

0808751 [2009] RRTA 217 (18 March 2009)

DECISION RECORD

RRT CASE NUMBER: 0808751

COUNTRY OF REFERENCE: Uganda

TRIBUNAL MEMBER: Shahyar Roushan

DATE: 18 March 2009

PLACE OF DECISION: Sydney

DECISION: The Tribunal remits the matter for reconsideration with the direction that the applicant satisfies s.36(2)(a) of the Migration Act, being a person to whom Australia has protection obligations under the Refugees Convention.

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 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 Uganda, arrived in Australia and applied to the Department of Immigration and Citizenship for a Protection (Class XA) visa. The delegate decided to refuse to grant the visa and notified the applicant of the decision and her review rights by letter.
3. 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.
4. The applicant applied to the Tribunal for review of the delegate's decision.
5. The Tribunal finds that the delegate's decision is an RRT-reviewable decision under s.411(1)(c) of the Act. The Tribunal finds that the applicant has made a valid application for review under s.412 of the Act.

RELEVANT LAW

6. Under s.65(1) a visa may be granted only if the decision maker is satisfied that the prescribed criteria for the visa have been satisfied. In general, the relevant criteria for the grant of a protection visa are those in force when the visa application was lodged although some statutory qualifications enacted since then may also be relevant.
7. Section 36(2)(a) of the Act provides that a criterion for a protection visa is that the applicant for the visa is a non-citizen in Australia to whom the Minister is satisfied Australia has protection obligations under the 1951 Convention Relating to the Status of Refugees as amended by the 1967 Protocol Relating to the Status of Refugees (together, the Refugees Convention, or the Convention).
8. 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.
20. The applicant appeared before the Tribunal to give evidence and present arguments. The applicant was represented in relation to the review by her registered migration agent.

Application for a Protection Visa

21. According to information provided in her protection visa application, the applicant was born in, and is a national of, Uganda. She has completed many years of education. She describes her profession before coming to Australia as an administrative officer. She worked in that position in Place C for several months.
22. In reply to questions as to her reasons for claiming to be a refugee, the applicant claimed to have left Uganda to escape female genital mutilation (FGM). She claimed to have been born into Tribe A of Place B, and like all other female members of her tribe she has to participate in all cultural customs, including female circumcision. The custom is a rite of passage to womanhood and is designed to prepare girls for marriage. The procedure is risky, unhealthy and painful. She claimed to be carrying painful memories of seeing her loved ones dying as a result of this procedure.
23. The applicant claimed that in her teens her clan elders began to pressure her and send her notices through her village friends to get ready for circumcision. She had made it clear that she did not want to undergo the procedure because by then she had attained a certain level of education and was well aware of its consequences. She had witnessed friends and relatives suffer from pain and shock. Some had died as a result of bleeding, being infected or contracting various other viruses as a result of sharing unsterilised surgical instruments. She "dodged" the procedure by running to friends or from home to home. This affected her education, because she had to miss school when she was on the run. She succeeded for a while by she was eventually found.
24. The applicant claimed that in [month, year] she was getting ready to go to church when she found three men at her door. They tied her up and forced her into their car. Her neighbours who were witnessing the incident did not intervene. She was taken to her village against her will and the villagers tried to persuade her to accept the ceremony. She refused and rejected the accompanying gifts: a cow, bags of millet and maize, goats, hens and money. This did not go well with the village elders and she was locked up in a house awaiting her fate. She made an unsuccessful attempt to escape and this

resulted in her being subjected to “torture” She was beaten and they attempted to suffocate her. However, one of her cousins sympathised with her helped her escape that night. She had to travel through the bush on her own despite being weak. She was assisted by an old man who nursed her for a day and gave her some money enabling her to travel to the city.

25. The applicant claimed that in the city she found a job, but feared being taken back to the village on a daily basis. She did not have freedom and felt tormented and emotionally sick. Finally, when she got an opportunity to travel to Australia, she applied immediately.
26. The applicant claimed that the Ugandan law supports the coexistence of all different cultures in the country, which includes the Tribe A culture. She would not be able to resist or runaway for too long as she would be eventually found, intimidated, tortured, detained and forced to undergo the procedure. She claimed that she would not have the liberty to get married according to her customs, because she has to seek the approval of her parents and elders. She would not be able to even think about marriage if she is not circumcised.
27. The applicant claimed that the authorities would not protect her because they are unable to stop her community from forcing the practice upon her. Most politicians do not genuinely support the campaign against FGM because they do not want to alienate their political base. Although there has been a rise in the number of activists campaigning against the practice, there has been no success in her tribe. Whilst the rate has dropped, it is still rampant in some areas.
28. The applicant submitted a number of news reports in relation to the practice of FGM in Uganda.

Interview

29. The applicant was interviewed by the delegate on two occasions. The applicant provided oral evidence consistent with the contents of her application for a protection visa. The Tribunal, however, notes the following claims made by the applicant in the course of her two interviews with the delegate.
30. The applicant stated that her biological father is from Tribe A and her mother from Place C. They separated before she was born and her mother married her step father. She started receiving notices requiring her to undergo circumcision in [year]. She also received notices in [year] and [year]. Her father used to tell her mother that she (the applicant) should return to the village to undergo circumcision. Her mother and step father did not support the practice because they are not from the same tribe. Her mother and step father cannot protect her because she does not belong to her step father’s clan and they would be unable to protect her against her own people. Her mother sent her away on holidays so that she could avoid her father. She can no longer stay at her parents’ house because she is of marriage age and should be at her husband’s house by now. By remaining at her parents’ house she would bring shame upon them.
31. It was put to her that female circumcision has been outlawed in Place B and she would be able to resist the practice and find support from the authorities. She said she did not know about that. It was put to her that the elders in Place B support women who resist

the practice. She said may be there are groups who take that view, but her father, grandmother and others all believe in practise it.

32. The delegate asked why her father or members of the tribe had not made a more concerted effort to find her if they were so determined in forcing her to undergo circumcision. She said may be they wanted her to relax a bit and get her when she was unaware; or perhaps they came and did not find her.
33. The applicant provided a detailed and internally consistent account of her abduction and her escape from her village. She stated that after her escape, her father told her mother that he would get her (the applicant) no matter what. She explained that her father has now assumed a high role in the village hierarchy and probably believes that his persistence on the practice would enhance his credibility amongst the villagers. She was asked why she was left alone by her father in the months after her escape. She said she did not know why her father did not come immediately. She added that when they come, they never give notices.
34. The delegate discussed with the applicant the false information she had provided in her offshore visa application. The applicant essentially stated that she had provided that information in order to ensure the success of her visa application. It was not easy to leave Uganda and she was not prepared to jeopardise the opportunity to leave. In relation to the inconsistencies between her date of birth as indicated in her passport and in her application for a protection visa, she stated that she had lost her passport and as she needed her passport to be replaced urgently, she had paid a substantial amount of money to a friend to expedite the process. She did not go through the formal process and her friend had made a mistake with regard to her date of birth as shown on her passport.

Application for Review

35. In support of the application for review, the applicant's representative provided a detailed submission regarding the facts of the case and the relevant law. The submission enclosed a statutory declaration from the applicant; supporting written statements from the applicant's relatives, friends and associates in Uganda; a large volume of country information and other documents in support of the case.
36. In her statement, the applicant provided a more comprehensive and detailed account of her claims and addressed the issues raised by the delegate in her decision. These claims are outlined below.
37. The applicant had explored leaving Uganda for a number of years before coming to Australia, but it was very difficult to get visas to the countries she considered going to. She also considered going to other African countries, but the cultural differences between those countries and Uganda are great and she would have faced many difficulties settling in those countries. The trip to Australia provided her first "good opportunity" to escape, she knew that other applicants from Uganda had been denied visas on grounds that they had not enough social, political or financial ties to Uganda and she was afraid that her application might still be dismissed. For these reasons, she provided some incorrect information on her visa application as she could not waste the opportunity to flee.

38. In relation to her efforts to avoid detection by her father, she stated that she was first told by her father and the people of his village to get ready to undergo the FGM process when she was in her teens. From that time on, and particularly through out her studies, she had neither spent an extended period of time at home nor close to home. It was her mother's intention throughout that time to keep her away from home and out of her father's reach.
39. Throughout her studies, the applicant attended several schools in different suburbs. By changing schools often and not exposing her school details to people, especially those with whom her father's associates, it helped her mother and her to conceal her whereabouts and ensure her safety Her father could not track her down in the schools she went to because of the strict rules applied in these schools. For every student, a single visitation card is issued to authentic parent and there are specific days set in every term for authentic visitation card holders to pay a visit to their daughters while at school. Visitation was therefore restricted to only the person with a Parent/Guardian card issued by the school authorities and on only specified days and for her case it was only her mother who had the permission to visit her while at school and pick her up from school at the end of the term.
40. During school holidays she did not necessarily live in one place for the whole holiday period. Her mother often made her spend her holiday with one of her relatives all of whom reside different suburbs. In addition, hence during the school holiday period she participated in some youth programs. These "life set-ups" greatly contributed to her safety.
41. The applicant's situation was at its worst between [year] and [year] when she was not at school. Between [month, year] and [month, year] she was attending school, and was preparing to sit exams. The school did not have boarding facilities, so she lived near her school. The security there was not as strict as the places she had lived in previously. Late in [year] she learned from her friends that strangers had been coming to her place, saying they were her father's friends and asking about her by her father's surname in a seemingly friendly manner. These men from her father's village soon began to gain information about her and continued to make inquiries about her. They would ask about her in a friendly way and did not appear aggressive. As a result, the people at her school who were approached did not know that she was in hiding from the FGM ritual and thought her father's friends were genuinely looking for her.
42. After some time, she began to receive letters delivered to where she was staying At first the letters were just messages that said that there were people who wanted to see her, and that she should prepare herself for the FGM ritual. There was information about the custom and its importance, and how she should get ready. She informed her mother about the letters and from the very first letter she warned her not to meet the people who sent her the letters. She told her how to stay away from strangers and instructed her to disguise her identity at school and at home unless she knew the people she was interacting with. Her normal life routine was affected and her freedom was severely limited.
43. The applicant ignored all of the letters and did not arrange to meet the strangers who had come looking for her. The letters, however, became increasingly aggressive and she decided she could not stay there any longer. Instead, she stayed at a friend's house for a month. Then one day, towards the end of the school year, "the strangers" came to her

school late in the day, dressed in their ritual attire and with their faces painted, and began asking people about her in a more aggressive manner. They were not allowed into the school grounds, because there was a gatekeeper at the school gates, but many people saw them asking the gatekeeper about her, holding a photograph of her and calling her by her father's surname, and they came to tell her what was happening. She was able to hide in a classroom until the men had left. After this, she did not return to the school for the rest of the school year, but stayed with one of her relatives in a different suburb instead. Because she did not attend school, she could not sit the exams to progress to the next day.

44. The following year, she returned to complete her studies. She was less afraid this year, because the tradition was normally to conduct the ceremony in even-numbered years. She completed the previous year's work again and sat the exam at the end of the year. In [year], she did not go to school all year. Her mother and she were worried that her father would try to force her to undertake the FGM ritual again because it was an even-numbered year, so she went to her mother's village, Village D. She stayed with her relatives all year. She shared accommodation with her relatives and helped out in their family business.
45. Between [year] and [year], she attended another school, which was very strict about visitors and visitation was restricted to only the person with a Parent/Guardian card issued by the school authorities. In her case it was only her mother (her visitation card holder) or the person she delegated her card to who had the permission to visit her while at school. She did not receive any further visits from strangers from her father's village or letters at her school during this time, but her mother received letters from her father's people. These letters continued to remind her mother that her father's people wanted her to undertake the FGM ritual because it is their custom, and that her father was unhappy with her. As such, she was aware that they were still looking for her and still wanted her to undertake the ritual, but they did not know exactly where she was.
46. Between [month, year] and [month, year], she continued her studies. She was always aware that her father's people wanted to subject her to the FGM ritual, but since the strangers had stopped approaching her school and had not sent letters to her, she thought she was relatively safe for the time being. However she knew that they would find her eventually and she would be at risk again, so she began planning an escape to a safer place, somewhere her father's people could not track her down. Travelling to Australia seemed like her best opportunity, far away from her father's people
47. The process for coming to Australia began in mid-[year]. So she obtained a passport, but unfortunately she lost it and needed to apply for a replacement. She managed to obtain a replacement passport quickly by speaking to a friend who works in the passport office, and circumventing the usual, slower process. She told her employer of her intention to go to Australia and prepared her visa application and supporting documents; and provided them to the employer. All the applications were sent by the employer to the Australian Embassy in Nairobi, Kenya, and were supported by documents from the employer verifying that all applicants were genuine visitors. Since she had not been approached directly by her father's people for a couple of years, she was hopeful that it would be okay to wait before fleeing Uganda. However she was abducted by her father's people. Her father's people may have chosen to abduct her outside of the usual period for performing the ritual because she had evaded them for so

long. They may even have been informed that she was planning on leaving the country for Australia.

48. In relation to her sister's death, she stated that she had no assistance in preparing her application and did not understand what information was important. She did not appreciate that it was necessary to include all of the details relating to her circumstances in her application form. These were the reasons why she did not provide details of this incident as part of her initial application for a visa. She stated that she had, however, mentioned her dead sister in her visa application when she wrote that she had lost "relatives and friends as a result of FGM". The relative to whom she referred was her sister who died shortly after undergoing FGM in [year] while in her teens. The applicant was only a couple of years younger than her sister at the time. Her sister was living with her father in his village, and she was living with her mother as her mother had been unable to bring her sister to live with them
49. The applicant disagreed with the delegate's finding that effective protection, as well as counselling services, legal aid and other services provided by NGOs were available to her in Uganda. The applicant acknowledged the existence of many counselling services and other NGOs, but she contended that they do not offer protection. She stated that the NGOs' main function is to rehabilitate those girls who have already undergone the process of FGM. They have not been able to protect them from being forced to undergo the practice. These NGOs work towards sensitising the population against FGM. But they are not available to support her in her choice of not wanting to undergo the process of FGM or protect her from FGM.
50. The applicant stated that although there is a bill before the Parliament in Uganda to outlaw FGM, the Parliament does not take it seriously. Politicians who campaign against FGM end up getting voted out of office. There are women activists and lawyers who are opposed to FGM, but they work by pushing the government to change its laws and do not help women who are fleeing the procedure. There are no effective measures to enforce the existing "bylaw" against FGM in the district. The FGM ritual is such a strong cultural tradition that it will continue to happen in spite of the laws, until organisations like REACH are able to slowly change the people minds.
51. The applicant stated that there is no national criminal law in Uganda against FGM and no efforts from activists can guarantee protection for the girls. Some girls delay undergoing the procedure for as long as possible, although eventually they end up undergoing the process of FGM because of social pressure and intimidation by relatives. The only protection available under Ugandan law is for girls under the age of 15. Those over the age of 15 cannot be protected by the law. The cultural importance of the process is still so strong and no law against it would change the situation.
52. The following written statements were provided by the applicant in support of her application:
 - Statement from the applicant's mother, providing information about the approaches received from the applicant's father requiring her to undergo the FGM procedure. The applicant's mother also provided some additional details about the death of the applicant's older sister, as a consequence of an infection resulting from the FGM procedure;

- Statement from a medical doctor, stating the applicant's sister was admitted for treatment at his clinic. He also stated to have treated the applicant for the injuries she suffered at the time of her abduction. He stated that FGM is a deeply rooted cultural practice in certain areas in Uganda that has proved very difficult to eliminate. He stated that while there are local ordinances in some areas that prohibit the practice, "they do not make it a criminal offence and they are not really effective";
- Two statements from Person E, confirming that the applicant had expressed her fears of being forced to undergo FGM for several years before her abduction and providing information in relation to the applicant's interactions with him after her abduction;
- Statement from Person F, providing information about what he observed on the morning of her abduction; and
- Statement from the applicant's employer, for whom the applicant worked for in the months following her abduction, providing information about the applicant's employment and what he knew about her fears of being forced to undergo FGM.

The Hearing

53. The applicant's evidence at the hearing was entirely consistent with the contents of her written statements and oral evidence to the delegate. The applicant's evidence at the hearing is summarised below.
54. She stated that she was born in Place C. She returned to Place C to live with her mother and step-father a few years later. She did not remain at the same school and changed schools a number of times due to her fears of being found by her father. As a result, she missed one year of schooling and had to repeat another. She took residence at a private residential property, she did not stay at her parents' house for prolonged periods of time and moved between relatives' houses. She graduated in [month, year], having spent the preceding several months at her relative's place which was located near her school. She was always fearful of her father or other villagers coming to her parents' house to get her and she never stayed at the same place for lengthy periods of time.
55. In relation to her travels, she stated to have travelled to and stayed in Place G as part of trip organised for students. When asked why she had not stayed there. She said she could not due to cultural differences and the fact that she would not have been accepted to any tribe of family.
56. The applicant stated that her departure from Uganda has made her father even angrier than before. He is an elder and occupies a high position in the village hierarchy. He believes in his culture and the importance of tribal traditions. By refusing to undergo circumcision she has disgraced him. If she were to go back, she would be forced into circumcision. The fact that he managed to track her down and take her back to the village means that he would be able to do it at any time. Her father believes in female circumcision as it is deeply rooted in the culture. She is aware of cases when girls have been circumcised right before getting married. As far as her father is concerned, she is his daughter and belongs to him and his tribe. Her place of burial is on her father's land. It is his responsibility to ensure she is circumcised.

57. The applicant stated that she would not be able to safely relocate anywhere within Uganda. She said Uganda is not a big country and Place C is the safest place for her. Her father's people, however, were able to find her there. She was kidnapped by three men in tribal clothes and transported by car to her father's village. When she arrived, everything was ready for the circumcision ceremony. This suggested that her abduction was well planned. She was asked why Person F, who had witnessed the incident, has indicated in his statement that he saw ten tribesmen had taken her. She said may be there were more men around and whom Person F had seen, but she was taken by three men.
58. The applicant stated that for many years before the kidnap, her father and the elders in the village sent her letters inviting her to participate in the ritual and await her turn. As she refused, the letters and the messages became increasingly aggressive in tone. People also went to her house asking for her. She was not home, but if their intention was to warn her they could have just called.
59. The applicant was asked why she would not be able to count on the authorities to protect her against being taken away. She said the police support the coexistence of cultural beliefs and do not want to be seen to be alienating or attacking any tribe.
60. The applicant's representative submitted that the pressure on her to undergo the practice had not intensified and staying in Place I was not an obvious choice. The intensity of the interest in her to undergo circumcision grew over time culminating in her abduction. It was further submitted that the discrepancy in relation to the number of tribesmen responsible for abducting her should not be accorded much weight as the importance of the statement provided by Person F is relatively low compared to all the other evidence before the Tribunal.

FINDINGS AND REASONS

61. The applicant's case is based on the Convention ground of membership of a particular social group. The applicant essentially claims to be at risk of undergoing female circumcision if she were to return to Uganda.
62. At the hearing before the Tribunal the applicant gave her evidence in a straightforward and unembellished manner. Her evidence was entirely consistent with her written claims and the oral evidence she gave to the delegate. Overall, the Tribunal found her to be a reliable and credible witness.
63. The Tribunal accepts that the applicant's father is from Group H. The Tribunal accepts that he is an elder and an important figure in his village. The Tribunal accepts that although the applicant's mother is not a member of Group H, the applicant is considered to be a member of Group H due to her paternal lineage and is bound by that group's traditional cultural practices. The Tribunal accepts that in Uganda female circumcision is mainly carried out among the tribe. The Tribunal further accepts that the applicant was required to undergo circumcision due to the prevalence and the importance of the practice in her father's village.
64. According to the US Department of State, "Initiation ceremonies take place in December of even numbered years on girls between ages of 14 and 16" (US Department of State 2001, Prevalence of the Practice of Female Genital Mutilation

(FGM): Laws Prohibiting FGM and their Enforcement; Recommendations on How to Best Work to Eliminate FGM, p.47). [Information about the applicant's tribe deleted in accordance with s.431 as it may identify the applicant]

65. The above information is consistent with the applicant's claim that she was first invited to participate in the ritual of female circumcision by her father and the elders in his village when she was in her teens. Her refusal resulted in many more subsequent requests, which gradually turned into aggressive demands. The Tribunal accepts as plausible that the applicant was able to avoid any possible direct confrontation with her father or people from her father's village by changing schools and moving from place to place. The Tribunal accepts that these changes and movements, which were motivated by fear, were disruptive to her studies and her life in general. The Tribunal accepts that she was taken to her father's village against her will with the intention of forcing her to undergo circumcision. Considering the applicant's overall credibility, the Tribunal does not attach significance to the inconsistency between the applicant's evidence and Person F's statement regarding the number of people responsible for abducting the applicant. The Tribunal accepts that the applicant refused to submit herself to the ritual despite the overwhelming pressure on her to do so and her first attempt to escape her predicament resulted in her being seriously beaten. The Tribunal accepts that the applicant was eventually successful in running away and returning to Place C, where she remained until she came to Australia.
66. The country information before the Tribunal supports the applicant's claim that she would continue to be placed under intense pressure to undergo circumcision. According to Minority Rights Group International, "Girls who had previously been spared in adolescence are being forcefully mutilated upon marriage." [Information about the applicant's tribe deleted in accordance with s.431 as it may identify the applicant.]
67. In view of the applicant's tribal affiliation, the importance placed on the practice of female circumcision with her tribe, her father's place within the village hierarchy, his persistence in persuading and/or forcing the applicant to undergo the procedure over the years, culminating in her being kidnapped and taken to the village; the Tribunal cannot make a confident finding that the applicant's father's efforts in locating and forcing her to undergo the procedure would cease. The Tribunal is of the opinion that if the applicant were to return to Uganda her chance of being forced to undergo circumcision cannot be ruled out as remote or insubstantial.
68. The US Department of State reports that clitoridectomy and excision (removal of the clitoris together with part or all of the labia minora) are commonly practiced in Uganda (US Department of State 2001, *ibid*). [Information about the applicant's tribe deleted in accordance with s.431 as it may identify the applicant] Apart from the gruesome nature of the procedure itself, the consequences of circumcision include severe psychological and physical injury, severe period pains, difficulties and complications arising out of an inability to pass urine, infections leading to sterility, and complications during childbirth, as well as loss of pleasure during sex. The Tribunal is satisfied that the harm the applicant would be subjected to involves 'serious harm' as required by paragraph 91R(1)(b) of the Act. The fact that the applicant mostly lived in different locations in Uganda did not deter her father and his fellow villagers from tracking her down over the years. The Tribunal is not satisfied that the applicant would be able to safely

relocate to another city or region in Uganda to lead a normal life and avoid being found and forced to undergo circumcision.

69. In *Applicant S* Gleeson CJ, Gummow and Kirby JJ gave the following summary of principles for the determination of whether a group falls within the definition of particular social group at [36]:
- ... First, the group must be identifiable by a characteristic or attribute common to all members of the group. Secondly, the characteristic or attribute common to all members of the group cannot be the shared fear of persecution. Thirdly, the possession of that characteristic or attribute must distinguish the group from society at large. Borrowing the language of Dawson J in *Applicant A*, a group that fulfils the first two propositions, but not the third, is merely a “social group” and not a “particular social group”. ...
70. On the basis of the independent country information and the applicant’s evidence, the Tribunal is satisfied that Tribe A women of Uganda possess characteristics and attributes that make them distinguishable from the rest of the society and that they constitute a particular social group within the Convention meaning. Based on the evidence before it, the Tribunal is satisfied that the essential and significant reason for the persecution feared by the applicant is her membership of the particular social group of Tribe A women of Uganda.
71. The Tribunal has considered whether effective state protection is available to the applicant. The information consulted by the Tribunal suggests that there is no national law against FGM in Uganda (US Department of State 2009, *2008 Country Reports on Human Rights Practices – Uganda*, 25 February, Section 5 ‘Children, <http://www.state.gov/g/drl/rls/hrrpt/2008/af/119030.htm>). Indeed, whilst only a small minority still practise FGM, it is lawful and does not contravene any provisions of the Constitution (‘Uganda: Women petition court to outlaw FGM’ 2007, *IRIN News*, 30 April <http://www.irinnews.org/Report.aspx?ReportId=71867>). Local by-laws making FGM illegal do not impose deterrent punishment and the Tribunal has been unable to find any information amongst the sources consulted on the arrest or imprisonment of those who encourage or perform FGM (‘Ugandans ban female circumcision’ 2008, *BBC News*, 15 October <http://news.bbc.co.uk/2/hi/africa/7672236.stm>; ‘Uganda: Criminalise Female Genital Mutilation’ 2008, *New Vision*, 14 December, allAfrica.com website <http://allafrica.com/>; and US Department of State 2009, *ibid*). The sensitisation programme undertaken by the Reproductive, Educative and Community Health (REACH) project and awareness programs by other NGOs appear to have had an impact on the practice by reducing FGM in Kapchorwa (The traditional ‘surgeons’ earn a living from it (‘FGM can be defeated by joint effort’ 2009, *New Vision*, 6 January, <http://www.newvision.co.ug/D/8/14/667148>). However, these efforts cannot be said to amount to effective state protection for someone in the applicant’s shoes. The Tribunal is satisfied that the applicant does not have adequate and effective state protection available to her In Uganda The Tribunal is satisfied that the applicant has a well-founded fear of persecution for a Convention reason.
72. The Tribunal is satisfied that the applicant does not have a legally enforceable right to enter and reside in any country other than her country of nationality, Uganda. The Tribunal finds that the applicant is not excluded from Australia’s protection by subsection 36(3) of the Act (see *Applicant C v Minister for Immigration and Multicultural Affairs* [2001] FCA 229; upheld on appeal, *Minister for Immigration and Multicultural Affairs v Applicant C* (2001) 116 FCR 154).

CONCLUSIONS

73. The Tribunal is satisfied that the applicant is a person to whom Australia has protection obligations under the Refugees Convention. Therefore the applicant satisfies the criterion set out in s.36(2)(a) for a protection visa.

DECISION

74. The Tribunal remits the matter for reconsideration with the direction that the applicant satisfies s.36(2)(a) of the Migration Act, being a person to whom Australia has protection obligations under the Refugees Convention.

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 Officers ID: PRRTIR