

1209651 [2013] RRTA 352 (20 May 2013)

DECISION RECORD

RRT CASE NUMBER:	1209651
DIAC REFERENCE(S):	CLF2011/215984
COUNTRY OF REFERENCE:	Nigeria
TRIBUNAL MEMBER:	Giles Short
DATE:	20 May 2013
PLACE OF DECISION:	Sydney
DECISION:	The Tribunal remits the matter for reconsideration with the direction that the applicant satisfies paragraph 36(2)(a) of the Migration Act.

statement of decision and reasons

introduction

1. [Name deleted under s.431(2) of the *Migration Act 1958* as this information would identify the applicant] is a citizen of Nigeria. He belongs to the Igbo tribe and he is an adherent of a church known as the Community of Yahweh Worldwide. He claims that Muslims associated with the terrorist group, Boko Haram, have been trying to recruit him because they want him to become an imam. He claims that they want to recruit him because he is a gifted evangelist and they believe that he will have the capacity to convert Christians to Islam. He claims that they first attempted to recruit him in Jos in 2001, that in September 2001 they tried to take him from his home but he escaped, that they chased after him with a knife and he injured himself jumping from a building, that they left him for dead and that he subsequently discovered that his father had been killed by them. He claims that he was captured by them along with other Christians in Maiduguri in 2009 but released because he told them he could not become an imam until he had completed his national service. He claims that after he completed his national service he worked in the capital, Abuja, and during this time they continued to approach him. He claims that in July 2011 they beat him and gave him what they said was a last warning. He claims that he left his job in Abuja and went to Enugu but they abducted him from there and threatened to kill him if he did not attend a meeting in Abuja [in] October 2011 to renounce his faith. He left Nigeria [six days prior to the meeting] to come to Australia.
2. [The applicant] claims that he fears that he will be seriously harmed or killed by members of Boko Haram if he returns to Nigeria because he has not joined them. His representatives have submitted that he fears persecution for reasons of his religion and his membership of three particular social groups, ‘influential community figures’, ‘perceived apostates’ and ‘members of the Igbo tribe’. [The applicant]’s application for a protection visa was refused by a delegate of the Minister for Immigration and Citizenship and he has applied to this Tribunal for review of that decision. A summary of the relevant law is set out at Attachment A. The issues in this review are whether [the applicant] has a well-founded fear of being persecuted for one or more of the five reasons set out in the Refugees Convention in Nigeria and, if not, whether there are substantial grounds for believing that, as a necessary and foreseeable consequence of his being removed from Australia to Nigeria, there is a real risk that he will suffer significant harm.

Findings and Reasons

DOES [THE APPLICANT] HAVE A WELL-FOUNDED FEAR OF BEING PERSECUTED FOR ONE OR MORE OF THE FIVE CONVENTION REASONS?

[THE APPLICANT]’S CLAIMS

3. [The applicant] was born in Lagos and he attended primary school there. He then attended an educational institution associated with the Community of Yahweh Worldwide, [seminary deleted: s.431(2)] in [town deleted: s.431(2)] in Anambra State, from [years deleted: s.431(2)]. He completed his Senior School Certificate at [school and year deleted:

s.431(2)]. He explained at the hearing before me that he had not in fact attended this school except for the purpose of taking the examinations. He said that his mother and his siblings had still been living in Lagos at the time but his father had been posted to Jos in 1998 and he had joined his father there after completing his Senior School Certificate. He did not seek employment in Jos because he was planning to go to university and he needed to take the Joint Admissions and Matriculations Board examinations for that purpose. He has said that in the meanwhile he devoted himself to working for his church.

4. [The applicant] said at the hearing before me that while he had been at [seminary deleted: s.431(2)] he had boarded with an evangelist, [name deleted: s.431(2)], who had influenced him greatly. He said that after he had moved to Jos he had been involved in teaching scripture to children including children who were not church members and that while he had been in Jos many new members had joined the church including a few Muslims. [The applicant] has said that while he was in Jos Muslims regularly approached him and tried to persuade him to join their religion. His evidence regarding his activities in Jos and the approaches to him made to him by Muslims is corroborated by a letter from [Mr A] who was the head of the Auxiliary workers group of the Community of Yahweh Worldwide in Jos at the time (folio 53 of the Tribunal's file 1209651). [Mr A] also gave oral evidence at the hearing before me, confirming in particular [the applicant]'s involvement in leading evening prayers and in Bible classes and the approaches to him by a group of extremists who wanted him to join them.
5. [The applicant] has said that in around August 2001 he met with an imam named [Iman B] who told him that he had had a dream that he ([the applicant]) had been chosen to become an imam. He claims that [Imam B] also told him it would be considered disobedience to Allah if he did not follow his calling. He claims that he told his father about this meeting, that he and his father subsequently had a confrontation with [Imam B] and that his father reported this to the police. He has said that in September [Imam B] and others came to his home and attempted to take him but that he escaped as referred to above and that he subsequently discovered that his father had been killed by the Muslims.
6. [The applicant] has said that his father was burned and was buried in a mass grave and it is notorious that there was fighting between the Christians and Muslims in Jos at this time.¹ [The applicant] has produced a letter from [name deleted: s.431(2)], the Church chairman of the Community of Yahweh Worldwide in Jos, saying that the members of the church believe that [the applicant]'s father was murdered or burned after having been taken away by Muslim people with whom he had had a serious confrontation as [the applicant] had told them at the time, that [location deleted: s.431(2)] where they had lived had not been affected by the crisis 'though in the subsequent crisis the area was dealt with' and that, because so many people had been murdered and burned beyond recognition, the state government had conducted a mass burial without delay (the reverse of folio 54 of the Tribunal's file 1209651).
7. As referred to above, [the applicant] has said that he injured himself in escaping, breaking his left leg and arm, and he produced to the Department a letter from a doctor at Medibank Health Solutions saying that he had suffered a fracture of the humerus bone in his left arm in 2001 (folio 112 of the Department's file CLF2011/215984). He has said that he was taken to a local healer and that he remained there for two weeks because of the fighting between the Christians and Muslims in Jos referred to above. He has said that [Mr A] and [Pastor C] of the [chapel deleted: s.431(2)] in Maiduguri then arranged for him to go to

¹ See Human Rights Watch, *Jos: A City Torn Apart*, December 2001.

Maiduguri where he spent a few days in the [hospital deleted: s.431(2)] receiving treatment for his injuries. [Mr A] and [Mr D] of the Community of Yahweh Worldwide in Maiduguri have confirmed his account of these events in letters (folio 53 and the reverse of folio 56 and folio 55 of the Tribunal's file) and they both gave oral evidence to like effect at the hearing before me.

8. [The applicant] has said that in Maiduguri he lived initially with [Pastor C] and then with [Mr D]. He has said that [Pastor C] was a friend of his father, that he regarded him as an uncle and that he learned about the Pentecostal way of preaching from him. At the hearing before me he said that [Pastor C] had been particularly committed to preaching the Gospel in public places and that while he had been in Maiduguri he had taken part in evangelical crusades. He said that along with [pastor's name deleted: s.431(2)] (who [Mr D] had told him had died in August 2012) he had organised a programme of meetings every Tuesday night from 7.00 pm until 10.00 pm for people to come together to hear some preaching, to share the Word of God and to be revived. [Mr D] said in his oral evidence that [the applicant] was an ordained evangelist and that in Maiduguri he had been involved in preaching the Gospel to the poor, the sick and the youth and he had been engaged in organising crusades. He said that [the applicant] had the kind of charisma that encouraged people and that he understood preaching very well. He said that [the applicant] also had the gift of healing. He confirmed that [the applicant] had also been involved in the Youth Wing of the Christian Association of Nigeria. [The applicant] left Maiduguri to study at the [university deleted: s.431(2)] in late 2003 but he said at the hearing before me that he had continued to visit Maiduguri during his university vacations and he had returned there after completing his studies in September 2008.
9. [The applicant] undertook his national service teaching Christian religious knowledge at a school in Bayelsa State from March 2009 until March 2010. He has said that in July 2009 he returned to Maiduguri to attend a religious programme and he produced to the Department a letter from the National Youth Service Corps giving him permission to attend a church retreat in Borno State [in] July 2009 and stating that a failure to return or report [on a date in] July would attract sanctions (folio 84 of the Department's file CLF2011/215984). He has said that along with [Pastor C] and around 50 other Christians he was abducted by members of Boko Haram and taken to a hideout near Maiduguri. He has said that he was tortured and beaten and that he and the other Christians were asked to renounce their faith. He has said that [Pastor C] was beheaded when he refused. [The applicant]'s representatives produced a document compiled by Amnesty International Australia referring to reports (including one from Human Rights Watch) confirming [the applicant]'s account of these events (see folios 66 to 68 of the Tribunal's file 1209651).
10. [The applicant] has said that one of the Muslims who had originally approached him in Jos named [Mr E] recognised him while he was in the hideout and reminded him of [Imam B]'s belief that he had been called to be an imam. He has said that he told [Mr E] that he was doing his national service and that [Mr E] released him saying that he would give him the opportunity to answer his calling. In his letter referred to above and in his oral evidence [Mr D] confirmed that [the applicant] had told him that the people who had abducted him had wanted him to renounce his faith and to accept his calling to be an imam. [The applicant] has said that after he was released he approached a friend of [Pastor C] named [Mr F] who was a reporter and cameraman from [details deleted: s.431(2)] and told him what had happened. He has said that [Mr F] wrote numerous letters to the Nigeria State Security Service about the violence of Boko Haram towards Christians and he produced to the Department a copy of a

letter supposedly written by [Mr F] to the State Security Service dated [in] August 2011 referring to the beheading of [Pastor C] by Boko Haram and to [the applicant] having been tortured by them because they claimed he had a calling to serve Allah as an imam (see folio 90 of the Department's file CLF2011/215984).

11. Between December 2009 and February 2011 [the applicant] applied to study at universities in [countries deleted: s.431(2)] and he also entered the 2012 US Diversity Visa Lottery Program. At the hearing before me he said that after what had happened in July 2009 he had started fighting to leave Nigeria. He said that the only way he had known that it would be possible was through study. He said that a friend had suggested to him that he should apply for a scholarship to study in [country deleted: s.431(2)] but he said that he had not been successful. He said that late in 2011 he had considered going to Ghana but his sister there had told him that the people in Ghana had a very negative attitude towards people from Nigeria. He said that he had also felt that it was so close to Nigeria and that he would not be safe.
12. After he completed his national service [the applicant] worked for a month in Lagos (from March to April 2010) and he then moved to Abuja where he was employed by a company from May 2010 until August 2011. At the hearing before me he referred to the fact that, as he had mentioned at the Departmental interview, [Mr F] had had a cousin who had decamped from Boko Haram and had gone to Lagos but who had been killed in Lagos. He said that he had thought that he would be safer in the Federal Capital Territory. He has said that while he was working in Abuja he received text messages from members of Boko Haram and that in January 2011 he received a telephone call from [Imam G], the Chief Imam of the main mosque in [location deleted: s.431(2)]. At the hearing before me he said that he had had a number of telephone conversations with [Imam G] and that he had even visited him in [location deleted: s.431(2)]. He said that the founder of Boko Haram, Mohammed Yusuf, had wanted to Islamise Nigeria and that the people behind this had been a group of imams and he referred in this connection to the al-Nazral School, an Islamic school formerly based in Enugu which has since been moved to Ntezi, outside Afikpo in Ebonyi State. He said that at this school they nurtured the little ones in this religion. He said that [Imam G] was heavily involved in this and that he had given information which he had learned about this to [Mr F], the reporter.
13. [The applicant] has said that he was not involved in evangelism in Abuja but he was involved with the Christian Association of Nigeria in campaigning for the current President, Goodluck Jonathan, in the presidential election in April 2011. He has said that in July 2011 he received a call from [Mr E] telling him to stop attending his church. He has said that three weeks after he received this call [Mr E] and another member of Boko Haram came to his home in Abuja and gave him a letter telling him that it was time to start following his calling to be an imam. He has said that they beat him and told him that this was his last warning but that they had also gave him a copy of the Quran as a gift from [Imam G]. He has said that he left his job and Abuja [in] August 2011 and that he went to Enugu. He has produced a letter from his employer in Abuja confirming his employment and his resignation [in] August 2011 and stating that he told his employer that some Islamic extremists were after him (folio 52 of the Tribunal's file 1209651).
14. [The applicant] has said that that in September 2011 he was abducted in front of the compound where he was staying in Enugu. He has said that his abductors told him that they were having a large meeting [in] October 2011 to force him to be a member and that he should make sure that he was in Abuja a week before meeting. He has said that he was

beaten and then dumped somewhere and that he woke up in hospital. He produced to the Department a letter dated [in] September 2011 purporting to be from a doctor at [hospital deleted: s.431(2)] in Enugu stating that he had been seen [in] September 2011, that he was said to have been tortured and starved for days by a ‘suspected mob’, that he had lost consciousness and ‘sustained swollen jaw and abrasion’ and that he had been discharged three days later (folio 92 of the Department’s file CLF2011/215984).

15. [The applicant] has said that after he was discharged from hospital he called [Mr F] and told him what had happened. He produced a copy of a further letter supposedly written by [Mr F] to the State Security Service dated [in] October 2011 referring to his having been abducted by Boko Haram and having been in their custody for three days (folio 91 of the Department’s file CLF2011/215984). [The applicant] has said that he moved back to Abuja and that he stayed with his friend from Jos, [Mr A]. In his letter referred to above [Mr A] confirmed that [the applicant] had stayed with him in October 2011 and he said that [the applicant] had confided in him what had happened to him in Enugu. At the hearing before me [Mr A] confirmed that [the applicant] had told him that he had been receiving calls from the extremists and that they had wanted him to renounce his religion. He confirmed that, as he had said in his letter, he strongly believed that it would not be safe for [the applicant] to return to Nigeria. He said that while [the applicant] had been staying with him in Abuja these people had still been calling him. He said that he had been shocked at how they had managed to track [the applicant] and he had advised him that it would be best for him to leave the country.
16. [The applicant] has said that while he was in Abuja the people from Boko Haram were calling him every day. He has said that he believes that he was not killed by Boko Haram because their members believed that Allah had called him to be an imam. He has said that [Mr F] had a friend who worked for Foreign Affairs who arranged a visa for him to come to Australia. He has referred to the fact that after he left Nigeria he learned that [Mr F] had been killed by members of Boko Haram. The document compiled by Amnesty International Australia referred to above also quotes from reports (including one from the Committee to Protect Journalists) confirming that [Mr F] was killed [in] October 2011 and that Boko Haram claimed responsibility, accusing him of being an informant for the security services (see the reverse of folio 66 of the Tribunal’s file 1209651).
17. Under cover of a submission to the Tribunal dated [in] February 2013 [the applicant]’s representatives produced a report dated [in] September 2012 from a psychologist at STARTTS who said that she had provided [the applicant] with a total of 23 sessions of counselling. She said that he reported difficulties consistent with post-traumatic stress disorder and depression and that in recent weeks there had been grave concerns for his safety which had resulted in hospital psychiatric care and ongoing contact with the local mental health team. [The applicant]’s representatives also produced a report dated [in] September 2012 from another psychologist, [name deleted: s.431(2)], who said that she had seen [the applicant] four times. She referred to his claims and she said that in her opinion he was suffering from post-traumatic stress disorder. [The applicant]’s representatives also produced a letter dated [in] September 2012 from a general practitioner likewise stating that [the applicant] was suffering from severe post-traumatic stress disorder and that he was on anti-depressant medication.
18. Under cover of a letter dated [in] May 2013 [the applicant]’s representatives produced a further report from the psychologist, [name deleted: s.431(2)], who said that she had now seen [the applicant] 15 times. She said that he had provided her with further details of what

had happened to him when he had been abducted in September 2011. She said that [the applicant]'s hypervigilance 'due to both being physically tracked down and assaulted several times in Nigeria, and also due to the psychological trauma which is forever in his mind' would be unlikely to subside if he returned to Nigeria and that in her opinion it was extremely unlikely that he would recover from these disabling symptoms and lead a productive life if he returned to Nigeria. She also said that he had told her that a witness to the 2009 incident, [pastor's name deleted: s.431(2)], had died when his church had been bombed in August 2012.

19. [The applicant]'s representatives have also produced to the Department and the Tribunal letters and a petition from members of the [church deleted: s.431(2)] in Sydney and from [pastor and church deleted: s.431(2)] attesting to [the applicant]'s religious beliefs and his character. At the hearing before me [pastor's name deleted: s.431(2)] confirmed that he considered [the applicant] to be reliable and he said that he had never met anyone who had had such a profound effect on him. He said that when one first met a person one looked for discrepancies in their account of events but that he definitely believed everything [the applicant] was saying. He said that he and his wife had a very high regard for [the applicant] and considered him a close friend. He said that he trusted him explicitly.
20. [Name deleted: s.431(2)] also gave oral evidence at the hearing before me. She said that she was not an easy person to get around and that before she took someone into her home to meet her family the talk they talked needed to match the walk they walked. She said that [the applicant] had the full run of her house and that of her daughter and son-in-law. She said that he had never once given her any concern that what he had said was not true and that she regarded him as her adopted son. She said that they shared a passion for Biblical history and Biblical prophecy and they could talk for hours. She added that he had a gift with children.

CONSIDERATION OF THE ISSUES

21. [The applicant]'s evidence has been broadly consistent over the course of the processing of his application although (as is to be expected) he has added considerably more detail in relation to various aspects of his account. He has produced a wealth of corroborative evidence in the form of letters and other documents and two of his friends in Nigeria also gave oral evidence at the hearing before me corroborating aspects of his evidence. The evidence from the psychologists is consistent with his account and I also give weight to the evidence of his friends in the community here who have said that they find him trustworthy and of good character.
22. As I indicated to [the applicant] in the course of the hearing before me, I consider that the evidence given at the hearing before me clarified why Boko Haram would have wished to recruit him, particularly in terms of his involvement in evangelism and his ability as a charismatic preacher to persuade people to follow him. I put to him that it seemed odd that these same people would have been using physical violence against him. [The applicant] said by way of response that many of the people in Boko Haram had different agendas. He said, for example, that in July 2011 [Mr E] had told the other member of Boko Haram that he should not continue beating him.
23. I put to [the applicant] that he said that these people - [Mr E] and the imams - wanted to recruit him and wanted him to become an imam and that they were prepared to hunt him all over Nigeria to do this but by his account they had kept letting him leave even though they had used physical violence against him. [The applicant] said that if they wanted you and they

used violence to get you they said it was a blessing, that it was because of the love of Allah. I put to him that they had still kept allowing him to go. [The applicant] said that they had wanted him. I asked him why they had kept allowing him to go if they had wanted him. [The applicant] said that they would not get the best of him. I put to him that they would not get the best of him by torturing him either. [The applicant] said that what had happened in 2009 had been general torture: it had not been because they had wanted him. He said that in 2009 they had just captured different people.

24. I referred to the fact that [the applicant] had said that he had been tortured again in 2011 when he had been abducted in Enugu. [The applicant] said that the people who had assaulted him and tortured him in 2011 had been different people: they had been kidnappers. He said that he had seen different people on the first day and these had been the people who had told him about the meeting in Abuja [in] October 2011. He said that the people who had tortured him had asked him about the letters which [Mr F] had written to the State Security Service. He said that he could not explain why they had released him.

CONCLUSION

25. While it is difficult to understand why the people from Boko Haram would have behaved in the way [the applicant] has said that they did, I formed a favourable view of his credibility having observed him giving evidence at the hearing before me. As referred to above, his evidence has been internally consistent and it is corroborated by the documentary and oral evidence before me including independent evidence regarding events in Nigeria. Having regard to all of the evidence before me I accept that [the applicant] is telling the truth about the events which prompted him to leave Nigeria. I accept that having initially been approached by Muslims in Jos and having escaped (although his father was killed) he was again approached to become an imam when he was captured in Maiduguri in 2009. I accept that although he was released on that occasion the people from Boko Haram remained in contact with him and continued to pressure him to join them, culminating in the incident when he was abducted in Enugu in September 2011.
26. I accept that there is a real chance that, if [the applicant] returns to Nigeria now or in the reasonably foreseeable future, he will once again be approached by Boko Haram to join them and that if he refuses he will be seriously harmed or killed. I consider that the reason for the harm feared is the applicant's religion in that, if he were to be seriously harmed or killed it would be because he refused to renounce his religion as required by his persecutors.² I accept on the basis of the evidence before me that Boko Haram has demonstrated that it can track [the applicant] wherever he goes in Nigeria. I accept, therefore, that there is no part of Nigeria to which he could return where he would be safe from the persecution which he fears. I have given consideration to whether [the applicant] could be protected by the Nigerian authorities from the persecution which he fears. However, as mentioned in the document compiled by Amnesty International Australia referred to above (citing a report from *The Economist*), President Goodluck Jonathan himself has suggested that Boko Haram has infiltrated all branches of the government, including the army and police (see the reverse of folio 72 of the Tribunal's file 1209651). I do not accept on the evidence before me that the Government of Nigeria meets international standards³ with regard to the protection it affords

² Compare *Okere v Minister for Immigration and Multicultural Affairs* (1998) 87 FCR 112.

³ See *Minister for Immigration and Multicultural Affairs v Respondents S152/2003* (2004) 205 ALR 487 at [26] and [27] per Gleeson CJ, Hayne and Heydon JJ.

to civilians like the applicant who face credible threats from non-state actors like Boko Haram.

conclusions

27. I consider that the persecution which [the applicant] fears involves ‘serious harm’ as required by paragraph 91R(1)(b) of the Act in that it involves a threat to his life or significant physical harassment or ill-treatment. I consider that his religion is the essential and significant reason for the persecution which he fears, as required by paragraph 91R(1)(a) of the Act. I further consider that the persecution which the applicant fears involves systematic and discriminatory conduct, as required by paragraph 91R(1)(c), in that it is deliberate or intentional and involves his selective harassment for a Convention reason, namely his religion. For the reasons given above I do not consider that there is any part of Nigeria to which [the applicant] could reasonably be expected to relocate where he would be safe from the persecution which he fears.
28. I find that [the applicant] is outside his country of nationality, Nigeria. For the reasons given above, I find that he has a well-founded fear of being persecuted for reasons of his religion if he returns to Nigeria. I find that he is unwilling, owing to his fear of persecution, to avail himself of the protection of the Government of Nigeria. In the course of the Departmental interview the primary decision-maker referred to the fact that, as a citizen of Nigeria, [the applicant] had the right to go to any of the Economic Community of West African States (ECOWAS) countries including Ghana and to remain there for up to three months. As referred to above, [the applicant] said in the course of the hearing before me that he had thought of going to Ghana but that he had not felt that he would be safe there. He also referred to the prejudice against people from Nigeria in Ghana. I have accepted above that the people from Boko Haram have been prepared to pursue [the applicant] wherever he went in Nigeria and it is relevant that they would enjoy the same right to visa-free travel to any of the ECOWAS countries as [the applicant] himself. I consider that [the applicant] would have a well-founded fear of being persecuted by members of Boko Haram for reasons of his religion in any of the ECOWAS countries and I therefore consider that, in accordance with subsection 36(4) of the *Migration Act 1958*, he is not excluded from Australia’s protection by subsection 36(3) of the Migration Act. It follows that I am satisfied that [the applicant] is a person in respect of whom Australia has protection obligations under the Refugees Convention as amended by the Refugees Protocol. Consequently the applicant satisfies the criterion set out in paragraph 36(2)(a) of the Migration Act for the grant of a protection visa.

decision

29. The Tribunal remits the matter for reconsideration with the direction that the applicant satisfies paragraph 36(2)(a) of the Migration Act.

attachment a - relevant law

30. In accordance with section 65 of the *Migration Act 1958* (the Act), the Minister may only grant a visa if the Minister is satisfied that the criteria prescribed for that visa by the Act and the Migration Regulations 1994 (the Regulations) have been satisfied. The criteria for the grant of a Protection (Class XA) visa are set out in section 36 of the Act and Part 866 of Schedule 2 to the Regulations. Subsection 36(2) of the Act provides that:

- ‘(2) A criterion for a protection visa is that the applicant for the visa is:
- (a) a non-citizen in Australia in respect of whom the Minister is satisfied Australia has protection obligations under the Refugees Convention as amended by the Refugees Protocol; or
 - (aa) a non citizen in Australia (other than a non citizen mentioned in paragraph (a)) in respect of whom the Minister is satisfied Australia has protection obligations because the Minister has substantial grounds for believing that, as a necessary and foreseeable consequence of the non citizen being removed from Australia to a receiving country, there is a real risk that the non citizen will suffer significant harm; or
 - (b) a non-citizen in Australia who is a member of the same family unit as a non-citizen who:
 - (i) is mentioned in paragraph (a); and
 - (ii) holds a protection visa; or
 - (c) a non citizen in Australia who is a member of the same family unit as a non citizen who:
 - (i) is mentioned in paragraph (aa); and
 - (ii) holds a protection visa.’

REFUGEE CRITERION

31. Subsection 5(1) of the Act defines the ‘Refugees Convention’ for the purposes of the Act as ‘the Convention relating to the Status of Refugees done at Geneva on 28 July 1951’ and the ‘Refugees Protocol’ as ‘the Protocol relating to the Status of Refugees done at New York on 31 January 1967’. Australia is a party to the Convention and the Protocol and therefore generally speaking has protection obligations to persons defined as refugees for the purposes of those international instruments.

32. Article 1A(2) of the Convention as amended by the Protocol relevantly defines a ‘refugee’ as a 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.’

33. The time at which this definition must be satisfied is the date of the decision on the application: *Minister for Immigration and Ethnic Affairs v Singh* (1997) 72 FCR 288.
34. The definition contains four key elements. First, the applicant must be outside his or her country of nationality. Secondly, the applicant must fear ‘persecution’. Subsection 91R(1) of the Act states that, in order to come within the definition in Article 1A(2), the persecution which a person fears must involve ‘serious harm’ to the person and ‘systematic and discriminatory conduct’. Subsection 91R(2) states that ‘serious harm’ includes a reference to any of the following:
 - (a) a threat to the person’s life or liberty;
 - (b) significant physical harassment of the person;
 - (c) significant physical ill-treatment of the person;
 - (d) significant economic hardship that threatens the person’s capacity to subsist;
 - (e) denial of access to basic services, where the denial threatens the person’s capacity to subsist;
 - (f) denial of capacity to earn a livelihood of any kind, where the denial threatens the person’s capacity to subsist.
35. In requiring that ‘persecution’ must involve ‘systematic and discriminatory conduct’ subsection 91R(1) reflects observations made by the Australian courts to the effect that the notion of persecution involves selective harassment of a person as an individual or as a member of a group subjected to such harassment (*Chan Yee Kin v Minister for Immigration and Ethnic Affairs* (1989) 169 CLR 379 per Mason CJ at 388, McHugh J at 429). Justice McHugh went on to observe in *Chan*, at 430, that it was not a necessary element of the concept of ‘persecution’ that an individual be the victim of a series of acts:

‘A single act of oppression may suffice. As long as the person is threatened with harm and that harm can be seen as part of a course of systematic conduct directed for a Convention reason against that person as an individual or as a member of a class, he or she is “being persecuted” for the purposes of the Convention.’
36. ‘Systematic conduct’ is used in this context not in the sense of methodical or organised conduct but rather in the sense of conduct that is not random but deliberate, premeditated or intentional, such that it can be described as selective harassment which discriminates against the person concerned for a Convention reason: see *Minister for Immigration and Multicultural Affairs v Haji Ibrahim* (2000) 204 CLR 1 at [89] - [100] per McHugh J (dissenting on other grounds). The Australian courts have also observed that, in order to constitute ‘persecution’ for the purposes of the Convention, the threat of harm to a person:

‘need not be the product of any policy of the government of the person’s country of nationality. It may be enough, depending on the circumstances, that the government has failed or is unable to protect the person in question from persecution’ (per McHugh J in *Chan* at 430; see also *Applicant A v Minister for Immigration and Ethnic Affairs* (1997) 190 CLR 225 per Brennan CJ at 233, McHugh J at 258)
37. Thirdly, the applicant must fear persecution ‘for reasons of race, religion, nationality, membership of a particular social group or political opinion’ Subsection 91R(1) of the Act provides that Article 1A(2) does not apply in relation to persecution for one or more of the

reasons mentioned in that Article unless ‘that reason is the essential and significant reason, or those reasons are the essential and significant reasons, for the persecution’ It should be remembered, however, that, as the Australian courts have observed, persons may be persecuted for attributes they are perceived to have or opinions or beliefs they are perceived to hold, irrespective of whether they actually possess those attributes or hold those opinions or beliefs: see *Chan* per Mason CJ at 390, Gaudron J at 416, McHugh J at 433; *Minister for Immigration and Ethnic Affairs v Guo* (1997) 191 CLR 559 at 570-571 per Brennan CJ, Dawson, Toohey, Gaudron, McHugh and Gummow JJ.

38. Fourthly, the applicant must have a ‘well-founded’ fear of persecution for one of the Convention reasons. Dawson J said in *Chan* at 396 that this element contains both a subjective and an objective requirement:

‘There must be a state of mind - fear of being persecuted - and a basis - well-founded - for that fear. Whilst there must be fear of being persecuted, it must not all be in the mind; there must be a sufficient foundation for that fear.’

39. A fear will be ‘well-founded’ if there is a ‘real chance’ that the person will be persecuted for one of the Convention reasons if he or she returns to his or her country of nationality: *Chan* per Mason CJ at 389, Dawson J at 398, Toohey J at 407, McHugh J at 429. A fear will be ‘well-founded’ in this sense even though the possibility of the persecution occurring is well below 50 per cent but:

‘no fear can be well-founded for the purpose of the Convention unless the evidence indicates a real ground for believing that the applicant for refugee status is at risk of persecution. A fear of persecution is not well-founded if it is merely assumed or if it is mere speculation.’ (see *Guo*, referred to above, at 572 per Brennan CJ, Dawson, Toohey, Gaudron, McHugh and Gummow JJ)

COMPLEMENTARY PROTECTION CRITERION

40. An applicant for a protection visa who does not meet the refugee criterion in paragraph 36(2)(a) of the Act may nevertheless meet the complementary protection criterion in paragraph 36(2)(aa) of the Act, set out above. ‘Significant harm’ for the purposes of that definition is exhaustively defined in subsection 36(2A) of the Act: see subsection 5(1) of the Act. A person will suffer ‘significant harm’ if they will be arbitrarily deprived of their life, if the death penalty will be carried out on them or if they will be subjected to ‘torture’ or to ‘cruel or inhuman treatment or punishment’ or to ‘degrading treatment or punishment’ The expressions ‘torture’, ‘cruel or inhuman treatment or punishment’ and ‘degrading treatment or punishment’ are further defined in subsection 5(1) of the Act.