

1102251 [2011] RRTA 390 (24 May 2011)

DECISION RECORD

RRT CASE NUMBER: 1102251

DIAC REFERENCE(S): CLF2010/115787

COUNTRY OF REFERENCE: Malaysia

TRIBUNAL MEMBER: Kay Kirmos

DATE: 24 May 2011

PLACE OF DECISION: Brisbane

DECISION: The Tribunal remits the matter for reconsideration with the direction that the applicant satisfies s.36(2)(a) of the Migration Act, being a person to whom Australia has protection obligations under the Refugees Convention.

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 Malaysia, arrived in Australia on [date deleted under s.431(2) of the *Migration Act 1958* as this information may identify the applicant] February 2010 and applied to the Department of Immigration and Citizenship for the visa [in] September 2010. The delegate decided to refuse to grant the visa [in] February 2011 and notified the applicant of the decision.
3. The delegate refused the visa application on the basis that the applicant is not a person to whom Australia has protection obligations under the Refugees Convention.
4. The applicant applied to the Tribunal [in] March 2011 for review of the delegate's decision.
5. The Tribunal finds that the delegate's decision is an RRT-reviewable decision under s.411(1)(c) of the Act. The Tribunal finds that the applicant has made a valid application for review under s.412 of the Act.

RELEVANT LAW

6. 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.
7. 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).
8. 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'

9. 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.

10. 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.
11. 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.
12. There are four key elements to the Convention definition. First, an applicant must be outside his or her country.
13. 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.
14. 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.
15. 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.
16. 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.

17. 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.
18. 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

19. The Tribunal has before it the Department's file relating to the applicant. The Tribunal also has had regard to the material referred to in the delegate's decision, and other material available to it from a range of sources.
20. The applicant arrived in Australia [in] February 2010 as the holder of a Student subclass 573 visa which was granted [in] December 2009. The applicant travelled to Australia previously on eight occasions in 2008 and 2009 as the holder of a visitor visa. He applied to the Department for a protection visa [in] September 2010. In summary, he claimed that he entered Australia as the beneficiary of a [government] scholarship to study in Australia. He is a homosexual. He lost his scholarship due to his homosexual behaviour coming to the attention of the Malaysian Government. He was told that he was destroying Malaysia's name through his conduct. His family, as his guarantor, has been ordered to repay the scholarship. He feared that if he returned to Malaysia he would be prosecuted under the homosexual laws that operate in Malaysia. He believed he would be blacklisted, would be unable to study or find employment. The authorities will not protect him as he has been reported as having ruined the country's reputation.
21. Attached to the Departmental file are supporting documents and submission in support of the application. The delegate decided to refuse to grant the visa [in] February 2011 on the basis that the applicant is not a person to whom Australia has protection obligations under the Refugees Convention. The applicant applied to the Tribunal for a review of the decision.
22. The applicant forwarded a submission together with further supporting documentation to the Tribunal prior to the hearing. He appeared before the Tribunal [in] May 2011 to give evidence and present arguments.
23. The applicant stated that he entered Australia [in] February 2010 on a student visa. He currently resides with his partner in Brisbane.
24. The applicant was studying [course and education provider deleted: s.431(2)]. He stated that he applied for the protection visa, because the Malaysian Government found out that he was gay. He had been fined in Malaysia for being gay but he was given the opportunity to study in Australia. The Government took away his scholarship to study in Australia and told him that he was giving Malaysia a bad name. He fears that if he returns to Malaysia he would not be able to study and may face imprisonment.

25. Asked to provide further details, he stated that he realised he was attracted to mature Caucasian males during his first trip to Penang at the age of 12. He said he cannot change himself, he is attracted to the same sex and has had same-sex relationships. His parents were aware of his homosexuality when he was aged 17. A man from the United Kingdom with whom he had been in contact, came to visit him in Malaysia. His parents know of his homosexuality but it is not discussed. He has told them he cannot change.
26. He stated that he met boyfriends over the Internet. He never had a girlfriend. He had many friends in secondary school, some of whom accepted his homosexuality, some who did not. He was educated at primary and secondary level in [town deleted: s.431(2)], and the Government sent him to Kuala Lumpur to [study] at college. Until then he had endured name-calling, but this was his first time away from his parents. After he had been in Kuala Lumpur for one year, he wanted to explore the gay scene. He went to [club deleted: s.431(2)] where he interacted with other gay men. He was very discreet because he didn't want people to know he was gay.
27. One of his friends was interviewed at college because he was very feminine, and it became known that he was a transvestite and making videos. This friend mentioned that the applicant was gay. The college counsellor met with the applicant and asked him some questions, which he did not want to answer. He was told that it would be confidential, so he told them that he was gay. The counsellor later told the disciplinary department of his college everything. The applicant was told by the disciplinary committee that they knew who he was. The college fined him 500 Malaysian Ringgits for his sexual confusion and missing classes. There was a disciplinary hearing before 12 members but he did not appear at the hearing, as he agreed he had gone to the gay club and had skipped classes. The applicant's parents paid the fine. He does not know if the authorities were aware at that time, as it was at college process.
28. At the time he had a partner in Melbourne. The applicant has travelled to Australia eight times. He went to [Country 1] once in 2008. In March 2009, he travelled to see his partner in Melbourne and stayed for a week. They had a relationship for approximately 2 years which ended not long before he came to Australia in February 2010 to study.
29. When the applicant arrived in Australia in 2010, he began a relationship with a man from Sydney he met online after his relationship with the Melbourne man ended. He skipped some classes to see him, but kept up with his studies. Everything was fine until a lecturer rang and asked him to see her. The [Department Head] then received an anonymous call about his behaviour and that he was skipping classes to see his partner in Sydney. The Department Head e-mailed the Malaysian Government about an unnamed student's conduct, but did not name the applicant. The applicant subsequently received a call from [the government department] office in Canberra. He was questioned about his sexuality and told to stop his gay behaviour and to go to classes.
30. The applicant promised not to see his partner any more, but he did. The Department Head informed the Government that the student in question was the applicant. At this point, the applicant's parents were called by the Malaysian Government and were told that the applicant's scholarship was stopped and that they had to repay the money he had received. They put pressure on the applicant directly and through his family. His father has been repaying the debt because he doesn't want any problems.

31. The applicant stated that he had been fined because of his homosexuality and had lost his scholarship because of it. Neither he nor his family has been threatened. He fears that if he returns to Malaysia he will be denied access to study and the Government now being aware of his homosexuality, may prosecute him. He could be jailed as sodomy is an illegal act.
32. The Government sends effeminate children to camps to change them. Even if he is discreet people know he is gay. There will be pressure to change and he will be targeted. Here he has freedom.

Background information

33. The homosexual rights group, PT Foundation (formerly known as Pink Triangle) stated in a 2008 article that there was marginalisation of, and entrenched prejudice against, homosexual men in Malaysia. There was said to be a “tremendous level of ignorance to the point of bigotry among the masses” with regard to homosexuality. This has resulted in difficulties encouraging a healthy, responsible gay community that would look after its members. Fearful gay men often do not identify themselves as gay, only engaging covertly in anonymous sexual encounters, internet hook ups, and one night stands. Nevertheless, there is said to be an emerging generation of young Malaysians who are “open minded, willing to learn and with the ability to make informed opinions and values” [Tan, S. 2008, ‘Malaysia’s PT Foundation turns 21’, Fridae website, 27 November <http://www.fridae.com/newsfeatures/2008/11/27/2162.malaysias-pt-foundation-turns-21> – Accessed 25 June 2010].
34. An August 2009 article reported Simranjit Kaur Gill of the Bar Council Human Rights Committee in Malaysia’s observation that there are “ever increasing attempts to restrict and limit sexuality rights in Malaysia, be it the straight or gay communities”. The article added that in Malaysia the homosexual community is frequently seen as “breaching social codes, fomenting dissent and advocating ‘deviancy’”. They are perceived as not being ‘normal’ [Tan, S. 2009, ‘Gay sex acts should not be criminalised: Malaysian Bar Council Human Rights Committee’, Fridae website, 13 August <http://www.fridae.com/newsfeatures/2009/08/13/8773.gay-sex-acts-should-not-be-criminalised-malaysian-bar-council-human-rights-committee> – Accessed 25 June 2010].
35. The US Department of State (US DOS) reported in 2010 that religious and cultural taboos against homosexual conduct were widespread [US Department of State 2010, *Country Reports on Human Rights Practices, for 2009 – Malaysia*, March, Section 6] According to a delegate from Action Canada in a UN Human Rights Council report, a Malaysian delegation had acknowledged that the Malaysian Penal Code “criminalized oral and anal sex and stated that it was against the tenets of the State’s official religion, Islam, and also Christian and Buddhist religions”. [‘Press Release – Human Rights Council Adopts Outcomes of Universal Periodic Review on Malaysia and Jordan’ 2009, UN High Commissioner for Human Rights website, 12 June <http://www.unhchr.ch/hurricane/hurricane.nsf/view01/E6699BD6D1ABE0E1C12575D300469591?opendocument>].
36. In the aforementioned Bar Council Human Rights Committee interview, Gill also mentioned that “of late, there have been ever increasing attempts to restrict and limit Malaysians sexuality rights from the fatwas (a decree handed down by an Islamic religious leader) on tomboys, yoga, etc...”.

37. The US DOS reports that “although there are no laws that prohibit homosexual conduct, laws against sodomy and ‘carnal intercourse against the order of nature’ exist and were enforced sporadically”. A February 2010 *Jakarta Globe* article takes the laws to mean homosexuality is effectively illegal and adds that the crime of sodomy incurs a punishment of 20 years jail.
38. While it is difficult to enforce anti sodomy and anti carnal intercourse laws, and they are only enforced sporadically, it is alleged that authorities use the laws as a tool to “intimidate, harass, extort and exploit gay men and gay-friendly businesses”, thereby effectively criminalising lesbian, gay, bisexual and transgender people (LGBTs). The law “hangs like the proverbial sword of Damocles over the heads of gay men” Amnesty International Malaysia, in a 2007 article on the Fridae website, states that the “potential outing” that results from coming to the attention of the authorities with regard to the anti homosexual laws results in keeping gay men vulnerable. It adds “the press too is not ashamed to exploit this vulnerability selling itself with sensational news” [Lim S.H. 2007, ‘No sex party going on at Penang fitness centre, say those arrested’, Fridae website, 22 November <http://www.fridae.com/newsfeatures/2007/11/22/1946.no-sex-party-going-on-at-penang-fitness-centre-say-those-arrested> – Accessed 25 June 2010].
39. This intimidation of the homosexual community often occurred in the form of raids of suspected gay venues under the guise of “keeping all types of vice activities in check”. According to the PT Foundation quoted in the same Fridae article, the laws allow authorities “to drive gay-friendly saunas underground, operating as ‘fitness centres,’ ‘spas,’ etc”. In one police raid on a fitness centre in Penang, 37 men were arrested. Police claimed that at the time of the raid “a sex party was in progress” but this was denied by those arrested. One patron who was detained for two nights claimed “we were fully dressed when the police came in.” The detainees were released after signing a bond. According to observers, the arrests were unlikely to result in charges. Amnesty International Malaysia suggested that “raids like this don’t happen in isolation. One raid leads to another, and it’s usually a political tactic to divert the people from more pressing issues of concern”. [Amnesty International 2007, ‘Malaysia: Fear for safety/torture or ill-treatment’, AI website, 3 August <http://web.amnesty.org/library/Index/ENGASA280022007?open&of=ENG-MYS>]
40. A search of the archives of Malaysia’s *The Star* newspaper for the past twelve months found reports regarding raids or adverse attention to homosexual men in Kuala Lumpur in April 2009, and in the state of Penang in June 2009, February 2010 and March 2010. A 2008 *Pink News* article reported a series of raids on a massage parlour, a health club and two other properties during which more than 70 men were arrested. The local press alleged again that they were hosting “sex parties” and that porn magazines, DVDs, condoms and lubricant were seized. According to police the case was classified as under the “act of gross indecency under Section 377D of the Penal Code”. [‘Toilet trysts at Central Market’ 2009, *The Star Online*, 25 April <http://thestar.com.my/news/story.asp?file=/2009/4/25/nation/3767197&sec=nation> – Accessed 25 June 2010; ‘Two caught with pants down in raid on gay joint’ 2009, *The Star Online*, 13 June <http://thestar.com.my/news/story.asp?file=/2009/6/13/nation/4110005&sec=nation> – Accessed 25 June 2010; ‘Grandpa held in raid at gay joint’, *The Star Online*, 4 February <http://thestar.com.my/news/story.asp?file=/2010/2/4/nation/5611822&sec=nation> – Accessed 25 June 2010; ‘Police: Penang a gay sex services hub’, *The Star Online*, 15 March <http://thestar.com.my/news/story.asp?file=/2010/3/15/nation/5863021&sec=nation> – Accessed 25 June 2010; ‘We conduct raids with the cops, says MPPP’ 2010, *The Star Online*, 16 March <http://thestar.com.my/news/story.asp?file=/2010/3/16/nation/5868786&sec=nation> – Accessed 25 June

2010; 'Malaysian police target gay people in Saturday afternoon raids' 2008, *Pink News*, 3 November <http://www.pinknews.co.uk/news/articles/2005-9470.html> – Accessed 25 June 2010].

41. An August 2009 article from *The Star Online* observed, that “[n]umerous cases have been recorded of violence committed against people who openly display their non-heterosexuality”. It added that there was a “climate of hatred and misunderstanding” to anything against sexual norms. [Kulasagaran, P. 2009, ‘Sexy event’, *The Star Online*, 23 August <http://ecentral.my/services/sprinterfriendly.asp?file=/2009/8/23/soundnstage/4563501&sec=soundnstage> – Accessed 25 June 2010] The aforementioned 2007 Amnesty International article cites fears there may be developing a “climate of vigilantism among community groups and society at large against those whose sexuality or gender identity is perceived to deviate from the ‘norm’”. The website *Fridae* warns gay travellers to Kuala Lumpur of vice squad, police, and “basher” activity, and reminds readers to be vigilant whilst “cruising” [Travel & Resources: Kuala Lumpur & Vicinity [Klang Valley] (undated), Utopia Asia website <http://www.utopia-asia.com/malaki.htm> – Accessed 25 June 2010].

FINDINGS AND REASONS

42. The applicant’s claims are based on the convention ground of being a member of a particular social group. His case is essentially that he is a practising homosexual and fears persecution by the community and the authorities in Malaysia.
43. Having sighted the applicant’s passport at the hearing, the Tribunal accepts that the applicant is a national of Malaysia.
44. At the hearing the applicant’s evidence was entirely consistent with his written claims. The Tribunal found him to be a credible witness. He has documentation to support his claims in the form of a Scholarship Agreement with the Malaysian Government, Notification of Withdrawal of Scholarship by the Malaysian Government for misbehaviour and sexual misconduct, copies of emails and witness statements from persons present at the time.
45. The Tribunal accepts that the applicant began to believe he was homosexual from the age of 12. It accepts that he acted for the most part discretely in Malaysia and formed relationships with older Caucasian men. The Tribunal accepts that when his college found out about his homosexuality he was questioned and fined by his college as a result of his sexual orientation in 2009. The Tribunal accepts the applicant had relationships with men in Melbourne and Sydney after meeting them via the internet. It accepts that the relationship with the man in Sydney became known to [the university] and he was reported to the [government department]. It accepts that he was questioned and his scholarship was withdrawn in part because of his conduct. The Tribunal is not disregarding the applicant’s conduct in Australia for the purposes of s.91R(3).
46. The country information referred to above indicates that discrimination and harassment against homosexuals persists in Malaysia from the community and the police. Homosexuals in Malaysia are likely to face prejudice, violence, police harassment and threats to their safety and wellbeing. Homosexual intercourse continues to be prohibited under the Malaysian Penal Code and while there are relatively few instances of prosecution for the offence, country information exists that the law has been enforced, albeit sporadically. The country information also indicates that police cannot be relied

upon to protect the rights of homosexuals. There were reports of police raids and intimidation of homosexuals.

47. While Kuala Lumpur appears to be the country's most gay friendly city, country information indicates that this is more so for foreigners and local homosexuals still fear for their safety and the gay scene is largely underground.
48. The Tribunal notes that country information indicates that the marginalisation of gay men in Malaysia is the result of a highly moralistic and conservative society and the rise of political Islam. It blames the "bigotry among the masses" on entrenched prejudice and homophobia spread by religious bodies, local media and other groups.
49. In *Applicant S*, Gleeson CJ, Gummow and Kirby JJ gave the following summary of principles for the determination of whether a group falls within the definition of particular social group at [36]:

... first, the group must be identifiable by a characteristic or attribute common to all members of the group. Secondly, the characteristic or attribute common to all members of the group cannot be the shared fear of persecution. Thirdly, the possession of that characteristic or attribute must distinguish the group from society at large. Borrowing the language of Dawson J in *Applicant A*, a group that fulfils the first two propositions, but not the third, is merely a "social group" and not a "particular social group". ...
50. The independent evidence before the Tribunal indicates that homosexuals in Malaysia possess common characteristics and attributes that make them distinguishable from the rest of the society and is not the shared fear of persecution; and based on the prevailing social and cultural norms in Malaysia they constitute a particular social group within the convention meaning. The Tribunal accepts, therefore, that homosexuals form a particular social group in Malaysia for the purposes of the convention. The facts of this case suggest that the persecution the applicant would face is for the essential and significant convention reason of membership of a particular social group.
51. The Tribunal finds that if the threat of harm were to prevent the applicant from living openly as a homosexual this would in itself amount to persecution: see *Appellant S395/2002 v Minister for Immigration and Multicultural Affairs* (2003) 216 CLR 473 at [43]-[44] per McHugh and Kirby JJ.. The Tribunal considers that the harm which the applicant fears amounts to persecution involving 'serious harm' as required by paragraph 91R(1)(b) of the act in that it involves at least significant physical harassment or ill-treatment. The Tribunal is satisfied that the harm he fears involves systematic and discriminatory conduct, as required by s.91R(1)(c), in that it is deliberate or intentional and involves selective harassment for a convention reason.
52. The Tribunal accepts the applicant's evidence that if he returned to Malaysia he would have to behave discreetly in the expression of his sexual orientation for fear of facing reprisals and serious harm from the police and community. He would be unable to express his sexuality in the manner he has in Australia. It is satisfied that if the applicant were to return to Malaysia it is unlikely that he could complete his education. On the basis of the evidence before it the Tribunal cannot exclude as remote and insubstantial the chance that he would face serious harm as a consequence of being a homosexual and practising his sexuality throughout Malaysia. As the applicant has

come to the attention of authorities by virtue of the withdrawal of his scholarship, the Tribunal finds the likelihood of serious harm is not remote.

53. The sources consulted make clear the Malaysian penal code prohibits having sexual relations. Therefore, it appears that the state itself provides avenues for persecution of homosexuals through the operation of certain laws. Based on the evidence before it, the Tribunal is satisfied that the applicant does not have adequate and effective state protection available to him in Malaysia. The Tribunal is satisfied that there is a real chance that he would face significant harassment or serious physical harm in Malaysia. These acts could be committed by members of the community or the authorities, including the police. The Tribunal is not satisfied that the applicant could avoid the persecution he fears by internally relocating within Malaysia.
54. For the reasons outlined above, the Tribunal is satisfied that the applicant's fear of persecution is well-founded.
55. The Tribunal is satisfied that the applicant does not have a legally enforceable right to enter and reside in any country other than his country of nationality, Malaysia. The Tribunal finds that the applicant is not excluded from Australia's protection by subsection 36(3) of the Act (see *Applicant C v Minister for Immigration and Multicultural Affairs* [2001] FCA 229; upheld on appeal, *Minister for Immigration and Multicultural Affairs v Applicant C* (2001) 116 FCR 154).

CONCLUSIONS

56. The Tribunal is satisfied that the applicant is a person to whom Australia has protection obligations under the Refugees Convention. Therefore the applicant satisfies the criterion set out in s.36(2)(a) for a protection visa.

DECISION

57. The Tribunal remits the matter for reconsideration with the direction that the applicant satisfies s.36(2)(a) of the Migration Act, being a person to whom Australia has protection obligations under the Refugees Convention.