

0805553 [2008] RRTA 536 (4 December 2008)

DECISION RECORD

RRT CASE NUMBER: 0805553

COUNTRY OF REFERENCE: Kenya

TRIBUNAL MEMBER: Deborah Morgan

DATE: 4 December 2008

PLACE OF DECISION: Adelaide

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

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

1. This is an application for review of a decision made by a delegate of the Minister for Immigration and Citizenship (the delegate) to refuse to grant the applicant a Protection (Class XA) visa under s.65 of the *Migration Act 1958* (the Act).
2. The applicant, who claims to be a citizen of Kenya, first arrived in Australia in the early 2000s. The applicant applied to the Department of Immigration and Citizenship for a Protection (Class XA) visa.
3. The delegate decided to refuse to grant the visa and notified the applicant of the decision and his review rights by letter.
4. The delegate refused the visa application on the basis that the applicant is not a person to whom Australia has protection obligations under the Refugees Convention.
5. The applicant applied to the Tribunal for review of the delegate's decision.

RELEVANT LAW

6. Under s.65(1) a visa may be granted only if the decision maker is satisfied that the prescribed criteria for the visa have been satisfied. In general, the relevant criteria for the grant of a protection visa are those in force when the visa application was lodged although some statutory qualifications enacted since then may also be relevant.
7. Section 36(2)(a) of the Act provides that a criterion for a protection visa is that the applicant for the visa is a non-citizen in Australia to whom the Minister is satisfied Australia has protection obligations under the 1951 Convention Relating to the Status of Refugees as amended by the 1967 Protocol Relating to the Status of Refugees (together, the Refugees Convention, or the Convention).
8. Further criteria for the grant of a Protection (Class XA) visa are set out in Part 866 of Schedule 2 to the Migration Regulations 1994.

Definition of 'refugee'

9. Australia is a party to the Refugees Convention and generally speaking, has protection obligations to people who are refugees as defined in Article 1 of the Convention. Article 1A(2) relevantly defines a refugee as any person who:
owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence, is unable or, owing to such fear, is unwilling to return to it.
10. The High Court has considered this definition in a number of cases, notably *Chan Yee Kin v MIEA* (1989) 169 CLR 379, *Applicant A v MIEA* (1997) 190 CLR 225, *MIEA v Guo* (1997) 191 CLR 559, *Chen Shi Hai v MIMA* (2000) 201 CLR 293, *MIMA v Haji*

Ibrahim (2000) 204 CLR 1, *MIMA v Khawar* (2002) 210 CLR 1, *MIMA v Respondents S152/2003* (2004) 222 CLR 1 and *Applicant S v MIMA* (2004) 217 CLR 387.

11. Sections 91R and 91S of the Act qualify some aspects of Article 1A(2) for the purposes of the application of the Act and the regulations to a particular person.
12. There are four key elements to the Convention definition. First, an applicant must be outside his or her country.
13. Second, an applicant must fear persecution. Under s.91R(1) of the Act persecution must involve “serious harm” to the applicant (s.91R(1)(b)), and systematic and discriminatory conduct (s.91R(1)(c)). The expression “serious harm” includes, for example, a threat to life or liberty, significant physical harassment or ill-treatment, or significant economic hardship or denial of access to basic services or denial of capacity to earn a livelihood, where such hardship or denial threatens the applicant’s capacity to subsist: s.91R(2) of the Act. The High Court has explained that persecution may be directed against a person as an individual or as a member of a group. The persecution must have an official quality, in the sense that it is official, or officially tolerated or uncontrollable by the authorities of the country of nationality. However, the threat of harm need not be the product of government policy; it may be enough that the government has failed or is unable to protect the applicant from persecution.
14. Further, persecution implies an element of motivation on the part of those who persecute for the infliction of harm. People are persecuted for something perceived about them or attributed to them by their persecutors. However the motivation need not be one of enmity, malignity or other antipathy towards the victim on the part of the persecutor.
15. Third, the persecution which the applicant fears must be for one or more of the reasons enumerated in the Convention definition - race, religion, nationality, membership of a particular social group or political opinion. The phrase “for reasons of” serves to identify the motivation for the infliction of the persecution. The persecution feared need not be *solely* attributable to a Convention reason. However, persecution for multiple motivations will not satisfy the relevant test unless a Convention reason or reasons constitute at least the essential and significant motivation for the persecution feared: s.91R(1)(a) of the Act.
16. Fourth, an applicant’s fear of persecution for a Convention reason must be a “well-founded” fear. This adds an objective requirement to the requirement that an applicant must in fact hold such a fear. A person has a “well-founded fear” of persecution under the Convention if they have genuine fear founded upon a “real chance” of persecution for a Convention stipulated reason. A fear is well-founded where there is a real substantial basis for it but not if it is merely assumed or based on mere speculation. A “real chance” is one that is not remote or insubstantial or a far-fetched possibility. A person can have a well-founded fear of persecution even though the possibility of the persecution occurring is well below 50 per cent.
17. In addition, an applicant must be unable, or unwilling because of his or her fear, to avail himself or herself of the protection of his or her country or countries of nationality or, if stateless, unable, or unwilling because of his or her fear, to return to his or her country of former habitual residence.

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

CLAIMS AND EVIDENCE

19. The Tribunal has before it the Department's file relating to the applicant. The Tribunal also has had regard to the material referred to in the delegate's decision, and other material available to it from a range of sources.

Claims in the protection visa application

20. The applicant is in his 40s and has a disability and is a citizen of Kenya who was born in City A, North Eastern Province (NEP), and Kenya in the 1960s. The applicant claims Identity Z ethnicity. His religion is Islam. Between the 1970s and 1980s the applicant attended Learning Institution 1. Between the 1980s the applicant attended Learning Institution 2. Between the 1980s, the applicant attended City A, School. From 1990s the applicant studied at Learning Institution 3. He undertook further academic studies between the 1990s. Since arriving in Australia the applicant has undertaken further academic studies in the health sector at Learning Institution 3.
21. The applicant's employment in Kenya was as an employee at a learning institution between 1990s and 2000s. In 2000s the applicant travelled to Country X for an interview and in 2000s he travelled to Country Y to attend a seminar. The applicant claims to have lived in City A, Kenya for his entire life. The applicant entered Australia under a visa in the 2000s. The applicant has a Kenyan passport that is due to expire in 2000s and stated he had no difficulty in obtaining a passport in Kenya.
22. The applicant was previously married. The applicant divorced in 2000s. The applicant has several children, the eldest of whom was born in the 1980s and the youngest of whom was born in 2000s.
23. The applicant left Kenya in order to better his academic qualifications after 'facing disadvantages and neglect for many years'. He claims to have suffered 'discrimination and humiliation' from the Kenyan community because of his disability. He fears that if he returns to Kenya he will suffer gross discrimination, humiliation and unfair treatment in consequence of his disability. The applicant further fears that he will be deprived of basic opportunities and rights in most areas of life. He mostly fears government officials and he also fears family members, fellow workmates and the community generally. The applicant believes that if he were to return to Kenya, Kenyan society's negative and stereotyped attitudes would further alienate and disadvantage him because of his academic achievements as a person with a disability. The applicant stated that the government and legal institutions cannot protect him with respect to violation of his rights because of their lack of concern for persons with disabilities.
24. The applicant returned to Kenya in the 2000s and in 2000s. The stated purpose of his return to Kenya was 'family visits.'
25. In consequence of a request for additional information by the Department, the applicant provided a written submission that includes the following information. He was born with a health condition into a traditional Identity Z nomadic family. His mother was

widowed when he was employee at a learning institution young and the famine of 67-69 forced the family to settle in the slums of City A. His siblings went to school and he was left behind until later when he started at school. He was harassed at his first school because of his disability and he dropped out of classes. In the 1970s he commenced at a school for the people with disabilities many kilometres from home.

26. In the 1990s the applicant's medical condition had deteriorated to the extent he became disabled. In the 1990s, some of the applicant's siblings died and he took responsibility for his sibling's children.
27. He is doing his further studies in Australia under a scholarship from a foundation and as part of his studies he returned to Kenya to collect data from specific areas.
28. The applicant submitted that the Kenyan community generally discriminates against people with disabilities and there is ignorance of the causes of impairments and the needs of disabled people. Government officials, his fellow workmates and his own community have intimidated and harassed him. A senior public servant stated that the applicant should not hold the position of counselling head at a school because he has a disability. He was discriminated against in promotions despite being over qualified.
29. The applicant claims fear of his personal safety in consequence of pressures from his parents in law forced him to divorce his wife when he desperately needed her support. His children are currently in the care of his siblings.
30. The applicant further submitted that NEP has suffered marginalisation and brutal security exercises for many years, remaining under a state of emergency until the 1990s. He referred to the government's burning of City A town in the 1980s and he claimed to have been assaulted by police officers during a raid on their village. Police officers took his only specialised tools. He was frightened and fled in the dark and fell on sharp objects and was injured. When his siblings complained to police about his missing specialised tools they were assaulted and chased away.
31. The applicant referred to the Kenyan government's policy of chronic underdevelopment of NEP and its inadequate legal system which did not protect him when he complained about violations of his rights.
32. In its letter dated in the 2000s, a non profit organisation certified that the applicant has a disability and there is no potential for improvement with any treatment.

The delegate's decision

33. The delegate decided that the applicant had not shown that for reasons of race, religion, nationality, membership of a particular social group or political opinion that he has a profile that would interest the Kenyan authorities. The delegate deduced that as the applicant worked as an employee at a learning institution in Kenya he had not been denied the right to earn a living. The delegate's decision relied on the report entitled "State of Disabled Peoples Rights in Kenya", 2007, in particular, section 2 of the report "Systemic Provisions to Protect, Promote and Fulfill the Human Rights of People with Disabilities in Kenya" which she found indicated the Kenyan government has taken some positive measures to educate and change perceptions and behaviour in relation to disabled persons in Kenya. The delegate found that the applicant had overcome hurdles

to obtain a position as an employee and that he had not been denied access to education or employment. The delegate decided the applicant feared harm from non state agents and that he implied the harm feared would be condoned by the government. The delegate found the random acts of violence, discrimination or harassment feared by the applicant are not within the scope of the Convention. In relation to the applicant's former wife's family, the delegate found that state protection is available to the applicant if he fears harm from them. The delegate determined that the applicant's return travel to Kenya from Australia on two occasions led her to conclude that his travel (to Australia) 'was not a consequence of any fear.' The delegate found that the applicant's delay in applying for a protection visa, for which he applied several weeks before his visa expired, cast strong doubts on his credibility to fear for his personal safety or well being as required by the Convention.

The applicant's movements' details

Departmental data available to the Tribunal indicates that the applicant first arrived in Australia in the early 2000s. *[Information deleted in accordance with s431 of the Migration Act as this information could identify the applicant].*

The Tribunal

34. The applicant has been represented at review by his registered migration agent.
35. The applicant appeared before the Tribunal to give evidence and present arguments. The representative attended the Tribunal hearing. During the hearing the applicant handed provided a letter from his supervisor at Learning Institution 3 which calls for the applicant to be granted permanent residency as his high quality skills certain areas, his knowledge of a range of cultural backgrounds and of the implications for persons with disabilities should be exploited by Australia. The letter includes the information that the applicant's skills would be particularly useful in relation to that part of our population with low levels of literacy that need education in relation to adjusting to life in Australia.
36. The applicant's sworn oral evidence is summarised by the Tribunal as follows. He has completed his studies and he expects to receive his certificate at a ceremony in the 2000s
37. The Tribunal asked the applicant what harm he fears if he returns to Kenya. The applicant responded he fears discrimination in consequence of his disability that will affect his livelihood and access by him to employment suited to his qualifications The applicant claimed that the government's laws are persecutory because the Kenyan constitution is silent about discrimination in relation to disabled persons. The applicant told the Tribunal that he is not able to seek election as a member of the Kenyan parliament because he has a disability.
38. In relation to his past employment, the applicant was the only employee with his qualifications in his province. Other employees in his position with lesser qualifications than him were paid higher salaries than him. The applicant confirmed he was told it was wrong for him to take on the role of a certain position because of his disability. The applicant said that these facts occurred because of his disability. He lodged a complaint against the NEP senior public servant in relation to being prohibited from acting as a

certain position but he was told that his complaint was trivial and not supported by evidence.

39. Even though he will soon hold a high qualification, the entrenched stigma against disabled persons in Kenya will adversely affect his employment opportunities and that will also negatively affect his feelings.
40. The applicant said he did not claim that he was treated badly on a regular basis; rather, the acts of discrimination were random. However, he feels desperate and de-humanised in consequence of one act of discriminatory conduct against him.
41. The applicant also claimed he fears persecution in consequence of his ethnicity as an Identity Z ethnicity. He said that NEP is an under-resourced and marginalised area for Identity Z people who have been subjected to police brutality and victimisation. The applicant confirmed that he was attacked by the authorities in the 1980s because of his ethnicity, not because of his disability.
42. The applicant stated that it is difficult for Identity Z to obtain assistance from the authorities in NEP and harder for him because he is disabled. The Kenyan government disadvantages Identity Z people in relation to education and availability of financial resources.
43. The applicant stated that he fears discrimination from his former parents in law who forced his wife to divorce him because of his disability. His parents in law threatened to harm him if he did not divorce their child He is bitter about his divorce.
44. The applicant acknowledged the delegate's finding that he could report his former parents in law to the authorities but he said no action would follow if he did so because the NEP police are not only unreliable, they are also corrupt. He confirmed his claim about the theft of his specialised tools and the police treatment of his family when they reported the theft. He said that in NEP it is easy to harm without repercussion. Furthermore, because he has a disability, he is an easy target to harm.
45. The Tribunal asked the applicant to comment on three Kenyan institutions. In relation to the Kenyan National Commission on Human Rights which the Tribunal noted has disability as one of its concerns, the applicant said the Commission visited NEP after he was injured by police in the 1980s and he showed Commission personnel his bruises. The applicant said the Commission is active and trying to help disabled people but cannot do much under the current legislation.
46. With respect to the National Council for Persons with Disabilities established in the 2000s, the applicant said because the Council is in its infancy not much has yet been done by it to protect the disabled.
47. As for the third group, the applicant said the Society is the oldest of the three institutions, that it has very limited resources and no access to advocacy. He asked the Society for assistance in relation to him being prohibited from being a school counsellor but he did not receive any.
48. The Tribunal asked the applicant if he had ever, in consequence of his disability, been declined protection by the authorities in the past. In response, the applicant told the

Tribunal that the Kenyan legal system failed to protect him in relation when he was refused a position. He also stated that when his specialised tools were stolen he was not given protection and his siblings were assaulted by police.

49. The Tribunal asked the applicant if he claimed that protection would be denied him by the Kenyan authorities in the future because of his disability. The applicant responded that he was not one hundred percent certain of future protection, given his past experiences with the authorities.
50. The Tribunal asked the applicant if it was his claim that protection would be denied him in the future by the Kenyan authorities because of his Identity Z ethnicity. He said he was not sure about that matter and he went on to say that in the past he has not been refused protection by the authorities because he is an Identity Z person. He said of the one many people in NEP, a large percent of them are Identity Z.
51. The Tribunal asked the applicant to comment that part of the delegate's decision where she found the applicant's delay in making a protection visa application together with his two return visits to Kenya whilst in Australia raised concerns about the "immediacy, gravity and credibility" of his claims to fear persecution in Kenya. The applicant explained that he returned to Kenya in 2000s to see his family because his wife had requested him to sort out their divorce. His return trip in the 2000s was mostly for the purpose of collecting data for his studies in certain area. On one of the trips he also spent time with his family.
52. The applicant said he did not lodge a protection visa application any earlier because he held a visa and he feared a refugee application would not only interrupt his goal of being granted a certificate but also making an earlier application may have caused him to forego the opportunity of completing his studies. The applicant stated his delay in lodging his protection visa application did not mean he did not have internal fears about returning to Kenya. The applicant stated that visiting Kenya does not mean he had no fear of persecution.
53. The applicant told the Tribunal that the "State of Disabled Peoples Rights in Kenya (2007) Report" contains important information in relation to human rights issues of the disabled in Kenya. He offered to provide a copy of the report to the Tribunal in the following week.
54. At the close of the hearing the applicant stated many disabled persons in Kenya do not have access to an education and that he is the only disabled person with his level of education in his region of Kenya.

Submission post hearing

55. The Tribunal received the following reports from the applicant's representative:
 - *Addressing Social, Political & Economic Marginalisation of Kenya's Disabled Community* – Frederick Agyeman–Duah, University of Denver.
 - *State of Disabled Peoples Rights in Kenya (2007) Report* is a study of four key human rights principles: dignity, autonomy, equality and inclusion in three areas in Kenya – Rift Valley, Nairobi and Nyanza. The report included the information that 74% of persons with disabilities had been denied the right to

make decisions on issues affecting their own lives. The study reported that disabled persons in Kenya they are treated unequally by their families, their communities and public authorities and they have faced prejudice and negative stereotypes which has seriously affected their dignity.

- This report confirms that there is no constitutional definition of disability in Kenya and that the constitution does not refer to discrimination on the basis of disability.
- The report refers to the Kenyan government's enactment of the Persons with Disabilities Act (PDA) in 2003 which defines disability to include any "visual, hearing, learning or physical incapacity which impacts adversely on social, economic or environmental participation." The report states the PDA is the only Kenyan legislation that outlaws discrimination against the disabled in Kenya At page 20 of the report (quoted by the delegate) the following is stated:

"The PDA includes provisions to prohibit discrimination on the basis of disabilities in various sectors including education, employment, health and provision of services in both the public and private sector ..."

- The PDA 2003 created the National Council of Persons with Disabilities (the NCPD Council) as a statutory organ to oversee the welfare of the disabled in Kenya. The Report states the NCPD is formulating policies to guide it under its strategic plan, that it is mobilising resources for its activities, supporting research and educating the public about people with disabilities, developing systems for registration of persons, groups and organisations, strengthening the capacity of disabled persons so that they may influence and monitor the implementation of service delivery.

Additional country information obtained by the Tribunal

56. US Department of State Country Reports on Human Rights Practices – Kenya - 2007, released 11 March 2008 includes the following:

Persons with disabilities

"The law prohibits discrimination against persons with physical or mental disabilities in employment, education, access to health care however, the government did not effectively enforce these provisions. ... implementation has been slow as the government worked to harmonize the law with existing laws. ..."

57. According to information on the USAID website, "North Eastern Province is home to approximately one million people, the majority of whom are ethnic Identity Z entrenched in nomadic or semi-nomadic lifestyles". The US Department of State's 2008 report on religious freedom in Kenya refers to the population of the North Eastern Province as "predominantly ethnic Identity Z origin".

58. The World Directory of Minorities – Kenya – Pastoralists, updated in July 2008, includes the following:

"...From colonial times the government has treated the northern parts of Kenya mainly as a security problem. Other interventions have primarily been to try to persuade nomads to settle.

Emergency powers have enabled the authorities to bypass the judicial system. Although a variety of colonial and post-colonial legislation has been alternately enforced or ignored, draconian measures are widely available and have often been used. These have included powers to arrest, move or detain people, confiscate or destroy livestock, prohibit gatherings, and impose a mandatory death penalty for illegal possession of firearms. The northern districts are Trust Lands with very limited defences against expropriation, an important factor in moves to privatize land, particularly for ranching.

Language Z-speaking pastoralists attracted the greatest government hostility under the Moi regime. The eastern parts of northern Kenya are traditionally inhabited by Identity Z. These areas have long been claimed by Country Z, with disavowals having limited impact on Kenyan suspicions. The inhabitants voted to secede from Kenya in a referendum held shortly before independence in 1963. The results were ignored by the incoming government, leading to a war. A mixture of secessionist insurgency, inter-ethnic and clan warfare, and outright banditry has characterized the region ever since.

Hostility between Identity Z and the authorities have led to continuous conflict over efforts to control movement, such as the impounding of cattle, resulting in extremely serious abuses, including massacres in City A in the 1980's (hundreds of people) and another city in the 1980's (up to thousands) and the 1980's (hundreds). The impact of such killings affects all Kenyan Identity Z's – including those long-resident in urban areas – who feel themselves treated as second-class citizens. A specific grievance was the requirement since the 1980's for Kenyan Identity Z's to carry a separate pink identity card, in addition to the national identity card carried by all Kenyans. This was ostensibly to distinguish them from Identity Z refugees, numbering about several hundred thousand, who also suffered abuse at the hands of the authorities, including alleged rape by soldiers.”

Information about the country information has been altered in accordance with s431 as it may identify the applicant

59. Ahmed Issack Hassan, an advocate in Kenya, has published a history of northern Kenya, including NEP in *Fahamu*. The study includes the following historical overview:

AMENDMENTS TO THE INDEPENDENCE CONSTITUTION AND EMERGENCY LAWS IN THE NFD

Kenya became independent on 12 December 1963. Section 29 of the independence constitution provided for the procedure to be followed in the event of declaring a state of emergency. However, Section 19 of the Kenya Independence Order in Council (Kenya subsidiary legislation, 1963) provided that the Governor-General:

‘may, by regulations which shall be published in the Kenya Gazette, make such provision as appears to him to be necessary or expedient for the purpose of ensuring effective government or in relation to the North Eastern Region and without prejudice to the generality of that power, he may by such regulation make such temporary adaptations, modifications or qualifications or exceptions to the Provisions of the Constitution or of any other Law as appear to him to be necessary’

When Kenya became a republic in 1964, the powers enjoyed by the Governor-General under Section 19 were transferred to the president, giving him the power to rule the North Eastern Region by decree. There have been several subsequent amendments to the independence constitution. For example, the sixth amendment Act No.18 of 1966 enlarged the government's emergency powers. It removed legislation relating to parliamentary control over emergency

laws and the law relating to public order. Existing constitutional provisions were repealed and replaced by one which gave the president a blank cheque: 'at any time by order in the Kenya Gazette to bring into operation generally or in any part of Kenya, part III of the preservation of Public Security Act or any part thereof.'

The application of emergency laws meant that in effect Kenya had two separate legal regimes: one applied exclusively to the NFD and the other to the rest of the country. The detailed provisions of the emergency laws were contained in the North Eastern Province and Contiguous Districts Regulations, 1966. These regulations formed the basis for the degradation of human rights and explicitly endorsed instances in which the fundamental human rights of the person could be violated. In the process, the government arrogated powers that could only apply to the rest of Kenya when it was at war.

The Northern region was thus technically a war zone and became a virtual police state. The regulations created offences that were punishable without due process. Possession of a firearm, or consorting with or harbouring someone with a firearm, was punishable by death. Harbouring someone who may act in a manner prejudicial to the preservation of public security was punishable by life imprisonment. Even the owning, operating or use of boats or any other means of transport on the Tana River was made a crime liable to imprisonment. Entry into the region by people other than civil servants and members of the security forces was prohibited. Members of the armed forces were given wide powers of search, arrest, restriction and detention. Members of the provincial administration and the security forces were given powers to preside over 'judicial trials.' The Regulations also suspended the application of Sections 386 and 387 of the Criminal Procedure Code, which require the holding of an inquest on the death of persons in police custody or under suspicious circumstances.

The constitutional and legislative framework for the application of emergency laws in Northern Kenya was completed in 1970 with the passing of the Indemnity Act, Chapter 44 of the Laws of Kenya. This was meant to indemnify government agents and members of the security forces working in the region against any claims on account of any loss or damage occasioned by their actions. Many human rights violations occurred in the NFD after 1967; those responsible for these violations cannot claim indemnity under this act.

EFFECTS OF THE EMERGENCY LAWS IN THE NFD

a) Human rights violations

Members of the security forces have been accused of gross violations of human rights in the course of their duties, including instances of genocidal killing, mass murder and rape, extra-judicial killing, arbitrary arrests and detention of persons and communities, and illegal confiscation and theft of properties. For example:

- A massacre at an estate, in the 1980's. Following the killings of some government officials in City A town, the security forces retaliated by burning the whole of estate, killing people and raping women, and herding the town's residents to a mini-concentration camp at a City A building where they kept them for some days without food or water. Human rights organisations estimate the dead at over several thousand, with an equal number unaccounted for.
- A massacre, in 1980's. The security forces launched an operation in a city targeting a sub-clan of the Identity Z. Most of those rounded up were summarily executed after days of incarceration at the local airstrip. Close to several thousand people are said to have died.

- Other instances of extra-judicial killings and collective punishment include those in Malka-mari, Garse, Derakali, Dandu and Takaba areas of Mandera District.

b) Discrimination

Kenyan Identity Z's in general complain of discriminatory laws, regulations, practices and procedures that apply to them and not to other Kenyans. This is especially acute in the area of citizenship and immigration, i.e., in the issuing of birth certificates, identity cards and passports. The screening exercise of Kenyan Identity Z's in 1980's is also cited as a clear case of discrimination. Its justification was contained in a government statement:

'The Government is to register all Kenyan Identity Z's and expel those found to have sympathy with Country Z. The Government cannot tolerate citizens who pretend to be patriotic to Kenya while they involve themselves in anti-Kenya activities. The Government has therefore found it necessary to register Kenyans of Identity Z ethnic group to make them easily identifiable by our security forces.'

....

The screening exercise and the requirement on Kenyan Identity Z ethnic group to produce their screening card in addition to their identity card as proof of citizenship was seen as a violation of their fundamental rights to protection from discrimination as enshrined in Section 82 of the constitution. The legality of the exercise was also questioned by many experts.

c) Marginalisation and underdevelopment

One of the most visible legacies of the period of emergency law in the region is the state of underdevelopment in all aspects of life. The government's energies and resources were largely directed towards security and the maintenance of law and order. Its policy has been described as one of containment not engagement. No constructive or meaningful development took place during this period. Indeed, over 80 per cent of the region's budget was spent on security. The net result is that the region is today the most underdeveloped and marginalised in Kenya.

d) Constitutional reform, multi-party politics and the repeal of the emergency laws

The clamour for constitutional reform in the 1990s, which led to the repeal of Section 2A of the constitution, the introduction of multi-party politics and the Inter-Parties Parliamentary Group (IPPG) talks that produced the minimum reforms to the constitution, also saw the repeal of the emergency laws affecting the NFD in general and NEP in particular. Section 127 of the constitution, which laid the foundation for the state of emergency, was repealed on 29 November 1991.

The repeal of these laws was a big step forward in restoring to the people of the NFD their fundamental rights and freedoms as guaranteed in chapter five of the constitution. They are now much freer than before and are slowly becoming aware and assertive of these rights (Hassan, A. I. 2008, 'Legal Impediments to Development in North', *AllAfrica.com*, source: Fahamu).

60. H.D. Waqo, 2008, 'Addressing Historical Injustices – Queries That Require An Answer' says in relation to marginalisation of northern Kenya:

The entire northern region of Kenya has suffered untold levels of neglect and deliberate marginalisation by successive regimes. The North West (Turkana, Pokot and Samburu); Upper Eastern (Isiolo, Marsabit and Moyale); NEP (Mandera, Wajir, Garissa and Ijara); Coast (Tana River and Lamu), are all affected.

Insecurity has become synonymous with these areas as deaths from banditry, raids, and ethnic conflict. The Government security forces are too weak to contain the violence.

Kenya's political history is based on socio-ethnic foundations where the large ethnic groups call all the shots. The northerners and pastoralists are few and weaker than the rest

61. The most recent US Department of State Report on Human Rights Practices in Kenya, 2007, reports as follows:

National/Racial/Ethnic Minorities

The population is divided into more than 40 ethnic groups, among whom discrimination and occasional violence were frequent. The 1999 census indicated that Bantu ethnic groups constituted approximately 67 percent of the population, of which the Kikuyu and closely related Embu and Meru accounted for 32 percent, the Luhya 16 percent, and the Kamba 10 percent; Nilotic groups constituted 30 percent, of which the Kalenjin accounted for 12 percent and the Luo 11 percent; and Cushitic groups – mainly Identity Z – constituted a small percent of the population.

.....

Many factors contributed to interethnic conflicts: the proliferation of guns, the commercialization of traditional cattle rustling, the growth of a modern warrior/bandit culture (distinct from traditional culture), unresponsive local political leadership, diminished economic prospects for groups affected by a severe regional drought, political rivalries, and the inability of security forces to adequately quell violence. Conflict between land owners and squatters was particularly severe in Rift Valley and Coast provinces, while competition for water and pasturage was especially serious in the northern districts of Eastern Province and in North Eastern Province.

62. A recent report of fighting between Identity Z clans in NEP calls for government intervention and accuses officials of “fanning clannism”. In the 2000s the *Daily Nation* reported that “policemen and district officers have taken sides with their clansmen” in an ongoing conflict over land. The *Daily Nation* reported that “the security officers on the ground had used violence on the residents” as part of a security operation in NEP. A follow-up article dated 2000s in the *Daily Nation* further reported accusations against the security personnel involved in the operation:

“ ...A security operation in North Eastern Province has left more than 200 people hospitalised.

Residents accused the security personnel of torturing them. The operation, which started on Sunday, is intended to curb the influx of illegal firearms from Country Z and Ethiopia. It is a joint army and the police undertaking. ...”

FINDINGS AND REASONS

63. The Tribunal finds that the delegate's decision is an RRT-reviewable decision under s.411(1)(c) of the Act. The Tribunal finds that the applicant has made a valid application for review under s.412 of the Act.
64. The Tribunal accepts that the applicant is a citizen of Kenya who first arrived in Australia under a Kenyan passport in the 2000s. The Tribunal accepts that the applicant is presently outside his country of nationality, Kenya.
65. The Tribunal accepts that the applicant's ethnicity is Identity Z and that he was born in and formerly resided in Kenya's North Eastern Province (NEP).
66. The Tribunal accepts that the applicant completed his secondary education in the 1980s that he has been granted qualifications at a learning institution and that shortly he will be awarded a further qualification, by another learning institution in South Australia.
67. The Tribunal accepts the applicant's claim that he has a disability, by the 1990s and that he has been certified as having this disability in Australia.
68. The Tribunal finds that the Convention grounds of membership of a particular social group (persons with his disability in Kenya) and race (Identity Z ethnicity) are the essential and significant reasons for harm feared by the applicant as outlined in Subdivision AL of the Migration Act. However, for the reasons that follow, the Tribunal has formed the view that neither of these grounds, whether singularly or cumulatively, constitutes persecution for Convention reasons.

Claim of persecution as a member of the particular social group of specific disability group persons in Kenya

69. The Tribunal is satisfied that the applicant, who it has found is a Kenyan with a disability, is a member of a group of persons who are identifiable by a characteristic or attribute common to all members of the group, that the disability distinguishes the group from society at large and that the common characteristic is not a shared fear of persecution and (*Applicant S v MIMA* (2004) 217 CLR 387).
70. The applicant's claims in relation to this ground are summarised by the Tribunal as follows. In his protection visa application he claimed to have suffered discrimination and humiliation from the Kenyan community because he has a disability. He fears that if he returns to Kenya he will suffer gross discrimination, humiliation and unfair treatment in consequence of his disability. The applicant further fears that because of his disability he will be deprived of basic opportunities and rights in most areas of life. He mostly fears government officials and he also fears family members, fellow workmates and the community generally. The applicant claimed that if he were to return to Kenya, its society's negative and stereotyped attitudes would further alienate and disadvantage him because of his high academic achievements as a person with a disability. The applicant stated that the Kenyan government and its legal framework cannot protect him with respect to violation of his rights because of its lack of concern for persons with disabilities.

71. It is claimed by the applicant that the NEP senior public servant prohibited him from holding the position because he has a disability. He claims to have been discriminated against in promotions despite being over qualified. Fear of his personal safety in consequence of discriminatory pressures from his parents in law forced him to divorce his wife in 2000s
72. At the Tribunal hearing the applicant confirmed that what he fears in Kenya in consequence of his disability is discrimination in consequence of his disability that will affect his livelihood and access to employment appropriate to his qualifications. The entrenched stigma against disabled persons in Kenya will adversely affect his employment opportunities and will also negatively affect his feelings. The applicant claimed that Kenya's constitution is persecutory because it is silent about discrimination in relation to disabled persons. The applicant told the Tribunal that he is not able to seek election as a member of the Kenyan parliament because he has a disability. The applicant was the only employee in his area of work with a qualification in his province. Workers in his field of work with lesser qualifications than him were paid higher salaries than him. The applicant confirmed he was told it was wrong for him to take on the role of a specific role because of his disability. He lodged a complaint against the NEP senior public servant in relation to being prohibited from acting as in a specific role but he was told that his complaint was trivial and not supported by evidence.
73. The applicant stated that he fears discrimination from his former parents in law who forced his wife to divorce him because of his disability. His parents in law threatened to harm him if he did not divorce their child. He feels bitter about this occurrence in his life.
74. The applicant said he did not claim that he was discriminated against in Kenya on a regular basis; rather, acts of discrimination against him were random but nonetheless de-humanising.
75. On the basis of the reports provided by the applicant and his oral evidence and the independent country information before it, the Tribunal finds that there has long been and there remains entrenched discrimination against disabled persons in Kenya, including persons with his disability. The Tribunal acknowledges that discriminatory conduct against disabled persons as evidenced in the literature provided by the applicant and in country information before the Tribunal indicates that interference with the dignity of disabled persons in Kenya occurs in an unjustifiable manner and that such conduct has in some cases been in violation of basic human rights.
76. The Tribunal notes that some legislative measures have been introduced to reduce discrimination against disabled persons in Kenya including the establishment of the Kenyan National Commission on Human Rights which has disability as one of its concerns. At the hearing the applicant said the Commission is active and is trying to help disabled people but cannot do much under the current legislation. With respect to the National Council for Persons with Disabilities established in 2003, the applicant said because the Council is in its infancy not much has yet been done by it to protect the disabled. As for the other group, the applicant said the group has very limited resources and no access to advocacy.

77. The Tribunal accepts that the applicant, a Kenyan with a disability, has been discriminated against because of his disability in the workplace, by government officials (in education), the community generally and by his former wife's family.
78. The Tribunal notes that it is statutorily required by s 91R(1) of the Act that persecution must involve 'serious harm' to the person and that the persecution must be 'systematic and discriminatory'. Section (2) of s 91R sets out a list of the type and level of harm that meet the serious harm test as follows:

91R. (1) For the purposes of the application of this Act and the regulations to a particular person, Article 1A(2) of the Refugees Convention as amended by the Refugees Protocol does not apply in relation to persecution for one or more of the reasons mentioned in that Article unless:

- (a) that reason is the essential and significant reason, or those reasons are the essential and significant reasons, for the persecution; and
- (b) the persecution involves serious harm to the person; and
- (c) the persecution involves systematic and discriminatory conduct.

- (2)** Without limiting what is serious harm for the purposes of paragraph (1)(b), the following are instances of *serious harm* for the purposes of that paragraph:
- (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.

79. In *MIMA v Haji Ibrahim* (2000) 204 CLR McHugh J emphasised the degree of harm that is required to constitute persecution for the purposes of the Convention. His Honour's judgment included the following:

The Convention protects persons from persecution, not discrimination. Nor does the infliction of harm for a Convention reason always involve persecution. Much will depend on the form and extent of the harm. Torture, beatings or unjustifiable imprisonment, if carried out for a Convention reason, will invariably constitute persecution for the purpose of the Convention. But the infliction of many forms of economic harm and the interference with many civil rights may not reach the standard of persecution. Similarly, while persecution always involves the notion of selective harassment or pursuit, selective harassment or pursuit may not be so intensive, repetitive or prolonged that it can be described as persecution.

80. The Tribunal finds that the nature of harm experienced in Kenya by the applicant in consequence of his disability, is not akin to the instances of serious harm that are set out in s91R(1)(b) of the Act. Firstly on the applicant's admission, the discrimination he has suffered in consequence of his disability has been random, not systematic. The Tribunal finds that this matter takes the applicant's claim out of the realm of subsection 91R(1)(c).
81. The Tribunal finds that the discrimination suffered by the applicant in Kenya because of his disability did not amount to a threat to his life or liberty. The applicant has not claimed that discrimination in consequence of his disability has involved significant

physical ill treatment or economic hardship that has threatened his capacity to subsist, nor has he claimed he has been denied access to basic services to an extent that threatened his capacity to subsist or to earn a livelihood. The evidence is that the applicant completed his education and that he went on to study at a learning institution and completed with further studies. The applicant has worked in Kenya for number of years. The Tribunal accepts that the applicant suffered discrimination in employment in relation to his rate of pay and promotion but finds discrimination of that nature does not amount to serious harm for Convention purposes because it was not life threatening nor did it deny him a capacity to earn a livelihood. On these grounds the Tribunal finds the applicant has not suffered serious harm for Convention purposes in the past.

82. In relation to the likelihood of future harm to the applicant in consequence of his disability, the Tribunal finds the evidence is that this applicant has a legal disability with no likelihood of recovery of his disability in the foreseeable future. Accordingly, in the event of the applicant's return to Kenya, his disability is a permanent factor.
83. For the reasons given above, the Tribunal is not satisfied that the nature of the discrimination that may be suffered by the applicant in consequence of his disability if he returns to Kenya including humiliation, stereotyping, unequal employment opportunities and social isolation amount to a well founded fear of persecution for Convention purposes, such conduct being outside the ambit of s91R of the Act.
84. Country information provided by the applicant (which notably was also referred to by the delegate) indicates that while discrimination against disabled people in Kenya is socially entrenched and the country's constitution does not contain rights against discrimination for the disabled, the government has made recent efforts to improve their rights, in particular by the enactment of the PDA and the NCDP. The Tribunal finds that the government's enactment of the PDA gives disabled Kenyans including people with his disability persons' rights to seek redress in ways they did not have before 2000s. The Tribunal acknowledges country information indicates the Kenyan government has been slow to implement the PDA.
85. The Tribunal acknowledges that while country information indicates that if the applicant returns to Kenya he is likely to have to endure stereotyping, humiliation and discrimination in consequence of his disability. It appears to the Tribunal that the applicant would at least have the option of seeking redress in relation to discrimination with respect to his disability in employment, education, health and provision of services under the PDA.
86. In consequence of its findings with respect to the applicant's claims of persecution with respect to his disability, the Tribunal finds neither his evidence nor country information before it have established that there is a real chance that Convention based serious harm would befall him because of his disability if he were to return to Kenya now or in the reasonably foreseeable future. On these grounds the Tribunal finds the applicant does not have a well founded fear of persecution in relation to his disability if he were to return to Kenya now or in the reasonably foreseeable future.

Applicant's claim with respect to his former spouse's family

87. The applicant has claimed his ex wife's parents claimed to harm him if he did not divorce their child. He told the Tribunal they did not want their child in a marriage to a

person with a disability. The applicant claims to have responded to that threat by divorcing his wife. The applicant claims he is bitter about this matter. The Tribunal finds that the applicant's subjective fear of physical harm from his ex wife's parents must have reduced because he divorced her. However, he claims that post his divorce he continues to fear discrimination from his former parents in law.

88. The Tribunal finds that at time of decision the applicant fears discrimination not physical harm from his former parents in law and that his fears of discrimination from them are related to his disability. For the reasons given above, the Tribunal is not satisfied that the applicant's fears of discriminatory acts by his parents in law causing humiliation, stereotyping or isolation or the like, amount to a well founded fear of persecution for Convention purposes.

Applicant's claim of persecution on the basis of Identity Z ethnicity

89. At the hearing the applicant claimed he fears persecution in Kenya on the basis of his ethnicity as an Identity Z. The applicant further claimed that his province, NEP, is an under-resourced and marginalised area for people of Identity Z who are subjected to police brutality and victimisation. The applicant claimed that he was attacked by police in the 1980s because of his ethnicity, not because of his disability.
90. The Tribunal accepts that the applicant was subjected to lashing and having his specialised tools stolen by the Kenyan police in the 1980s and that those acts, which were part of the event, were related to the applicant's ethnicity as a Identity Z. In relation to his ethnicity, the applicant has not made any other claims of brutality or harm by the police or any other agent. The Tribunal accepts that the applicant was subjected to serious harm by the Kenyan police in the 1980s for the purposes of s.91R(2) of the Act.
91. The extent to which past events can be a guide to the future was explained by the High Court in *Guo* as follows:
- “Past events are not a certain guide to the future, but in many areas of life proof that events have occurred often provides a reliable basis for determining the probability – high or low – of their recurrence.”
92. The Tribunal finds that the applicant's past life in Kenya which it accepts has included one incident of serious harm from the authorities in the 1980s does not, having occurred some many years ago, provide a reliable basis for determining that he is will face a real chance of being subjected to persecution in the reasonably foreseeable future.
93. The Tribunal accepts that country information before it indicates that Kenya generally including NEP, the applicant's province, has been beleaguered by its successive governments' under development for generations and that ethnic differences have given and continue to give rise to clan conflicts and consequent atrocities. Recently there have been reports of the security forces exacerbating clan conflicts by 'fanning clannism'. The Tribunal acknowledges country information that reports death and destruction as a result of chronic banditry in northern Kenya which has been described as evidence of the state's neglect and isolation of northern Kenya.
94. The Tribunal finds that although the applicant claims to have been born into a nomadic family, he has not claimed to have been involved in clan conflicts. The Tribunal finds

the applicant's quest for knowledge has removed him from the nomadic lifestyle he was born into - since secondary school he has focussed on improving his academic qualifications with some teaching along the way. The Tribunal notes the applicant is shortly to receive the accolade of further studies from a learning institution in South Australia. The Tribunal finds the applicant is not affected by the issues that country information describes in relation to Identity Z pastoralists in northern Kenya because his teaching career and his academic pursuits remove him from that sphere.

95. The Tribunal does not accept from the country information before it or in the context of the applicant's own evidence that there is real chance he would be subject to any further persecution in a Convention sense because he is a Identity Z. The Tribunal finds that the chance of serious harm to the applicant in the reasonably foreseeable future is remote when the applicant's past life as an Identity Z is taken into account – he claims police attacked and harmed him in the 1980s with no further incidences of harm occasioned to him since then.
96. Taking all these matters into account, the Tribunal finds that the chance of the applicant being persecuted in Kenya because of his Identity Z ethnicity is remote for the purposes of the Convention. On these grounds the Tribunal finds the applicant does not have well founded fear of persecution in relation to his ethnicity if he were to return to Kenya now or in the reasonably foreseeable future.
97. The applicant's oral evidence included the information that he is not certain whether or not he would receive protection from the Kenyan authorities in relation to his ethnicity. The Tribunal treats this aspect of the applicant's oral evidence as indicating he is not certain of his ability to access protection in Kenya in relation to his ethnicity. However, because the Tribunal has found the applicant does not have a well founded fear of persecution in relation to his ethnicity it takes the view there is no need for it to make further findings in relation to protection.

Delay in applying for protection visa

98. The Tribunal finds that the applicant first arrived in Australia in the 2000s.
99. The Tribunal finds that the applicant lodged his application for a protection visa the 2000s, just prior to the expiry of his other visa.
100. The judgment of Heerey J in *Selvadurai v MIEA* 20 May 1994 is pertinent to this case at [11(v)]:

“...The applicant complained of the Tribunal's taking into account the fact that the applicant did not lodge his application for refugee status until some 20 months after he had arrived in Australia and just prior to the expiration of his visa. In my opinion, this was a legitimate factual argument and an obvious one to take into account in assessing the genuineness, or at least the depth, of the applicant's alleged fear of persecution.”
101. When asked at the Tribunal hearing why he had not lodged his protection visa sooner, the applicant said the purpose of his return to Kenya in 2000s was to see his family because his wife had requested him to sort out their divorce. He said his return trip in 2000s was mostly for the purpose of collecting data from targeted group for his further studies and on that trip he also spent some time with his family. The Tribunal accepts

the applicant's explanation that he did not lodge a protection visa application because he feared a refugee application would not only interrupt his goal of being granted a certificate in further studies but also, if it was refused, the refusal may have caused him to forego the opportunity of completing his studies. The applicant further claimed his delay in lodging his protection visa application did not mean he did not have internal fears about returning to Kenya and that visiting Kenya from Australia does not mean he has not had a fear of persecution.

102. The Tribunal accepts that persons new to Australia may need some time to gather their thoughts and to take advice before they lodge an application for a protection visa. The facts that the applicant took almost many months to lodge a protection visa application coupled with his two return visits to Kenya from Australia do not support a well founded fear of persecution on his initial arrival or subsequently. The Tribunal finds that the applicant's extensive delay in applying for a protection visa serves to negatively affect the genuineness of his claimed fears of persecution. Furthermore, while the Tribunal accepts the applicant may have subjective fears about returning to Kenya, it has already found his fears do not amount to a well founded fear of persecution for Convention purposes.

Relocation

103. Because the Tribunal has found that the applicant's claimed fears of persecution are not well founded it finds that it is not necessary to make findings with respect to relocation.

CONCLUSIONS

104. Based on all of the above and having considered the applicant's claims individually and cumulatively, the Tribunal finds that if the applicant returned to Kenya now or in the reasonably foreseeable future, there is no real chance that he will face serious harm for any Convention reason.
105. Having considered the evidence as a whole, 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) for a protection visa.

DECISION

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

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

Sealing Officer's I.D. Angela Scarano