0907346 [2009] RRTA 1168 (10 December 2009)

DECISION RECORD

RRT CASE NUMBER:	0907346
DIAC REFERENCE:	CLF2009/67286
COUNTRY OF REFERENCE:	Kiribati
TRIBUNAL MEMBER:	Jonathon Duignan
DATE:	10 December 2009
PLACE OF DECISION:	Sydney
DECISION:	The Tribunal affirms the decision not to grant the applicant a Protection (Class XA) visa.

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

1. This is an application for review of a decision made by a delegate of the Minister for Immigration and Citizenship to refuse to grant the applicant a Protection (Class XA) visa under s.65 of the *Migration Act 1958* (the Act).

2. The applicant, who claims to be a citizen of Kiribati, last arrived in Australia [in] December 2007 and applied to the Department of Immigration and Citizenship for a Protection (Class XA) visa [in] May 2009. The delegate decided to refuse to grant the visa [in] August 2009 and notified the applicant of the decision and his review rights by letter [on the same date].

3. The applicant applied to the Tribunal [in] September 2009 for review of the delegate's decision.

4. The Tribunal finds that the delegate's decision is an RRT-reviewable decision under s.411(1)(c) of the Act. The Tribunal finds that the applicant has made a valid application for review under s.412 of the Act.

RELEVANT LAW

5. Under s.65(1) a visa may be granted only if the decision maker is satisfied that the prescribed criteria for the visa have been satisfied. In general, the relevant criteria for the grant of a protection visa are those in force when the visa application was lodged although some statutory qualifications enacted since then may also be relevant.

6. Section 36(2)(a) of the Act provides that a criterion for a protection visa is that the applicant for the visa is a non-citizen in Australia to whom the Minister is satisfied Australia has protection obligations under the 1951 Convention Relating to the Status of Refugees as amended by the 1967 Protocol Relating to the Status of Refugees (together, the Refugees Convention, or the Convention), while s.36(2)(b) prescribes criteria for members of the same family unit as such a person.

7. Further criteria for the grant of a Protection (Class XA) visa are set out in Part 866 of Schedule 2 to the Migration Regulations 1994.

Definition of 'refugee'

8. Australia is a party to the Refugees Convention and generally speaking, has protection obligations to people who are refugees as defined in Article 1 of the Convention. Article 1A(2) relevantly defines a refugee as any person who:

> owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence, is unable or, owing to such fear, is unwilling to return to it.

9. The High Court has considered this definition in a number of cases, notably *Chan Yee Kin v MIEA* (1989) 169 CLR 379, *Applicant A v MIEA* (1997) 190 CLR 225, *MIEA v Guo* (1997)

191 CLR 559, *Chen Shi Hai v MIMA* (2000) 201 CLR 293, *MIMA v Haji Ibrahim* (2000) 204 CLR 1, *MIMA v Khawar* (2002) 210 CLR 1, *MIMA v Respondents S152/2003* (2004) 222 CLR 1 and *Applicant S v MIMA* (2004) 217 CLR 387.

10. 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.

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

12. Second, an applicant must fear persecution. Under s.91R(1) of the Act persecution must involve "serious harm" to the applicant (s.91R(1)(b)), and systematic and discriminatory conduct (s.91R(1)(c)). The expression "serious harm" includes, for example, a threat to life or liberty, significant physical harassment or ill-treatment, or significant economic hardship or denial of access to basic services or denial of capacity to earn a livelihood, where such hardship or denial threatens the applicant's capacity to subsist: s.91R(2) of the Act. The High Court has explained that persecution may be directed against a person as an individual or as a member of a group. The persecution must have an official quality, in the sense that it is official, or officially tolerated or uncontrollable by the authorities of the country of nationality. However, the threat of harm need not be the product of government policy; it may be enough that the government has failed or is unable to protect the applicant from persecution.

13. Further, persecution implies an element of motivation on the part of those who persecute for the infliction of harm. People are persecuted for something perceived about them or attributed to them by their persecutors. However the motivation need not be one of enmity, malignity or other antipathy towards the victim on the part of the persecutor.

14. 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.

15. Fourth, an applicant's fear of persecution for a Convention reason must be a "well-founded" fear. This adds an objective requirement to the requirement that an applicant must in fact hold such a fear. A person has a "well-founded fear" of persecution under the Convention if they have genuine fear founded upon a "real chance" of persecution for a Convention stipulated reason. A fear is well-founded where there is a real substantial basis for it but not if it is merely assumed or based on mere speculation. A "real chance" is one that is not remote or insubstantial or a far-fetched possibility. A person can have a well-founded fear of persecution even though the possibility of the persecution occurring is well below 50 per cent.

16. 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.

17. Whether an applicant is a person to whom Australia has protection obligations is to be assessed upon the facts as they exist when the decision is made and requires a consideration of the matter in relation to the reasonably foreseeable future.

CLAIMS AND EVIDENCE

18. The Tribunal has had regard to material contained on Tribunal case file 0907346 and Departmental file CLF2009/67286 as well as material available to it from a range of other sources as referred to in this decision.

19. The applicant provided with his application a declaration regarding his circumstances relevant to the application. This relevantly stated:

> 1. Kiribati is a pacific country where I was born and grew up.
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> 2. Kiribati is formed by three main groups of islands, the Gilbert group, Line island group and the Phoenix group.
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> 3. Kiribati has more seawater than land mass with a height of two to three meters above sea level. The islands are coral atolls with mainly sand stones gravels and no soil. Kiribati is located around the intersection of the equator and the international dateline in the Pacific Ocean. After the British Colony left, the island is administered by Australia. The Australian dollars is used in Kiribati as its currency.
>
> 4. Most of my life I have lived and worked in Kiribati. I completed my High School education in Kiribati but could not further my education as we are so many in the family and my Dad passed away during my last year in High School. I had to work to help support my younger brothers and sisters.
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> 5. In [year] I joined the Kiribati Government work force and in [year] I was married.
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> 6. I did not have any children of my own but adopted my sister's daughter. The annual average wage scale I was earning was between AUD$3,000.00 - $4,000.00 per year.
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> 7. During my engagement with the government work force I was fortunate to be given short courses overseas in Fiji from which I received promotions in my positions on successfully completing the account course. I worked as a [type of Clerk] and then [another type of Clerk] at the [employer]. I then later saw the advertisement in our local newspaper for a position of [Accountant], needed at the [Employer 1] where I lodged my application and attended an interview. I was successfully accepted to the new job.
>
> 8. It was at [Employer 1] where I started travelling overseas and did more courses at the time, relating to my present work. I did airline ticketing and revenue airline ticket account proration.
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> 9. In my first year with the [Employer 1] I was sent to IATA (International Airline Transport Association) in Geneva, Switzerland, where I completed my four- week course - Diploma in Airline Ticketing.
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> 10. In my second year I was sent back to IATA Switzerland to do my Airline Ticket Proration and in my third year I did Airline Marketing. Every time travelled to Switzerland to attend the courses I often travelled via Fiji, Sydney, Singapore and

London and then on to Geneva. Other times I travelled via Dubai, the Middle East and Bangkok.

11. Other business travels made while with the airline was to Hong Kong, Los Angeles, China, and Malaysia. On my holidays I visited friends in London, UK, Majuro Marshall Islands, and Fiji.

12. At the time [Employer 1] worked closely with [name] and I was privileged to come over to Sydney and worked (on-the-job training) with [name], in their Revenue Account Section, for three months. On completion of my attachment I went back to Kiribati and worked a year for [Employer 1], after which I was then sent back to Sydney Australia to undergo three (3) years study in an Advanced Certificate in Commerce with [education provider]. I then went on to complete a Diploma of Travel and Tourism with the [education provider] NSW.

13. From 1991 to 1994 I underwent further study in Sydney before returning back to Kiribati on completion as I am bound by [Employer 1] to return and work for them as least two years.

14. On completion of my work contract with [Employer 1] I stepped down and run a small trading business importing [goods] from [Country 1] and then selling it in Kiribati. It was good in the beginning but collapsed when a fight (Solomon crisis) occurred in the Solomon Islands between islanders and businessmen. The fighting was severe in that the Solomon government could not control and seek Australian Army Peace keeping force assistance.

15. I then later tried the Agency Business where I helped the Kiribati Marine Boys find work on overseas Fishing Vessels. The Agency was not viable as the operation cost exceeded the income.

16. Life in Kiribati is getting harder and harder. Most people are very poor and keep struggling for their everyday life. The village ([Village A]) in which used to live, before coming to Sydney, is badly affected by sea water and it has become very difficult to earn a living.

17. The sea water is springing up through the ground, which is mainly sand, and spoiling the drinking well water. We tried to economise our rain water tank catchment and use this for drinking. We have nowhere to obtain fresh water. Some of the islands in Kiribati have disappeared due to the sea water level rising and the change in climate. The fruit trees like breadfruit, papaya, etc which are our main livelihood (beside fish), are ruined and completely destroyed.

18. This is the reason why I travelled to Australia: to find a shelter, a home that can give me peace of mind and good health. Australia is an abundant, peaceful and blessed country.

19.1 arrived in Sydney Australia [date] 2007. Since then I have never returned to Kiribati. I entered Australia legally on a one year multiple stay visa where I am allowed to stay in Australia for up to 3 months on every entry. Before the three months expired I flew to Nadi, Fiji and then flew back again to Australia, my dream home. I kept doing this until my air ticket was finished.

20. I cannot travel back to Kiribati as there is no future there for me and I am not able to earn a living. Moreover, the future of the country is quite frightening as every year the country sinks future into the sea due to the climate changes.

> 21.I am grateful to my Kirabati family and friends who have supported me during my stay here. I cannot pay back their love and kindness but God Almighty is the only and the one who can generously reward them.
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> 22. I never intended to burden my Kiribati relatives living in Australia but I humbly seek and request the Australian Authorities to kindly please allow me to stay in Australia. I honestly appreciate your understanding and kind consideration of my situation. The thought of returning to my country which is facing inevitable disappearance is terrifying.
>
> 23. Thanking you and God bless.

20. Within the application form, the applicant identified the impact of the rising sea level on his country, including the contamination of drinking water and the deterioration of his own health from a non-balanced diet. He believed the country would be covered by sea water in 3 to 5 years.

21. The fear of what may happen if he retuned to Kiribati was identified as not being able to work, support his family and eventually not having anywhere to go. Drinking water was polluted and incursion of sea water could remain for substantial periods, affecting fruit tress and other food crops. Fortnightly king tides flooded the area of the applicant's village and eventually the island would sink under water.

22. The applicant's adviser submitted that:

> The applicant is a national of Kirabati. He is [age] years of age. He is married and has one adopted daughter. His wife is still in Kiribati and his daughter is married and resides in the United States.
>
> The applicant has previously travelled to Australia to study and work, but his most recent entry was in March 2007 and he has not departed Australia since that date. The applicant's claims are that he can not return home to his country, Kirabati, which has been significantly affected by climate change and is likely to be non habitable in the foreseeable future.
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> Kirabati is a collection of small Islands in the pacific ocean, it is halfway between Australia and Hawaii. Most of the country's remaining land is less than 2 metres above sea level.
>
> The applicant resided in the village of [Village A] prior to coming to Australia. [Village A] (sic) has been badly affected by sea water and regular wild storms. The crops are ruined and there is no fresh drinking water. Living in the village has become extremely difficult and it is anticipated that all the people of that village will have to relocate as they will not have any food, water or shelter. Relocation within Kirabati itself is difficult, as it is all a matter of short time before people are again affected by rising sea levels and have to relocate again. There is already a serious shortage of food, fresh water, shelter and energy and this must urgently be addressed now before the Island of Kirabati is completely submerged, which some estimate could be as early as 2050, according to a IPCC report.
>
> Climate change is a reality and the effects of carbon dioxide emission is most greatly felt in the pacific and small Islands such as Kiribati are bearing the brunt of these changes to the environment, consequently the people of Kiribati will become displaced and it is extremely important that developed countries in the pacific

recognise the effect of climate change on the people of Kiribati and have in place measures to accommodate the refugees affected by climate change.

Can Australia's existing laws accommodate climate change refugees?

Under existing laws, climate people affected by climate change are not recognised as a cognisable group of people in need of protection. It is submitted however, that existing protection visa laws can, and should, be creatively interpreted to accommodate climate change refugees in the absence of specific provisions in the Migration Act.

Under the Migration Act, s36(2) (a), persons to whom Australia has protection obligations are entitled to a protection visa. As a party to the refugee convention Australia owes protections to 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.''

The applicant is outside his home country of Kiribati.

The applicant's claims are grounded in events that are currently taking place now and will take place in the future in their home country, including rising sea levels, salination and floods. It is submitted that climate change should be seen as a form of persecution which involves serious harm. While it may be difficult to define climate change as persecution having regard to current international and domestic law, it would not be difficult to satisfy the requirement of serious harm as defined in s9lR(1)(c) and s9 in the Migration Act, in that people affected by climate change will suffer significant economic hardship, as they will be denied the capacity to earn a livelihood and that such hardship threatens the applicant's capacity to subsist. Furthermore, the government of Kirabati is unable to protect people such as the applicant from the persecution: Chan per McHugh J at 430.

It is further submitted that the people of Kirabati, especially people such as the applicant, who come from parts of the island that is heavily affected by rising sea levels and salination, are a cognizable social group, and can be defined as members of 'a particular social group".

It is submitted that the applicant's fear is well founded. There is a large body of evidence available to indicate that carbon dioxide emissions are bringing about radical and fast approaching climate change. In recent years many of the pacific islands have submerged deeper under water and most of the Island of Kiribati is less than 2 or so metres above sea level, making it highly vulnerable to sea level change, violent storms and eventually full submersion. Australia's current policy clearly indicates that the government accepts the reality and the effect of climate change on the region.

It is submitted that the applicant is a person to whom Australia has protection obligations, as he has a well-founded fear of persecution in Kiribati for reasons of membership of a particular social group: namely, people from Kirabati and / or from the Island of Kiribati who have lost the capacity to earn a livelihood as a result of climate change.

> It is acknowledged that Australian laws, as currently interpreted, might not provide the perfect legal framework within which people such as the applicant can claim protection, however, it is submitted that in such circumstances, and in the absence of specific legislation to deal with this, the laws should be interpreted in a creative way to allow people such as the applicant to be recognized as refugees.

23. The application included the following supporting documentation, going to the applicant's circumstances and the situation facing those living in Kiribati:

    - letter from the Edmund Rice Centre, dated 28 March 2009.
    - article from ABC News titled, "Government encouraged to welcome 'climate change refugees", dated 14 July 2008.
    - press release, from Bob Brown, dated 12 November 2008, "Australian should open doors for climate change refugees".
    - article titled "Kirabati — relocation and adaptation", by Maryanne Loughry and Jane McAdam.
    - article titled, "The world's first climate change refugees", dated 24 June 2008.
    - article titled, "Climate refugees: resettlement programmes, something for the EU", dated 18 August 2008.

24. This material supports the view of the applicant and his adviser that there are likely to be serious repercussions from rising sea water level predicted by theorists studying the impact of global warming. Pressures which exist in Kiribati are likely to be exacerbated and ultimately the islands may become unliveable. There is reference to the program of the New Zealand Government to settle numbers of inhabitants of Pacific Islands in the foreseeable future, although there are limitations on this program. The material also referred to the applicant's background in study and his personal attributes as witnessed by those who had worked with him.

25. The applicant attended an interview with an officer of the Department in which he gave information about the impact on his own health of the difficulties experiences in his home country and the likely devastation of his home in the near future. The information he gave at this time was consistent with that referred to above.

26. The delegate did not find the applicant to be a person to whom Australia had protection obligations and refused him the grant of a Class XA visa.

27. The applicant sought review of that decision.

28. The applicant gave evidence at a hearing before the Tribunal [in] November 2009. The applicant agreed that he was national of Kiribati, who had a history of frequent travel to Australia. He agreed that his most recent arrival in Australia was [in] December 2007. His current passport was a replacement for his previously expired passport, both lasting for 10 years. The applicant was born in Kiribati and was not aware of any right to permanently live in any other country. While travelling to other countries frequently he had not lived permanently in any other country.

29. The applicant thought he was not given a visa by the Department because it appeared he did not meet the criteria. He felt the Department did not seriously consider the application, based on the feeling that he did not meet the criteria to become an immigrant to Australia. They did not seriously consider the problem which he felt deeply in himself that he was currently facing.

30. The issue of whether the applicant could be said to fear persecution for a reason dealt with in the Refugees Convention was discussed. He explained that he understood that his fear was not for political or social reasons, but his fear was of global warming and this was not seriously considered. The difficulty in identifying any person, group, state or organisation who or which was taking any action directed at the applicant was discussed. The lack of any apparent motivation to have any impact on the people of Kiribati by those high greenhouse gas emitting countries or groups was discussed. The applicant explained that the problem he identified was because freshwater in Kiribati was being overtaken by salt water and this had serious implications for health.

31. The village in which the applicant lived had been affected by salt water and even the fruit trees were not producing enough for people to live healthily. That was the fear that the applicant had.

32. The applicant was asked how he believed his circumstances fitted with the interpretation of the term refugee. He explained that his concern was his health. His fear was that he knew what was happening to his country and he feared going back to an unhealthy lifestyle. The reasons for these effects on Kiribati were beyond his knowledge and he could not explain it, although he was aware of theories which explained it.

33. In respect of the issue of diabetes, the applicant had only found out he had diabetes when he undertook the medical check in Australia He was not aware of others in his family who suffered diabetes. The applicant had not taken any medication in connection with his condition so far. The applicant's adviser indicated that his condition was currently controlled by diet.

34. The issues affecting Kiribati were discussed with the applicant. Information available to the Tribunal indicated that the applicant was correct to be concerned about the impact of sea level rise on Kiribati in the next 90 years. It would appear that this would affect the way of life in Kiribati and possibility the ability to live there at all. The applicant indicated that while some evidence indicated that it could be 90 years before the problems occurred, he believed this would happen more quickly.

35. The absence of motivation important to the notion of being persecuted for a Convention reason was discussed. The applicant could not think of anything about this issue at the moment.

36. Given that the matter concerning the application went to the interpretation of the Refugees Convention, the Tribunal sought any views of the applicant's adviser about this issue. The applicant's adviser referred to circumstances in Sweden, where she believed the terms of the Refugees Convention had been stretched to include fears such as those of the applicant, being climate change refugees. She believed if a similar approach was adopted in Australia this would allow us to recognise an area that was going to be of increasing concern in the future. She explained that she saw the difficulty as the selective and discriminatory nature of the conduct.

37. The possibility that the impact of climate change was an inadvertent impact of the actions of human activity, rather than actions which had the necessary element of motivation was discussed. She noted that while the material referred to by the Tribunal may indicate an impact in 90 years, the current evidence also indicated a much faster rate of deterioration within a much shorter time frame. She indicated that it was her belief that this was a matter of increasing importance that would need to be dealt with.

38. The applicant's adviser indicated that she was aware of recent evidence from a recent visit to Kiribati which showed the substantial impact on the shoreline of Kiribati and they were awaiting the conclusion of that report in the near future.

39. The Fourth Assessment Report of the Intergovernmental Panel on Climate Change, (the FARS) published in 2007 indicated a range of scenarios which could affect sea level rise, indicating a rise of some 50cm to a rise of several metres depending on variable factors, including the actions taken in respect of the production of greenhouse gases over the next half century. The applicant's adviser referred to the work of Ms Jane McAdam in this regard.

40. The FARS provides a summary of its findings in respect of global sea level rise in the following terms:

> The best estimate for how much further the sea level will rise due to ocean expansion and glacier melt by the end of the 21st century (compared to 1989-1999 levels) is 28-58 cm. This will worsen coastal flooding and erosion.
>
> Larger sea-level increases of up to 1 metre by 2100 cannot be ruled out if ice sheets continue to melt as temperature rises. There is now evidence that the Antarctic and Greenland ice sheets are indeed slowly losing mass and contributing to sea level rise. About 125,000 years ago, when the polar regions were significantly warmer for an extended period than at present, melting polar ice caused the sea level to rise by 4 to 6 metres. Sea-level rise has substantial inertia and will continue for many centuries.
>
> The oceans will also experience higher temperatures, which have implications for sea life. Over the past four decades, for example, North Atlantic plankton have migrated pole-ward by 10 degrees of latitude. Similarly, the acidification of the oceans as they absorb more carbon dioxide will impair the ability of corals, marine snails and other species to form their shells or skeletons.

41. The applicant's claims of fearing harm from the sea level rise affecting Kiribati, that he would have a limited ability to earn a livelihood of any livelihood at all, that it would affect his health and make Kiribati uninhabitable for the applicant in future were discussed. He did not identify any harm other than these.

42. The applicant's wife remained living in Kiribati, in a home owned by the applicant. The home itself was not affected by king tides, but every fortnight if there was a really high tide there was evidence of sea water seeping through the sandy soil all around the home. This meant they were unable to grow things they had grown in the past.

43. The applicant wished to give more information about Kiribati. The island on which his home stood is nearly two miles wide and the available water was pretty salty. Fruiting trees were dying. The drinking water from the well was no longer drinkable when the applicant was there last. Rain water was collected and also water was supplied to the whole island through a lake filled with good water. As far as the applicant was aware it had not been raining much in Kiribati, although it was raining a little at this time of year. The applicant also noticed that

life in Kiribati is becoming very expensive. All of these problems combined and present themselves as a huge problem. At [Village A] mud is cause by salt water at high tide Extreme erosion is also a problem on the ocean and lagoon side of the village. The problem was not going away but was getting worse and worse as the years go by.

44. The applicant and his adviser sought additional time to provide further information to the Tribunal which was allowed. Subsequent to the hearing, the Tribunal received a submission which stated that additional information from a member of the Edmund Rice Centre was not available, but submitting that there was sufficient evidence that Kiribati was a country heavily affected by climate change. Also included was an article from 21 November 2009 by Adam Morton and titled *A way of life being washed away* which referred to the impact of climate change on Kiribati Also included was an extract from the Government Office of Sweden related to asylum in that country which noted that the Swedish Aliens Act identified those in need of protection because of an environmental disaster.

45. It was submitted that those fleeing their home country for environmental reasons should be defined as a particular social group to whom Australia had protection obligations. It was further submitted that in light of scientific knowledge of the impact of carbon dioxide emissions, Australia's continued production of high levels of such pollution, in complete disregard for people on low lying islands, constitutes the relevant motivation to characterise climate change as persecution.

FINDINGS AND REASONS

46. The Tribunal accepts that the applicant is a citizen of Kiribati and no other country. He has consistently maintained his birth in that country and has presented travel documentation issued by the authorities of that country. This is the country against which his claims should be assessed.

47. The applicant fears return to his country of nationality because there is substantial scientific evidence that rising sea levels will devastate that country. He fears rising sea levels will see the further diminution of fresh water for drinking, washing and survival of food production crops. He fears ultimately that the country could be completely submerged by sea water and not longer habitable.

48. The difficulty with this application in the Tribunal's view, is that the Tribunal does not believe the applicant fears persecution for reasons of race, religion, nationality, membership of a particular social group or political opinion as required by the Refugees Convention. Although it is not necessary that those who would persecute proceed from a basis of malignity, it is well established that persecution within the meaning of the Convention must involves a discriminatory element. S.91R(1)(c) and the requirement that for the Refugees Convention to apply to persecution, the persecution must involve systematic and discriminatory conduct reflects this In *Applicant A & Anor v MIEA & Anor* (1997) 190 CLR 225, Brennan CJ stated:

> … the feared persecution must be discriminatory. The victims are persons selected by reference to a criterion consisting of, or criteria including, one of the prescribed categories of discrimination ("race, religion, nationality, membership of a particular social group or political opinion") mentioned in Art 1(A)(2).

49. In the same case, McHugh J said:

> When the definition of refugee is read as a whole, it is plain that it is directed to the protection of individuals who have been or who are likely to be the victims of intentional discrimination of a particular kind. The

> discrimination must constitute a form of persecution, and it must be discrimination that occurs because the person concerned has a particular race, religion, nationality, political opinion or membership of a particular social group. …
>
> Whether or not conduct constitutes persecution in the Convention sense does not depend on the nature of the conduct. It depends on whether it discriminates against a person because of race, religion, nationality, political opinion or membership of a social group.

50. In *Ram v MIEA & Anor (1995)* 57 FCR 565, this was expressed as involving an element of motivation for the infliction of harm, although it is clearly not necessary that the motivation be enmity towards the persecuted Burchett J stated in that case:

> Persecution involves the infliction of harm, but it implies something more: an element of an attitude on the part of those who persecute which leads to the infliction of harm, or an element of motivation (however twisted) for the infliction of harm. People are persecuted for something perceived about them or attributed to them by their persecutors.

51. In this case, the Tribunal does not believe that the element of an attitude or motivation can be identified, such that the conduct feared can be properly considered persecution for reasons of a Convention characteristic as required. It has been submitted that the continued production of carbon emissions from Australia, or indeed other high emitting countries, in the face of evidence of the harm that it brings about, is sufficient to meet this requirement. In the Tribunal's view, however, this is not the case. There is simply no basis for concluding that countries which can be said to have been historically high emitters of carbon dioxide or other greenhouse gases, have any element of motivation to have any impact on residents of low lying countries such as Kiribati, either for their race, religion, nationality, membership of any particular social group or political opinion. Those who continue to contribute to global warming may be accused of having an indifference to the plight of those affected by it once the consequences of their actions are known, but this does not overcome the problem that there exists no evidence that any harms which flow are motivated by one of more of the Convention grounds.

52. While it has been submitted that the applicant can be considered a member of a potential range of social groups, including those from Kiribati, or those from Kiribati who have lost the ability to earn a livelihood or those fleeing their homes for environmental reasons In the Tribunal's view, this does not assist the applicant, because the Tribunal does not believe that it is possible to identify any agent of persecution who or which can be said to be undertaking actions which harm the applicant for reasons of membership of any particular social group. Thus, while there may be many potential social groups of which the applicant is a member, the absence of the element of motivation means that persecution cannot be said to be occurring for reasons of membership of any such group.

53. Likewise, it has been submitted that other jurisdictions have in place mechanisms which allow for the identification of elements of natural disaster or environment problems which give rise to people seeking protection in a country other than that of which they hold nationality. The applicant's adviser has identified provisions in the Swedish Aliens Act which could be so used, while the Organisation of African Unity through the 1969 Convention Governing the Specific Aspects of Refugee Problems in Africa introduced an expanded definition of a refugee, which focuses less on the motive for flight than the Refugees Convention and may encompass flight from natural or environmental phenomenon While it may be true that these developments have occurred elsewhere in consideration of human flight, the Tribunal is bound to apply the law as it currently stands in Australia. Considering

the circumstances here, the Tribunal does not believe that the law allows for protection under the Refugees Convention for those in the situation of the applicant.

54. There appears no doubt that the circumstances the applicant, and others living in Kiribati, face are serious and deserving of significant Governmental consideration and attention. They are not matters against which, however, the Refugees Convention as it applies in Australia is able to provide protection.

55. For these reasons, it is the view of the Tribunal that the applicant does not hold well-founded fear of being persecuted for reasons of race, religion, nationality, membership of any particular social group or political opinion should he return to Kiribati now, or in the foreseeable future. On this basis, he is not a person owed protection obligations by Australia Nor is he the member of the same family unit as such a person. This being the case, he cannot satisfy essential prescribed criterion for a Class XA visa contained at s.36 of the Act. He must, therefore, be refused the grant of such a visa under s.65 of the Act. The delegate's decision to this effect should be affirmed.

DECISION

56. The Tribunal affirms the decision not to grant the applicant a Protection (Class XA) visa.

I certify that this decision contains no information which might identify the applicant or any relative or dependant of the applicant or that is the subject of a direction pursuant to section 440 of the *Migration Act 1958*.

Sealing Officer's I.D. prrt44