

060744446 [2006] RRTA 204 (16 November 2006)

DECISION RECORD

RRT CASE NUMBER: 060744446

COUNTRY OF REFERENCE: Malaysia

TRIBUNAL MEMBER: Irene Tsiakas

DATE DECISION RECORD SIGNED: 16 November 2006

PLACE OF DECISION: Melbourne

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

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

This is an application for review of a decision made by a delegate of the Minister for Immigration and Multicultural Affairs to refuse to grant the applicant a Protection (Class XA) visa under s.65 of the *Migration Act 1958* (the Act).

The applicant, who claims to be a citizen of Malaysia and formerly resident in Malaysia, arrived in Australia in 2006 and applied to the Department of Immigration and Multicultural Affairs for a Protection (Class XA) visa after her arrival. The delegate decided to refuse to grant the visa on a specified date in late 2006 and notified the applicant of the decision and her review rights by letter dated and posted on that same date.

The delegate refused the visa application as the applicant is not a person to whom Australia has protection obligations under the Refugees Convention.

The applicant applied to the Tribunal in late 2006 for review of the delegate's decision.

The Tribunal finds that the delegate's decision is an RRT-reviewable decision under s.411(1)(c) of the Act. The Tribunal finds that the applicant has made a valid application for review under s.412 of the Act.

RELEVANT LAW

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.

Section 36(2) of the Act relevantly provides that a criterion for a Protection (Class XA) 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 Refugees Convention as amended by the Refugees Protocol. 'Refugees Convention' and 'Refugees Protocol' are defined to mean the 1951 Convention Relating to the Status of Refugees and 1967 Protocol relating to the Status of Refugees respectively: s.5(1) of the Act. Further criteria for the grant of a Protection (Class XA) visa are set out in Parts 785 and 866 of Schedule 2 to the Migration Regulations 1994.

Definition of 'refugee'

Australia is a party to the Refugees Convention and the Refugees Protocol and generally speaking, has protection obligations to people who are refugees as defined in them. Article 1A(2) of the Convention 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.

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) 205 ALR 487 and *Applicant S v MIMA* (2004) 217 CLR 387.

Sections 91R and 91S of the Act now qualify some aspects of Article 1A(2) for the purposes of the application of the Act and the regulations to a particular person.

There are four key elements to the Convention definition. First, an applicant must be outside his or her country.

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.

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.

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.

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.

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.

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

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.

The applicant appeared before the Tribunal in late 2006 to give evidence and present arguments. The Tribunal was assisted by an interpreter.

Protection Visa Application:

In her protection visa application the applicant states she was born in the 1960's in state A, Malaysia. She states her ethnicity is Tamil and her religion Hindu. She states that she speaks several languages. She arrived in Australia in mid 2006 on a legally issued passport in her own name. She arrived in Australia on a visitor visa. She applied for a protection visa several days later. In her protection visa application she claimed she has had several years education and gained a qualification in the late 1980's. She worked prior to this for approximately six months in private business. During the following year she studied a course. From January of the following year for a period of a few years she worked, and from that time until her departure she was self employed in Malaysia. Her mother and siblings reside in Malaysia. In her protection visa application she states that from the year of her birth to mid 2005 she resided in State A, Malaysia. From mid 2005 to mid 2006 she resided at a specified location in State A, City J, Malaysia.

In a Statutory Declaration accompanying her protection visa application, she states that she left Malaysia because she was in a relationship with a Malay Muslim, which had brought her into conflict with the Malaysian authorities. She states her family and her boyfriend's family objected to their relationship and her boyfriend's parents have reported the relationship to the police.

She met her boyfriend several years ago and they became good friends. They began the relationship some time later. He works at sports club. Some time ago she moved in with him and they would like to get married. Most of their problems started in early 2006.

In early 2006, her boyfriend's parents along with two Islamic Sharia police and a government policeman came to her mother's house and threatened her mother, asking for the applicant's whereabouts.

Some time prior to this his parents told her that she should leave their son alone and to forget about him. They also told her she could not be with him unless she converted to Islam. She was threatened they would inform the police who would take her into custody and she would be placed behind bars. She states they cannot marry under Malaysian Sharia law because she is Hindu and he is Muslim. She stated that if a woman marries a Muslim without converting

to Islam the police will come and take her into custody under Sharia law and she would be jailed.

The applicant stated that she has been living together with her boyfriend for a significant period and people have assumed that they have a sexual relationship, which is very serious under Sharia law. The consequences of living with someone include imprisonment, lashing and execution. Her boyfriend's parents expect that he will marry a Malay Muslim girl. They are angry at her for stopping him from doing this. They reported them to the authorities.

Initially they kept their relationship a secret, but it became harder as time progressed. They do go out in public together. Other Muslims can identify he is an original Malay Muslim, because he was born a Muslim, and that she is an Indian Hindu. If she had been an Indian Muslim her dress and code would have been different. It is obvious she is an Indian Hindu.

Her parents believed that she was living with a female friend that was closer to her workplace. Her boyfriend's parents lived a significant distance away from his apartment. It was her boyfriend's family friend who found out they were living together and he told her boyfriend's parents. Her boyfriend's parents were furious and reported them to the police in early 2006.

In early 2006 her boyfriend's parents and two men from the government Islamic department came to visit her boyfriend's house. The Islamic men and his parents told the applicant that she could no longer live with her boyfriend without being married and she could only marry him if she converted to Islam. They threatened to report her to the police if they continued living together.

Her boyfriend's parents along with two Islamic Sharia police and one government policeman came to see her mother, looking for her. Her mother told her that these people were harsh and that they told her that they wanted to take the applicant to the police station because she was living with a Malay Muslim and they were unmarried. Her mother was frightened and upset.

Shortly after her mother called her and told her to leave Malaysia. Her boyfriend also said to avoid problems she should leave Malaysia. Both her boyfriend and her mother told her that her boyfriend's family and the two men have lodged a report against her to the police. After the report was lodged, his parents, a government policeman and two Sharia police came to her mother's house. At that time she was living with her boyfriend. Her mother phoned her immediately after the incident and told her she should go away.

The same night she left his place and stayed with a friend who was a long drive away. She stayed with her friend for several days while she arranged to get out of Malaysia. She had no problems leaving Malaysia because she took her passport and made preparations without anyone knowing.

She fears returning to Malaysia because she fears she will be put into jail. She has to convert to Islam or else not be with her boyfriend. She is scared of the government. Her mother told her that the police promised that she would be in serious trouble if she returns. She does not want to be a Muslim because she has a strong faith in Hinduism and goes regularly to the Hindu temple. If she converted to Islam she could not attend or participate at her mother's

funeral, which would be a traditional Hindu ceremony. She states there is an Islamic law saying that she can't even go near her mother's body when she dies since she is a Hindu. They cannot relocate within Malaysia because her boyfriend may have trouble finding a job anywhere else and they still won't be able to be married under the Malaysian Sharia law.

The Review Application:

The applicant lodged an application for review with the Tribunal in late 2006.

The Hearing:

The applicant reiterated details of her name, date and place of birth. She started working full-time in Australia recently in hospitality. She has no family in Australia. Her mother, siblings and other family members live in Malaysia. Her ethnicity is Tamil and her religion is Hindu. She entered Australia on a legally issued passport in her own name. The applicant stated that she had previously travelled to Country S for a holiday. She states this was several years ago. She completed a significant portion of high school and also gained a qualification and has worked in a specified industry for many years. She stated that she lived with her mother at the one address from the time of her birth until when she left to come to Australia.

The applicant claimed that she left Malaysia because she had a lot of problems essentially due to religious differences with her boyfriend. She said that his family were not agreeable to the alliance. Neither was her family. They were lovers and there were a lot of problems and the police got involved. He is a Malay Muslim and she is Hindu by religion. His family insisted that she convert to Islam and she refused. If she were forced to convert it would be the end of things because she would not be able to attend Hindu temples or visit her people. She stated that she met him several years ago. She said that for some time they were friends and she lived with him for a period.

The Tribunal put to her that when it asked her about all the addresses she lived at in Malaysia she stated that she only lived at the one address with her mother from the time of her birth until she left to come to Australia. She replied that when she was asked about the addresses she gave her family address because that's what she thought she was being asked.

The applicant stated that from early 2005 until she left to come to Australia she was living at a specified location. The Tribunal asked her to provide the specific address. She said she does not write to her boyfriend and did not remember the address. It was put to her that if she had lived there for the period that she did surely she would be able to remember the address, as she had written a specific address in the protection visa application. She stated that it has been a long time since she left the place and she cannot remember. She could only remember the name of the specified location.

The applicant said she met her boyfriend when he used to come to her workplace and was a regular customer. He lived several minutes away. They became friendly and a relationship developed. He worked at a specified sports club and had been there for several years. He used to come to her workplace and help her with the business. He did a lot of things in a supportive way. He used to explain about pamphlets and things and he was a loving, friendly guy. They did not go out much and kept their relationship secret. They used to meet in the workplace at about 7 p.m. and he helped her. She was asked what type of help he provided. She states that if she had any hassles at work he would comfort her and be supportive.

They did not meet every evening. If either was busy they did not meet. They usually met frequently.

The applicant was asked whether she has had any contact with him since she came to Australia. She said that they usually telephone and more often SMS each other. She telephones and sends SMS messages to him. He does not ring her often. More often he SMS's to her mobile. Once every few days he will send an SMS. Occasionally he will write as well. She will send him an SMS every few days. She telephones him once a week and last rang him two days ago. She claimed that he sent the two letters, one when she first came to Australia and one last week. She did not bring the letters with her to the hearing. The applicant was asked whether he had married or moved on. She stated that he misses her and although his parents have made marriage proposals he has rejected them all. It was put to her that in the statement accompanying her protection visa application on page 4, paragraph 15 which she signed in mid 2006, she had written that her boyfriend had written to her a number of times since she came to Australia. She said maybe there were many letters sent to her, but, as she was living at another place, and she changed addresses, she may not have received all the letters. He did tell her he sent her many letters.

The Tribunal asked the applicant about inconsistencies at the hearing that her boyfriend wrote two letters and in her protection visa application submission that he sent a lot of letters. The applicant responded that she knows that her boyfriend sent a lot of letters to her old address and that she did not collect them.

She was asked whether the boyfriend would convert from Islam and she stated most definitely not. She said she knows definitely he would not convert to a Tamil's religion. She however did not ask him whether he would convert because this is something that does not happen in Malaysia.

She moved into his flat in early 2005 and problems escalated in shortly before. Prior to this she was with her boyfriend at his flat when his parents visited her. They came with two Islamic men. She was asked to leave her boyfriend. They told her that a Hindu must convert to Islam and that they would come again and if she has not converted or left her boyfriend they would take this issue to the police. Lots of threats were made and they were abusive. She did not convert. Her mother is of a mature age if anything happened to her she would not be able to attend the funeral rites.

They knew that she was still living with her boyfriend. They went to harass her mother and ask her mother where her daughter is. The mother said she did not know where the applicant is. Her mother did not know in the beginning that she was living with her boyfriend because she had told her mother she was living with friends. She gradually told her mother the truth. Her mother believed that she only had contact with this man. Her boyfriend's parents, two Islamic men and a government policeman attended her mother's house at the in early 2006. They shouted and screamed at her mother and told her to tell her daughter that she should leave her boyfriend or they would report it to the police. It was put to the applicant that she stated that a government policeman was in attendance at her mother's place. She said the policeman that went to her mother's place could have been a family friend. After they visited her mother, her mother telephoned the applicant on her mobile phone and told her that if she did not leave her boyfriend, his parents would take the matter to the police.

The applicant stated that after her mother telephoned her she left and went to a friend's place in City I because she was told that the police would arrest her because she was not prepared to convert to Islam. Some time later this issue was reported to the police. Her boyfriend told her this. The Tribunal asked the applicant how the boyfriend knew that the matter was reported to the police. The applicant replied his parents or friends may have told him.

It was put to her that it is conceivable that his parents to frighten him said that they would report the matter to the police and that they may not have done so. She said that can't be the case because lots of people gave him this information and her boyfriend has friends in the police force and he had no peace at his workplace because there was a scandal.

His parents visited her on two occasions in early 2006. As nothing had changed on the second occasion, a few days after they visited the applicant they went to see her mother.

The applicant was asked why would her boyfriend's parents go to her mother and ask where she lived when they had visited her at their son's place on two previous occasions. The applicant responded that they wanted to drag her mother into the matter and hoped that pressure would be put on the applicant to leave her boyfriend. His family arranged marriage proposals which were put to her boyfriend and threatened to report the matter to the police. They hoped all of this would distance the applicant from her boyfriend.

It was put to the applicant that Sharia law only applies to Muslims and because she was not a Muslim, Sharia law would not apply to her and the Sharia police would have no interest in her. It was also put to her that under Sharia laws there are consequences for living with someone outside marriage but she is not a Muslim and not subject to this law. The applicant stated that being together and not married is always a problem.

The Tribunal put to her that Malaysia is a country with a government police force that is able to protect both the applicant and the boyfriend from his parents and that the Sharia police would not be interested in the applicant, as she is not a Muslim. The applicant responded that all she experienced were hassles and harassment and no police protection. She was asked whether she reported the hassles and harassment to the police. She stated that she did not report it to the police because she did not want it in the open because it was a shameful thing that she lived with someone.

The Tribunal asked her how his parents found out she was living with her boyfriend. She stated that one-day they went out and a family friend saw them and he probably informed her boyfriend's parents. She said he may have seen them together two or three times and all of her boyfriend's friends knew they were together. The applicant also stated that they were trying to keep it a secret but maybe neighbours found out, although she and her boyfriend felt they were being secretive.

The applicant said she will have many problems if she returns to Malaysia and she knows a police report was made. If she returns to Malaysia she will not have a job and her boyfriend has lost his job. The applicant was asked how she knew a police report was made. She said she came here to Australia at the time. It was reported to her and therefore she stayed at a friend's house for several days before she came to Australia. It was put to her that she had left the business in the hands of a family member and therefore she would have a job given it was her own business if she returned to Malaysia. She said that she has so much hurt, and shame and his parents went the salon to find out about her and customers know about it.

They went to the salon looking for her but she was not there and they spoke to her work colleagues who are employees. She said the customers in her shop would have gone out and gossiped to other customers.

The Tribunal put to her that she has now left and her boyfriend's parents have achieved their purpose in that she is away from their son. Why therefore would they go to her salon? She said they went to the salon before she came to Australia. She was asked why this was not in her application. She said this was because she was giving extra information.

The applicant stated that her boyfriend lost his job because there were a lot of problems after she left. A scandal erupted and he had to leave his workplace. He is now working elsewhere. She was asked how the people at a boyfriend's workplace found out about their relationship. She said when someone goes to the police and the police tell everyone. She said the police in Malaysia do that sort of thing because they are gossips. They would have spread the names of the people and where they work. She was asked what interest her boyfriend's parents would have had to go to the police and hurt their son at the same time. She responded that they were using her and her family to resolve the situation.

She was asked what further fears she had if she were to return to Malaysia. She said there were lots of problems including disgrace, scandal, her boyfriend lost his job and they would be determined that she be arrested even if it was for just one day because that would be humiliating for her and every policeman is looking for her. The Tribunal questioned this and she said when she says every policeman was looking for her she meant every policeman involved in her case at the police station where it was reported.

Her boyfriend, her mother, her siblings and other family know that she is in Australia. She added that her mother is hurt by all of this. Her mother is sick and these problems have made her mother's condition worse. If she returns to Malaysia with the police case anything may happen to her.

The applicant was asked to explain how she knew that the matter had been reported to the police. The applicant stated that friends told her this.

Country Information:

Background:

US Department of State, Country Reports on Human Rights Practices 2005, Malaysia, 8 March 2006.

Malaysia is a federal constitutional monarchy with a population of approximately 25.6 million. It has a parliamentary system of government headed by a prime minister selected through periodic multiparty elections. The National Front, a coalition of political parties dominated by the United Malays National Organization (UMNO), has held power since 1957. The most recent national elections, in March 2004, were conducted in a generally transparent manner, but the opposition complained of the ruling coalition's exploitation of the powers of incumbency. The civilian authorities generally maintained effective control of the security forces.

The country's human rights performance improved during the year; nevertheless, problems remained. The following human rights problems were reported:

- abridgement of citizens' right to change their government
- incomplete investigation of detainee deaths and prisoner abuse
- overcrowded prisons
- detention of persons without trial or adequate access to legal representation
- lengthy confinement of immigrants in detention camps in poor and overcrowded conditions
- corporal punishment (caning) of illegal migrants and other prisoners
- restrictions on freedom of the press
- restrictions on freedom of assembly and association
- increased constraints on the ability of Muslims to change their religion
- violence against women
- treatment of trafficking victims as illegal migrants
- ethnic discrimination
- minimal labor law protection for household workers

There was a major trend toward greater public and government oversight of the police. The government partially addressed prison overcrowding by building new prisons. While freedom of expression remained subject to significant constraints, the media increased criticism of government policies and officials, exposure of government corruption, and coverage of contentious debates among elected officials. The government granted the Office of the United Nations High Commissioner for Refugees (UNHCR) unfettered access to detainees of possible interest to the UNHCR as well as to facilities at immigrant detention centers.

Role of the Police and Security Apparatus

Modeled on the British system, the Royal Malaysia Police is under the command of the inspector general of police (IGP), who reports to the minister of internal security. For the past several years, the prime minister has also served as the minister of internal security. The IGP is responsible for organizing and administering the police force. Police functions generally are divided into five areas: enforcement of law and order, maintenance of national peace and security, prevention and detection of crimes, arrest and prosecution of offenders, and gathering of security intelligence. The police force consisted of approximately 93 thousand officers.

On April 29, a police commission formed in February 2004 to suggest ways to improve the police published a report with 125 recommendations for legal and procedural reform. It proposed that the CPC be amended to require a detailed report from the police to a magistrate within a week of a custodial death, followed by an autopsy within 24 hours and an independent inquest within a month.

Following publication of the commission report, the prime minister assumed the chairmanship of a task force established to examine various elements of the commission report and recommend specific government actions to address the problems highlighted in the report. Recommendations based on the task force's analysis had not been completed or publicized by year's end.

During the latter half of the year, the government focused its initial reform efforts on improving the salaries, quarters, and general living conditions of police officers. In September, for example, the Public Works Department presented police leaders with designs for 27 thousand units of new living quarters.

The Judiciary:

The law provides for an independent judiciary, and the government generally respected this provision in practice. However, constitutional provisions, legislation restricting judicial review, and other factors limited judicial independence and strengthened executive influence over the judiciary.

The secular legal system is based on English common law. Trials are public, although judges may order restrictions on press coverage. Defendants have the right to counsel, bail is usually available, and strict rules of evidence apply in court. Defendants may make statements for the record to an investigative agency prior to trial. Limited pretrial discovery in criminal cases impeded defendants' ability to defend themselves. Defendants are presumed innocent and may appeal court decisions to higher courts.

Sharia Law:

Shari'a laws are administered by state authorities through Islamic courts and bind all Muslims, most of whom are ethnic Malays. These laws and the degree of their enforcement vary from state to state. In 2002 the government established a committee to recommend ways to harmonize Shari'a throughout the country; however, any recommendations must be adopted by individual state legislatures. Efforts to harmonize state Shari'a with federal laws have also proven difficult. Shari'a courts do not give equal weight to the testimony of women. Many NGOs also complained that women did not receive fair treatment from Shari'a courts, especially in matters of divorce and child custody (see sections 2.c. and 5).

c. Freedom of Religion

The law provides for freedom of religion; however, the government placed some restrictions on this right. Sunni Islam is the official religion, and the practice of Islamic beliefs other than Sunni Islam was significantly restricted. Non-Muslims, which included large Buddhist, Christian, Hindu, and Sikh communities, were free to practice their religious beliefs with few restrictions. The government provided financial support to an Islamic religious establishment and also provided more limited funds to non-Islamic religious communities. State authorities imposed Islamic religious laws administered through Islamic courts on all ethnic Malays (and other Muslims) in some matters but generally did not interfere with the religious practices of the non-Muslim community.

Prime Minister Abdullah has emphasized religious tolerance towards all faiths. During the year the government promoted *Islam Hadhari*, which emphasized tolerance towards other religions and a moderate, progressive interpretation of Islam.

In family and religious matters, all Muslims are subject to Shari'a. According to some women's rights activists, women were subject to discriminatory interpretations of Shari'a and inconsistent application of the law from state to state.

Women:

Non-Muslim women are subject to civil (secular) law. The Guardianship of Women and Infants Act gives mothers equal parental rights. Four states extend the provisions of the bill to Muslim mothers, and women's groups urged the other states to do the same.

US Department of State, International Religious Freedom Report, Malaysia 2006.

The constitution provides for freedom of religion; however, the Government places some restrictions on this right. Islam is recognized in the constitution as "the religion of the Federation," but the practice of non-Sunni Islamic beliefs was significantly restricted, and those deviating from accepted Sunni beliefs could be subjected to "rehabilitation." Non-Muslims were free to practice their religious beliefs with few restrictions.

There was no material change in the status of respect for religious freedom during the period covered by this report.

The generally tolerant relationship among religious groups in society contributed to religious freedom.

In practice Muslims are not permitted to convert to another religion. In several recent rulings secular courts ceded jurisdiction to Shari'a courts in matters involving conversion to or from Islam.

Control of mosques is exercised at the state level rather than by the federal government; state religious authorities appoint imams to mosques and provide guidance on the content of sermons. While practices vary from state to state, both the Government and the opposition PAS have attempted to use mosques in the states they control to deliver politically oriented messages. In recent years, several states controlled by the governing coalition announced measures including banning opposition-affiliated imams from speaking at mosques, more vigorously enforcing existing restrictions on the content of sermons, replacing mosque leaders and governing committees thought to be sympathetic to the opposition, and threatening to close down unauthorized mosques with ties to the opposition. Similarly the state government of Kelantan, controlled by the PAS, reportedly restricts imams affiliated with the Barisan Nasional (the ruling coalition) from speaking in mosques.

Proselytizing of Muslims by members of other religions is strictly prohibited, although proselytizing of non-Muslims faces no similar obstacles.

In family and religious matters, all Muslims are subject to Shari'a law. Some women's rights advocates asserted that women faced discriminatory treatment in Shari'a courts due to prejudicial interpretation of Islamic family law and the lack of uniformity in the implementation of such laws among the various states.

Muslim/non Muslim marriages:

"[w]hile all the juristic schools allow a Muslim man to marry a Jewish or Christian woman, they prohibit a Muslim woman from marrying [a] non-Muslim man" (Jan. 2004).

In addition, cohabitation without marriage (common-law marriages/partnerships) is not allowed in Islam and is frowned upon by Malaysian society in general (Murtads 10 June 2004) (CX106712, Source: Immigration and Refugee Board of Canada, June 2004).

.....there are certain restrictions on Muslims; they can't change their religion or apostasise, and there are Muslims who say that according to Islamic law anyone who apostasises, must be punished.

Generally it is difficult because of the pressure of the Muslim party that the other party converts, although according to Islamic law, the sharia law, if a Muslim man wants to marry a girl who is a Christian or a Jew, she can retain her religion. But if a woman wants to marry a man who is of another religion, non-Muslim, then he has to convert. (CX156918, "Malaysia: Freedom of Religion in Malaysia?" Religion Report, ABC Radio National, 28 June 2006).

When it comes to family matters in Malaysia, Muslims come under the Syariah judicial system while non-Muslims go to the civil courts to resolve their disputes (CX159524, "Malaysia: Courts causing confusion", National Evangelical Christian Fellowship, July- August 2004).

A non-Muslim must convert his/her religion to Islam in order for him/her to marry a Muslim. He/she must refer to the State Religious Department or seek help from an Imam at the nearest mosque in your area. Then follow the same marriage procedures for Muslims (CX159525, "Malaysia: Marriage", 2006).

On mixed marriages, the document says: "You cannot marry a non Muslim. If you decide to divorce and to seek to convert from Islam, you will lose the custody of your children because they are Muslims."

Our civil law says that a Muslim person cannot ask to marry a non Muslim. If you have a Muslim name, or if you converted to Islam, the department for the registration of marriages will not give you the permission to marry a non-Muslim person. In Islamic law, the custody of children is called hadana (the mother's custody of the child). The woman has the right to custody of her children only if they are under 12 years. But if she does not adhere to the Islamic faith, she loses custody of her children. If she has renounced Islam or does not practice the religion anymore, the mother will lose the right of custody of her children, and this will be granted to the husband's mother, that is, the grandmother, because the children are considered as Muslims since their mother was a Muslim at the time of their birth. (CX159951, Asia News, 22 September 2005).

FINDINGS AND REASONS

In order to be a refugee under the Convention, it is necessary for the applicant to be outside her country of nationality and for her to hold a well founded fear of persecution for reasons of at least one of the five grounds listed in that Convention. The applicant has claimed that she is in need of protection for reason of her religion.

The applicant has claimed to be a national of Malaysia and of no other country. She travelled on a passport issued in City K, Malaysia and she has have made claims against no other

country. The Tribunal is thereby satisfied that she is outside her country of nationality and that is Malaysia. For the purposes of the Convention, the Tribunal will assess the applicants' claims against Malaysia, her country of nationality.

The Tribunal's task is to consider whether the applicant's claimed fear of persecution for reason of her religion is well founded. To do this, the particular claims she has raised and the evidence she has advanced must be examined.

The applicant claims that she was in a relationship with a Malay Muslim, and states that both her and her boyfriend's parents objected to the relationship. She believes his parents reported the relationship to the police and that this will bring her into conflict with the Malaysian authorities. She states that she moved in with him some time before she left Malaysia. She states that at the beginning of 2006, her boyfriend's parents with two Islamic Sharia police and a government police man went to her mother's house and threatened her, asking for her daughter's whereabouts. The applicant also claims that prior to this his parents told her to leave their son alone unless she converted to Islam. His parents threatened that they would inform of police who were taken into custody. She believes she cannot marry under Malaysia Sharia law. The applicant claims that if a woman marries a Muslim without converting to Islam the police will take her into custody and she would be jailed. As she has been living with her boyfriend for some time, people will assume she has had a sexual relationship and the consequences could include imprisonment, lashing and execution. Her boyfriend's parents were furious and reported them to the police at the beginning of 2006. She fears returning to Malaysia because she fears she will be put into jail. She claims she cannot relocate within Malaysia because her boyfriend may have trouble finding a job elsewhere.

The Tribunal accepts the applicant is a Tamil Hindu born in Malaysia. The Tribunal noted the applicant's evidence and even though it was not convinced by her evidence it will give her the benefit of the doubt and accept that she was in relationship with a Muslim man. It is therefore also plausible that his parents spoke to her in early 2006 and asked her to convert to Islam or to leave their son alone. It can also accept that they contacted her some time later and threatened to report her to the police in the hope that she would leave their son alone. To assist in their cause of disentangling their son from the applicant, the boyfriend's parents may have gone to her mother's house with two Islamic Sharia police and a government policeman and threatened her. The applicant stated that she believed that the government policeman was a family friend and only went along to frighten her mother as even on her own evidence the applicant does not believe that any reports had been made to the police prior to early 2006. The Tribunal accepts that the policeman was a family friend.

The applicant also states that she cannot marry under Malaysia and Sharia law because she is not Muslim. The Tribunal notes that there is some conflict in the independent country information above (CX106712, CX156918, CX159525, and CX159951) about this matter but accepts that the applicant is probably correct that she cannot marry unless she converts to Islam. The Tribunal rejects her claim that if a woman marries a Muslim without converting to Islam the police will take her into custody, that she would be jailed, suffer lashing and execution. Independent country information clearly states that Sharia law does not apply to her in Malaysia because she is not a Muslim. Sharia laws are administered by state authorities through Islamic courts and bind all Muslims only. Non Muslim women are subject to civil secular law (US State Reports 2006 and Religious Report 2006, and CX159524).

Although the applicant believes that her boyfriend's parents were furious and reported them to the police at the beginning of 2006, there is no objective independent evidence of this. It is based only on what her boyfriend told her and she believes he found this out from friends and his parents. It is quite conceivable that his parents told their son that they reported his relationship to the police and spread the rumours to his friends to frighten them in the hope that they would end their relationship. Even if her boyfriend's parents had reported her to the police, as the applicant has not broken any Malaysian law, the police would not take any action against her. The Tribunal does not accept that she will be put into jail or otherwise seriously harmed if she returns to Malaysia because of any relationship she may have had with her boyfriend. The Tribunal does not accept the applicant's evidence that all of the police involved in her case in Malaysia would be looking for her. She has not broken any Malaysian law in having a relationship with the male person.

As the applicant was operating her own business she will have a job to return to in Malaysia. The applicant left the business to a family member to operate and it is currently operated by this person. The applicant stated that she and her boyfriend cannot relocate within Malaysia because her boyfriend may have trouble finding a job anywhere else. She also gave evidence that due to the scandal her boyfriend lost his job and that he has now found other work. The Tribunal does not accept that the applicant suffered any serious harm in Malaysia.

The issue of the adequacy of state protection was summarised in *Svecs v MIMA* (1999) FCA 1507 where Hely J remarked at 26 that:

“The issue is not whether the authorities can guarantee that the applicants will not suffer harm for a convention reason, but whether in the language of the Full Court in *A, B & C v Minister for Immigration & Multicultural Affairs* at parag 42, (the relevant Country) has “effective judicial and law enforcement agencies, is governed by the rule of law and has an infrastructure of laws designed to protect its nationals against harm of the sort said to be feared” by the applicants.”

In the remotest occurrence that her boyfriend's parents would attempt to harm her on her return to Malaysia, although the applicant believes that the State cannot protect her in Malaysia, the Tribunal is satisfied from country information outlined above that Malaysia would be willing and able to offer her effective protection. Malaysia is a country with a legitimate police force and judiciary based on the British model; it has court process and government in place. (US Department of State Country Report 2005 above). Although she states that she only experienced threats, hassles and harassment from her boyfriend's parents and no police protection she has not sought help from the police, the authorities or the Malaysian Government. The Tribunal therefore finds that the applicant has not been refused protection by the Malaysian authorities. It further finds based on the country information above (US Department of State Country Report 2005) that the Malaysian government is willing and able to provide the applicant with an adequate level of protection should she seek it. The Tribunal does not accept that she suffered any serious harm for reasons of having a Muslim boyfriend in Malaysia in the past and based on the country information referred to above the Tribunal finds that she will not suffer any serious harm in the future.

The Tribunal finds that the applicant is not a person who is of adverse interest to the Malaysian authorities.

In view of the above findings the Tribunal finds that the applicant can return to her area. The Tribunal also finds that based on the findings above and country information discussed above, she can continue her relationship with her boyfriend without facing a real chance of persecution now or in the reasonably foreseeable future.

Taking into account all of the above and the applicants' claims both individually and cumulatively, the Tribunal is not satisfied that she faces a real chance of persecution if she returns to Malaysia now or in the reasonably foreseeable future.

The Tribunal is not satisfied, on the evidence before it, that the applicant has a well-founded fear of persecution based on her religion or for any other reason within the meaning of the Convention.

CONCLUSIONS

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 as amended by the Refugees Protocol. Therefore the applicant does not satisfy the criterion set out in s.36(2) for a protection visa.

DECISION

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 dependent of the applicant or that is the subject of a direction pursuant to section 440 of the migration Act 1958.

Sealing Officers I.D. rander