

1217632 [2013] RRTA 870 (9 December 2013)

DECISION RECORD

RRT CASE NUMBER: 1217632
DIBP REFERENCE: CLF2012/18866
COUNTRY OF REFERENCE: Nepal
TRIBUNAL MEMBER: Ms Philippa McIntosh
DATE: 9 December 2013
PLACE OF DECISION: Sydney
DECISION: The Tribunal affirms the decision not to grant the applicant a Protection (Class XA) visa.

*Any references appearing in square brackets indicate that information has been omitted from this decision pursuant to section 431(2) of the *Migration Act 1958* and replaced with generic information which does not allow the identification of an applicant, or their relative or other dependant.*

INTRODUCTION

1. [The applicant] is a citizen of Nepal who has been in Australia since [2009]. Her claimed fears of returning to Nepal relate to her sexual orientation.
2. Her application for a protection visa was refused by a delegate of the Minister for Immigration and Border Protection and she has applied to this Tribunal for review of that decision.
3. A summary of the relevant law is set out at Attachment A. I have taken account of the policy guidelines prepared by the Department of Immigration and Border Protection to the extent that they are relevant.

FINDINGS AND REASONS

The applicant's claims

4. The applicant, aged [a certain age], arrived in Australia on a student visa in 2009. That visa was renewed in [2011]. She applied for the protection visa [in] 2012.
5. In evidence provided by her to the Department she said she was from [a village] in southern Nepal (approximately [a number of] km west of Kathmandu). She described this village as having a population of over [a number of] people who were "all farmers and illiterate". They were very religious and completely against any form of sexual preference beyond socially accepted norms. Girls in this village mostly married before they were 15 and arranged marriages were very common.
6. During the tribunal hearing held on 28 November 2013 she said that she was regarded as a tomboy in the village where she grew up, but the villagers only realised she was a lesbian when they found out about her relationship with a young woman, [Ms A]. Until then she had a normal life with no problems. She had been [a certain age] when people started talking about her being a lesbian.
7. She was unable to explain why, if she had lived a normal life until [a certain age], she had said in written claims to the Department that she had been "beaten up and tortured by my family and school principals all my life because of my sexual tendencies". She said her parents had not liked the way she dressed in jeans and a T-shirt and had been critical of her. At her co-educational school teachers did not like her because she spent all her time with female students. They hit and scolded her. However she explained that the teachers did this with all students. I told her that I inferred from her answer that she had not been beaten up and tortured all her life, to which she responded she had told me what was happening.
8. She told the Department that in [Year 1] (when she would have been [a certain age]) she and a classmate, [Ms A], fell in love. The relationship was discovered, as a result of which she was banned from attending school and beaten by her parents, who considered her to be a disgraceful person. She was locked up in a room at home for a few months. Everyone in the village was talking about this. After being allowed to return to school she discovered that [Ms A] had been [killed] by the latter's parents and [brothers]. She told me that she and [Ms A] had fallen in love in [Year 1] and [Ms A] had died in "[Year 2] or [Year 3]". She said that the relationship lasted about, or perhaps more than, one year.

9. Asked if she had any mementos, such as photographs of [Ms A] or any other evidence of the relationship, the applicant said “no, it’s finished so I didn’t bring photographs”. When I expressed surprise, she said that maybe she had had photographs of [Ms A] at some time but she did not know where they were now. She had brought no photographs to Australia. She then said that when they were in love she had had [Ms A]’s photograph in her purse and that maybe her parents had taken it.
10. Of the reaction in the village to the murder of [Ms A], the applicant told me there was “a noise about it”. [Ms A]’s parents said it was the applicant’s problem. She added that everyone knew about the murder, and most thought it was a bad thing to have happened although some thought it was good.
11. As to what form the police investigation took she said it was a small village. Even if the police came it did not matter. Normally the police took no action even if they got a report about an incident. They left it to the villagers to bring matters to a conclusion and resolve them. In the case of the murder she said that “the police came, looked around and left”. She added that the closest police station had been burnt down and that the next closest was far away.
12. She said that no one was arrested for the murder. Asked if she had heard of any girl being killed by her family before in her village, she said she had not, and agreed that it was a shocking event. I told her that under the circumstances it was difficult to believe the police would have done nothing, given the strength of feeling in the village. The applicant responded that it did not matter to the police.
13. I told her that the Blue Diamond Society in Nepal, an indigenous NGO that worked to protect against discrimination against the lesbian, gay, bisexual, and transgender communities, reported less serious incidents against lesbians yet in this period did not report the murder of a schoolgirl because she was a lesbian¹²³. I also told her of evidence indicating that “honour killings” would have been very unusual in Nepal at that time⁴. Given the gravity of this case I would have expected the murder to be widely reported if it had occurred. In response she said it was not like in Australia.
14. In writing she had told the Department that her parents wanted her to return to school so that she could do her exams, and she finished school in [Year 2].
15. To the tribunal she submitted a letter on the letterhead of the [Institution 1] dated [in] January 2012 and headed “To whom it may concern”. It purported to have been handwritten by the school principal, [Mr B]. The letter certified that the applicant had been studying at the school since [Year 4] up to higher secondary level. It said:

While she studied here, her behaviour was like boys. We had a lot of counseling to behave like girls but she didn’t. Due to her boys like behaviour, the school sometimes had to face problems too.
16. This letter was discussed at the hearing. Noting that she said she was banned from attending school and that the whole village knew about her relationship with [Ms A], I told her I

¹ [[Information deleted]

² [information deleted]

³ [information deleted]

⁴ [information deleted]

assumed that this school principal knew she had been in a relationship with a classmate. She said he did not know. This high school was some distance from the village. After [Ms A] died a family member had accompanied her there as a guardian. She went on to say that the school from which she was banned, and which she had been attending when she and [Ms A] were caught, was [Institution 2]. After that the applicant had gone to [Institution 1], whose principal did not know about this event. Asked why she had said in her written claims that she was allowed to return to school, she said she had bent she was allowed to go to this other school after [Ms A]'s death.

17. Asked how she had obtained the letter from [Mr B], she said he had been gone to her village to see if it was true that she was a lesbian, then had written a letter. She said she did not know when he had gone to her village, but then said she had asked him to write a letter to her saying that she was a lesbian, and in order to see if she was a lesbian he had gone to her village. Asked why, if so, he had not said in his letter that she was a lesbian, she then said that she had wanted him to say she had passed her higher secondary exam. Asked why he had not said that either, she said "I just asked him to write that". She added nothing further.
18. Asked what the author meant when he said the school had had to face some "problems" because of the applicant's behaviour, she was unable to provide any explanation. Initially she said that it was "the lesbian problem" but agreed he did not know she was a lesbian at the time she was a student at the school. She said however that he had seen she was with girls and was involved in bad behaviour. She said "if I touch a girl, she might touch another girl and might get spoilt".
19. She confirmed that she had told the author of the letter that she was applying for protection in Australia and that she would be giving his letter to immigration. I told her I inferred from the fact that he provided the letter that he was sympathetic towards her. The applicant indicated she was unwilling to confirm this, but conceded that he was willing to provide her with the letter as a favour.
20. I told her that if her partner had been murdered in the village, and her school principal was aware of that and sympathetic towards her, it was very difficult to believe he would not have mentioned the applicant's sexual orientation and the fact that her partner had been murdered. The applicant responded that he had mentioned her bad behaviour, which was a very big thing.
21. On the protection visa application form the applicant wrote that she had undertaken 12 years of [education] up to [Year 2]. She named one school attended by her throughout this period - "[Institution 1]".
22. However she told me she finished school in [Year 3], being two years after [Ms A] died. She also said she finished [Institution 2] in [Year 5] and that she was at [Institution 1], but did not know for how long. Asked why the principal of [Institution 1] had written she had attended it since [Year 4], she said she did not know. I told her that I could infer that she had not changed schools at all, and that that would make me wonder about the plausibility of her claims of the scandal surrounding her sexual orientation, and whether she had had a girlfriend who had died. To this the applicant insisted that she had changed schools and said that the principal might have written the wrong dates in his letter.
23. The applicant claimed in writing to the Department that when she finished highschool her parents forced her to marry the son of a family friend and she travelled with him to Australia

to study. She told him she was a lesbian but he could not understand, and tried to make her happy. According to her divorce order they married on [Year 5] and divorced [in] 2011 in Australia.

24. Asked if she had been living at her family home until she married in [Year 4], then moving to Kathmandu with her husband, she said that her parents had kept her at the home of a distant cousin, [some] hours away by bus from her home. She had stayed there for around one month. She said she stayed there until she left the country, and had travelled from there to the airport.
25. In writing to the Department the applicant provided a single address in [her village] where she had lived in Nepal from [birth] to [Year 5]. She told me that she had been staying with her husband and his family in Kathmandu for a [certain time] before she came to Australia in [2009]. His father supported the couple, neither of whom were working. Asked why she had earlier told me that she had been living with a “distant cousin” until she left Nepal, she denied having lived with a cousin.
26. The applicant told me that her father and her husband’s father arranged the marriage, and her husband and his family regarded it as a genuine marriage. However she had only married in order to come to Australia. She denied paying her husband to include her on his visa.
27. She said that in Kathmandu she had not felt like socialising outside the home, although she could have done so if she had felt like it.
28. Asked why she had been so keen to come to Australia that she had entered this marriage solely for that purpose, she said she had heard it was nice. She could live a free life as a lesbian.
29. Asked if, while living in Kathmandu, she had made any contact with NGOs that supported lesbians, or whether she had met any lesbians, she said she had not because she believed she should go somewhere where there was security. She agreed she had not tested the water in Kathmandu to see if she could live there as a lesbian. She did not see why she should have done so as lesbians were not looked on in a good way and had not been given full support. I told her that that may be so but did not mean they were being seriously or significantly harmed in Kathmandu. The applicant disagreed, saying there was “so much threat”. Asked how she knew this given that she had not had any contact with lesbians in Kathmandu, she said she knew this from the Internet.
30. The applicant visited her parents in Nepal in 2011 ([dates deleted]) because her mother had fallen ill. Her father picked her up from the airport and during this visit she stayed in the family home. At the Departmental interview she agreed that her family accepted her.
31. [Ms A]’s brothers had told her father she should be dead too. Despite [a number of] years having passed since the applicant’s former girlfriend’s death, she thought they wanted to kill her because she had caused her girlfriend’s father to have very bad status and they had not been able to kill her earlier because the applicant’s father had saved her. When she visited for five weeks in 2011 her mother asked her to leave the village after three or four weeks, because it was too dangerous for her to remain there. She had the spent her final week in a hotel in Kathmandu.

32. Asked why, if anyone wished to harm her, they had not done so when she was staying at her family home for several weeks, she said she did not go out. Told that it was hard to believe that in a small village she could hide in a house for three weeks with no one knowing, she said it did happen. She was not harmed because no one knew she was there. Also “that thing” happened long ago and they did not know she had come back.
33. The applicant feared being killed if she returned to Nepal by the parents and brothers of her former girlfriend and the people in her village. This “honour death” would happen because she was a lesbian, which went against all the “social and religious principles” of her village. Asked why, if they had wished to harm her, they had not done so in the years after [Ms A] died, she said she was given security in that period.
34. She told the Department that in Australia she had made friends with a lot of women who shared a lot with her and had the same feelings.
35. Asked at the tribunal hearing about her relationships with women in Australia, she said she had had a relationship here for three or four months, and other relationships for one or two months. She was not in a relationship at the moment. She met prospective partners at a club. She said she had been going to a number of clubs since her arrival in Australia four years earlier, although “not continuously”, and that there were many in the city. Invited to name her favourite clubs, she said she could not recall their names. She could also not tell me their whereabouts but one was at Town Hall. I told her that it was difficult to believe that she had been going to any clubs if she could not recall their names or where they were, to which she said she could take me to them.
36. The applicant said she was not in contact with any girl with whom she had had a relationship.
37. Asked if she wished to make any claims relating to Complementary Protection, she said she did not.
38. I discussed with the applicant evidence that homosexuality was legalised in Nepal in 2007 and evidence from other sources about the treatment of lesbians in particular.^{5 6 7 8 9 10 11}

⁵‘Nepal leads on gay rights with international parade’ 2010, *ABC News*, 30 August <http://www.radioaustralia.net.au/connectasia/stories/201008/s2996937.htm> – accessed 5 April 2011; US Department of State 2011, *Country Reports on Human Rights Practices for 2010 – Nepal*, 8 April, Section 6; ‘New law threatens to crush Nepal’s gays’ 2011, *The Times of India*, 9 June http://articles.timesofindia.indiatimes.com/2011-06-09/south-asia/29638154_1_sunil-babu-pant-gay-rights-gay-bar – accessed 20 June 2011; Sarkar, S. 2011, ‘New law threatens Nepal as gay rights haven’, *News One News*, 10 June <http://www.inewsonline.com/2011/06/10/new-law-threatens-nepal-as-gay-rights-haven/55986> – accessed 21 June 2011; ‘Nepal, thanks to Maoist rebels, is emerging as Asia’s pioneer regarding rights for LGBT people’, *The Huffington Post*, 4 December http://www.huffingtonpost.com/2011/11/09/nepal-asia-pioneer-lgbt-rights_n_1084188.html – accessed 5 December 2011; Amnesty International 2009, *Annual Report 2009 – Nepal*, 28 May; Freedom House 2010, *Countries at the Crossroads 2010 – Nepal*, 7 April, p.11; Human Rights Watch 2011, *World Report 2011 – Nepal*, 24 January; Freedom House 2011, *Freedom in the World 2011 – Nepal*, UNHCR Refworld website, 18 July <http://www.unhcr.org/refworld/docid/4e2450e3c.html> – Accessed 15 December 2011; ‘Nepal to Protect Gays in Constitution’ 2010, *The Advocate*, 19 January http://www.advocate.com/News/Daily_News/2010/01/19/Nepal_to_Protect_Gays_in_Constitution/ – accessed 7 June 2011; Chapagain, K. 2011, ‘Nepal Averts Crisis Over Constitution Deadline’, *The New York Times*, 29 May http://www.nytimes.com/2011/05/30/world/asia/30nepal.html?_r=2&partner=rss&emc=rss – accessed 7 June 2011; South Asia Analysis Group 2011, ‘Nepal: Constitution Assembly Gives Itself Another Six months Of Extension – Analysis’, *Eurasia Review*, 11 December <http://www.eurasiareview.com/11122011-nepal-constitution-assembly-gives-itself-another-six-months-of-extension-analysis/> – accessed 20 December 2011; International Crisis Group 2011, ‘Nepal’s Peace Process: The Endgame Nears’, *Asia Briefing* N°131, 13

The applicant did not dispute its accuracy but said that there was no guarantee for her whole life.

Consideration of the claims

39. I am satisfied that the applicant is a national of Nepal and have considered her claims in relation to that country.
40. Her claims to have been harmed in the past and to fear harm in the future rely on her claim that she was perceived to be, and is, a lesbian. I have considered her evidence carefully and for the following reasons am not satisfied that she is.
41. Firstly, of her claim to have been “beaten up and tortured by my family and school principals all my life because of my sexual tendencies”, she told the Tribunal that she had had a normal life until [a certain age], when her relationship with [Ms A] became known and she was perceived to be a lesbian as a result. I consider highly implausible, and do not accept, that the applicant was beaten up and tortured all her life because of her sexual tendencies.
42. Secondly, I am not satisfied that her claim to have been in a relationship with a schoolmate is true. The [murder] of a schoolgirl by her family because of her sexual orientation, an act disapproved of by most villagers, would have surely been a topic of grave concern and discussion in the area. It seems unlikely that, if it occurred, news of it would not have reached an NGO in Kathmandu that was monitoring and reporting on such incidents at that time. While I appreciate that the purported incident occurred during the so-called People’s War between Maoists and the government, it is also not credible that the police, having been prepared to come to the village because of a report about the murder, would not arrest the

December <http://www.crisisgroup.org/en/regions/asia/south-asia/nepal/B131-nepals-peace-process-the-endgame-nears.aspx> – accessed 20 December 2011; ‘Nepal: Lesbian Visibility Increases After the Government Recognizes LGBT Rights’ 2009, International Gay & Lesbian Human Rights Commission website, 21 May <http://www.iglhrc.org/cgi-bin/iowa/article/takeaction/resourcecenter/906.html> – accessed 7 June 2011
3 Sarkar, S. 2009, ‘Nepal Lesbian Haven’, *Fuse Magazine*, source: Big News Network website, 23 April <http://www.fusemagazine.com.au/index.php/news/article-archive/300-nepal-lesbian-haven> – accessed 7 June 2011

⁷ ‘About Mitini Nepal’ (undated), Mitini Nepal website <http://www.mitininepal.org.np/index.php?cid=1> – accessed 17 June 2011

⁸ ‘Nepal: Lesbian Visibility Increases After the Government Recognizes LGBT Rights’ 2009, International Gay & Lesbian Human Rights Commission website, 21 May <http://www.iglhrc.org/cgi-bin/iowa/article/takeaction/resourcecenter/906.html> – accessed 7 June 2011

⁹ Haviland, C. 2008, ‘Nepalese army ‘sacks lesbian’’, *BBC News*, 1 July <http://news.bbc.co.uk/2/hi/7483499.stm> – accessed 7 June 2011

¹⁰ Nessman, R. 2010, ‘Pink Everest: Nepal appeals for gay tourists’, *MSNBC*, source: *Associated Press*, 15 March <http://today.msnbc.msn.com/id/35871348/ns/today-todaytravel/t/pink-everest-nepal-appeals-gay-tourists/> – accessed 20 June 2011

¹¹ Freedom House 2011; ‘Nepal leads on gay rights with international parade’ 2010; ‘Nepal: Kathmandu to See First LGBT Centre in Region’ 2010, Gays Without Borders website, source: *The Kathmandu Post*, 2 February <http://gayswithoutborders.wordpress.com/2010/02/03/nepal-kathmandu-to-see-first-lgbt-centre-in-region/> – accessed 21 December 2011; ‘Nepal, thanks to Maoist rebels, is emerging as Asia’s pioneer regarding rights for LGBT people’, *The Huffington Post*; Cerone, J. 2009, ‘Haze, with some colorful spots, in Kathmandu’, Boston.com Passport blog website, 25 May http://www.boston.com/news/world/blog/2009/06/haze_with_some.html – accessed 21 December 2011; ‘Nepal detains gay activists’ 2010, *ABC News*, source: *Reuters*, 15 September <http://www.abc.net.au/news/stories/2010/09/15/3011864.htm> – accessed 15 September 2010; Human Rights Watch 2006, ‘Police on ‘sexual cleansing’ drive’ 13 January <http://hrw.org/english/docs/2006/01/12/nepal12422.htm> – accessed 17 January 2006

killers, and indeed do nothing at all. I also note that the applicant has no photograph or any evidence at all of the claimed relationship and, further, was vague in her evidence as to in what year [Ms A] was killed, a vagueness not consistent with her claim to have been in a close relationship with [Ms A].

43. In addition, the applicant claims that she was kept at home after the relationship became known, and after [Ms A] was killed (according to her, some time in [Year 1], [Year 2] or [Year 3]), and then sent to a different school: [Institution 1]. That claim is contradicted by the letter from the Principal of [Institution 1] which states that she attended that school from [Year 4] to higher secondary level – the applicant suggested this was an error. I am not persuaded that it was.
44. Thirdly, I am not persuaded that she has been socialising with lesbians in Australia, or has made any effort to do so. Despite claiming to have been going to clubs for that purpose for some four years, being since her arrival in Australia, she was unable to recall the names of her favourite clubs or to say what streets they were in. In the absence of any evidence from any source that she has had a relationship with a female partner in Australia, or that she is regarded as a lesbian by anyone, this casts further doubt over the reliability of her claim that she is a lesbian.
45. Fourthly, she did not dispute that, at the time she lived there, there were NGOs in Kathmandu which provided social or other support for lesbians (such as Mitini Nepal and Blue Diamond Society). Therefore the fact that she did not take the opportunity to contact them, despite living in Kathmandu for a year and being free to do so if she wished, is not consistent with her claim to be a lesbian.
46. Finally, she claims to fear being harmed by [Ms A]’s family members, who live in her home village. However the fact is they did not harm her, or apparently even attempt to harm her, in the years she remained in her home village until around [Year 5], or when she visited that village from Australia in 2011. I further infer from the fact that she willingly returned to her village in 2011 that she did not have any fear of being harmed there. I am not persuaded that she would have visited there if she were fearful of being killed, as she has claimed she was.
47. Taken as a whole, this evidence casts such doubt on her general credibility that I am not satisfied she is a lesbian.
48. All the applicant’s claims to fear being harmed in Nepal relate to her being a lesbian. I am satisfied that lesbians in Nepal are members of a particular social group in Convention terms. However as I do not accept that she is a lesbian, and do not accept that she might be perceived to be, it follows that she does not have a well-founded fear of being persecuted in Nepal for the Convention reason of her membership of this particular social group.
49. As the applicant does not claim to fear being persecuted for any other reason, I find that she does not have a well-founded fear of Convention-related persecution in Nepal.

Complementary Protection

50. As to whether there are substantial grounds for believing that, as a necessary and foreseeable consequence of the applicant being removed from Australia to Nepal (the “receiving country”) there is a real risk that she will suffer significant harm, as noted above, her claims to fear significant harm rely on her being a lesbian.

51. As I am not satisfied that she is a lesbian, there is not a real risk she will be significantly harmed for that reason.
52. I am satisfied, and find, that there are no substantial grounds for believing that, as a necessary and foreseeable consequence of the applicant's being removed from Australia to Nepal, there is a real risk that she will suffer significant harm.

CONCLUSIONS

53. For the reasons given above, the Tribunal is not satisfied that the applicant is a person in respect of whom Australia has protection obligations under the Refugees Convention. Therefore she does not satisfy the criterion set out in s.36(2)(a).
54. Having concluded that the applicant does not meet the refugee criterion in s.36(2)(a), the Tribunal has considered the alternative criterion in s.36(2)(aa). The Tribunal is not satisfied that she is a person in respect of whom Australia has protection obligations under s.36(2)(aa).
55. There is no suggestion that the applicant satisfies s.36(2) on the basis of being a member of the same family unit as a person who satisfies s.36(2)(a) or (aa) and who holds a protection visa. Accordingly she does not satisfy the criterion in s.36(2).

DECISION

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

Philippa McIntosh
Member

ATTACHMENT A

Relevant law

57. 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

58. 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.

59. 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.

60. 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.
61. 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.
62. 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.
63. ‘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)
64. 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.

65. 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.

66. 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

67. 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. The Full Court of the Federal Court has held that the ‘real risk’ test imposes the same standard as the ‘real chance’ test applicable to the assessment of ‘well-founded fear’ in the context of the Refugees Convention as referred to above (see *Minister for Immigration and Citizenship v SZQRB* [2013] FCAFC 33 at [246] per Lander and Gordon JJ with whom Besanko and Jagot JJ (at [297]) and Flick J (at [342]) agreed). ‘Significant harm’ for the purposes of the complementary protection criterion 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.

Ministerial direction

68. In accordance with Ministerial Direction No. 56, made under section 499 of the Act, the Tribunal is required to take account of policy guidelines prepared by the Department - ‘PAM3: Refugee and humanitarian - Complementary Protection Guidelines’ and ‘PAM3: Refugee and humanitarian - Refugee Law Guidelines’ - to the extent that they are relevant to the decision under consideration.