is intended to cause, extreme humiliation which is unreasonable.
104. Departmental policy provides guidance on this point:  
Treatment is degrading if it is such as to arouse in the person subjected to it feelings of fear, anguish and inferiority capable of humiliating and debasing the person and possibly breaking their physical or moral resistance.<sup>14</sup> Treatment may also be said to be degrading if it grossly humiliates a person in front of others or drives the person to act against their will or conscience.<sup>15</sup>
105. The Department's policy is consistent with existing case law.
106. The family remained in [Location 1] for ten years even though they had saved money to move elsewhere by 2011, and the applicant wife's parents still live there. Even though the applicant wife stated that they thought it might happen anywhere in Fiji, the Tribunal has considered the evidence given by the applicant wife and does not consider that the treatment described above to constitute degrading treatment or punishment.
107. In relation to the applicant wife's claims that she had also been slapped by a Fijian woman at work and poked by Fijian boys as she was walking by the Tribunal has not ruled out such events happening again if the applicant wife returns to Fiji. However, the Tribunal is not satisfied that even cumulatively, these incidents constitute meet any of the definitions of significant harm.
108. The Tribunal has accepted that the applicant husband has been a victim of random violence in the past. However, under s.36(2B)(c) of the Act there is taken not to be a real risk that an applicant will suffer significant harm if the tribunal is satisfied that the real risk is one faced by the population generally and is not faced by the applicant personally.
109. The applicant husband acknowledged that his mother-in-law had thought that he was in the wrong place at the wrong time when he was assaulted. However, the Tribunal is satisfied that the risk of random violence is one faced by the population of the country generally and is not faced by the applicants personally. Therefore the Tribunal finds that there is not a real risk of general violence if the applicants return to Fiji.
110. The applicant wife also claimed that she would be harmed by the regime because of her political activities or the political opinion which has been ascribed to her through her work with the FLP, NFP, PCN, policing community network and Father Barr. The Tribunal has found above that there is not a real chance that the applicants will face serious harm for these activities or for their association with the applicant wife or her family. For the same

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<sup>14</sup> *Pretty v United Kingdom* (2002) 35 EHRR 1, [52].

<sup>15</sup> European Commission on Human Rights, Yearbook 12, the First Greek Case (5 November 1969), p 186

reasons,<sup>16</sup> the Tribunal finds that there is not a real risk that the applicants will suffer significant harm on these bases if they return to Fiji.

111. The applicant wife said she might be raped; however for the same reasons as those set out above in relation to real chance, the Tribunal finds that there is not a real risk that this would happen to the applicant wife.<sup>17</sup>

*Conclusion on the complementary protection criterion*

112. The Tribunal has considered the applicants' claims individually and cumulatively. The Tribunal finds that there are not substantial grounds for believing that, as a necessary and foreseeable consequence of the applicants being removed from Australia to Fiji there is a real risk that the applicants will suffer significant harm. The applicants do not meet the complementary protection criterion.

**Conclusion**

113. 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.

**DECISION**

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

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<sup>16</sup> The Tribunal notes the explanation of the 'risk threshold' in the Complementary Protection Guidelines, however, in considering s.36(2)(aa) it has proceeded on the basis that the 'real risk' test imposes the same standard as the 'real chance' test applicable in the context of assessment of the Refugee Convention definition following the Full Federal Court decision in *MIAC v SZQRB* [2013] FCAFC 33.

<sup>17</sup> See note above

## **ATTACHMENT**

### **RELEVANT LAW**

115. The criteria for a protection visa are set out in s.36 of the Act and Part 866 of 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**

116. 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 Refugee as amended by the 1967 Protocol relating to the Status of Refugees (together, the Refugees Convention, or the Convention).
117. 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.
118. 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.
119. There are four key elements to the Convention definition. First, an applicant must be outside his or her country.
120. 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)). 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.
121. 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.
122. 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.

123. 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.
124. 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. 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**

125. 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’).
126. ‘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.
127. An applicant will suffer significant harm if they will be subjected to torture: s.36(2A)(c). Torture is exhaustively defined in s.5(1) of the Act as an act or omission by which severe pain or suffering, whether physical or mental, is inflicted on a person. The pain or suffering must be intentionally inflicted. Furthermore, it must be inflicted for one of five purposes: for the purpose of obtaining from the person or a third person information or a confession; for the purpose of punishing the person for an act which they or a third person committed or is suspected of having committed; for the purpose of intimidating or coercing the person or a third person; for any purpose related to one of those purposes; or for any

reason based on discrimination that is inconsistent with the Articles of the International Covenant on Civil and Political Rights (the ICCPR).

128. However, torture does not include an act or omission arising only from, inherent in or incidental to, lawful sanctions that are not inconsistent with the Articles of the ICCPR.
129. 'Cruel or inhuman treatment or punishment' for the purposes of s.36(2A)(d) is exhaustively defined in s.5(1) of the Act to mean an act or omission by which severe pain or suffering, whether physical or mental, is inflicted on a person, or pain or suffering, whether physical or mental, is inflicted on a person, so long as, in all the circumstances, the act or omission could reasonably be regarded as cruel or inhuman in nature. The pain or suffering must be intentionally inflicted.
130. However, 'cruel or inhuman treatment or punishment' does not include an act or omission which is not inconsistent with Article 7 of the International Covenant on Civil and Political Rights (the ICCPR), nor one arising only from, inherent in or incidental to, lawful sanctions that are not inconsistent with the Articles of the ICCPR. Article 7 of the ICCPR prohibits torture and cruel, inhuman or degrading treatment or punishment.
131. The final type of significant harm listed in s.36(2A) is degrading treatment or punishment: s.36(2A)(e). Degrading treatment or punishment is exhaustively defined in s.5(1) of the Act to mean an act or omission which causes, and is intended to cause, extreme humiliation which is unreasonable.
132. However, 'degrading treatment or punishment' does not include an act or omission which is not inconsistent with Article 7 of the International Covenant on Civil and Political Rights (the ICCPR), nor one that causes, and is intended cause, extreme humiliation arising only from, inherent in or incidental to, lawful sanctions that are not inconsistent with the Articles of the ICCPR. Article 7 of the ICCPR prohibits torture and cruel, inhuman or degrading treatment or punishment.
133. 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.
134. Under s.36(2B)(a) of the Act, there is taken not to be a real risk that an applicant will suffer significant harm in a country if the tribunal is satisfied that 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. That relocation must be 'reasonable' is also a requirement when considering the definition of 'refugee' and the tribunal draws guidance from the judgments of the High Court in *SZATV v MIAC* and *SZFDV v MIAC* which held that whether relocation is reasonable, in the sense of 'practicable', must depend upon the particular circumstances of the applicant and the impact upon that person of relocation within his or her country: *SZATV v MIAC* (2007) 233 CLR 18 and *SZFDV v MIAC* (2007) 233 CLR 51, per Gummow, Hayne & Crennan JJ, Callinan J agreeing.

135. Under s.36(2B)(b) of the Act there is taken not to be a real risk that an applicant will suffer significant harm in a country if the tribunal is satisfied that 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. That is, the level of protection must be such to reduce the risk of the applicant being significantly harmed to something less than a 'real risk': *MIAC v MZYLL* [2012] FCAFC 147.
136. Under s.36(2B)(c) of the Act there is taken not to be a real risk that an applicant will suffer significant harm if the tribunal is satisfied that the real risk is one faced by the population generally and is not faced by the applicant personally.

#### **Section 499 Ministerial Direction**

137. 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 – to the extent that they are relevant to the decision under consideration.
138. The Tribunal notes the explanation of the 'risk threshold' in the Complementary Protection Guidelines, however, in considering s.36(2)(aa) it has proceeded on the basis that the 'real risk' test imposes the same standard as the 'real chance' test applicable in the context of assessment of the Refugee Convention definition following the Full Federal Court decision in *MIAC v SZQRB* [2013] FCAFC 33.

#### **Member of the same family unit**

139. 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 a spouse and a dependent child.