

DECISION RECORD

RRT CASE NUMBER: 1113384

DIAC REFERENCE(S): CLF2011/174298

COUNTRY OF REFERENCE: Malaysia

TRIBUNAL MEMBER: Paul Fisher

DATE: 30 November 2012

PLACE OF DECISION: Melbourne

DECISION: The Tribunal remits the matter for reconsideration with the following directions:

- (i) that the first named applicant satisfies s.36(2)(a) of the Migration Act, being a person to whom Australia has protection obligations under the Refugees Convention; and
- (ii) that the second named applicant satisfies s.36(2)(b)(i) of the Migration Act, being a member of the same family unit as the first named applicant.

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

1. This is an application for review of decisions made by a delegate of the Minister for Immigration and Citizenship to refuse to grant the applicants Protection (Class XA) visas under s.65 of the *Migration Act 1958* (the Act).
2. The applicants, who claim to be citizens of Malaysia, arrived in Australia on [date deleted under s.431(2) of the *Migration Act 1958* as this information may identify the applicant] September 2011 and applied to the Department of Immigration and Citizenship for the visas [in] October 2011. The delegate decided to refuse to grant the visas [in] November 2011 and notified the applicants of the decisions.
3. The delegate refused the visas on the basis that the first named applicant is not a person to whom Australia has protection obligations under the Refugees Convention
4. The applicants applied to the Tribunal [in] December 2011 for review of the delegate's decisions.
5. The Tribunal finds that the delegate's decisions are RRT-reviewable decisions under s.411(1)(c) of the Act. The Tribunal finds that the applicants have 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. Section 36(2)(b) provides as an alternative criterion that the applicant is a non-citizen in Australia who is a member of the same family unit as a non-citizen (i) to whom Australia has protection obligations under the Convention and (ii) who holds a protection visa. Section 5(1) of the Act provides that one person is a 'member of the same family unit' as another if either is a member of the family unit of the other or each is a member of the family unit of a third person. Section 5(1) also provides that 'member of the family unit' of a person has the meaning given by the Migration Regulations 1994 (the Regulations) for the purposes of the definition. The expression is defined in r.1.12 of the Regulations to include the spouse of the family head.
9. Further criteria for the grant of a Protection (Class XA) visa are set out in Part 866 of Schedule 2 to the Regulations.

Definition of 'refugee'

10. 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.
11. 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, *Applicant S v MIMA* (2004) 217 CLR 387 and *Appellant S395/2002 v MIMA* (2003) 216 CLR 473.
12. 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.
13. There are four key elements to the Convention definition. First, an applicant must be outside his or her country.
14. 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.
15. 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.
16. 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.
17. 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.

18. 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. The expression ‘the protection of that country’ in the second limb of Article 1A(2) is concerned with external or diplomatic protection extended to citizens abroad. Internal protection is nevertheless relevant to the first limb of the definition, in particular to whether a fear is well-founded and whether the conduct giving rise to the fear is persecution.
19. 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

20. The Tribunal has before it the Department’s file relating to the applicants. 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.

Background and Claims

21. The applicants claim to be nationals of Malaysia, and to be husband and wife. Only the first named applicant (hereafter “the applicant”) has made claims against the Convention.
22. The application forms variously indicated that the applicant was born in Serembam, Malaysia, that he speaks reads and writes English and Malay and also speaks Tamil, and that he is of Indian ethnicity and the Hindu religion. He received 13 years of education, and has resided continuously at the same [address] from January 1990 until September 2011. From July 2001 until April 2011 he was the sole proprietor of a business, [Company 1].
23. The application form indicates that the applicants were married [in] September 2011, but also states that they have, or at least the applicant has, [details in relation to children deleted: s.431(2)].
24. Despite indicating on the application forms that they were enclosing passport, licences and identity documents, no such evidence was in fact submitted in support of the protection visa application, but the forms do indicate that the applicants hold Malay passports issued [on two dates in] August 2011.
25. The application form also states that in September 2011, two weeks before coming to Australia, the applicant travelled to Indonesia for two days to visit his brother.
26. The applicant’s protection claims, which are set in response to questions 41 to 46 of Part C of the application forms, have been summarised by the delegate as follows:

- [In] April 2011 two unknown Malay men stopped a bike in front of his shop. While he was talking with his friend, one of the guys shot him with a gun which hit his stomach at close range. He ran into his shop but was hit with another bullet on his hip before his assailants drove away.
- He was taken to hospital and was abandoned in emergency until his father arrived. His father wanted to take him to a private hospital but they refused, as it was a police case. After surgery he was admitted into intensive care and due to unhygienic conditions he was infected and finally discharged 13 days later.
- The "*Gang 77*" and "*Tiga Line*" which have strong links to politicians are the culprits who shot him. He fears for his life, people are scared to be friends with him, he has been threatened, is unable to leave his house and is mentally tortured.
- His fears increased after one of his friends, [Mr A] was killed [in] September 2011 at a coffee shop by the "*Gang Tiga Line*" (reference: [deleted: s.431(2)]).
- The applicant fears "*Gang 77*" and "*Tiga Line*" because in 2006 he caught one of their gang members and handed them over to the police. They are forcing him to close down his business by threatening him.
- On [a date in] June 2010 at 4am they burnt his car in front of his house. He only knew about this after the gun shot incident. He claims that they will do even more just because he is Indian and he will never get justice for whatever they doing.
- He states that he was followed by the gang upon his hospital check-up and his incident was covered by most newspapers and he provided two web links.
- The applicant fears "*Gang 77*" and "*Tiga Line*" because he has given the names of those involved in the shooting incident to police. He claims that they are hardcore criminals, they are Malays and against other races, they have a strong influence with police and one of the men is the state representative's sons.
- He states that his friend was shot and nothing was done by the police, if he was still there he would be dead. The police gave him protection while he was at hospital but once he was discharged there was no protection. He believes he will never get justice as an Indian and because of his political background.
- The applicant maintains that the authorities are willing to help him but not for "*these particular guys*". The police cannot have a presence at his shop all the time and he caught a gang member who snatched [an item] from his staff and he was not charged after being corrupted by the gang leader.
- He is able to live in another part of Malaysia but their networks are all over the country.

27. The application was refused by a delegate of the Minister [in] November 2011.

Review Application

28. [In] December 2012 the Tribunal received an application for review of the delegate's decision.
29. [In] January 2012 the applicants were invited to a proposed hearing scheduled for [a date in] February 2012. A response to the hearing invitation was received, but no interpreter was requested.
30. On [the scheduled hearing date] the applicants appeared before the Tribunal, and submitted the following documents:

- Copy medical report showing that the applicant was hospitalised from [a date in] April 2011 to [a date in] May 2011 at the [hospital deleted: s.431(2)] and treated for a perforated small bowel, left colic arterial tear, and left renal injury *due to gunshot*;
 - Copies of separate bank statements for the applicant and for [Company 1];
 - Copies of business registration records issued by the Companies Registration Commission of Malaysia in the name of the applicant and [Company 2];
 - Internet news report from [details in relation to report deleted: s.431(2)];
 - Internet news report from [details in relation to report deleted: s.431(2)].
 - Photographs showing a scar stretching across the entirety of a male abdomen (x1) and a man lying, apparently dead, in a pool of blood in what appears to be an open air restaurant (x2).
31. It then became apparent that the second named applicant required a Tamil interpreter, whereupon the hearing was adjourned until [a date in] March 2012.
32. The applicants again appeared before the Tribunal [in] March 2012 to give evidence and present arguments, this time with the assistance of an accredited Tamil-English interpreter.
33. The applicants were represented in relation to the review by their registered migration agent.
34. After explaining its role, the purpose of the hearing, and the relevant legal provisions, the Tribunal indicated that it was not yet satisfied about the following matters:
- whether the applicant's claims were true
 - whether the harm feared is in fact Convention-based, or just criminal violence which falls outside of the scope of the Convention, given that the essential and significant reason of reasons for the harm feared must be a Convention reason.
 - whether state protection against the feared harm is available, and if not, whether it would be withheld for a Convention reason;
 - whether the harm feared could reasonably be avoided by the applicant relocating within Malaysia
35. The Tribunal then took evidence from the applicants in turn, the second named applicant waiting outside the hearing room while the first named applicant gave evidence.

Evidence of the [Applicant]

36. The applicant clarified his family structure. He noted that his parents, [details relating to siblings deleted: s.431(2)]. The second-named applicant is his second wife; he was divorced from the first wife in 2008 due to misunderstandings which are unrelated to his protection claims. He met his current wife, the second named applicant, in 2010, as she was working in his mother's restaurant. He provided the names of her parents, and noted that she originally had [details relating to siblings deleted: s.431(2)]. The date of the marriage listed on the protection visa application form ([date]/9/2011, or four days before they arrived in Australia) is incorrect; they were in fact married [in] September 2010. [Details in relation to the applicants' children deleted: s.431(2)]. She can confirm this if required. Neither he nor his wife has any relatives in Australia.

37. Asked about the visit to Indonesia, the applicant explained that his brother was [studying] there. He knew he was going to leave Malaysia, and had had purchased a cheap ticket for departing to Australia on [a date in] September, with the intention of never returning. He wanted to see his brother one last time before he left, and so took advantage of the time available before his departure to visit him in Indonesia.
38. The applicant wanted to leave Malaysia because of problems which date back to 2006. He was conducting business there and had [details of business deleted: s.431(2)]. One day around the end of 2006 a Malay guy came into the shop, snatched [an item], and ran off. The applicant happened to be standing just outside the store, so he chased and caught the man, and reported it to the authorities. It ended up going to court but took some three years to be heard, and in 2009 he was threatened that if he didn't withdraw the charges they would harm him. He did so, informing the police, but the problems continued. They believed he was scared, and so they targeted him with demands for protection, but he refused to accede to their demands.
39. The applicant explained that he is a Tamil Hindu, and that there is a group of Malay gangsters called "Tiga Line" and "Pekida", who have influence with the Malay government, and who don't like to be 'disturbed'. He didn't even complain about small incidents but still they threatened him, saying they were "aliens" His car was burned, and then in April 2011 they shot him.
40. The Tribunal sought clarification about the accuracy of the report from [newspaper and article deleted: s.431(2)]. He explained that the reference to [name deleted: s.431(2)] was in fact a reference to him, and that the reported had made an error when recording his name. The location was also erroneous, as the applicant owns the [shop] and was attacked at his business. The house pictured in the article belongs to the other victim. They know one another but have no particular connection. The other victim was a money-lender, and was also hospitalised. The applicant spoke to him when he had to return to the hospital to have his wounds dressed. He had had throat surgery he couldn't talk properly, but nevertheless told the applicant he had lent money to some members of the same gang.
41. The Tribunal noted that in his protection claims the applicant said that two unknown men attacked him but gave the names of five men said to have been involved in the attack to the police. Also, there were only two attackers according to the newspaper article he submitted. Asked on what basis he knew that more than two people were involved, the applicant explained that this particular group was always causing him problems, and their leader was called [Mr B]. They had threatened to harm him unless he paid protection money, but he told them to do what they wanted. That's what he was referring to when he said that they were forcing him to close his business. [Mr B] is the son-in-law of an [ex-senator]; he knows this because [Mr B] is married to the senator's daughter.
42. After he was attacked in April 2011, a manager handled the business. [Details in relation to business deleted: s.431(2)]. Some of the stores were sold, and the rest left with the manager to look after. The [subsidiary business] he gave to his brother, with any extra income he generates from it to go towards the upkeep of his children, including the [children] in the custody of his ex-wife.
43. The applicant was asked to explain more about the Tiga Line and Gang 77 groups he said in his claims were responsible for the attacks on you. He observed that Gang 77 is a separate group, although there is some overlap among the group members. The main thing he is worried about is Pekida. It is a social group to do with Islam and Malays, and is omnipresent

in Malaysia. They take sides every time there is an argument between Malays and Indians or Chinese. Nobody can take any action against them. If a car has a Pekida sticker on it, no-one will take or book the car. These are just a few examples. Pekida is the same thing as Tiga Line are the same thing. "Tiga" means tree, "line" is the same as in English and is their symbol, three lines.

44. The applicant was asked about [Mr A], and explained that he was a friend of the applicant and was killed [in] September 2011. It was his death which prompted the applicant to purchase a ticket to come to Australia. His death was not directly connected to the applicant's own problems. However, he thinks it likely that the same group was involved because the circumstances were similar, they were shot in the same way. The applicant also received a threatening message on his phone after [Mr A]'s death saying that they had missed him the last time but now the same thing would happen to him. [Mr A] was a nice person with no enemies and visited the applicant in hospital. The applicant thinks his the problem arose because he was working for [details deleted: s.431(2)] belonging to someone in Pekida.
45. The applicant was asked about the availability of state protection. He confirmed that the police had given him protection in hospital but couldn't provide it on an ongoing basis. He believes that this is because the people involved in his case wielded strong influence within the UMNO. He made two separate reports to the police, and they came to his house on two occasions. However, before he came to Australia he went to the police station to obtain copies of the reports and was told that there were no reports recorded on the system, which made him quite scared.
46. The Tribunal acknowledged that there is discrimination against ethnic Indians in Malaysia, but also observed that the report which the applicant did provide suggests that the police were investigating his case and taking it seriously. The applicant was referred to some country information suggesting that the police have investigated such cases on occasion. By way of reply, the applicant acknowledged that the police had initially taken action against the small-time criminal who snatched the [item] from one of his stalls, but that case proceeded very slowly, and at one point the police came back to him and said he didn't have proof. With the complaint about the shooting, he was told that there were doing a special investigation, but there was no outcome.
47. The applicant was asked how his claim came within the scope of the Convention, and whether it was not simply corruption. The applicant observed firstly that these people would not kill another Malay, but also noted that when Pekida kills someone everybody knows but behaves as if nothing happened.
48. The Tribunal queried the existence of any link between Pekida and Tiga Line, and noted that in his original claims the applicant had not mentioned Pekida. The applicant replied that they are one and the same thing, and added that former Prime Minister Badawi is the head of Pekida.
49. The applicant was asked about relocating within Malaysia to avoid the harm feared, noting that he had established businesses in the past, and querying why he could not do the same again in another part of that country. The applicant replied that he can only do business as that is all he knows. He was not too wealthy but he had around 20-30 employees. If he could safely relocate he would have done so. After the attack he was initially semi-paralysed by his injuries, and went to his grandmother's house [in] Pahang to recuperate. However, he then received a message on his phone asking why he had run to that place, referring by name to [his location], and stating that it was even easier to kill him there. His father became worried

and insisted he return home. It was like being under house arrest. He wouldn't have risked coming to Australia had it not been for that threat. He was still bandaged and recovering.

50. Asked why he had chosen Australia, the applicant replied that he had searched online and it seemed to be the nearest place he could get to easily, even though he had also read reports about (Indians) coming to Australia and getting killed. The threats against him have continued. His brother, for example, was told "your brother can be anywhere but we will still get him".

Evidence of the [second named applicant]

51. The second named applicant confirmed the details of how she met the applicant, the date of their marriage, and their respective family structures, although she pointed out that she had had [details of siblings deleted: s.431(2)]. She knows that her husband has [details of children deleted: s.431(2)].
52. The applicant was, however, unaware of the purpose of the visit which her husband had made to Indonesia. She asserted that they went sight-seeing, and a friend took them around, and didn't think her husband had any relatives in that country.
53. The applicant was asked whether she understood why her husband had brought her to Australia, to which she replied that she did not, and that he had not even told her that they were coming here until they were actually boarding the plane.
54. The applicant denied that she or her husband had ever had any problems in Malaysia, or that he had ever been to hospital, although she indicated that if he had gone to hospital she would definitely know about it. She was aware that he had [details of businesses deleted: s.431(2)], but did not know what had happened to those businesses since they came to Australia as he doesn't discuss those things with her. She doesn't know any of his friends. Asked whether her husband had ever spent time away from home, the applicant replied in the negative, indicating that no matter how late it was he would always come home.
55. However, when the applicant was asked whether her husband has a scar on his stomach, she confirmed that he does. The witness was then again asked whether her husband had been in hospital and this time she said that he had, for about 1½ weeks. Asked how he acquired the scar, she replied that she heard something but doesn't really know. Asked to elaborate, she replied that it happened last year, she thinks it was on [date deleted: s.431(2)]. She heard that the Malays shot him. That's what everybody in the family said, but they didn't say why, and she didn't think to ask as she was too shocked. Asked whether she heard anything else about the incident, the applicant replied that she had been at her brother-in-law's house when she heard them say that the men would take care of it.
56. Asked whether she had heard whether any of her husband's friends had been shot, the applicant replied that she had not.
57. The applicant was asked whether she would like to remain in Australia, and if so, why. She replied that she really likes it here, but also that her husband is not safe in Malaysia. However, when asked to elaborate she was unable to add anything more.

Further Evidence of the Applicant

58. The applicant then observed that when he and his wife travelled to Indonesia she had just gone shopping, and he had not taken her with him when he visited his brother. In Malaysia he

was earning in excess of \$20,000 annually. Here in Australia he is earning next to nothing but at least he is safe.

59. The Tribunal indicated that it was inclined to accept the applicant's account, but was concerned about whether the harm feared came within the scope of the Convention.
60. Additional time was extended to the applicants so that they could submit further supporting documents.

Post-hearing

61. [In] March 2012, the Tribunal was provided with a bundle of documents including the following:
 - Photos of the applicant's [businesses];
 - Photos showing the applicant in hospital being treated for his injury, an X-ray showing a bullet lodged near his spine, and medical reports relating to his treatment;
 - Documents evidencing the enrolment of the applicant's [brother]'s [enrolment] at [University] in Indonesia; and
 - Various media and internet reports relating both to specific incidents from the applicant's narrative and to Pekada and the politics of race in Malaysia more generally. Some of these are extracted in more detail below, under the heading *Country Information*.
62. [In] April and [in] May 2012 the applicant submitted further supporting documents including media reports and blogs from the internet, copies of the applicant's Malaysian ID Card (MyKad) and a sample MyKad of an ethnic Malay which shows his religion (Islam), and an article entitled *Is Malaysia's MyKad the 'One Card to Rule them All'?* (Mathews, T., (2004) 28(2) *Melbourne University Law Review* 474-511), which warns of the privacy implications of the (then new) MyKad system.
63. [In] August 2012 the applicant provided the Tribunal with a further bundle of documents, many of which had already been provided in support of his application, and further submissions essentially reiterating his protection claims, with the exception that for the first time the applicant claimed involvement in an opposition party, DAP, asserting that this also placed him at risk.

Country Information.

64. The abovementioned article *Is Malaysia's MyKad the 'One Card to Rule them All'?*, is available at <http://www.austlii.edu.au/au/journals/MULR/2004/15.html>, and includes the following:

The MyKad is similar in size to a credit card. Its computer chip enables numerous functions in the MyKad, including data processing, file management and the storage of large amounts of information.

The MyKad is secured by both physical card features and chip security features. The Chip Operating System ('COS') enables control over the read and write access to data on the MyKad. There is also a firewall or security function that constrains the access of different government agencies to the information relevant to their line of duty.

The chip is designed to be used at Government Service Centres ('GSCs') and accessed by Card Acceptance Devices, including key ring readers. The GSCs' main functions are to input, process and update information on the MyKad as well as to process applications for new MyKads. The

GSCs also communicate with the cardholders' central database, which is located at the headquarters of the NRD. The central database is maintained by the GSC back-end server, which also serves as a gateway to agency host computers and financial institutions.

The desktop CADs enable authorised access at the GSCs, at selected government agencies and at certain other locations, such as private hospitals. Government enforcement agencies including the NRD, the Road Transport Department, the Immigration Department and the Royal Malaysian Police, as well as paramedics, have mobile CADs which can read, access, write, print and utilise specific information on the MyKad, and which can also upload and download blacklists and summons data from the respective databases. Some of these enforcement agencies also have key ring readers which allow for read-only access to specific types of information on the MyKad. The key ring readers and various versions of the CADs with limited access rights or the ability to access the 'open information' embedded in the MyKad are available for sale to the public and to private sector organisations for applications such as the 'Visitor Management System' and the 'Hospital Information System'

As a result of the security features and technological specifications of the MyKad and its supporting infrastructure, specific types of personal information in the MyKad and in the respective databases can be accessed by certain government agencies or selected third parties who have the appropriate access rights. However, it is uncertain how and by whom access rights are determined. Both the level of access granted or enabled through the CADs and the purpose for which these access rights may be exercised are similarly unclear. There are no statutory provisions in the *National Registration Act 1959* (M'sia) ('NRA') or the *National Registration Regulations 1990* (M'sia) ('the Regulations') setting out restrictions on the types of information that may be accessed from the MyKad or the respective databases by any particular category of authorised officers. Any grants of access rights to the various authorities and third parties have thus far been done administratively and without transparency or public disclosure.

The NRD, as the agency maintaining the central database for the MyKad project, and other enforcement agencies such as the Royal Malaysian Police and the Anti-Corruption Agency, may already have, or be able to obtain, access rights to *all* types of personal information in the MyKad. In any event, certain government agencies and third parties will have access to all the open information about the MyKad holder embedded in the MyKad...

1 Data Surveillance

While some of the personal information on the MyKad is already contained on the existing national identity card, the additional types of personal information in the MyKad and the linking of that information through the PIN can facilitate data surveillance of an individual by the government and its enforcement agencies. This approach is reminiscent of the Orwellian concept of 'Big Brother', giving rise to major privacy concerns. As a leading English case anticipated:

if the information obtained by the police, the Inland Revenue, the social security offices, the health service and other agencies were to be gathered together in one file, the freedom of the individual would be gravely at risk. The dossier of private information is the badge of the totalitarian state.

Data surveillance involves the systematic use of personal data systems in the investigation or monitoring of actions or communications of an individual or group of persons. It can result in the use, albeit 'authorised', of personal information for purposes other than that for which the information was collected. Such surveillance could result in the personal information stored in the MyKad being used for secondary purposes, such as profiling certain categories of individuals or matching their personal data records to identify people of potential interest to the government. While this may empower enforcement agencies to create profiles on or to track suspected 'criminals', it will also enable the government to electronically monitor other individuals who are considered to be 'subversive', whether they are members of identified subversive groups, posing a security threat to the government, or simply critical of it.

'Big Brother' surveillance is of particular concern due to the inclusion of highly sensitive personal information in the MyKad such as voting constituency and voter registration

information. This type of information can enable the government to monitor individuals' voting patterns and effectively interfere with or discourage voter turnout during national elections. The inclusion of health information, such as any long-term illnesses, and of marital status, could also lead to the monitoring and surveillance of individuals or groups who may be of particular interest to the government due to their 'alternative' or 'non-conformist' lifestyles.

This capability for extensive data surveillance would confer on the government even greater power and control over its citizens, potentially giving the government detailed insight into the private lives of MyKad holders. As cautioned by a leading commentator on this issue: '[a]ll human behaviour would become transparent to the State, and the scope for non-conformism and dissent would be muted' ...

The MyKad project involves the five major solutions providers, the MDC, the major government departments involved in the implementation of the MyKad, the enforcement authorities and other support agencies. Such a comprehensive project involves thousands of people within the public service as well as the private sector. This gives rise to a further privacy concern — the misuse of personal information through corruption. Private sector models cited in United Kingdom debates have 'generally assumed that at any one time, one per cent of staff will be willing to sell or trade confidential information for personal gain'.

Malaysia is no stranger to corruption. In Transparency International's Corruption Perceptions Index 2002, the country received a score of 4.9, indicating the existence of a relatively high level of corruption. Despite the infancy of the MyKad project, there are already allegations that illegal immigrants in Malaysia's eastern state of Sabah possess valid MyKads. There have been instances of forgery and counterfeiting of existing identity cards and other high security devices — not due to a lack of security features, but due to the assistance of corrupt public officials holding positions of trust in government.

The various types of personal information in the MyKad would be of great value to third parties for purposes ranging from marketing and direct selling to identity theft. The fact that the security features of the MyKad would make it difficult for these parties to gain access to such information would in turn increase its value. This is likely to add to the temptation for public officials to engage in corrupt practices, including the unauthorised use or disclosure of the personal information in the MyKad. This could occur through the direct sale or disclosure of the personal information to third parties, the illegal sale or duplication of CADs or the unauthorised sale of access rights to third parties. Even a single incident of such corruption could severely jeopardise the information privacy of individual citizens.

Notwithstanding its high security features, the integrity and efficacy of the MyKad project depends on the trustworthiness of all the people involved in its implementation. This is an assurance that the Malaysian Government cannot yet give to its citizens.

65. One of the reports submitted by the applicant was the Malaysian Indian Minority & Human Rights Violations Annual Report 2008, published by the human Rights Party of Malaysia. The most recent such report the Tribunal was able to access is the 2010 report, which can be found at <http://www.humanrightspartymalaysia.com/books/annualrightsviolations2010.pdf> It includes the following:

The current ruling coalition in Government, dominated by the UMNO (United Malay National Organization) party runs a racist, Muslim religious extremist and Malay supremacist Government. By explicit State policies the vast majority of Malaysian Indians are excluded from the national mainstream development of Malaysia. We are systematically denied equality and equal opportunities in direct contravention and violation of Articles 8 and 12 of the Malaysian Federal Constitution. Covenants which were agreed upon by the founding fathers of the country now seem to have lost all meaning at the hands of this UMNO regime. About 70 % of the Indian Malaysians have been made to be and/or remain in the hardcore poor, poor and in the working class group with 90% being in the daily or monthly wage-earning category. The poverty we talk about is relative poverty arising from exclusion of the racist / religious extremist system – exclusion from proper basic life facilities, from education at all levels, from economic

development programs, from social development programs, from cultural development programs, from equal opportunities in employment to name few areas...

Police shootings and custody deaths largely involve Indian. Racial profiling of Indian Diaspora suspects to point of being killed in police lockups and shot dead are widespread. The steady increase in crime rate reflects the corruption in the law enforcement agencies and their ineffectiveness as a law enforcement agency. The weakness in the law enforcement agency, which is riddled with corrupt officers, is further undermined by its willingness to act in cohorts with the ruling government to overlook any misdeeds perpetrated by the ruling authorities. In return, the police force is immune from any prosecution of any crimes they may commit in the process of fulfilling their master's bid and the danger of such an alliance produces a police force that views itself above the law. An additional factor to the increase in crime rate is the direct influence of the ever widening effects of marginalization experienced by the poverty line Indians. The involvement of Indian youths in crime is now a widely acknowledged fact in Malaysia.

To counter the rising trend in crime rate, the Police resort to brutal and violent methods to deal with the problem. There are well-documented instances where the police have used unlawful force and torturous means to extract confessions from detainees for their suspected activities. Almost 90% Malaysians killed whilst in Police custody are ethnic Indians suspected of committing crimes. The Police also practice an unofficial 'shoot to kill' policy codename 'Operasi copperhead'. The Officers who act with impunity clearly violate the rule of law and the universal law of basic human rights.

4.4.2 Factual background recorded by the HRP, Malaysia based on newspaper articles reported in Malaysian newspapers:

Update:

- A review of the incidents mention below, in November 2010 by HRP, Malaysia, showed remains unresolved by the authorities. Moreover, the level of ethnic Indian detainees in custody or in prison remains unabated based on the following published reports collated by the HRP, Malaysia.
- 'The Star' (Malaysia) newspaper (16 March 2010, page N40) published information obtained by the Selangor Hindu Sangam which confirmed that 48% of prisoners in the 28 prisons nationwide continue to be ethnic Indians.
- The Utusan Malaysia newspaper (20 September 2010, page 5) reported that four months alone in 2010, 300 ethnic Indian youths were arrested and detained under Emergency Ordinance in the state of Selangor. A further 900 Indian youths have been arrested in Selangor in 2010 and a total figure of 5,000 in 2010 countrywide.
- The same newspaper (22 September 2010, page 10) reported that there were about 100,000 known ethnic Indian gangsters operating in Malaysia.
- According to page 20 of the News Straits Times of Malaysia (25 March 2010, page 20) 36,000 prisoners nationwide including 17,256 are serving a custodial sentence for minor crimes.
- Babu a 28 year old orphan who surrendered himself voluntarily to Police in Jempol on a suspected petty robbery case on the 24th January 2010 was found dead in a Police lock up a week later under mysterious circumstances. He allegedly hanged himself but the Police were not willing to disclose the findings of a CCTV linked to the cell on requests of NGO's representing Babu's family. (Malaysiakini 3rd February) Police denied any wrongdoing.
- On June 14th 2010 A Gnanaprasadam, 53, died in Police custody. He had previously complained to a Magistrate who heard his remand proceedings that he was beaten in custody. His wife met him the Friday before and noticed he had beatings mark. The Police told her that he would be released on Monday, however he died mysteriously on Sunday. Police claimed he could have died due to drug abuse. No inquest was held to determine the cause of his death.

- The investigation and prosecution into the unlawful killing of Kugan remains unchanged at review date of our report. In this high profile prosecution where only one police officer was prosecuted after much public pressure for the use of unlawful force to extort confession from a 22 year old ethnic Indian detainee who had been subjected to the most horrific forms of ill treatment at the hand of the authorities.
- On July 16 2010, police arrested R Gunasegaran, who died in custody at the Sental Police Station approximately two or three hours after his arrest.
- An initial autopsy found that Gunasegaran died of a drug overdose. Several witnesses claimed he was beaten in police custody. At his family's request, the high court ordered a second post-mortem examination and an inquest into his death. The inquest into the cause of his death was inconclusive despite presence of various wounds and injuries to the body.
- An eyewitness to the above inquest was subsequently arrested by the police at his home in the presence of his family who witnessed him being beaten by the police who then took the eyewitness into custody.
- On 8 November 2010, police shot and killed five ethnic Indian youths aged 17 to 24. The police described them as members of a criminal gang who fired first; however, an outcry, particularly from the Indian community questioned the police 'shoot to kill' policy. The police denied using such a policy and defended the police officers' right to defend themselves. At year's end there had been no known official inquiry into the matter
- On 22/11/10 K. Kalaiselvan (21) was believed to have been murdered by the Malay members of the police force at the Kota Tinggi, Johor, police station. But the cause of death has been reported (covered up) to be lung congestion. (see New Straits Times 17/12/2010 at page 22).
- Mahalingam (35) was similarly believed to have been killed by the police at the Nibong
- Tebal police station on 23/11/10 and to cover up the police placed the blame on five other fellow detainees and sent them away to the Simpang Renggam Prison to be detained without trial for two years and thereafter indefinitely. (see Makkal Osai 7/12/10 at page 7).
- Two brothers from Taiping were shot dead by the Malay police force in what is believed to be a police shoot to kill policy of Indian suspects (humanrightspartymalaysia.com 4/5/2010). The road where these two brothers were travelling were cordoned off and the police baclava wearing Special Action Forces simply murdered them in cold blood.
- On 6th January 2010 Isaikumar Sathieyananthan reported he was beaten by several policemen with rubber hose while a policewoman stuffed her booth into his mouth and took pictures of his private parts. He was slapped and kicked by her. He was arrested for suspected theft and released 8 days after the police realised he was not involved. (NST 7th Jan 2010). Federal CID Director promised full investigations but till date there are no response.
- 14 year old Mugilan was slapped on the spot for accidentally touching a young Malay girl in an open area swimming pool. He will now be forced to plead guilty for an offence he did not commit as he cannot afford the bail of even a mere RM 1,700 (USD 485) let alone being able to pay a lawyer. As at date he is now serving a two-month jail without even being found guilty in a Court of law. (see Free Malaysia Today 6/8/2010).
- 13 year old girl, G. Karpagam who complained to the police that her brother was stabbed was in turn locked up with adults at the Ipoh police station (see Makkal Osai 13/12/2010 at page 13).
- In the sedition trial of human right lawyer P.Uthayakumar on 30/11/10 (humanrightspartymalaysia.com 1/12/10) the Deputy Federal police criminal investigations department Director DCP Acryl Sani Abdullah Sani testified in effect that the Indians are

disproportionately 60% higher in comparison to the local in population that are killed in police lock ups and shot dead by the police.

- In another written parliamentary reply to Michael Jeyakumar Devaraj (PSM-Sungai Siput) on 28.6.2010 ,Home Minister Hishammuddin revealed that the police shot dead 82 suspects in 2008 and 88 in 2009.
- Although 5 million Malaysian Ringgit has been allocated to legal aid foundation 80 % of the defendants appear unrepresented at their trials (The Star, 30 July 2010, pageN24). The News Straits Times (24 January 2010, page 20) reported that 80% of the accused involved in theft and assault were unrepresented when charged in court.
- Segregation and exclusion of the Indian poor Diaspora from the national mainstream development of Malaysia has no doubt forced thousands in the gangsterism and a world of crime.

Previous: In the last 18 years, crime rate rose by 300%.

- The Human Resources Minister recently announced in Malaysian Parliament that 200,000 Indian youths are involved in crime. The age bracket of 15-34 year old Indian males makes up 330,000. Therefore, 60% of the youth are at a risk of being involved in crime. The acute problem, which requires multi faceted intervention to address the issue, is understood to have low priority with the government, which lacks the political will to avert the situation. The only known current policy towards the social problem is the alarming increase in police killings.
- In November 2009, the police shot and killed 11 suspects – 10 of whom were Indians (see UM paper; dated Nov 12/2009). One of those killed; a youth named Surendran (referred to later on in the report) had a sister who attempted to kill herself and her 4 children following the murder of her brother, as he was the sole breadwinner in the family. The lady subsequently lost her battle to survive from her trauma; leaving behind her four young children.
- On February 18th 2009 Police shot dead 6 suspected Indians for alleged robbery when they raided a house allegedly being used as a centre for gold smelting. Police claimed they acted in self defence. Four women were detained alive but till date the Attorney General and Police have not conducted inquest or revealed the result of their investigations nor the amount of gold allegedly confiscated.
- 95% of Malaysian victims shot dead by the police are Indians;
- 90% of the deaths in police and prison custody victims and 80% of victims who experience police harassment, unlawful arrests, frivolous and malicious prosecutions, inmates of police lock ups and prisons are ethnic Indians. This fact is significant when the Malaysian Indian population is a mere 8%.

66. As suggested by the applicant in his original application, the death of [Mr A] was reported in the Malaysian media, [details of article deleted: s.431(2)].

67. Background information about Pekida/Tiga Line can be found in the *Malaysia Today* website report entitled *October 1987 revisited*. Published on 15 January 2011, the report can be accessed from <http://malaysia-today.net/mtcolumns/37451-october-1987-revisited> (emphasis added):

PEKIDA is a 'fifth column' founded soon after May 13, 1969. Its purpose is to form a front line or line of defence in the event a second race riot erupts -- May 13 Version 2. All the Prime Ministers and Deputy Prime Ministers, past and present, have links with PEKIDA -- as do some in the army, police, UMNO leaders, civil servants, and whatnot.

It is like Ireland where Sinn Fein is the political party and the IRA is the militant wing. In Malaysia it is UMNO and PEKIDA respectively...What UMNO/PEKIDA is trying to do is

reminiscent of the 1987 UMNO-MCA sabre-rattling and the rounding up of more than 100 activists and political leaders soon after that in October 1987 -- called *Operasi Lalang*.

In 1987, UMNO had split into two that eventually resulted in the creation of UMNO Baru and Semangat 46. To distract people from UMNO's internal problems, Najib Tun Razak, the UMNO Youth Leader then, and Lee Kim Sai, the MCA Youth Leader, engaged in highly-publicised sabre-rattling, or what Malaysians would call '*wayang kulit*' (shadow play)...

To 'restore peace' and to 'guarantee the safety' of Malaysians, *Operasi Lalang* was launched and more than 100 'troublemakers' who were a 'threat to national security' were rounded up under the Internal Security Act. Many ended up in Kamunting under two years detention without trial.

Strangely enough, both Najib and Kim Sai, the main players in this *wayang kulit*, were spared. They were not detained under the Internal Security Act.

Today we are seeing the same thing happening again. Since March 2008, UMNO has been trying many times to trigger racial problems. Yesterday was just another in a series of many attempts.

Yesterday's demonstration was about a letter one MCA man wrote to the Prime Minister complaining about the 'noise' from the mosque in his neighbourhood. The Prime Minister leaked the letter and this triggered an uproar.

Back in 2008, Teresa Kok was accused of also complaining about the noise from the mosque. The mosque committee denied the incident but still Teresa was detained under the Internal Security Act.

On this latest issue the MCA man actually wrote a complaint letter to the Prime Minister and copied to all and sundry. However, even with this evidence no action was taken against him whilst in Teresa's case, even though she did no such thing -- and this was confirmed by the mosque committee -- she was still detained.

If this is not a *wayang kulit* then, as Ummi Hafilda Ali declared: I dare say I am still a virgin.

Watch out for PEKIDA or the 'tiga line' They have been trying to create problems since way back and during every by-election since March 2008. Their job is to push the country to the brink of another race riot so that the government can 'restore order' by detaining activists and opposition leaders under the Internal Security Act.

And when we say PEKIDA we of course mean UMNO.

68. On 28 February 2011 New Mandala highlighted the difficulties facing Indians in Malaysia in the article *Malaysian Indians: A sad story*. Accessed from <http://asiapacific.anu.edu.au/newmandala/author/gregore/>, it states as follows:

The HINDRAF rally to protest UMNO racism ended prematurely when police moved in to arrests its core leaders today after arresting its leaders at the state level over the past week. According to *The Malaysian Insider*:

Police detained Hindraf founder P. Uthayakumar this morning ahead of a mass protest scheduled to take place at the Kuala Lumpur City Centre (KLCC) shopping centre from 9am.

And *Malaysian Chronicle*:

Malaysian police locked down the Kuala Lumpur City Centre area ahead of a planned demonstration by Indian rights activists. Not only has the head of Human Rights party P Uthayakumar been arrested but Hindraf protesters gathering at various destinations around town have also been detained without any reasons given.

HINDRAF was protesting the usage of a book titled *Interlok* as compulsory text in Malaysian schools. They claim it demeans and stereotypes the Chinese and Indian communities in Malaysia. The book which is required reading for Malaysian students sitting for their O' Levels equivalent examinations had sentences as below (translated into English):

- Chinese sell their daughters

- Indians in Malaysia are from the pariah caste

The book is also factually incorrect when discussing the socio-cultural context of the Indians in Malaysia.

The Human Rights party (HRP), a political party headed by the most prominent HINDRAF leader, P. Uthayakumar, compiles annually the atrocities suffered by the Indian community in Malaysia. It blames the Barisan Nasional government driven by UMNO's "Malay Supremacy" ideology for the predicament that the Indian community in Malaysia is experiencing. In the words of P. Uthayakumar:

The Indians are still being marginalised...From womb to tomb they are riddled with fundamental problems. They are denied solid education, skills training, good employment opportunities and even a proper burial ground...This is our first rally against Umno racism particularly for the Indian poor. We have moved beyond Interlok to standing up against the most racist government in the world.

HINDRAF was credited as one of the major factors that led to the opposition gaining spectacular results in the 2008 General Elections.

69. On 6 December 2011, the *New Straits Times* published a report entitled *We won't surrender an inch*. Accessed from <http://www.malaysia-today.net/mcolumns/newscommentaries/45564-we-wont-surrender-an-inch>, it includes the following:

ONLY the current Barisan Nasional leadership can ensure that the position of Malays and Islam in the country remains unchanged, said Prime Minister Datuk Seri Najib Razak yesterday.

In his rousing speech to more than 12,000 Pekida (Malaysian Islamic Missionary and Welfare Organisation) members at its general assembly, Najib also pledged that his party, Umno, would not allow the Malay race to be oppressed in its own land.

"We will not surrender even an inch!" he said to cheers from the audience at the Shah Alam polytechnic here.

Najib said the government should be given more time to help rural Malaysians to catch up with those from the urban areas. This was needed to be fair to them.

He said the government would be extending its RM500 aid to families with monthly incomes below RM3,000 next month, just as it had recently extended the RM100 aid to all pupils nationwide, regardless of whether they were from public or private schools.

Najib asked the audience to question themselves on what would happen if the country's leadership were to fall into others' hands.

"We should ask ourselves what will happen to Muslims if the leadership is in tatters.

"What will happen to the religion if we lose our edge? What will happen to the sovereignty of our Malay rulers if we are no longer here to uphold their sovereignty?" he said, adding that the Malays were able to live as a dignified race because of the present leadership.

He pointed out that even without power, the opposition had made outrageous claims, such as reducing the civil service by half and declaring its wish to change the flag.

"They also tarnish the sovereignty of the rulers and Malays even when they have no power.

"Malays have never been an extreme, racist race. Since Merdeka, we have willingly shared power with non-Malays by extending our hands to them in creating a harmonious nation."

He urged members to close ranks and stop any in-fighting in establishing Pekida as an organisation that was at the forefront in championing Malay and Islamic causes.

Its president, Jamaluddin Yusof said Pekida understood the importance of defending the BN leadership in the 13th general election to ensure that opportunities for the Malay community were not sidelined.

70. On 25 January 2012, the *Malaysian Insider* published a report entitled Moderate Malaysia in danger from UMNO and Perkasa, says DAP. Accessed from <http://www.themalaysianinsider.com/malaysia/article/moderate-malaysia-in-danger-from-umno-and-perkasa-says-dap>, it includes the following:

KUALA LUMPUR, Jan 25 — Datuk Seri Najib Razak’s failure to rein in Perkasa is jeopardising Malaysia’s name internationally as a moderate country, DAP’s Tony Pua said today.

“The game that Umno and Perkasa are playing, regardless of the outcome of the next general election, is a highly dangerous one which may forever tarnish Malaysia’s reputation as a moderate country,” the opposition lawmaker said in a statement today.

“It will leave Najib in history as the prime minister who failed moderation,” he added.

The DAP publicity chief was responding to the latest published remarks from Perkasa’s secretary-general who had said that “the faith of Islam, of Muslims is under siege in Selangor”.

He noted that the right-wing movement seemed to imply that Christians were likely to become more aggressive in their proselytisation attempts in Selangor with its Mentri Besar Tan Sri Khalid Ibrahim now in charge of Islamic affairs.

The religious portfolio was previously handled by conservative Datuk Hasan Ali, until earlier this month when he was sacked from Islamic PAS for repeatedly breaching the party’s official stand.

Pua (picture) noted that while the prime minister was pushing for Malaysia to lead a global movement of moderates for peace, he was actually creating a fertile ground in breeding extremist racism and religion.

The Petaling Jaya Utara MP pointed to the prime minister’s inaction against right-wing Malay movement’s growing increasing audacity in issuing statements that provoke fear and anger between Muslims and Christians in the country.

He added the fact that such statements were carried in mainstream media owned by the ruling Barisan Nasional (BN) lynchpin, Umno, proved “Najib is either hopeless or devious in the fight against extremism”.

Pua raised again the 2010 attacks against houses of worship nationwide by extremists following a court ruling allowing the Catholic Church to publish the word “Allah”, and reminded that such “freedom provided Perkasa and its ilk... will not lead to any peaceful outcome”.

He said, “Without sincerity and political will from the top leadership, Perkasa has the tacit approval to do its worse in the light of the upcoming general elections to sow fear into the hearts of the Malay-Muslim community in order to protect the vote bank for Umno.”

71. Also on 25 January 2012 *Malaysia Today* published a report entitled *The mind is willing, the flesh is weak*. Accessed from <http://malaysia-today.net/mtcolumns/46777-the-mind-is-willing-the-flesh-is-weak>, the report is mainly a response to the preceding article, and includes the following:

.what we are seeing here, which Tony Pua did not address, is actually a fight to become the next Prime Minister. And for those (other than Anwar) who want to become Prime Minister, they will need to first weaken Najib before they bring him down, like what they did to Abdullah Ahmad Badawi.

“It will leave Najib in history as the prime minister who failed moderation,” said Tony Pua. That is true. But what Tony Pua did not state is: will Najib have failed moderation because he is not sincere about moderation or will he fail because he is being blocked from moderation?

Now, when I use the word 'sincere', please don't get me wrong. I am not using the word 'sincere' in the context that you and I understand it. I am using that word in the context of how a politician would see it.

To a politician, sincere is doing what can get him votes and allow him to retain power. Hence, Najib's 'sincerity' means doing what the voters want (in particular the non-Malay voters who he needs to win back after losing them in 2008).

Nevertheless, he is 'sincere', in the political context, about moderation. And if he can convince the voters about his sincerity, in particular the non-Malays, then Barisan Nasional can be assured of winning back many of the seats it lost in 2008 and Pakatan Rakyat can be reduced to less than 80 parliament seats and maybe just two states or so.

That would mean Najib would have performed superbly, going by the standards of the 2008 general election. And that would also mean there is no reason to oust Najib like they did Abdullah Badawi after the disaster of the 2008 general election.

To justify kicking Najib out, Barisan Nasional must lose more than 90 parliament seats and at least five states, maybe even six. Of course, Barisan Nasional will still form the federal government but Najib would have to go. Then Malaysia will see a new Prime Minister, but still one from Umno.

Does Najib really have control over Perkasa? Who controls Perkasa? Would Najib dare clamp down on Perkasa and incur the wrath of the hidden hand behind Perkasa? Is Najib ready for political suicide and suffer the fate of Abdullah Badawi?

Tony Pua is focusing on the issue of Perkasa. That is being a bit naïve. Tony Pua failed to mention Pekida. Pekida is more dangerous than Perkasa. Perkasa, which is headed by Ibrahim Ali, only screams and shouts, and once in a while holds demonstrations of 100 or so members.

Pekida, however, is more militant. Pekida is the IRA of Umno, not Perkasa. But you do not see them or hear them. There are many members of Pekida in the government, in Umno, in the military, in the police force, etc. This is the real paramilitary force of Umno. In fact, Abdullah Badawi is the leader of Pekida in Penang and Dr Mahathir the leader of Pekida in Kedah. And we have Pekida in Selangor and all over Malaysia, all headed by key Umno leaders.

72. On 29 January 2012 the following report on Pekida was published by *Malaysia Today* at <http://malaysia-today.net/archives/archives-2012/46887-pekida>

Pekida is an acronym for Pertubuhan Kebajikan dan Dakwah Islamiah Malaysia, and it has such a low profile that even Wikipedia does not have an entry on it.

Pekida did not surface from its self-imposed hermitage until the circulation of an SMS warning about a gathering of Malay extremists in Kuala Lumpur in response to the Hindraf issue in 2007. Pekida is also known as "Tiga Line" and their flag consists of three colours; red, yellow and green, mimicking the traffic lights.

Pekida is not a new organization and has been around for quite some time. It was formed immediately after the May 13 Race Riots in 1969 and its main objective was to create a frontline in the event of another race riot, and because of its intricate ties to the government, Pekida's major purpose has been somewhat diluted to include the retention of BN as the GOM and henceforth its subtle involvement as a major force to disrupt the Opposition as with the Perak Political Crisis in 2008 and Ops Lalang in 1987.

Pekida is not an isolated organization either. Since its inception forty and more years ago, its web of members include many highly placed political and military figures including prime ministers, cabinet members, government officials and high ranking police and military personnel. As such, it is a well-funded and well-organized group of paramilitary people and is seen to be the "fifth BN column", and since the Razak Administration all Menteri Besars and State UMNO Chiefs have been high-ranking members of Pekida.

Both the Social Contract and Ketuanan Melayu principles were originated from Pekida. In a 2009 interview with the Pekida president, Jamaluddin Yusof, he said, “Ketuanan Melayu is important because if we do not become tuan (masters) we become hamba (servants).” Does this mean that all Malays should become tuans and all other races exist as hambas to serve them? If such is the case, what is different between Ketuanan Melayu and Apartheid?

Pekida, like Umno, MCA and MIC are all about race segregation, quite similar to the South Africa apartheid of before. In the 2011 address to the Pekida general assembly, PM Najib pledged that his party, Umno, would not allow the Malay race to be oppressed in its own land, “We will not surrender even an inch!” As such, the race issue becomes an essential formula for BN to attempt to retain power; not social, economic or other more important factors.

For an organization that declares the safeguarding of Malay Rights as their singular priority, it henceforth does not make much sense when they gave official warning to the organizers of the Free Anwar 901 rally, an event that has nothing to do with Malay Rights. Similar harsh warnings were given to the BERSIH rally organizers. The question begets now whether Pekida is actually protecting Malays or Umno.

In the recently released movie KL Gangster, it was exposed that the film producers used quite a few of Pekida’s “secret codes” in their scenes and that the KL Gangster hierarchy was also based on the Pekida own power pyramid. Kumpulan 77, Kumpulan Merah, Semerah Padi and Pewaris are all gangs formed by Pekida members of whom has gone rogue, so says Pekida (after the release of the movie, not before) and hence their house cleaning these days.

So, is Pekida an organized group of legalized gangsters (RM13 membership fees), a Malay Rights protector (are they absconding the Sultans’ job?), an Umno crony or a non-racist (even though they only accept Malays), non-political (even though the majority of their leaders are from Umno) and non-government organization?

73. On 10 September 2012 the Tribunal published RRT Country Advice MYS40888, which includes the following information relevant to the present case (footnotes omitted):

1. Please provide information on the extent of discrimination that Tamil speaking Hindu Malaysians experience from the state and from Malays.

Demographic Context

According to the US Department of State (USDOS), ethnic Indians constitute the second largest ethnic minority in Malaysia, accounting for 7.3 per cent of the population. A 2008 report published by Minority Rights Group International estimates that approximately 80 per cent of the ethnic Indian population in Malaysia is Tamil. In addition, The Joshua Project asserts that the majority of ethnic Indian Tamils in Malaysia practice Hinduism— a trend consistent with the broader ethnic Indian population in Malaysia.

State Discrimination

Although limited information was located regarding the extent of state discrimination experienced by Tamil speaking Hindu Malaysians as a specific demographic, a number of reports were located regarding the extent of state discrimination experienced by the ethnic Indian community more broadly.

According to USDOS, while the Malaysian constitution “provides for equal protection under the law and prohibits discrimination against citizens based on race...the constitution also provides for the ‘special position’ of ethnic Malays”, or *bumiputra* In particular, the government is known to employ a number of affirmative action policies that visibly discriminate against non-ethnic Malay populations. In 2011, USDOS reported that such policies caused ethnic Indian citizens to remain among the country’s poorest groups. According to the report:

Government regulations and policy provide for extensive preferential programs designed to boost the economic position of ethnic Malays or bumiputra...Such programs limited opportunities for non-bumiputra in higher education, government employment, and ownership of businesses. Many industries were subject to race-based requirements that mandated bumiputra ownership levels,

limiting economic opportunities for non-bumiputra citizens. According to the government, these policies were necessary to ensure ethnic harmony and political stability.

Information was located describing the nature and extent of such policies as they affect higher education and government employment. According to a 2012 article published by *UCA News*, it is generally harder for ethnic Indian students to gain admission to public universities. The article cites statistics published by the *Malaysian Nanban* that claims only 2.6 per cent of seats available in public universities were offered to Indian applicants in the 2011-2012 academic year. In addition, a 2012 opinion article published by the online magazine *Non Resident Indian* states that while “educational loans provided by the government have to be returned with interest by Indian and Chinese students...Malay students have to return only 10 per cent of the loan amount”.

A 2012 article published by *Free Malaysia Today* citing Senator Ramakrishnan of the Democratic Action Party states that “the intake of Indians in the civil service has been negligible”. While bumiputra account for 67.4 per cent of the population, USDOS reported that in 2009 bumiputra constituted “more than 90 per cent of the country’s almost 1.15 million civil servants”. A 2009 Minority Rights Group International report lists the exclusive use of the Malay language by the government as a tangible barrier to ethnic Indian employment within the civil service. Other discriminatory language policies introduced by the government include the refusal to allow Tamil to be used as a language of service, as well as the refusal to use Tamil as a language of instruction in public schools and universities. Minority Rights Group International reports that education in Tamil occurs almost exclusively in private schools that remain only partially funded by the Malaysian government”. According to a 2012 article published by *The Kuala Lumpur Post*, full government financial assistance is denied to 374 of the 523 Tamil schools in Malaysia.

The Malaysian government has engaged in various anti-discrimination reforms since 2009. According to USDOS, the government released a series of economic policies throughout 2010 in an attempt to restructure “the country’s system of bumiputra ethnic preference to reduce unequal treatment of different ethnicities by the government”. In particular, “the prime minister cited the reforms as a means to better target subsidies and preferences to the poorest citizens, regardless of ethnicity”. Although the government lifted a 30 per cent bumiputra equity benchmark in 27 service sectors in 2009, “observers considered the announcement a minor adjustment to the entrenched pro-Malay economic policies”.

Social Discrimination

Limited information was located regarding the social treatment of Tamil speaking Hindu Malaysians by Malays specifically. Information was located, however, regarding the broader social treatment of ethnic Indians in Malaysia.

An article published by *The New Paper* in 2008, which cites a 2007 study undertaken by the Centre for Public Policy Studies in Malaysia, states that while “75 per cent of [ethnic] Malays feel that they have never been treated unfairly due to their race”, only 49 per cent of ethnic Indians feel the same way.

In 2010, USDOS reported that a number of Malaysian employers “exploited ethnic Indian citizens through forced labour”. More specifically, an August 2008 US diplomatic cable published by Wikileaks states that ethnic Indian Malays constitute one of the largest groups working on oil plantations across Malaysia who are exposed to debt bondage arrangements. Minority Rights Group International also reports that the ethnic Indian population lacks “the demographic weight to be able to exercise any large degree of political power”.

According to a 2008 report published by the Observer Research Foundation, Hindu members of the ethnic Indian community in Malaysia are the main recipients of discrimination and human rights violations. Information regarding freedom of religion for Hindus is provided in the response to Question 3.

2. Please provide information on the adequacy of state protection for Tamil speaking Hindu Malaysians against discrimination and threats.

No specific information was located regarding the adequacy of state protection for Tamil speaking Hindu Malaysians exposed to discrimination and threats. While no information was located to suggest that the police or judiciary engage in systematic discrimination against ethnic Indians, a number of isolated reports suspecting discrimination were identified.

- In March 2010, the Human Rights Party cited statistics from an article published by *The Star Online* claiming that ethnic Indians constitute a disproportionately high number of persons incarcerated in Malaysia. According to the article, 48 per cent of the jail population are ethnic Indian.
- In November 2009, police reportedly shot and killed five ethnic Indian youths between the ages of 17 and 24. According to USDOS, while “police described them as members of a criminal gang who fired first...an outcry, particularly in the ethnic Indian community, questioned the police’s ‘shoot-to-kill’ tactics”.
- In April 2009, police shot and killed two ethnic Indian brothers after reportedly observing them engage in suspicious activity. According to USDOS, “[t]he police reported that the brothers attempted to hit police personnel with their car and then opened fire, forcing the police to return fire in self-defence” Police claimed that the men were in constructive possession of a number of weapons. Police further claimed that the brothers were responsible for several armed robberies. Indian rights groups, however, remained critical of ‘shoot-to-kill’ tactics.
- In January 2009, an ethnic Indian man died in police detention following arrest for suspected car theft. A post mortem examination concluded that the man had been beaten to death. According to USDOS, while eleven police officers were initially under investigation, “the sole Indian among the eleven police officers was charged for the lesser crime of voluntarily causing grievous bodily hurt to extort a confession”.
- In January 2012, the judiciary acquitted the Indian police constable of the charge “on the basis that the prosecution had failed to establish a *prima facie* case against the accused”.
- In November 2007, a large public demonstration was held by a number of ethnic Indian activist groups in Kuala Lumpur. Information relating to the integrity of police operations at the rally can be found in the response to Question 3.

Information regarding the ability of the Royal Malaysian Police (RMP) to offer protection to Malaysian citizens in general, including information regarding available resources and the frequency of corruption, is located in the response to Question 5.

Complaint Mechanisms

The Human Rights Commission of Malaysia (SUHAKAM) is empowered to receive individual complaints relating to violations of human rights, including racial discrimination. The jurisdiction of the commission, however, is potentially limited by the special position of ethnic Malays in the constitution. In addition, according to a 2009 report published by the United Nations Human Rights Council, “some observers consider that because it has only limited independence, it avoids dealing with matters the Government considers too sensitive”.

While no quantitative information was located regarding the number of racial discrimination complaints received by the commission, a 2010 report that lists the most common types of complaints received by the commission does not mention cases of racial discrimination.

5. Please provide information on the functionality and ability of the Malaysian police force to protect all Malaysian citizens as well as the mechanisms in place to combat police corruption.

The Royal Malaysian Police (RMP) functions under the command of the Inspector General of Police, who reports to the Home Minister. As of 2011, the RMP employed approximately 102,000 officers, and operated 837 stations across Malaysia. While dated, a 2008 report published by the Centre for Public Policy Studies Malaysia states that the RMP provides 3.8 officers per 1,000 citizens.

According to the *Countries at the Crossroads* report published by Freedom House in 2010, “[b]y regional standards, Malaysia’s police appear to be reasonably organised”. The report notes, however, that “their effectiveness is limited by low salaries and endemic corruption” and that “[t]he police are frequently alleged to be providing protection for drug trafficking, prostitution and loan sharking” An unofficial translation of the RMPs *2009 Annual Report* indicates that police were able to successfully resolve 99,254 or 47.40 per cent of cases reported in 2009. In particular, the report states that 65.99 per cent of violent crimes and 42.90 per cent of property crimes were resolved. Information was located, however, to suggest that police sometimes “review the crime statistics to regain public confidence and come up with the right number for public consumption” and that a number of crimes go unreported.

According to USDOS, the public perceive the police force as among the country’s most corrupt government organisations. In 2009, a Home Affairs Ministry survey noted that 70 per cent of respondents had bribed police officers under duress. In addition, Malaysia’s Transparency International corruption perception index has continued to worsen since 2008. In a ranking of 183 countries, Malaysia has dropped from 47th place in 2008 to 60th place in 2011.

The Malaysian government does maintain some mechanisms to investigate and penalise corruption, predominantly via the Malaysian Integrity Commission established in April 2011. A 2012 article published by the *Borneo Post* reports that the highest number of complaints received by the commission in the first half of 2012 were against the RMP. According to an article published in June 2012 by *The Star Online*, the commission received “120 complaints of misconduct and wrongdoing against police from members of the public” between April 2011 and June 2012. Of the 120, “nine were referred to the Malaysian Anti-Corruption Commission for bribery and 15 were addressed to the disciplinary department within the police force” In addition, according to USDOS reporting on events from 2011:

Police officers are subject to trial by the criminal and civil courts. Police representatives reported that there were disciplinary actions against police officers during the year. Punishments included suspension, dismissal and demotion.

The government continued to focus police reform efforts on improving salaries, quarters, and general living conditions for police officers. However, the status of other reforms, including the formation of an independent police complaints and misconduct commission, remain pending at year’s end.

A 2012 article published by *Free Malaysia Today* asserts that the Malaysian government has ignored proposals to establish an independent police complaints and misconduct commission in the past. According to a 2010 report published by Freedom House, “police reform has been inhibited by resistance at the highest levels of the police force and, according to many, by the attorney general”.

Information was also located regarding the operation of The Malaysian People’s Volunteer Association (RELA) – a civilian paramilitary group with a membership of 2.69 million that seeks to supplement law enforcement capabilities. According to USDOS reporting on events from 2011, the government sought to increase the role of RELA in assisting police with criminal matters in light of “the impossibility of stationing police officers on every corner”. In particular, “RELA has authority to check travel documents and immigration permits of foreigners, conduct raids, detain and interrogate suspects, and conduct other security activities”. A number of non-government organisations, however, raised concerns over the operational integrity of the group including the perceived inadequate training of members. According to USDOS, while reported abuses have declined, RELA members have engaged in “extortion, theft, pilfering items from homes, and pillaging of refugee settlement” in the past. No information was located to suggest that members of RELA are subject to the same accountability practices as the RMP via the Malaysian Integrity Commission.

FINDINGS AND REASONS

Country of Nationality

74. The Tribunal accepts, based upon the applicants' entry into Australia on apparently valid Malaysian passports, that they are citizens of Malaysia. For the purposes of the Convention, the Tribunal has therefore assessed his claims against Malaysia as his country of nationality.

Assessment of Applicant's Claims and Evidence

Credibility Generally

75. The applicant claims to have been persecuted in the past, and to risk further persecution, because he came into conflict with members of Pekida/Tiga Line because he pursued criminal charges against a Malay man caught shoplifting, and, initially at least, refused to abandon them. The applicant had his vehicle torched in 2010 and was then shot in an apparent attempt on his life in 2011. In a subsequent telephone threat received by the applicant when he was when recuperating at his grandmother's provincial home, one of the gang members indicated that they knew where he was and boasted that it would be even easier to kill him there.
76. Some months after the hearing the applicant also claimed that he is a member of a political party and at risk of harm for this reason too. The Tribunal does not accept this, given that it was raised so belatedly, despite the applicant having been given the opportunity at the hearing to indicate whether there was any other reason he was fearful of being harmed in Malaysia.
77. Despite this, the Tribunal accepts the applicant's other claims, as they appeared to be credible, supported by documentary and physical evidence, corroborated at least to a basic degree by the second named applicant, and consistent with country information.
78. The applicant presented the claims in a credible manner at the Tribunal hearing, convincingly fleshing out the written claims with explanation and detail. He bears the physical evidence of surgery performed to repair the damage caused in the gunshot attack, and this is supported by documentary evidence in the form of photographic and X-ray evidence, medical reports, and media coverage of the attack. Relatively little supporting documentation was provided at the primary stage, but in addition to the aforementioned documents, the Tribunal had the benefit of a great deal of additional information tending to prove other aspects of the applicant's claims such as details of his business interests, which are relevant because they tend to show that unlike many other asylum claimants from Malaysia, the applicant's motivation in coming to Australia was not principally economic.
79. The second named applicant's evidence initially appeared to contradict that of her husband, as when, for example, she denied - in spite of the graphic evidence to the contrary - that he had ever been in hospital. However, when the questions were put to her in a different way a more corroborative account emerged. Although the account contained little detail it was apparent to the Tribunal, from the second named applicant's presentation at the hearing and the responses to some of the questions put to her, that the applicant tells her virtually nothing about his life, and that her status within the family is so marginal that she was not even told that they were coming to Australia until they arrived at the airport to board the plane. This also explains why she was not aware that her husband visited his brother in Indonesia, despite accompanying him on that trip.

80. The applicant's claims with respect to who is responsible for the harm he experienced in the past, why state protection is not available to him, and the basis upon which the claims come within the scope of the Convention also appear credible to the Tribunal, as they are supported in general terms by the country information extracted above.
81. The Tribunal therefore accepts the applicants' evidence and finds that the applicant did have his car burned, that he was shot in an attempt on his life, that he was subsequently warned over the telephone that he would be killed, and that the men responsible for these actions are criminals from Pekida/Tiga Line who continue to pose a threat to him. Bearing in mind the country information about both Pekida's integral links to the UMNO and the extent of corruption in the police force, the Tribunal also accepts that the applicant's initial complaint to the police was stalled as claimed, with pressure eventually being brought to bear on the applicant to withdraw the charges, and that despite this the criminal involved continued to target him. The Tribunal accepts that there were irregularities in the manner with which the police dealt with the applicant's complaints, such that when he later requested copies of some of those complaints he was told there was no record of them.

Well-Founded Fear of Persecution

Real Chance of Serious Harm Capable of Amounting to Persecution

82. It follows from the conclusions made in the previous section that the Tribunal finds that there is more than a remote chance that if the applicant returns to Malaysia in the reasonably foreseeable future he will once again experience serious harm capable of amounting to persecution for the purposes of s.91R at the hands of these same criminals.

State Protection

83. As this threat comes from criminals, the question arises as to whether the state is willing or able to protect the applicant from the harm feared. The applicant argues that although the authorities might be prepared to help him in some situations, they are not willing or able to provide protection against these particular criminals due to their influence. He asserts that the police themselves told him that they could not protect him after he left the hospital.
84. The country information extracted above indicates that there is widespread and institutional discrimination in Malaysia against those who are not ethnic Malays (or Bumiputras), including ethnic Indians such as the applicant. The country reports also make it clear that Pekida is closely linked to the ruling UMNO and that it enthusiastically promotes the NMO's racist political agenda, and that the Malaysian police force is afflicted by corruption and, as noted in the Freedom House report cited in RRT Country Advice MYS40888, is frequently alleged to be involved in the protection of criminal groups.
85. In light of this information, the Tribunal finds that state protection against the harm feared would not be made available to the applicant if he returned to Malaysia.

Relocation

86. The Tribunal has also considered whether it would be reasonably open to the applicant, in all the circumstances, to safely relocate within Malaysia in order to avoid the harm which he fears.
87. The Tribunal has accepted that when the applicant was recuperating at his grandmother's house he was again threatened, and that the caller knew where he was located. The Tribunal

also notes that under the MyKad system the applicant is required to have centrally stored information recorded on his MyKad and that this information is vulnerable to being corruptly accessed. The Tribunal therefore concludes that the applicant would not be able to avoid the harm feared by relocating within Malaysia because he would be at risk of being located and harmed wherever he moved to.

Conclusion on Serious Harm

88. Consequently, the Tribunal is satisfied that there is a real chance that the applicant will experience serious harm capable of amounting to persecution for the purposes of s.91R(2) in the reasonably foreseeable future if he returns to Malaysia.

Convention Nexus

89. The original incident which gave rise to the problems which eventually caused the applicant to flee to Australia was a petty crime. However, the evidence suggests, and the Tribunal is satisfied, that the sequelae reflect more than just criminal revenge, and must be viewed in light of the fact that Pekida is an ethnic organisation, with a racial agenda which reflects that of the UMNO.
90. Furthermore, the evidence concerning Pekida's political and racial platform and the racial discrimination which also permeates the Malaysian state organs including the police indicate that it is for these reasons that state protection is not available to the applicant. Consequently, the Tribunal is satisfied for the purposes of s.91R of the Act that the essential and significant reasons for the persecution feared by the applicant are Convention reasons or his race and imputed political opinion.
91. The Tribunal finds that there is a real chance that the applicant will encounter persecution for the Convention reason or reasons of his race and/or his imputed political opinion in the reasonably foreseeable future in the event that he returns to Malaysia.

Safe Third Country

92. There is no evidence before the Tribunal to suggest that the applicant has a current right to enter and reside in any safe third country, whether temporarily or permanently, for the purposes of s.36(3) of the Act, and the Tribunal finds accordingly.

CONCLUSIONS

93. The Tribunal is satisfied that the first named applicant is a person to whom Australia has protection obligations under the Refugees Convention. Therefore the first named applicant satisfies the criterion set out in s.36(2)(a) for a protection visa and will be entitled to such a visa, provided he satisfies the remaining criteria for the visa.
94. The Tribunal is not satisfied that the other applicant is a person to whom Australia has protection obligations. Therefore she does not satisfy the criterion set out in s.36(2)(a) for a protection visa. The Tribunal is, however, satisfied that the second named applicant is the wife of the first named applicant and therefore a member of the same family unit as the first named applicant for the purposes of s.36(2)(b)(i). As such, the fate of her application depends on the outcome of the first named applicant's application. As the first named applicant satisfies the criterion set out in s.36(2)(a), it follows that the other applicant will be entitled to a protection visa provided she meets the criterion in s.36(2)(b)(ii) and the remaining criteria for the visa.

DECISION

95. The Tribunal remits the matter for reconsideration with the following directions:
- (i) that the first named applicant satisfies s.36(2)(a) of the Migration Act, being a person to whom Australia has protection obligations under the Refugees Convention; and
 - (ii) that the second named applicant satisfies s.36(2)(b)(i) of the Migration Act, being a member of the same family unit as the first named applicant.