

1416750 (Refugee) [2016] AATA 3318 (12 February 2016)

**DECISION RECORD**

<b>DIVISION:</b>	Migration & Refugee Division
<b>CASE NUMBER:</b>	1416750
<b>COUNTRY OF REFERENCE:</b>	Tonga
<b>MEMBER:</b>	Christian Carney
<b>DATE:</b>	12 February 2016
<b>PLACE OF DECISION:</b>	Sydney
<b>DECISION:</b>	The Tribunal affirms the decision not to grant the applicant a Protection visa.

Statement made on 12 February 2016 at 4:19pm

Any references appearing in square brackets indicate that information has been omitted from this decision pursuant to section 431 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.

## STATEMENT OF DECISION AND REASONS

### BACKGROUND

1. The applicant is [an age] year old single man who arrived in Australia [in] December 2013 as the holder of a [temporary] visa and a passport issued to him by the government of the Kingdom of Tonga (Tonga). His visa expired [in] 2014 and he subsequently remained in the community without a visa until he was detected by Department officers [in] August 2014 and taken into immigration detention. He applied for a Protection visa [in] August 2014 and was released from detention on a Bridging visa [in] September 2014.
2. He claimed to fear being persecuted in Tonga by his [relative], by members of rival gangs in neighbouring villages, by members of gangs from schools that had a rivalry with his old school, and by the three men he saw robbing a shop who blamed him for their convictions. He was interviewed by a delegate of the Minister for Immigration [in] September 2014 who found his evidence to be vague, inconsistent in parts and mostly unreliable, and the delegate did not accept that his evidence indicated he was at risk of suffering serious or significant harm in Tonga.
3. The Tribunal must consider and decide whether the applicant has a well-founded fear of being persecuted in Tonga for one or more of the five reasons set out in the Refugees Convention and, if not, whether there are substantial grounds for believing that, as a necessary and foreseeable consequence of his being removed from Australia to Tonga, there is a real risk that he will suffer significant harm. In considering these issues, the Tribunal has applied the law set out in Appendix 1.

### CONSIDERATION OF CLAIMS AND EVIDENCE

#### Evidence to the Department

4. According to his application forms, the applicant was born in [his home town], in [year], where he lived up until his departure to Australia in December 2013. He received [number] years of education in Tonga. He worked in [an industry] before he came to Australia but did not provide details of his past work. Since arriving, he has worked as [an occupation] in Queensland.
5. He came here as part of a [group]. He left to avoid the threat of death or injury from fighting between rival groups in his area. He also left because of the violence he faced from his [Relative A] at home. He was attacked in March 2010 during a fight between two groups of students and [he suffered an injury]. In 2012 he reported a robbery to the police and the offenders were later put in prison. They threatened to kill him for his role in their prosecution. He fears they will get him once they get out of prison. He also fears being harmed by his [Relative A] and by people from the neighbouring village.
6. He attended an interview with the delegate in Sydney [in] September 2014. The delegate's decision record provides a detailed summary of the evidence he gave at that interview.

## Evidence to the Tribunal

7. The applicant gave the Tribunal a copy of the delegate's decision record with his application for review.
8. He appeared before the Tribunal on 18 December 2015 and gave evidence through an accredited Tongan interpreter. He confirmed the details of his identity, nationality, the members of his family, his current and past places of residence and employment. His father is in Sydney. He has one [sibling] in [another country] and [siblings] in Tonga. His mother is in Tonga. She lives by herself. His father came to Australia when he, the applicant, was [age]. He is close with his father now. He has maintained contact with his [sibling] in Tonga since he came here. He is close with them.
9. He did the [work] for four months but then it dried up and he has not been able to get work since that time. He last worked in 2014. He is supported by his [extended family]. He was in [immigration detention] for about 6 weeks. He has been living with his [extended family] since he got out. He is single. He was in a relationship before but it ended. He goes to [a church].
10. He was unemployed for most of the [years] after he finished school in Tonga. He stayed at home for most of that time. He did some [work] but only got food and in-kind payments for his work. A man named [Mr B] in Australia arranged his travel. [Mr B] is associated with [a relative] in Tonga. He has to pay [Mr B] back with the money he earned from [his work]. After he repaid money to [Mr B] he got about \$[amount] a week from his work.
11. When asked why he had not returned to Tonga when his work finished and his visa expired, he said he was afraid to go back. When asked why, he said it was because of the three men he saw robbing the shop. He told the police about them and they were arrested and they threatened to get him for telling on them. That happened on a Saturday night in the middle of 2013. He did not see the faces of the men. They had covers over their faces. They were from his village and he knew who they were. He told the police their names. He could tell who they were from their [body features]. He saw them under the light outside the shop when they ran out. It was the [specific] shop and the man who owned the shop came running out and called for help. That was when he turned and looked and saw them.
12. The police came that night and took down his story of what he saw. He went to the station the next day. He did not sign a statement. He refused because he knew if he did he would have to go to court to testify. He did not want to do that. When he told the police that they told him to go away and to wait to see what happened. He never signed a statement and never went to court.
13. The three men were caught and arrested and were sent to prison. He did not have any contact with the three men between when he saw them run out of the shop and when they were arrested. But their [brothers] came to see him and he ran away before they saw him. They knew he was a witness. That happened after the three men went to prison. They came to his house on the Friday night and threw stones at the roof. They knew he had told the police. When asked to explain who they knew that, he said that he thinks his name was mentioned in court. The police referred to him as the witness. The Tribunal put to him that it was difficult to believe the police would refer to him by names as a witness when he did not sign a statement and said he was afraid to testify. He said they had his unsigned statement and people saw his name on the statement. The Tribunal put to him that if a person pleads

guilty to an offence it is normally necessary for the names of witnesses to be mentioned in court. He said there were two hearings, the first when his name was mentioned and the second when they were sentenced.

14. The Tribunal noted that the delegate's decision record does not indicate that he told the delegate that his name was mentioned in court. He said he was not asked that question. The Tribunal noted that he told the delegate their brothers came to his house on Saturday night whereas before he told the Tribunal it was a Friday night. He said they came several times.
15. He confirmed there was about six months between that incident and his departure. Nothing happened to him in those six months because he ran away from his house. He ran away after they were sentenced and the brothers came that same night and he ran away. He moved to [another town] and stayed with his [Relative C], about five kilometres away. He was safe there. But if they saw him he would be in trouble. The Tribunal noted that it would not have been difficult for them to find him if they were looking for him and the fact nothing happened suggests they were not looking for him. He agreed.
16. He went to the police about the stone throwing. They told him they would protect him. But nothing happened. They did not tell the brothers to leave him alone. When asked how he knew they did not, he said he does not know but he assumes they did not. The families of those men who went to prison will get him. The Tribunal noted that they did nothing against him in the six months before he left and it asked him to explain he thinks they would do it now more than two and half years later. He said they will still get him now.
17. The Tribunal noted that, on one view, he had not actually given evidence against the men; in any event they committed the crimes and other people saw them, including the shop keeper; he did not lie or make up things about them; they were guilty of the crimes; it is now more than two and a half years later, why would those men risk going back to prison by harming him now. He said his [sibling] told him that one of the men has been freed. He still fears them coming after him. It was because of him they were arrested. The Tribunal noted that, on one view, in the heat of the emotion of being sentenced to prison, people might say things that they would never act on; if the men are released from prison, why would they risk going back by taking revenge on a witness, which is a serious offence. He said that is true but he is afraid.
18. The Tribunal noted that his written statement says the incident occurred in 2012, which is different to what he said today. He said he forgets and cannot remember when it happened. The Tribunal asked if it was six months or more before he left. He said maybe it happened in June 2012. The Tribunal noted that was 18 months before he left. He said that is correct. The Tribunal noted that he said before he lived with [Relative C] for the last six months he was in Tonga and that happened soon after the incident. It put to him that it was difficult to understand how he could be so confused about whether it was six or 18 months before he left; there was a significant difference between the two dates. He said he cannot remember exactly when it happened. The Tribunal noted that his application says he only lived in the one place for the entire time he was in Tonga, and that it does not refer to him living at his [Relative C's] or changing address. He said he was not sure of what to put in the application.
19. The Tribunal noted that if the incident occurred 18 months before he left it indicated the families of the three men had more opportunity to take action against him, and had not,

which suggested they did not hold him responsible or have an adverse interest in him, as claimed. He said that is true. He needs to get some information from Tonga to clear up the dates of when things happened. He will try to get the police reports and information.

20. The Tribunal asked if he had any other fears. He said his home area is not a good place. There is lots of drinking and swearing and fighting. It is rough and dangerous. When asked, he said he would probably go and live with his [Relative C] or his [sibling] if he went back. When asked if he had any other fears of returning, after a long period of silence, he said he also fears the old school issues too and the fighting between the school gangs. The Tribunal noted that he had finished school in [year] and it asked him to explain why he feared harm for those reasons now. He said they still target old boys from the rival gang. They could come after him.
21. The Tribunal noted that the delegate's decision record indicates that the only claims he initially mentioned at the interview related to the old school rivalry issues and his [Relative A], and after he spoke about those matters, he was twice asked if there was any other reason he feared returning, and he said 'no'. It was only when the delegate reminded him of his written claim about the robbery and his claimed fears of the three men taking revenge on him that he mentioned that incident. However, at the hearing, the robbery incident was the first thing he mentioned and he had not mentioned anything about his [Relative A]. In response, he said he had big problems at school. There were fights between rival gangs in [year]. He [suffered an injury] when he was jumping over a fence to get away from the gang.
22. The Tribunal noted the delegate's decision record indicates he had an interview with a Department compliance officer when he was detained for not having a visa, and he did not mention anything to that officer about having any fears of going back to Tonga. He said there was no interpreter and he did not understand the questions. He just said yes to everything they asked him. The Tribunal noted that he told the delegate that he did not talk about his fears because his father was there with him. He said that is true. His father answered the questions for him.
23. He still fears his [Relative A]. He is a drunk. After 2009 he left his mother's house because of his [Relative A] and he did not see him again.
24. The Tribunal noted that it had to consider and determine whether there was a real chance he would suffer serious harm, for reasons of his race, religion, nationality, political opinion or membership of a particular social group, or whether there were substantial grounds to believe there is a real risk he will suffer significant harm if he returns. It noted it had to be satisfied on the evidence before it that he was at risk of suffering serious or significant harm. The Tribunal asked him to comment on the view that, in the circumstances he has described, the chance or risk of the three men or their families coming after him and harming him in the future is remote and far-fetched. He said he is still afraid of them.
25. The Tribunal noted that the letter he gave from the Tongan [official] mentioned the incidents he had been involved with at school and his [Relative A] but nothing about his claimed involvement in the court case against the three men. He said he will get more information.
26. The Tribunal gave the applicant four weeks to provide further information to support his claims. At the time of decision, the Tribunal had not received any further information or correspondence from the applicant.

## FINDINGS AND REASONS

### Assessment of the applicant's claims and evidence about past events

27. The Tribunal's first task in determining whether the applicant is owed protection is to make findings of facts on relevant matters. The task of fact-finding often involves an assessment of an applicant's credibility. In this context, as set out in Appendix 1, the courts have made it clear that the Tribunal must be sensitive to the potential difficulties faced by asylum seekers in putting forward their claims, and that the Tribunal should adopt a reasonable approach to making its findings with regard to credibility and afford the benefit of the doubt to asylum seekers who are generally credible but unable to substantiate all of their claims. However, the Tribunal is not required to accept uncritically any and all claims made by an applicant.

#### *Nationality and general background*

28. The applicant has consistently maintained that he is a citizen of Tonga. Having observed a copy of the passport issued to him by the Tongan authorities in [2013], in the absence of any evidence to the contrary, the Tribunal accepts he is a national of Tonga and has assessed his claims against Tonga.
29. On the evidence before it, the Tribunal accepts he was born in [his home town] on [date] and received [number] years of education before he came to Australia in December 2013.

#### *Claims to fear harm in Tonga*

31. The applicant claimed to fear being harmed in Tonga by his [Relative A], by members of a local village that had a rivalry with his village, by members of gangs from schools that had a rivalry with his old school, and by the three men (and / or their families) who were convicted of robbery, who he had identified to the police. However, for a number of reasons discussed below, the Tribunal had a number of concerns about the reliability of his evidence in support of these claims, as his evidence about a number of matters was confused and inconsistent over time and, in many respects, vague and general and far from convincing.
32. For example, according to the delegate's decision record, despite the claims he had raised in his written application, at his interview, the only claims he initially mentioned were the ones relating to the old school rivalry issues and his [Relative A], and he was twice asked if there was any other reason he feared returning to Tonga and he said 'no'. It was only when the delegate reminded him of his written claim about the robbery and his claimed fears of the three men taking revenge on him that he mentioned that incident. However, at the hearing, the robbery incident was the first thing he mentioned and he did not mention anything about his [Relative A] until he was prompted by the Tribunal, and even then he did not provide any detailed evidence about the situation relating to his [Relative A] and mother or how or why he would be at risk of harm from him in the future.
33. Further, as discussed at the hearing, according to the delegate's decision record, at his interview with the Department compliance officer after being picked up in the community without a visa, he did not mention anything to that officer in response to being asked if there were any reasons he could not go back to Tonga, and he told the officer he wanted to stay here and work and raise a family and that Tonga was a poor country. When the delegate asked him why he had not mentioned anything at that time, he said his father was with him and that was the answer his father gave; however, the delegate put to him that the record

indicates that he and his father were interviewed separately. When the Tribunal asked him why he did not mention his claims to the compliance officer, he gave a different answer, and said that there was no interpreter used in that interview and he had not understood the questions, and had just said yes to everything they asked him. When the Tribunal noted the inconsistencies in his two explanations, he said that his father was there and his father answered the questions for him.

34. With regard to the robbery and his claimed fear of the three men who were imprisoned for breaking the law, his evidence was inconsistent and confused. For example, in his written statement he said the incident occurred in 2012, however, according to the delegate's decision record he told the delegate at interview that it occurred in the middle of 2013, which is what he initially told the Tribunal at the hearing. When the Tribunal noted the inconsistency in his evidence, he said that he cannot remember when it happened, and when asked if it was six months before he left or 12 or 18 months before he left, he said 'maybe it happened in June 2012'. He subsequently confirmed that it was 18 months before he left.
35. As discussed with him, it was difficult to understand how he could be so confused about whether such a significant incident had occurred either six or 18 months before he left, particularly when he said he had left his house and 'gone into hiding' at his [Relative C]'s house in the neighbouring village, five kilometres from his house. In addition, as discussed with him, his written application only refers to him having lived in the one house for the entire period he was in Tonga. When asked why he did not include his period of residence at his [Relative C]'s house, he said he was not sure of what to put in the application.
36. Moreover, as discussed with him, the issue of whether he had left his house six or 18 months before he left was also relevant on the issue of the degree of adverse interest in him by the families of the three men who were imprisoned and their opportunity to take adverse action against him. As put to him, the fact nothing happened to him during that period suggested the three men and their families did not have an adverse interest in him, because, if they did, and if it was their intention to inflict harm on him, it is reasonable to assume that they would have been able to locate him at his [Relative C]'s in the neighbouring village.
37. Further, as put to him, in the Tribunal's view, in light of the fact he did not give evidence against the men, either by a formal statement or by appearing in court, or have any contact with the three men in connection to the incident, it was difficult to understand how or why the three men would know he had spoken to the police or how or why they would blame him for their convictions and prison sentence. On one view, if the three men pleaded guilty as he claimed, that is a clear indication that they were guilty of the offence and, in light of him not agreeing to make a formal statement or give evidence against them, it is likely the police had other evidence to support the conviction. When the Tribunal discussed this with him, he claimed for the first time that the police had referred to him by name in court as a witness. When asked why he had not mentioned that before, he said he was not asked the specific question by the delegate. When the Tribunal put to him that it would be unusual for the police to refer to a witness by name when the witness had refused to sign a statement out of fear of retribution, he adjusted his evidence and said that the police had his unsigned statement and people must have seen his name on the statement. He claimed that this had happened at the first of two hearings for the men.

38. He also gave inconsistent evidence about when the brothers of the men came and threw stones at his house. According to the delegate's decision record he told the delegate at interview that it occurred on Saturday night whereas he told the Tribunal it was the night they were sentenced to prison and that was a Friday night. When the inconsistency was put to him, he said, for the first time, that they had come to his house several times.
39. In addition to the irregularities in his evidence about this claim, as discussed with him at the hearing, in light of the fact he did not actually give evidence against the men, that the men were guilty and pleaded guilty and that he did give false information to the police, it was difficult to understand why those men or their families would take adverse action against him now, more than three and a half years later, and risk going to prison for the serious offence of taking revenge on a witness. Indeed, his response to that contention was that he agreed it was unlikely but said he was still afraid that they will come after him. He said that he would get further information from Tonga to support his claims about this matter; however, at the time of decision, almost two months later, he had not provided any further evidence or contacted the Tribunal to seek further time.
40. The Tribunal has carefully considered his comments and explanation for why he gave inconsistent, vague and confused evidence about these matters; however, it has concerns about the reliability of his response and evidence, and, while it is prepared to accept that he may not have perfect memory recall and may not be able to recall precise details of events that happened in the past, and that he may have been nervous at his interview and at the hearing, having carefully considered the evidence before it, the Tribunal does not accept that his responses provide a satisfactory explanation for his inability to maintain a consistent and detailed account of his claims about these matters. In the context of his claims to be owed protection, these were important matters, and, in the circumstances, if his evidence was based on his personal experiences, it is reasonable to expect him to have maintained a consistent account of events and his inability to do so reflects poorly on his credibility and reliability as a witness.
41. Nevertheless, despite its concerns about the reliability of his evidence, the Tribunal is prepared to afford him the benefit of the doubt and accept some but not all of his claims in relation to this matter. For the above reasons, on the evidence before it, the Tribunal accepts that sometime around the middle of 2012, the applicant witnessed three men run out of a shop after they had committed a robbery, and that he later told the police that he saw them run out, that they had masks on their faces and that he did not see their faces, but that he told the police that he thought he knew who they were by their general appearance and he gave the police the names of three men. The Tribunal accepts that he did not make a formal statement or sign a statement or give evidence against the men in court, and it accepts that he told the police he did not want to get involved because he was worried about the men or their families taking revenge on him. On the evidence before it, the Tribunal is not prepared to accept and does not accept that the police or other people involved in the prosecution of the three men, disclosed his name to the three men or in open court, and the Tribunal considers that he embellished and exaggerated his evidence about this to strengthen his claim to protection. For all of the above reasons, on the evidence before it, the Tribunal does not accept that the three men or their brothers or other family members blamed him or threatened to harm him in any way in relation to their prosecutions or convictions or prison sentences, and it does not accept that the family members of the three men took action against him by throwing stones at his house or that they threatened to harm him in anyway.

42. For all of the above reasons, on the evidence before it, the Tribunal does not accept that, at the time he left Tonga in December 2013, the applicant was of adverse interest to the three men or their brothers or other family members, and, it does not accept that, in the event he returned now or in the reasonably foreseeable future, there is a real chance he would suffer serious harm for reasons relating to the prosecution, conviction and imprisonment of the three men he saw run out of the shop in about the middle of 2012.
43. With regard to his claim to fear being harmed in Tonga by his [Relative A], his evidence was vague, confused and general and far from convincing. Indeed, it was unclear from his evidence when he last had contact with his [Relative A] and whether or not his [Relative A] was still [connected to his family] or whether they were in Tonga or [another country]. According to the delegate's decision record he told the delegate at interview that he was still living with them at the time he came to Australia, however, that was inconsistent with his evidence he had left his home about 18 months before he came to Australia and that he had lived with his [Relative C] in the neighbouring village for the last 18 months. He told the delegate that his [Relative A] would get drunk and [became violent] and that his [Relative A] had assaulted him when he tried to protect [the family]. He claimed that had happened many times. As noted above, he did not mention anything about his [Relative A] at the hearing until he was prompted by the Tribunal, and even then he did not provide any detailed evidence about the situation relating to his [Relative A] and [his family] or how or why he would be at risk of harm from him in the future; all he said was that his [Relative A] is a drunk and that, because of his [Relative A], he had left his mother's house in 2009 and did not see him again; however, that evidence was inconsistent with his evidence to the delegate that he lived with them up until the time he came to Australia.
44. The Tribunal has carefully considered his evidence in support of his claim to fear harm from his [Relative A]; however, as can be observed, his evidence was inconsistent, vague and confused, and, while it is prepared to accept that he may not have perfect memory recall and may not be able to recall precise details of events that happened in the past, and that he may have been nervous at his interview and at the hearing, having carefully considered the evidence before it, the Tribunal does not accept that he has provided a reliable account of his claims about these matters. In the context of his claims to be owed protection, these were important matters, and, in the circumstances, if his evidence was based on his personal experiences, it is reasonable to expect him to have maintained a consistent account of events and his inability to do so reflects poorly on his credibility and reliability as a witness. For all of these reasons, on the evidence before it, the Tribunal is not prepared to and does not accept that the applicant was subjected to harm from his [Relative A] in the past, or that he left his home before his departure from Tonga for reasons relating to his [Relative A], and, it does not accept that, in the event he returned now or in the reasonably foreseeable future, there is a real chance he would suffer serious harm from or on behalf of his [Relative A] or for any related reasons.
45. With regard to his claim to fear being harmed in Tonga by members of a local village that had a rivalry with his village, his evidence in support of his claim was again vague, confused and general and far from convincing. When asked about this at the hearing, he said that his home area is not a good place, and there is lots of drinking and swearing and fighting, and that it is rough and dangerous. He did not refer to any particular person who he fears or has been threatened by, and he did not give any detailed evidence about the circumstances in which he would or could be subjected to harm by the people from any of the neighbouring villages. Having carefully considered the evidence he gave to the delegate and at the

hearing, the Tribunal considers his claims in this regard are based on mere speculation, and it does not accept that, in the event he returned now or in the reasonably foreseeable future, there is a real chance he would suffer serious harm by members of any of the local villages in his home area that had a rivalry with his village, or any related reason.

46. Similarly, with regard to his claim to fear being harmed by members of gangs from schools that had a rivalry with his old school, his evidence in support of these claims was again vague, confused and general and far from convincing. When asked about this at the hearing, he referred to fights when he was last at school in [year] and said he [suffered an injury] when he tried to jump a fence to escape a rival gang, but he did not refer to any particular person who he fears or has been threatened by in the recent past, or who has an adverse interest in him, and his claims related to events that occurred when he was at school, which was more than [number] years ago. The evidence before the Tribunal does not indicate how or why now, more than [number] years after he finished school, he would be of adverse interest to any person in Tonga for reasons of events that occurred when he was at school or because of the school he went to or people he associated with at school. Having carefully considered the evidence he gave to the delegate and at the hearing, the Tribunal considers his claims in this regard are based on mere speculation, and it does not accept that, in the event he returned now or in the reasonably foreseeable future, there is a real chance he would suffer serious harm from or by or on behalf of members of gangs from schools that had a rivalry with his old school, or for any related reasons of events that occurred when he was at school or because of the school he went to or people he associated with at school.
47. On the basis of the above findings, and having considered the applicant's claims individually and cumulatively, the Tribunal does not accept that there is a real chance the applicant would suffer persecution for a Convention reason if he returns to Tonga now or in the reasonably foreseeable future. Accordingly, the Tribunal finds that the applicant does not have a well-founded fear of persecution in Tonga.

### **Complementary protection**

48. Having concluded that the applicant does not meet the refugee criterion in s.36(2)(a), the Tribunal has considered the alternative, complementary protection criterion in s.36(2)(aa) and has had regard to 'PAM3 Refugee and Humanitarian - Complementary Protection Guidelines'.
49. With regard to his claims to fear being harmed for reasons relating to the prosecution, conviction and imprisonment of the three men he saw run out of the shop in about the middle of 2012, in light of its earlier reasons with regard to there not being a real chance that this would happen to him, for any of the reasons claimed, the Tribunal considers there are no substantial grounds for believing there is a real risk he will suffer significant harm in that way.
50. With regard to his claims to fear being harmed for reasons relating to his [Relative A], in light of its earlier reasons with regard to there not being a real chance that this would happen to him, for any of the reasons claimed, the Tribunal considers there are no substantial grounds for believing there is a real risk he will suffer significant harm in that way.
51. With regard to his claims to fear being harmed by members of any of the local villages in his home area that had a rivalry with his village, or any related reason, in light of its earlier reasons with regard to there not being a real chance that this would happen to him, for any

of the reasons claimed, the Tribunal considers there are no substantial grounds for believing there is a real risk she will suffer significant harm in that way.

52. With regard to his claims to fear being harmed by members of gangs from schools that had a rivalry with his old school, or for any related reasons of events that occurred when he was at school or because of the school he went to or people he associated with at school, in light of its earlier reasons with regard to there not being a real chance that this would happen to him, for any of the reasons claimed, the Tribunal considers there are no substantial grounds for believing there is a real risk she will suffer significant harm in that way.
53. Having considered the applicant's circumstances singularly and on a cumulative basis, the Tribunal finds there are no substantial grounds for believing that, as a necessary and foreseeable consequence of his being removed from Australia to Tonga, there is a real risk that he will suffer significant harm.

### **CONCLUSIONS**

54. For the reasons given above, the Tribunal is not satisfied that the applicant is a person in respect of whom Australia has protection obligations and it finds that he does not satisfy the criterion set out in s.36(2)(a) or (aa). There is no suggestion the applicant satisfies s.36(2) on the basis of being a member of the same family unit as a person who satisfies s.36(2)(a) or (aa) and who holds a Protection visa. Accordingly, the applicant does not satisfy the criterion in s.36(2) for a Protection visa.

### **DECISION**

55. The Tribunal affirms the decision not to grant the applicant a Protection visa.

Christian Carney  
Member

## APPENDIX 1 - RELEVANT LAW

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56. Section 65(1) of the Act provides that a visa may be granted only if the decision maker is satisfied that the prescribed criteria for the visa have been satisfied. The criteria for a Protection visa are set out in s.36 of the Act. 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 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), or on other 'complementary protection' grounds, or is a member of the same family unit as a person in respect of whom Australia has protection obligations under s.36(2) and that person holds a Protection visa of the same class.
57. 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.

### Refugee criterion

58. 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 Refugees Convention. Generally speaking, as a party to the Refugees Convention, Australia 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.
59. The High Court of Australia has considered this definition in a number of cases, notably *Chan Yee Kin v MIEA* (1989) 169 CLR 379, *Applicant A v MIEA* (1997) 190 CLR 225, *MIEA v Guo* (1997) 191 CLR 559, *Chen Shi Hai v MIMA* (2000) 201 CLR 293, *MIMA v Haji Ibrahim* (2000) 204 CLR 1, *MIMA v Khawar* (2002) 210 CLR 1, *MIMA v Respondents S152/2003* (2004) 222 CLR 1, *Applicant S v MIMA* (2004) 217 CLR 387, *Appellant S395/2002 v MIMA* (2003) 216 CLR 473, *SZATV v MIAC* (2007) 233 CLR 18 and *SZFDV v MIAC* (2007) 233 CLR 51. Sections 91R and 91S of the Act qualify certain aspects of Article 1A(2) for the purposes of the application of the Act and Regulations to a particular person.
60. There are four key elements to the Convention definition. Firstly, an applicant must be outside his or her country. Secondly, the applicant must fear persecution, which, according to s.91R(1) of the Act, must involve 'serious harm' and 'systematic and discriminatory conduct'. The expression 'serious harm' includes, for example, a threat to life or liberty; significant physical harassment or ill-treatment; or significant economic hardship or denial of

access to basic services or denial of capacity to earn a livelihood, where such hardship or denial threatens the applicant's capacity to subsist: s.91R(2). The High Court has said 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 condoned or be incapable of being controlled 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. 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.

61. Thirdly, 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).
62. Fourthly, an applicant's fear of persecution for a Convention reason must be 'well-founded'. 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 a genuine fear founded on a 'real chance' of being persecuted for a Convention reason. A fear is well-founded where there is a real substantial basis for it but not if it is merely assumed or based on mere speculation. A 'real chance' is one that is not remote or insubstantial or a far-fetched possibility. A person can have a well-founded fear of persecution even though the possibility of the persecution occurring is well below 50 per cent.
63. 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.

#### **Complementary protection criterion**

64. 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').
65. 'Significant harm' for these purposes is exhaustively defined in s.36(2A). 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.

66. 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).

### Credibility

67. The Tribunal's task of fact-finding may involve an assessment of an applicant's credibility. In this context, the Tribunal is guided by the observations and comments of both the High Court and Federal Court of Australia in a number of decisions including *Minister for Immigration and Ethnic Affairs v Wu Shan Liang & Ors* (1996) 185 CLR 259, *Minister for Immigration and Ethnic Affairs v Guo* (1997) 191 CLR 559, *Abebe v The Commonwealth of Australia* (1999) 197 CLR 510, *Randhawa v MILGEA* (1994) 52 FCR 437, *Selvadurai v MIEA & Anor* (1994) 34 ALD 347, *Minister for Immigration and Ethnic Affairs and McIlhatton v Guo Wei Rong and Pam Run Juan* (1996) 40 ALD 445, *Chand v Minister for Immigration and Ethnic Affairs* (unreported, 7 November 1997), *Kopalapillai v Minister for Immigration and Multicultural Affairs* (1998) 86 FCR 547 and *Minister for Immigration and Multicultural Affairs v Rajalingam* (1999) 93 FCR 220. In these and other decisions, the courts have made it clear that it is important that the Tribunal is sensitive to the difficulties faced by asylum seekers and that it adopts a reasonable approach in making its findings of credibility.
68. In *Minister for Immigration and Ethnic Affairs and McIlhatton v Guo Wei Rong and Pam Run Juan* (1996) 40 ALD 445, Foster J stated at 482 that "care must be taken that an over-stringent approach does not result in an unjust exclusion from consideration of the totality of some evidence where a portion of it could reasonably have been accepted." Numerous decisions have endorsed the principle that the benefit of the doubt should be given to asylum seekers who are generally credible but unable to substantiate all of their claims.
69. The Tribunal has also had regard to the decision of *Minister for Immigration and Ethnic Affairs v Wu Shan Liang & Ors* (1996) 185 CLR 259, and the comments of the High Court on the correct approach to determining findings on credibility. Kirby J observed at [25]:
- First, it is not erroneous for a decision-maker, presented with a large amount of material, to reach conclusions as to which of the facts (if any) had been established and which had not. An over-nice approach to the standard of proof to be applied here is undesirable. It betrays a misunderstanding of the way administrative decisions are usually made. It is more apt to a court conducting a trial than to the proper performance of the functions of an administrator, even if the delegate of the Minister and even if conducting a secondary determination. It is not an error of law for a decision-maker to test the material provided by the criterion of what is considered to be objectively shown, as long as, in the end, he or she performs the function of speculation about the "real chance" of persecution required by Chan.
70. The Tribunal is not required to accept uncritically any or all allegations made by an applicant. Nor is it required to have rebutting evidence available to it before it can find that a particular factual assertion by an applicant has not been made out, or obliged to accept claims that are

inconsistent with the independent evidence regarding the situation in the applicant's country of nationality. In *Chand v Minister for Immigration and Ethnic Affairs* (unreported, 7 November 1997), the Full Court of the Federal Court observed that "where there is conflicting evidence from different sources, questions of credit of witnesses may have to be resolved. The RRT is also entitled to attribute greater weight to one piece of evidence as against another, and to act on its opinion that one version of the facts is more probable than another." Nevertheless, as Burchett J counselled in *Sundararaj v Minister for Immigration and Multicultural Affairs* [1999] FCA 76, it is necessary to:

... understand that any rational examination of the credit of a story is not to be undertaken by picking it to pieces to uncover little discrepancies. Every lawyer with any practical experience knows that almost any account is likely to involve such discrepancies. The special difficulties of people who have fled their country to a strange country where they seek asylum, often having little understanding of the language, cultural and legal problems they face, should be recognised, and recognised by much more than lip service.

71. Indeed, as the Full Court noted in *Sujeendran Sivalingam v Minister for Immigration and Ethnic Affairs* (unreported, 17 September 1998) "refugee cases may involve special considerations arising out of problems of communication and mistrust, and problems flowing from the experience of trauma and stress prior to arrival in Australia." On this point, the Tribunal also takes into account the comments of Professor Hathaway in *The Law of Refugee Status*" (1991, Butterworths) at pages 84-86. Nevertheless, there is no rule that a decision-maker may not reject an applicant's testimony on credibility grounds unless there are no possible explanations for any delay in the making of claims or for any evidentiary inconsistencies: *Kopalapillai v Minister for Immigration and Multicultural Affairs* (1998) 86 FCR 547 at 558-9. Nor is there a rule that a decision-maker must hold a 'positive state of disbelief' before making an adverse credibility assessment in a refugee case. However, if the Tribunal has 'no real doubt' that the claimed events did not occur, it will not be necessary for it to consider the possibility that its findings might be wrong: *Minister for Immigration and Multicultural Affairs v Rajalingam* (1999) 93 FCR 220 per Sackville J (with whom North J agreed) at 241. In addition, if the Tribunal makes an adverse finding in relation to a material claim made by an applicant but is unable to make that finding with confidence, it must proceed to assess the claim on the basis that the claim might possibly be true: see *MIMA v Rajalingam* (1999) 93 FCR 220. The Tribunal is also mindful of the observations of Gummow and Hayne JJ in *Abebe v The Commonwealth of Australia* (1999) 197 CLR 510 at [191]:

... the fact that an Applicant for refugee status may yield to temptation to embroider an account of his or her history is hardly surprising. It is necessary always to bear in mind that an Applicant for refugee status is, on one view of events, engaged in an often desperate battle for freedom, if not life itself.