

**0904128 [2009] RRTA 936 (22 October 2009)**

**DECISION RECORD**

**RRT CASE NUMBER:** 0904128

**DIAC REFERENCE(S):** CLF2009/50283

**COUNTRY OF REFERENCE:** Malaysia

**TRIBUNAL MEMBER:** Di Hubble

**DATE:** 22 October 2009

**PLACE OF DECISION:** Melbourne

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

## STATEMENT OF DECISION AND REASONS

### APPLICATION FOR REVIEW

1. This is an application for review of decisions made by a delegate of the Minister for Immigration and Citizenship to refuse to grant the applicants Protection (Class XA) visas under s.65 of the *Migration Act 1958* (the Act).
2. The applicants, who claim to be citizens of Malaysia, arrived in Australia [in] March 2009 and applied to the Department of Immigration and Citizenship for Protection (Class XA) visas [in] April 2009. The delegate decided to refuse to grant the visas [in] May 2009 and notified the applicants of the decision and their review rights by letter of the same date.
3. The delegate refused the visa application on the basis that the first named applicant is not a person to whom Australia has protection obligations under the Refugees Convention.
4. The applicants applied to the Tribunal [in] June 2009 for review of the delegate's decisions.
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 applicants have 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. Section 36(2)(b) provides as an alternative criterion that the applicant is a non-citizen in Australia who is a member of the same family unit as a non-citizen (i) to whom Australia has protection obligations under the Convention and (ii) who holds a protection visa. Section 5(1) of the Act provides that one person is a 'member of the same family unit' as another if either is a member of the family unit of the other or each is a member of the family unit of a third person. Section 5(1) also provides that 'member of the family unit' of a person has the meaning given by the Migration Regulations 1994 for the purposes of the definition.
9. 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'

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

17. 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.
18. 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.
19. 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**

20. The Tribunal has before it the Department's file relating to the applicants and the Tribunal's own file. The Tribunal has had regard to the material referred to in the delegate's decision, and other material available to it from a range of sources.
21. The applicants appeared before the Tribunal [in] September 2009 to give evidence and present arguments. The Tribunal hearing was conducted with the assistance of an interpreter in the Tamil and English languages.
22. The Tribunal noted that in his protection visa application the first-named applicant (hereafter "the applicant") had indicated that the second-named visa applicant is his mother's sister and the applicant's adopted mother. Asked whether he knows why he was adopted out at the time of his birth, the applicant responded that he does not know. This is something only his mother can answer. He has never seen his biological mother. He does not even know who she is. The Tribunal noted that the applicant's biological parents are listed in his protection visa application. The applicant responded that this was taken from his birth certificate. He does not know because his mother never told him about his parents.
23. The Tribunal asked the applicant who filled out his protection visa application. The applicant responded that his boss in Malaysia spoke to a man in Australia called [Person A]. His boss told [Person A] that the applicant had a lot of trouble and he asked [Person A] to help him. His boss told him that he would be safe in Australia. After he arrived in Australia he sat down with [Person A] and went through the protection visa forms but his boss had already told [Person A] his story. [Person A] filled out the forms and he paid him \$100. Asked whether [Person A] is a registered migration agent, the applicant responded that he did not know. The Tribunal asked the applicant who had told [Person A] the names of the applicant's biological father, mother, brother and sister. The applicant responded that his mum would have told them. He might have heard their names somewhere along the line but he has never seen them. He does not even know where they are.

24. The Tribunal noted that in his protection visa application the applicant had indicated that he lived at [address deleted: s.431(2)] in Kuala Lumpur from the time of his birth until March 2009. The applicant confirmed that this was correct. He was born and raised there. He lived there with his mother, nobody else. He was working and taking care of her.
25. The Tribunal noted that in his protection visa application the applicant indicated that he was employed by [business deleted: s.431(2)] as a foreman from January 2008 to February 2009. The applicant confirmed that this was correct. He did whatever work his boss told him to do. There were 3 of them: him, his boss and another boy.
26. Asked why he left Malaysia, the applicant stated that they do not like Tamil people at home. He went to work and some Malay people had a lot of drinks and they hit him. When Tamil people go to the police or lodge a complaint, that is how they kill off Tamil people. They don't have any respect for Tamil people. He went to the police station to lodge a complaint and this is what happens.
27. The applicant then handed the Tribunal a document copied from the "You Tube" website referring to various videos associated with the January 2009 death in Malaysian police custody of a Tamil man, Ananthan Kugan, who was being questioned about a car theft syndicate that he allegedly worked for. The document also contained 156 comments that had been posted on the site, some of which were in English and others in Tamil.
28. The applicant commented that Tamils are treated badly, like slaves or dogs. Malays only care about their race. He worked for his boss for 4 years from 2006 until March 2009. In December 2008 some Malay people had taken a lot of drinks and they hit him on the leg. Early this year his boss told him to go to Australia for protection so he came here on the 8<sup>th</sup> March.
29. The Tribunal asked the applicant where the December 2008 incident had occurred. The applicant responded that it occurred about a 2 minute walk from his house. It was in the afternoon on his way home from work. There were 4 men sitting near his house and they had been drinking and taking drugs. Asked whether he knew the men before this, the applicant responded that he did not personally know them, but he used to see them seated in other areas. He finished work at about 5 pm They called him as he was walking by. He could see that they were affected by alcohol and drugs and one fellow came and hit him on the leg. They beckoned him and he asked, "What do you want?" They said nothing and this fellow had a big stick and hit him on the left leg. He fainted and when he came to he went straight to the police station. He did not get any medical assistance. He told the police, "They beat me up". The police took a report and then 2 or 3 days later he saw some of these men.
30. The Tribunal asked the applicant whether he had any injuries other than the injury to his left leg when he woke up. The applicant responded that his arm was swollen apart from the leg. He could not even move his arm. He does not know why his arm was swollen, maybe they beat him to get money from him or maybe it was because they hate Tamils. He is not sure why they attacked him, he can't say.
31. Asked what had happened at the police station, the applicant stated that he reported the incident and told the police exactly what had happened. He then went home. 2 or 3

days later he saw the one who had beaten him. He went to the police station again and said “There is the person who beat me, do something about it.” The applicant confirmed that he had made a formal complaint when he first went to the police station. He did not know the name of any of his attackers, but they are close friends of the minister’s son, Abdul Khalid.

32. Asked what had happened after he went to the police station, the applicant claimed that the police came and took the man away. The next day after work he saw that this man was out on bail. The Tribunal asked the applicant whether he knew what the man was charged with. The applicant responded that he did not know. All he said to the police was that this fellow had hit him. However, because he was a friend of the minister’s son it was easy for him to get out. The man went to his house and asked about him when he was at work. His mother told the man that he was not there. The man hit his mother and set fire to the house. He did not see the man, his mother told him all this later.
33. The Tribunal noted that in his application for a protection visa the applicant had stated that he made the police arrest this man, who was punished because of the applicant. Asked what punishment the man had received, the applicant told the Tribunal that he does not know what punishment the man received. He knows that the man was out. He told his boss and [Person A] the story. He does not know how they wrote it down.
34. The Tribunal asked the applicant what the man who had come looking for the applicant told his mother. The applicant stated that the man asked his mother where the applicant was. She told him that she did not know. The man then hit his mother and set fire to the house. The man threatened her and said that he was never going to leave her son alone. Her son would meet his death at his hands. This was in mid-December 2008.
35. Asked whereabouts the man had hit his mother, the applicant claimed that the man hit her with a stick on her legs and arms. The Tribunal asked the applicant whether the man had set fire to the house when his mother was in or out of the house. The applicant stated that his mother was in the house when it was set on fire and she then went outside. The man said he was going to kill her son. The man said that reporting it to the police would not help because he was a friend of the minister’s son. They are against Tamils, they hate them. They are racists.
36. The Tribunal asked the applicant whether he had at any stage sought medical treatment for his injuries. The applicant stated that after reporting the matter to the police his boss took him to a doctor who bandaged the injuries and gave him pain relief.
37. The Tribunal noted that in his application for a protection visa the applicant had claimed that after a few weeks some Malay men had come to his house and hit his mother. Asked whether it was a few weeks or a few days later that he reported the matter to the police, the applicant claimed that it was a few weeks later. The applicant then corrected himself and claimed that it was a few days later.
38. The Tribunal asked the applicant whether there were any witnesses to the men burning down the applicant’s house. The applicant responded that he asked his neighbour to write out something because he saw the fire. The Tribunal confirmed that this was the letter from [Person B] that the applicant had earlier handed to the Tribunal. The Tribunal noted that the letter claimed that it was a few weeks later that the Malay men

had gone to his house and attacked his mother but the applicant had just told the Tribunal it was a few days later. The applicant responded that it was a few days later. He told them but he does not know how they wrote it. The Tribunal asked the applicant who he was referring to. The applicant responded that he told [Person A] the truth. However he does not know what he wrote or how he wrote it. Asked whether he had told [Person B] what had happened and then asked [Person B] to write the statement, the applicant confirmed that he had.

39. The Tribunal asked the applicant what had happened after his house was burnt down. The applicant responded that he and his mother had stayed at a temple after that. Asked whether his house had burned down completely, the applicant confirmed that it was only weatherboard and had fully burned down. Asked whether he or his mother had reported his mother's injuries and the fire to the police, the applicant responded that he had not as there was no point in telling the police as they would not do anything. The Tribunal sought to confirm with the applicant that he had not reported this matter to the police. The applicant stated that he did not report it to the police. However, he did seek medical treatment from a doctor for his mother.
40. The Tribunal noted that in his protection visa application the applicant claimed that he went back to the police station and made another report but nothing happened. The applicant had claimed in his application that the police had told him that he was torturing them and they refused to take action. The applicant told the Tribunal that he did not report it to the police. Asked why he had claimed that he had in his application, the applicant stated that he cannot read and whatever he said they wrote but he does not know what they wrote in the form. The Tribunal noted that this was a significant part of the applicant's story and the Tribunal was surprised that if the applicant had told [Person A] his story that [Person A] would get something like this wrong. The applicant responded that he told his story to [Person A] but he does not know what he wrote. But he never went back to the police after that first time. The Tribunal noted that in his protection visa application the applicant had claimed that after he made the second police report, Malay gangsters started searching for him. The applicant confirmed that there was no second police report.
41. The Tribunal noted that in his application for a protection visa the applicant claimed that the Malay gangsters had chased him and his mother in the street like dogs. He and his mother had run but no-one helped them. They went to the police station but the police said that they cannot do anything. The applicant confirmed that this had not occurred.
42. Asked which temple he and his mother had slept at after that, the applicant responded that it was 2 hours away. They had stayed in that area all the time after that. He was too frightened to go to work and his boss took care of everything. He never left the temple, he just hung around. The Tribunal asked the applicant how long he had remained at the temple for. The applicant responded that he was having this problem from 2008 so it was about a year. The Tribunal noted that the applicant had claimed that his problems began in December 2008 and he travelled out to Australia 4 months later in March 2009. However he had just told the Tribunal that after he had these problems he stayed at the temple for a year. The applicant said that he thought the Tribunal meant something else because he was there at the temple from the start. These problems occurred for about 3 months. His boss helped him because he told his boss that these people are coming to his house. Asked when he had stayed at the temple the

first time, the applicant responded that this was in December 2008 when his house burned down. Before that he would go to the temple if he got bored. He started staying at the temple continuously after the problems. Maybe he stayed there 1 or 2 months, he cannot remember. The Tribunal confirmed that the applicant had not stayed at the temple for a year, as claimed earlier.

43. The applicant gave the Tribunal a letter from his former employer. The Tribunal noted that the letter states that the Malaysian Police Force is still chasing the suspects from the fire. The applicant told the Tribunal that his boss told him this. The Tribunal noted that the applicant had told the Tribunal that he had not reported the fire to the police. The Tribunal asked the applicant why the police would still be chasing the suspects from the fire if the police did not know about the fire. The applicant responded that of course they are still looking for him because the gang is run by the minister's son. They have even come to the shop where he works and they have asked his boss where he is.
44. The Tribunal noted that in his protection visa application the applicant claimed that he had learned that "they" had his and his mother's photos. The applicant stated that his boss told him this. Asked who "they" are, the applicant responded that "they" are the people he referred to earlier. Asked how these people would have obtained his photo, the applicant claimed that the Malaysians would have obtained a copy of his and his mother's ID cards from the police station. The Tribunal noted that the applicant's mother had not made a complaint to the police. The applicant responded that information about ID can easily be obtained in Malaysia.
45. The Tribunal asked the applicant when he had left the temple. The applicant responded that on about the [date deleted: s.431(2)] March his boss came and said that he had a friend in Australia, [Person A], who would help him. He already had his passport, which he had obtained in Kajang. Asked whether he had experienced any problems obtaining his passport, the applicant responded that he shaved his hair and took off his jewellery. He said that he wanted his passport really quickly and he got it the same day. He did not have any problems at the airport.
46. Asked what he feared would happen to him if he returned to Malaysia, the applicant claimed that "they" would definitely kill him. The Tribunal asked the applicant why he could not move somewhere else in Malaysia to avoid these problems. The applicant responded that Malaysia is such a tiny place and they will find him wherever he is. It is all Malay people there and they are racist. The Tribunal asked the applicant whether he had ever travelled out of Malaysia before. The applicant responded that he travelled to Singapore with his boss when he was 5 or 6 years old. He knew his boss then.
47. The Tribunal noted that the applicant's mother's passport indicates that she has travelled quite a lot. The applicant responded that his mother likes travelling a lot. The Tribunal noted that during the period September 2005 to December 2007 his mother had travelled to Thailand 4 times. Asked who he had stayed with whilst his mother was away, the applicant responded that he stayed at home alone. His boss' home is nearby and he looked after the applicant. His mother likes to go to Thailand to have a look around. He worked to send her there. Asked how long his mother would go for, the applicant stated that he cannot remember; maybe a week or so. The Tribunal noted that the applicant's mother had generally only gone into Thailand for 2 or 3 days at a time and on 1 occasion in December 2007 she went to Thailand for 1 day. The Tribunal

asked the applicant why his mother would go all that way for 1 day. The applicant responded that the exchange rate is very good and you do not always need a passport to go there. \$1,000 Malaysian is plenty to travel all around Thailand. She goes to the temples there.

48. The Tribunal asked the applicant whether he is working in Australia. The applicant responded that neither he nor his mother have worked in Australia. They are surviving on Red Cross money.
49. Asked whether there was anything else that he wished to tell the Tribunal, the applicant responded that there was not.
50. The Tribunal noted that in his protection visa application the applicant had claimed that he is in danger from a gang controlled by former Prime Minister Abdul Badawi's son, Abdul Khalid, and that the police cannot or will not protect him. The Tribunal noted that country information that is available to the Tribunal indicates that Tamils in Malaysia are discriminated against and disadvantaged and there are various policies that are in place that provide advantages and preferential treatment to ethnic Malays and other groups but not to Tamils, who remain amongst the country's poorest groups. Whilst numerous reports refer to gangs involved in various criminal activities in Malaysia, and whilst the reports refer to the gangs by name, the reports very seldom refer to the ethnic or religious group that the gang members or the victim belongs to. The Tribunal's resources did not contain any information to suggest that specifically Muslim gangs operate in Malaysia or that Indians or Tamils would be refused protection if they were to approach the Malaysian authorities for protection against Muslims. Rather, the information available to the Tribunal indicates that the Malaysian authorities have been active against organised Islamic groups, such as Jemaah Islamiah. For example, in 2007 at least 4 suspected Jemaah Islamiah members were arrested and 16 Jemaah Islamiah members were released, having been detained for over 4 years.
51. Asked to comment, the applicant claimed that Tamils do not have any respect in Malaysia. There are Malay gangs, their team number is 80. Malays only help their own people, they do not help Tamils. There is discrimination - you cannot work in banks or for the police. All Tamils do is put tar on the roads. That is the way Tamils are treated. If Malays commit any criminal offences they can come out on bail but if the same thing happens with Tamils, they are jailed. Tamils are treated worse than dogs. They are slaves and there is no protection in Malaysia.
52. Asked whether there was anything else that he wished to add, the applicant stated that there was not.
53. The Tribunal then took evidence from the second-named applicant. Asked when her son had started working for [business deleted: s.431(2)], the second-named applicant stated that her son worked there for about 2 years as a car mechanic.
54. Asked why she had left Malaysia, the second-named applicant claimed that they beat her son. They burnt the house and beat her as well. Asked whether this had occurred on the same or different days, the second-named applicant stated that her son went to report his beating to the police station and as soon as the Malay fellow came out he came and burnt the house. This was 2 or 3 days after her son reported it to the police. She was at the house when 5 people came. The Malay people beat her. She lost

consciousness. When she woke up she went to her son's workplace and told him that they had burnt the house and they were looking for them now.

55. The Tribunal asked the second-named applicant how many people had beaten her. She responded that maybe 3 people beat her but 5 people came. They hit her on the arm and leg, using their hands and a stick to do so. Asked which part of her son's body was beaten in the previous incident, the second named applicant responded that her son was beaten on his back and leg. She was at home at the time and does not know what he was beaten with. He told her that they beat him with their hands as well as a stick.
56. The Tribunal asked the second-named applicant what happened after she went to her son's work and told him that some Malay men were looking for them. She responded that they went and stayed at the temple. Asked whether they had reported the burning down of their house to the police, the second named applicant initially claimed that they did, but because it was a minister's son the police did not bother to do anything about it. Asked when they had reported it to the police, the second-named applicant stated that they never told the police. They wanted to but they thought there would be problems so they decided not to. The fellow who beat her son got out in 2 days so they did not want to.
57. Asked what the Malay people told her they would do, the second-named applicant stated that they said if her son continued to stay there he would be killed. Also her son's boss said that her son would be killed if he continued to stay there. Asked how her son's boss would know what was going to happen, the second-named applicant stated that this was because it was on her son's way home from work that he was attacked.
58. The Tribunal asked the second-named applicant whether her house was on fire when she came to. She responded that it was. It was difficult to get out but she had to see her son. Some of her neighbours saw the fire and tried to come to her aid, but it burnt anyway. Asked whether she obtained medical attention for her injuries, the second-named applicant stated that she attended a clinic. The doctor stitched her in a couple of places and gave her medication.
59. Asked where she went after that, the second-named applicant stated that she and her son went to the temple where they stayed for about 2 months. Her son's boss said it was difficult and he would send them to Australia. He made all the arrangements. They did not return to their local neighbourhood after that as they were too afraid.
60. The Tribunal noted that the second-named applicant's passport indicates that she had made lots of trips to Thailand over the past few years. The second-named applicant stated that she goes to the temples. Asked who had paid for the trips, the second-named applicant stated that her son's boss mainly paid for the trips and they also belong to a savings scheme. They put money in monthly towards this and after 5 months you get some money back.
61. Asked whether there was anything else that she wished to add, the second-named applicant stated that there was not. Asked whether there was anything else that he wished to add the applicant stated that there was not.

## Country information

62. The US Department of State, *Country Reports on Human Rights Practices 2008*, (released by the Bureau of Democracy, Human Rights, and Labor, February 25, 2009), notes in relation to Malaysia that:

*Malaysia is a federal constitutional monarchy with a population of approximately 26.9 million. It has a parliamentary system of government headed by a prime minister selected through periodic, multiparty elections...*

### *Role of the Police and Security Apparatus*

*The Royal Malaysia Police is under the command of the inspector general of police, who reports to the home minister. The inspector general is responsible for organizing and administering the police force. The government has some mechanisms to investigate and punish abuse and corruption. Several NGOs conducted local surveys on government corruption and identified the police as among the country's most corrupt government organizations. Additional data indicated 73 percent of those surveyed perceived the government's anticorruption efforts as "ineffective or very ineffective." Reported police offenses included accepting bribes, theft, and rape. Punishments included suspension, dismissal, and demotion. Police officers are subject to trial by the civil courts. Police representatives reported that there were disciplinary actions against police officers during the year.*

### *Arbitrary or Unlawful Deprivation of Life*

*The government or its agents did not commit any politically motivated killings; however, local media reported that police killed 82 persons while apprehending them, up from 16 such killings in 2007. Local nongovernmental organizations (NGOs) also reported that seven persons died in police custody, down from 11 such deaths in 2007.*

*The trial of police chief inspector Azilah Hadri and police corporal Sirul Azhar Umar for the 2006 murder of Altantuya Shaaribu remained ongoing at year's end. On October 31, the court acquitted political analyst Razak Baginda of abetting her murder.*

### *Arrest and Detention*

*The law permits police to arrest individuals for some offenses without a warrant and hold suspects for 24 hours without charge. A magistrate may extend this initial detention period for up to two weeks... Bail is usually available for those accused of crimes not punishable by life imprisonment or death. The amount and availability of bail is determined at the judge's discretion. When bail is granted, accused persons usually must surrender their passports to the court.*

### *Freedom of Religion*

*The constitution provides for freedom of religion; however, the constitution and the government placed some restrictions on this right. The constitution defines all ethnic Malays as Muslims and stipulates that Islam is the official religion. The government significantly restricted the practice of Islamic beliefs other than Sunni Islam. Article*

*11 of the constitution states, "Every person has the right to profess and practice his religion," but it also gives state and federal governments the power to "control or restrict the propagation of any religious doctrine or belief among persons professing the religion of Islam."*

*Non-Muslims, who constitute approximately 40 percent of the population and include large Buddhist, Christian, Hindu, and Sikh communities, were free to practice their religious beliefs with few restrictions. According to the government, it allocated RM428 million (approximately \$125.9 million) to build Islamic places of worship and RM8.1 million (\$2.4 million) to build Christian, Buddhist, Hindu, and other minority religions' places of worship between 2005 and the end of the year.*

#### *Discrimination, Societal abuses, and Trafficking in Persons*

*The constitution provides for equal protection under the law and prohibits discrimination against citizens based on sex, religion, race, descent, or place of birth. However, the constitution also provides for the "special position" of ethnic Malays and the indigenous groups of the eastern states of Sabah and Sarawak (collectively, bumiputras), and discrimination based on this provision persisted. Government policies and legislation gave preferences to bumiputras in housing, home ownership, awarding of government contracts and jobs, educational scholarships, and other areas. Nonbumiputras regularly complained about these preferences, arguing that government subsidies for disadvantaged persons should be dispensed without regard to race. ...*

#### *National/Racial/Ethnic Minorities*

*The law and government policy provide for extensive preferential programs designed to boost the economic position of bumiputras. Such programs limit opportunities for nonbumiputras in higher education, government employment, business permits and licenses, and ownership of land. Businesses are subject to race-based requirements that limit employment and other economic opportunities for nonbumiputra citizens. According to the government, these programs are necessary to ensure ethnic harmony and political stability. Despite the government's stated goal of poverty alleviation, these race-based policies are not subject to upper income limitations and appeared to contribute to the broadening economic disparity within the bumiputra community. Ethnic Indian citizens, who did not receive such privileges, remained among the country's poorest groups...*

63. Other sources consulted by the Tribunal include: *BBC News* <http://news.bbc.co.uk>, *ABC News* <http://www.abc.net.au/news>, Google <http://www.google.com.au/>, Copernic <http://www.copernic.com/>, FACTIVA (news database), BACIS (DIAC Country Information database), and ISYS (RRT Country Research database, including Amnesty International, Human Rights Watch, US Department of State Reports).
64. Numerous reports in Malaysian newspapers make reference to incidents involving gangs in Malaysia. These often involve armed robbery, theft, extortion, rape, street violence, drugs, gambling, illegal human trafficking, illegal logging and wildlife smuggling and other forms of crime. While gangs are often identified by name, reports seldom specify to which ethnic/religious group gang members and their victims belong. Specific references to Muslim gangs operating in Malaysia have not been found. A search of sources available to the Tribunal found no references to 'Muslim gangs' as

such, although references were found to gangs involving Indonesians (who are possibly Muslim).

65. According to the 2008 Amnesty International Annual Report in relation to Malaysia, most of the people detained under the country's *Internal Security Act*, numbering 83 in 2007 according to Amnesty International, were alleged members of Islamist groups, including Jemaah Islamiah. The report states that at least 4 suspected Jemaah Islamiah members were arrested in 2007, and at least 16 were released during the year, having all been detained for over four years. Many were given restricted residence orders.

## **FINDINGS AND REASONS**

66. The Tribunal finds that the applicant is a Malaysian citizen, who is outside his country of nationality. There is no evidence before the Tribunal to suggest that the applicant has the right of entry or residence in any other country apart from Malaysia.
67. In his protection visa application the applicant claimed that he fears Malay gangsters will kill him and his mother if they are returned to Malaysia. The applicant claimed that he was assaulted by members of the "Three Line Gang", which is ruled by Malay gangsters and controlled by the Malaysian ex-Prime Minister Abdul Badawi's son, Abdul Khalid "to Islam" (sic). The applicant claimed that after he was attacked by gang members he reported the matter to the Malaysian police, who accompanied him and arrested one of the offenders. This man was subsequently released. A few weeks later gang members attended his house, attacked his mother, told her that they would subsequently kill the applicant and then they burned the house down. The applicant claimed that later that day he and his mother reported this to the police but they refused to take action. He claimed that after he made the second police report, gang members started to search for him. However, the police never helped them or gave them any protection. The police do not like Indians and they do not want to protect them. The gangsters are seeking revenge because they, "as a Islam" (sic), were punished because of him.
68. However, at the Tribunal's hearing held [in] September 2009, the applicant repeatedly denied having made a second police report. The applicant confirmed that he had made an initial police report and complaint regarding his own injuries. Two to three days later he saw some of his attackers, went to the police station, told the police this and demanded that they do something about it. The police then came and took the man away. The applicant said that the next day he saw the man, who was out on bail, although he did not know what the man had been charged with. Thereafter, the man went to his house when he was not there, attacked his mother and burned down their house. The applicant claimed that he did not report this to the police as he did not believe the police would do anything. The applicant also denied the claim contained in his protection visa application that following the second attack Malay gangsters had chased him and his mother in the street like dogs and he and his mother had run to the police station but the police had said that they could not do anything. The applicant confirmed that this had not occurred. Rather, immediately after the second attack he and his mother had gone to stay at a temple, which was 2 hours away. They remained at the temple, not returning to their local area, until their subsequent departure for Australia.

69. Although the impression created by the applicant's protection visa application is that he and his mother are at risk of persecution in Malaysia from a politically connected Muslim gang because the Malaysian police failed to protect them, the applicant's evidence at the hearing portrayed a very different scenario. At the hearing the applicant confirmed that the police had promptly arrested one of the assailants when the applicant pointed him out. The assailant was charged with an unknown offence and then released on bail. The Tribunal notes that this is entirely consistent with available Malaysian country information which indicates that individuals who are accused of crimes not punishable by life imprisonment or death are usually granted bail.
70. Critically, at the hearing the applicant resiled from the claim, contained in his protection visa application, that the second attack was reported to the Malaysian police who then failed to act. The applicant also denied that he and his mother were chased down the street by their assailants into the police station where the police took no action, as claimed in his protection visa application.
71. At the Tribunal's hearing the applicant submitted 2 letters, one from his former employer and the other from a neighbour. The letter from his former employer states, in relation to the burning down of the applicant's house, that the suspects were "yet to be detected" and that the "Malaysian Police Force is still after the suspects" The second letter indicates that it is not safe for the applicants to return as the Malay gang members are still looking for them.
72. As the applicant did not report the assault on his mother or the burning down of their house, the Tribunal therefore does not accept that the Malaysian Police Force would be looking for or attempting to detect suspects. This is for the reason that there is no reason to suggest that the police would be aware that a second offence had been committed given that the applicant did not report this incident. On that basis, the Tribunal accords the letter from the applicant's former employer little weight. However, the Tribunal accepts as truthful the other letter from the applicant's Malaysian neighbour as the neighbour's claims are broadly consistent with the applicant's claims and evidence.
73. Accordingly, based on the applicant's claims and evidence, as corroborated by his mother and his Malaysian neighbour, the Tribunal accepts that the applicant was assaulted by some Malay men who subsequently assaulted his mother and burned down their home. The Tribunal also accepts that the applicant reported the assault upon him to the Malaysian police who subsequently arrested and charged one of the applicant's assailants when he was pointed out to the police by the applicant. The Tribunal finds that the assailant was subsequently released on bail and that this accords with normal practice in Malaysia. The Tribunal also accepts that gang members are still looking for the applicants. In such circumstances, the Tribunal finds that the applicant has a subjective fear of injury or death at the hands of gang members who are seeking revenge for his having reported the first assault to the police. This constitutes serious harm.
74. Fear of revenge does not come within the scope of the Convention unless it can be shown that the retaliation is linked with a racial, religious or other Convention reason. Based on available country information, the Tribunal accepts that there are gangs in Malaysia who engage in criminal activities and perpetrate various criminal acts on

Malaysian citizens. However, the Tribunal was unable to locate any references to specifically Muslim gangs operating in Malaysia.

75. When asked to comment on this information during the Tribunal's hearing, the applicant referred to "Malay" gangs. He also referred to discrimination against, and ill-treatment of, Tamils in Malaysia. The applicant made no mention of specifically Muslim gangs. Earlier when describing the initial assault upon him, the applicant had claimed that "some Malay people had a lot of drinks and they hit him". There was no reference to Muslims in the applicant's evidence during the hearing. The Tribunal also notes that the letter from the applicant's neighbour refers to "some Malay guys" coming to the applicant's house. There is no mention of Muslim gangs or Muslims in the neighbour's letter at all. In such circumstances, the Tribunal finds that the applicant's attackers belong to a Malaysian criminal gang, rather than a specifically Muslim criminal gang.
76. On the evidence, the Tribunal also considers that the initial attack on the applicant was an opportunistic incident of street violence arbitrarily perpetrated against him by drug and alcohol-fuelled gang members. The applicant's evidence to the Tribunal was that some gang members beckoned him over, and he responded by asking what they wanted, whereupon he was attacked. The applicant told the Tribunal that when he woke up he did not know why his arm was swollen, maybe they had beaten him to get money from him or maybe it was because they hate Tamils. The applicant specifically stated that he is not sure why he was attacked, he was unable to say. In such circumstances, the Tribunal does not accept that gang members were motivated by reason of the applicant's race or religion.
77. The Tribunal also finds that the gang's subsequent desire for revenge was not for the essential and significant reason of the applicant's race or religion, or any other Convention reason, but because the applicant reported one of their number to the police who subsequently arrested and charged him. The Tribunal finds that gang members were motivated for personal reasons. Accordingly, the Tribunal finds that neither the applicant's race nor religion, nor any other Convention reason, is the essential and significant reason for the harm feared by the applicant.
78. The Tribunal accepts that the majority of Malaysia's authorities are Muslim but that, of itself, does not mean that there would be a discriminatory withholding of state protection for a Convention reason. The Tribunal accepts that ethnic Indians/Tamils, many of whom are Hindu, do suffer discrimination in Malaysia. The country information indicates that in Malaysia the "bumiputra" policy gives priority to people of Malay origin within Malaysia over other ethnic groups. The Tribunal accepts that Indians/Tamils living in Malaysia represent something of a disadvantaged minority within the community. However, the Tribunal has not been able to locate any reports of the Malaysian police failing to act due to a person being of Indian/Tamil race/ethnicity or of Hindu faith or any information to suggest that the police in Malaysia apply the criminal law in a discriminatory manner.
79. The Tribunal considers it significant that the applicant did not seek police protection following the assault upon his mother and the burning down of their home. Based on the available country information, the Tribunal does not accept that the Malaysian authorities would refuse to assist the applicant or that they would withhold state protection because of the applicant's race or religion, or for any other Convention

reason. The Tribunal does not accept that the Malaysian police would have refused to protect the applicant and his mother had they reported the assault upon the second-named applicant and the subsequent burning down of their house. The very fact that an assailant was arrested and charged shortly after the applicant made his first police report further undermines this claim. The Tribunal finds that the applicant could access state protection and that such protection would not be withheld by the Malaysian authorities.

80. In *MIMA v Respondents S152/2003* (2004) 222 CLR 1 the majority judgment of the High Court (Gleeson CJ, Hayne and Heydon JJ) held that where the persecutor is a non-state agent, the willingness and ability of the state to protect its citizens may be relevant to the following: whether the fear is well-founded; whether the conduct giving rise to the fear is persecution; and whether the applicant is unable or, owing to their fear, unwilling to avail themselves of the (external) protection of their country of nationality. Their Honours' judgment makes it clear that the fact that the authorities in an applicant's country may not be able to provide an assurance of safety, so as to remove any reasonable basis for fear, does not necessarily justify an unwillingness to seek their protection [at 28]. On the facts of that case, their Honours reasoned that the existence of an appropriate level of state protection led to the conclusion that the applicant was not a victim of persecution, and could not justify his unwillingness to seek the protection of his country.
81. Whilst the Tribunal accepts that the applicant is fearful of members of the Malaysian gang that assaulted him and subsequently assaulted his mother and burned down their home, the fact that one of the applicant's assailants was arrested and charged after the first assault leads the Tribunal to conclude that the Malaysian authorities will not withhold state protection from the applicant. The Tribunal acknowledges that the Malaysian authorities cannot guarantee the applicant's safety against any further harm at the hands of gang members. However, in this instance the Tribunal does not accept that this justifies the applicant's unwillingness to seek the Malaysian authorities' protection. As the protection of the Malaysian state is available to the applicant should he wish to avail himself of it, the Tribunal finds that the applicant is not a victim of persecution.
82. The Tribunal has had regard to the "You Tube" document handed up by the applicant at the Tribunal hearing regarding the death in custody of Ananthan Kugan. Country information available to the Tribunal confirms that there have been media reports in Malaysia of several deaths in custody. However, available country information does not suggest that such deaths have been race/ethnicity or religion related. The information also indicates that criminal and disciplinary actions are instituted against police officers accused of having committed offences against persons in their custody. In any event, the Tribunal considers that this information does not directly relate to the applicant's situation in that he has not claimed that he is at risk of being detained or incarcerated by the Malaysian police authorities.
83. Based on all of the evidence, the Tribunal finds that there is no real chance, now or in the reasonably foreseeable future, that the applicant would be subject to persecution because of his race or religion or any other Convention reason, should he return to Malaysia.

84. Accordingly, the Tribunal is not satisfied that the applicant is a person to whom Australia has protection obligations under the Refugees Convention. Therefore the applicant does not satisfy the criterion set out in s.36(2)(a) for a protection visa.
85. The Tribunal notes that the second-named applicant did not complete a Form 866C (for applicants who wish to submit their own claims to be a refugee). Rather, she completed a Form 866D, relying on her membership of the same family unit as the first-named visa applicant who completed a Form 866C
86. On that basis, the Tribunal considers that it is not open to it to treat the second-named applicant as if she had applied for a protection visa in her own right. Rather, the time of decision criteria that must be addressed in respect of the second-named applicant is whether she is a member of the same family unit as an applicant to whom the Tribunal is satisfied Australia has protection obligations (section 36(2)(b)(i), Schedule 2 cl.866.222(a)) and whether that applicant holds (or has been granted) a protection visa (section 36(2)(b)(i), Schedule 2 cl.866.222(b)).
87. As the first-named applicant has not satisfied the criterion set out in s. 36(2)(a) for the grant of a protection visa, the second-named applicant does not meet the requirements of either cl. 866.222(a) or (b). She is not, therefore, entitled to the grant of a protection visa.

## CONCLUSIONS

88. The Tribunal is not satisfied that the applicant is a person to whom Australia has protection obligations under the Refugees Convention. Therefore the applicant does not satisfy the criterion set out in s.36(2)(a) for a protection visa.
89. The second-named applicant applied as a member of the same family unit as the applicant. The fate of her application depends on the outcome of the applicant's application. As the applicant does not satisfy the criterion set out in s.36(2)(a), it follows that the second-named applicant cannot satisfy the relevant criterion set out in s.36(2)(b) and cannot be granted the visa.

## DECISION

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

<p>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 <i>Migration Act 1958</i>. Sealing Officer's I.D. RCHADW</p>
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