

**0803537 [2008] RRTA 316 (29 August 2008)**

**DECISION RECORD**

**RRT CASE NUMBER:** 0803537

**DIAC REFERENCE(S):** [file number]

**COUNTRY OF REFERENCE:** Kyrgyzstan

**TRIBUNAL MEMBER:** Shahyar Roushan

**DATE DECISION SIGNED:** 29 August 2008

**PLACE OF DECISION:** Sydney

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

## **STATEMENT OF DECISION AND REASONS**

### **APPLICATION FOR REVIEW**

1. This is an application for review of a decision made by a delegate of the Minister for Immigration and Citizenship to refuse to grant the applicant a Protection (Class XA) visa under s.65 of the *Migration Act 1958* (the Act).
2. The applicant, who claims to be a citizen of Kyrgyzstan, arrived in Australia on [date] and applied to the Department of Immigration and Citizenship for a Protection (Class XA) visa on [date]. The delegate decided to refuse to grant the visa on [date] and notified the applicant of the decision and her review rights by letter dated [date]
3. The delegate refused the visa application on the basis that the applicant is not a person to whom Australia has protection obligations under the Refugees Convention.
4. The applicant applied to the Tribunal on [date] for review of the delegate's decision.
5. The Tribunal finds that the delegate's decision is an RRT-reviewable decision under s.411(1)(c) of the Act. The Tribunal finds that the applicant has made a valid application for review under s.412 of the Act.

### **RELEVANT LAW**

6. Under s.65(1) a visa may be granted only if the decision maker is satisfied that the prescribed criteria for the visa have been satisfied. In general, the relevant criteria for the grant of a protection visa are those in force when the visa application was lodged although some statutory qualifications enacted since then may also be relevant.
7. Section 36(2)(a) of the Act provides that a criterion for a protection visa is that the applicant for the visa is a non-citizen in Australia to whom the Minister is satisfied Australia has protection obligations under the 1951 Convention Relating to the Status of Refugees as amended by the 1967 Protocol Relating to the Status of Refugees (together, the Refugees Convention, or the Convention).
8. Further criteria for the grant of a Protection (Class XA) visa are set out in Parts 785 and 866 of Schedule 2 to the Migration Regulations 1994.

### **Definition of 'refugee'**

9. Australia is a party to the Refugees Convention and generally speaking, has protection obligations to people who are refugees as defined in Article 1 of the Convention. Article 1A(2) relevantly defines a refugee as any person who:  
  
owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence, is unable or, owing to such fear, is unwilling to return to it.

10. The High Court has considered this definition in a number of cases, notably *Chan Yee Kin v MIEA* (1989) 169 CLR 379, *Applicant A v MIEA* (1997) 190 CLR 225, *MIEA v Guo* (1997) 191 CLR 559, *Chen Shi Hai v MIMA* (2000) 201 CLR 293, *MIMA v Haji Ibrahim* (2000) 204 CLR 1, *MIMA v Khawar* (2002) 210 CLR 1, *MIMA v Respondents S152/2003* (2004) 222 CLR 1 and *Applicant S v MIMA* (2004) 217 CLR 387.
11. Sections 91R and 91S of the Act qualify some aspects of Article 1A(2) for the purposes of the application of the Act and the regulations to a particular person.
12. There are four key elements to the Convention definition. First, an applicant must be outside his or her country.
13. Second, an applicant must fear persecution. Under s.91R(1) of the Act persecution must involve “serious harm” to the applicant (s.91R(1)(b)), and systematic and discriminatory conduct (s.91R(1)(c)). The expression “serious harm” includes, for example, a threat to life or liberty, significant physical harassment or ill-treatment, or significant economic hardship or denial of access to basic services or denial of capacity to earn a livelihood, where such hardship or denial threatens the applicant’s capacity to subsist: s.91R(2) of the Act. The High Court has explained that persecution may be directed against a person as an individual or as a member of a group. The persecution must have an official quality, in the sense that it is official, or officially tolerated or uncontrollable by the authorities of the country of nationality. However, the threat of harm need not be the product of government policy; it may be enough that the government has failed or is unable to protect the applicant from persecution.
14. Further, persecution implies an element of motivation on the part of those who persecute for the infliction of harm. People are persecuted for something perceived about them or attributed to them by their persecutors. However the motivation need not be one of enmity, malignity or other antipathy towards the victim on the part of the persecutor.
15. Third, the persecution which the applicant fears must be for one or more of the reasons enumerated in the Convention definition - race, religion, nationality, membership of a particular social group or political opinion. The phrase “for reasons of” serves to identify the motivation for the infliction of the persecution. The persecution feared need not be *solely* attributable to a Convention reason. However, persecution for multiple motivations will not satisfy the relevant test unless a Convention reason or reasons constitute at least the essential and significant motivation for the persecution feared: s.91R(1)(a) of the Act.
16. Fourth, an applicant’s fear of persecution for a Convention reason must be a “well-founded” fear. This adds an objective requirement to the requirement that an applicant must in fact hold such a fear. A person has a “well-founded fear” of persecution under the Convention if they have genuine fear founded upon a “real chance” of persecution for a Convention stipulated reason. A fear is well-founded where there is a real substantial basis for it but not if it is merely assumed or based on mere speculation. A “real chance” is one that is not remote or insubstantial or a far-fetched possibility. A person can have a well-founded fear of persecution even though the possibility of the persecution occurring is well below 50 per cent.

17. In addition, an applicant must be unable, or unwilling because of his or her fear, to avail himself or herself of the protection of his or her country or countries of nationality or, if stateless, unable, or unwilling because of his or her fear, to return to his or her country of former habitual residence.
18. Whether an applicant is a person to whom Australia has protection obligations is to be assessed upon the facts as they exist when the decision is made and requires a consideration of the matter in relation to the reasonably foreseeable future.

## **CLAIMS AND EVIDENCE**

19. The Tribunal has before it the Department's file relating to the applicant. The Tribunal also has had regard to the material referred to in the delegate's decision, and other material available to it from a range of sources.
20. The applicant appeared before the Tribunal on [date] to give evidence and present arguments. The Tribunal hearing was conducted with the assistance of an interpreter in the Russian and English languages.
21. The applicant was represented in relation to the review by her registered migration agent.

## **Application for a Protection Visa**

22. According to her application for a protection visa, the applicant is a national of Kyrgyzstan, born in [month, year]. She is of Uzbek ethnicity and speaks, reads and writes Russian and Uzbek. She is married and has [number] children aged [ages] She has completed [number] years of education and holds tertiary qualifications in [fields of study]. She describes her profession before coming to Australia as "[title]" and was the [position] of a [business] from [year] until [month, year]. She lived at the same address in [city A], Kyrgyzstan in the [number] years prior to her departure from that country.
23. The applicant's [subclass] visa to Australia was issued on [date] She departed Kyrgyzstan legally on a passport issued in her own name on [date]
24. In a statement attached to her application form, the applicant claims to have left Kyrgyzstan for fear of persecutions for the reason of her ethnicity. She also makes a number of related claims summarised below.
25. She was born and lived in Kyrgyzstan before coming Australia
26. In the Soviet era and under President Akaev's rule, non-Kyrgyz citizens were relatively protected from beatings and threats of "elimination". Following the overthrow of Akaev's government and Kyrgyzstan's proclamation of independence, the situation of Russians, Uzbeks, Uigurs and all other non-Kyrgyz ethnic minorities became "unbearable"; and ethnic minorities were blamed by ultranationalists for the country's problems
27. In the recent past an increasing number of people have moved from the countryside to the cities hoping to get a better life, but in cities they are faced with more problems because of the high rate of unemployment, lack of accommodation and the overall poverty in the country. This situation has given rise to gangs of nationalist youth who

threaten and beat members of non-Kyrgyz ethnic minorities. Consequently, the applicant was subjected to abuse and humiliation because of her “non-Kyrgyz” name and “non-Asian” appearance

28. In [month, year], the applicant and her husband were beaten and racially abused near their house by [number of] Kyrgyz youths who lived nearby. Their assailants also demanded their relocation to Uzbekistan. In [month, year], the applicant was returning home alone when she was confronted by the same youths again and beaten. After that she and members of her family did not leave their house after dark
29. In the middle of [month, year], [number of] drunk Kyrgyz youths entered [the business] at closing time and pushed, punched and racially abused her. They also threatened her that these acts would be repeated because she deserved it for being non-Kyrgyz
30. On the same day she visited the local police station and lodged a report. The police officer registered the complaint “with a smile” and said that due to the absence of any witnesses he believed that she was beaten by her husband rather than by youngsters
31. The following day the same [number of] youths returned to [the business] and told her that they wanted to teach her a lesson for complaining to the police. They pushed her to the ground and raped her. It was “clear” that they had connections in the police and enjoyed police protection. After this incident, the applicant started to look for an opportunity to leave Kyrgyzstan. She applied for an Australian visa and came to Australia to seek protection

#### *Interview with the Department*

32. On [date] the applicant attended an interview with the Department. The Tribunal has listened to the tape recording of the interview and what follows is a summary of the evidence given by the applicant at the interview.
33. The applicant said she is a citizen of Kyrgyzstan and cannot live in Uzbekistan because she is not from there, has no family or any other connection with that country and would be considered a Kyrgyz in Uzbekistan. She said she went to an Uzbek school and learned Uzbek and Russian there.
34. She was asked who helped her with her application. She said a member of the Kyrgyz community in Australia by the name of [name B] helped her. [Name B] then introduced her to her representative, [person C], who completed her application form and drafted her statement in English for her. [Name B] had consequently checked the information in the form for her.
35. The applicant was asked about her family. She said she is married with [number] children. Her children were born in [years]. Her husband and children live at their home in [city A]. She said she had lived at the same address since she got married in [year]. Her [parent] has passed away, but her [parent] and [number] siblings all live in [city A]. She said one of her [siblings] lives with their [parent]. She speaks to her husband twice a week. [Information relating to the applicant’s family deleted in accordance with section 431 as it may identify the applicant]

36. The applicant said that she began planning her trip to Australia after fights between ethnic Uzbeks and Kyrgyz turned violent. The Kyrgyz used to live in tents and lead a nomadic life. The urban population consisted of mainly Russians and Uzbeks. But now the Kyrgyz have all started to settle in the cities causing problems, including homelessness
37. The applicant was asked about [the business]. She said [the business] was called [name, translation] and it was a joint venture with some [country D] nationals. They [description of business] and she started working in this [business] in [year]. Initially she was the [position description] and then [position description]. She [description of duties] and her [country D nationals] partners [description of duties]. [The business] employed [number of] people in the [business]. The [business] was open [number] days a week, from [time to time]. [the] employees [description of duties] She said that her husband did not work in the [business] and works as [occupation].
38. The applicant was asked about what had happened in [month, year]. She said she was returning home with her husband from the market when some young Kyrgyz men started calling them “dirty”, racially abusive names. One of them hit her husband and the applicant started shouting for help. This happened in the [area] where they lived and the applicant knew the boys because they were from the area. The other Uzbeks pretended not to see anything because they did not want to attract trouble. She was asked whether this was the first time something like this happened. She said yes, before that they were verbally abused, but never beaten. She explained that Kyrgyz youth look for opportunities to abuse Uzbeks. She was asked why they were assaulted on this occasion. She said she thought they were just drunk, as she could smell it on their breath. She said her husband suffered bruises. After this, the applicant did not let her children out in the evening. She was asked if she took her husband to the hospital, she said no because there was no evidence. He just rang his work and said he was sick. She was asked why she did not take him to the hospital or call the police. She said her husband didn't have any broken bones. There was no point in going to the police because they would have asked for evidence. She said their Kyrgyz neighbours watched and smiled during the whole incident. It was put to her that if she did not approach the police for help, it cannot be said that the police did not help. She said when their friends experienced problems they tried to go to the police, but it was no use and the police even tried to get a bribe from them
39. The applicant was asked about the Kyrgyz youth who came to [the business]. She said they were different boys to the ones who had assaulted her husband and were unknown to her. She was asked why she had reported this incident to the police and not the earlier assault. She said she had wanted to go to the police when her husband was beaten, but he stopped her. However, she went to the police to report the assault perpetrated on her in [month]. On that occasion a “smiling” police officer asked her the names of her assailants and witnesses. When she told the officer that she did not know, he laughed at her and suggested that her husband might have been the perpetrator. She said the next day her attackers came into [the business] just before closing time when she was alone and doing some paperwork. After being sexually assaulted, she did not go to the hospital, because she was ashamed She said she did her best to protect herself by reporting the first assault (on her) to the police. She could not do anything else.
40. She was asked whether her relatives knew about the assault. She said they all knew. She was asked why, when she had a husband and a large family, she did not take any

precautions to ensure her own safety. She said she did not want to put any of them at risk as they have families of their own. It was put to her that if she was thinking about the welfare of her [siblings] (in other words, she anticipated further trouble), why she would not take the simple measure of locking the door of her business. She said the day before she went to the police and had hoped that they would do something about the situation. It was put to her that the police cannot guarantee protection of its citizens in any country and that it is reasonable to expect that if she had been attacked she would have taken steps to protect herself. She said there are terrible stories about young women being raped and if she called her [siblings] they would be sent to prison. They could be shot or put in prison.

41. The applicant was asked about her offshore visa application. She was shown some of the documents submitted in support of that application, including bank statements and documents from her employer. One of these documents was a business registration for her husband. She said her husband did not operate a business. He obtained the certificate because he once intended to set up a business, but did not go through with it. She was asked if she used an agent to get her visa. She said she stopped going to [the business] after being assaulted and raped. She started looking for a means to leave. She found someone who was in the tourist industry and asked for help in leaving the country. She was asked how the agent helped. She said he asked her to bring her passport and all of her documents and he sent them to the Embassy. She said she paid him US\$ [amount] and she purchased her ticket separately.
42. She was asked about the document titled "Information about Firm", which is signed by [person E, position] and [person F, position]. She said [person E] worked in the [business] and the statement was from before. It was put to her that document is dated [date] and states that [person E] was the [position] at that time. She said she had no idea. [Information deleted in accordance with section 431 as it may identify the applicant]. It was put to her that there was another document claiming the applicant was the [position] of the company. She said that the agent who applied for the visa arranged the paperwork. She was asked what she meant. She said she paid him for all the paperwork and he did it. She was asked whether the agent made up all of the documents. She said no, some of the documents were genuine. The agent took some papers from her, but other ones he made up. She was asked why he would do this, [information deleted in accordance with section 431 as it may identify the applicant]. She said he asked her to give him the other certificates (eg birth certificates) but said all the rest he would arrange. She was asked why he would go through all the trouble of falsifying documents. She said he told her not to worry about the documents. She was asked if the letterhead appearing on the relevant documents was the letterhead of the business. She said yes. She was asked how he got hold of the letterhead. She said she was not sure, but he told her not to worry. It was put to her that it did not make sense that the agent would create false documents when genuine ones existed. She said it was according to the rules of his industry. It was put to her that as an educated woman she could not have thought that the Australian Embassy in Moscow would have preferred false documents to genuine ones. She said her agent asked for her signature a few times and notified her when he had sent her documents to Moscow. She was asked if both documents were on her company's letterhead. She said yes. She was asked why they were different. She said the blue one is genuine and the other one is not. She said the agent must have copied it.

## **[Subclass] Visa Application**

43. The applicant's Departmental file contains the documents she had submitted to the Australian Embassy in Moscow in support of her [Subclass] visa application, including copies of the following two employment related documents:
- Document bearing the letterhead "[letterhead title]" The document, which is titled "document title" and dated [date], states that [business name] was established in [year] and is involved in [description of business]. The document is signed by [person E, position] and [person F, position]; and
  - Document bearing the letterhead "[letterhead title]" and dated [date] stating that the applicant worked for the company as [position] from [year] to [year] when she was promoted to the position of [position], which she currently holds. The document is signed by [person E, position] and [person F, position].

## **Application for Review**

### *The Hearing*

44. The applicant stated that she lived at the same address in [city A], Kyrgyzstan from [year] until her departure from that country on [date]. Her house was located in the suburb of [suburb name], which along with the suburb of [suburb name], is inhabited mostly by Uzbeks Her husband and [number] children continue to live in the same house. Her [parent] and [number] [siblings] live in [suburb name]
45. The applicant finished school in [year] and after initially working for [number] years she completed a degree in [field of study]. After graduating, she was employed at [business name] as [position] [information deleted in accordance with section 431 as it may identify the applicant]. She ran the [business] until the middle of [month, year] when she stopped working. [Information deleted in accordance with section 431 as it may identify the applicant] In Australia she has been working as a [occupation].
46. She obtained her current passport in [month, year] when the government invited all citizens who held old passports to substitute the documents with newly security enhanced travel documents. So she applied for a passport for all members of her family. Towards the end of [month, year] she started looking for a way to leave Kyrgyzstan and in early [month] she found an agent who was able to assist her. She obtained a [Subclass] visa to Australia on [date] after the agent made appropriate arrangements.
47. She stated that under the Soviet rule life was much easier in Kyrgyzstan. The situation had somewhat deteriorated under president Akaev's rule, but after president Bakiyev took over the situation became intolerable. She was beaten, called names, humiliated and was threatened with death because she was not Kyrgyz and did not look like one. Nomad Kyrgyz and those residing in rural areas have been moving into the cities in increasing numbers giving rise to unemployment and competition over accommodation and resources. Members of ethnic minorities have become scapegoats and were being openly told to leave the cities.
48. In [month, year] she was returning home from the market with her husband when [number] Kyrgyz men standing idly by started to racially abused them. When the



applicant and her husband gathered their pace, their path was blocked and they were verbally abused and assaulted. The applicant's husband bore the brunt of the attack, but the applicant also suffered from bruises when she tried to protect him. Their assailants lived in the area, but the applicant did not know them by name. The Tribunal asked her why she was targeted. She said she could smell alcohol on their breath and that she and her husband were not specifically targeted. Rather, these youth wanted to make trouble and it did not matter which Uzbek crossed their path first. The applicant's husband did not report the matter to the police because he thought it would be useless to do so.

49. A few days later the applicant was returning home again when she encountered one of the youths who had assaulted her earlier. He was accompanied by [number] others and when he saw her, he taunted her, slapped her in the face and pushed her to the ground. The applicant was scared, but she got up and left.
50. In [month, year] the applicant was about to close [the business] when she encountered [number] different Kyrgyz youth standing outside [the business] They started to racially abuse her and told her to go back to her country. They pushed her around and grabbed her face, but did not beat her because she begged them not to do so. She felt humiliated, but managed to break free and leave. She was asked why she was targeted on this occasion. She said she did not know and that they were just standing there. She explained that [the business] was close to [location] and near [location] and [location]. They were standing around and when she stepped out they probably saw an Uzbek woman and an easy target.
51. Following this incident, the applicant immediately went to the local police station. The officer present asked her what had happened and told her to register a complaint. She did so, but as she was writing a complaint she was nervous and trembling. The officer asked her if she had witnesses and suggested to her that perhaps it was her husband who had beaten her. She told the officer that she was telling the truth and implored him to help her. He just took her complaint and smiled. The applicant went home but did not tell her husband what had happened because she knew that he did not want her to go to the police. He was fearful that by approaching the police they could be putting their children at risk of harm.
52. The following day she went to work. She checked everything and all seemed normal. It was not a particularly busy day and staff left earlier. She was sitting in [the business] doing paperwork when the [number] youths who had assaulted her the previous day came into [the business] and started to yell abuse at her. They said that she had complained to the police and that she was going to be punished. She imagined the worst and thought that they were going to kill her. They threw her papers around, pushed her to the ground and one of the youth sexually assaulted her, while the others watched, laughed and spat on her face. Finally they kicked her and left.
53. The Tribunal asked her how her assailants had found out that she had complained to the police. She said she suspected that they had connections with the police. The Tribunal asked her, if she did not know her assailants and had been unable to provide information as to their identities to the police, how the police knew who these people were so that they could inform them about the complaint she had made. She said she had taken down the registration number of a car parked outside of [the business], which she suspected belonged to the youth and provided the number to the police. She added that the police knew everyone and what everyone was doing. She said she did not go to

the police because she was scared and could not predict what the consequences would be. She was asked if she went to hospital after the incident. She said she did not because she was afraid in case she was asked to officially report the matter. However, she told her husband and also informed her [parent] and [some of her siblings], but she was too ashamed to share what had happened to her with [some other siblings].

54. The Tribunal asked her if she encountered the youth again. She said no, she did not work and did not leave the house because she did not want any member of her family to get hurt.
55. She was asked if anything else happened to her. She said no. The Tribunal noted that she had not claimed that anything had happened to members of her extended family who continue to live in [city A]. She said the situation is dangerous and serious, but the officials tried to hide the facts. The situation is getting worse and people cannot go out of their houses. The Tribunal noted that the attacks on her appear to have been random attacks and that nothing seems to have happened to members of her extended family who continue to live in Kyrgyzstan She said she was scared because of what had happened to her. All Uzbeks are having problems, not just her. They all want to leave Kyrgyzstan, but they do not have the money to do so.
56. She was asked why she thought the police would not protect her. She said police officers are all Kyrgyz and there is a rampant corruption. It would be useless to go to the police.
57. She was asked why she could not relocate to [suburb name] or another city in Kyrgyzstan populated by Uzbeks. She said there is a shortage of housing in [suburb name]. They own a very old house and they would not be able to sell it for what it is worth. She added that they have bought a piece of land in [an area] outside of [city A] called [area name]. They had hoped to build a house and move there. She was asked why she cannot move to [area name]. She said they have not built a house yet and it would take years before they could get permission from the government to do so.
58. The Tribunal put to her that, while there is evidence to show that Uzbeks suffer from some forms of discrimination in Kyrgyzstan, such as in employment, receiving promotions and in housing, the Tribunal has not been able to find any information to suggest that they are victims of violence. She said everyone from the president to the police are Kyrgyz and no one listens to complaints from Uzbeks. She said she was different to other Uzbek women, in that she is educated and was a successful businesswoman. Most Uzbek women are housewives who sit at home and pray.
59. The Tribunal noted that her visa to Australia was issued on [date], but she did not leave Kyrgyzstan until [date] She said when she applied for a visa she had to send her national ID card along with her passport to the Australian embassy in Moscow Her ID card was lost in Moscow. She would not have been able to leave the country without her ID card so at first she tried to get the embassy to locate her card. When they failed to do so, she applied for a new one. The new card was issued on [date]. The applicant produced her ID card which indicated that it was indeed issued on that date.
60. The applicant's representative commented that on two occasions the applicant was assaulted not where she lived, but where [the business] was located. The applicant and her husband had only *intended* to move to [an area]. The situation in Kyrgyzstan

deteriorated quite rapidly after Akaev lost power and ethnic problems have intensified since then. The influence of Islam in the country has also increased. This would highlight the applicant's characteristics as an educated professional woman. It is consistent with historical events in that those who are better-off are the first to be targeted in cases of ethnic conflict.

## **FINDINGS AND REASONS**

61. The applicant's claims are based on the Convention grounds of race and membership of a particular social group. Essentially, the applicant, an ethnic Uzbek, claims to have been a victim of assault, including sexual assault, in Kyrgyzstan. She claims that she was not afforded effective state protection and fears further harm if she were to return to Kyrgyzstan.
62. The Tribunal accepts that the applicant is a national of Kyrgyzstan and of Uzbek ethnicity.
63. At the hearing before the Tribunal the applicant gave her evidence in a straightforward manner and her evidence was entirely consistent with her written claims and the independent evidence before the Tribunal. In carefully listening to the applicant's oral evidence at the hearing, the Tribunal was left with the impression that she had been subjected to mistreatment and was traumatised by her past experiences. Overall, the Tribunal found her to be a credible witness.
64. The Tribunal accepts that in [month, year] the applicant and her husband were racially abused and physically assaulted near their home by [number of] drunk Kyrgyz youth. The Tribunal accepts that although the applicant's husband bore the brunt of the attack, the applicant suffered bruises and minor injuries when she tried to protect him. The Tribunal accepts that a few days later the applicant was assaulted again when she encountered one of the youth involved in the earlier incident.
65. The Tribunal further accepts that in [month, year] the applicant was attacked by [number] different Kyrgyz youth at [the business]. The youth racially abused and physically pushed her around. Whilst the applicant did not suffer any injuries, the Tribunal accepts that the applicant found the incident humiliating and frightening. The Tribunal accepts that the applicant reported the incident to the police; and although the police registered her complaint, the matter was not treated seriously and the police questioned the veracity of her claims. The Tribunal accepts that on the following day the [number] youth returned to [the business] and sexually assaulted her. She was also kicked and verbally abused. In the Tribunal's view, these incidents amount to serious harm as defined by s.91R of the Act.
66. The two incidents in [month, year] and the first incident in [month, year] appear to have been unpremeditated acts committed against the applicant by random drunk or aggressive youth searching for easy targets to torment. Her evidence indicated that although she was aware that the youth who attacked her in [month, year] lived in her area, she did not know them and she and her husband had happened to cross paths with the youth. Similarly, the youth who attacked her at [the business] in [month] were initially unknown to her. They were lurking around the [business] when they turned their attention to her as she stepped out of [the business]. However, these factors do not necessarily suggest that the attacks were not systematic in nature.

67. The independent evidence before the Tribunal points to a great number of negative changes in ethnic relations within Kyrgyzstan since 2005. Nationalism and anti-Uzbek feelings have assumed greater prominence and the level of interethnic tensions has risen, especially among youth. Day-to-day discrimination against Uzbeks fuelled by the perception of their relative wealth has become more prevalent in southern Kyrgyzstan and ethnic Uzbeks have been further squeezed from prestigious position in the public service, the academe, and law enforcement. According to the International Helsinki Federation for Human Rights, in certain areas with a sizeable Uzbek population, such as Jalalabad, Uzbeks are afraid to go out because of groups of young Kyrgyz who go about harassing them (see Insulting graffiti in Osh, Kyrgyzstan, 19 March 2007 <http://enews.ferghana.ru/article.php?id=1880>; Nourzhanov, K. 2008, Email to RRT Research & Information 'Re: KGZ33630', 6 August; and RRT Research & Information 2008, Email to Brent Hierman: 'Request for Information KGZ33630', 13 August; Tolken' 2007, 'We Are Different, Yet Together', Country Web Log: Kyrgyzstan, NewEurasia.net website, 29 March <http://kyrgyzstan.neweurasia.net/2007/03/29/we-are-different-yet-together/>; and International Helsinki Federation for Human Rights and Memorial 2006, 'Ethnic Minorities in Kyrgyzstan: Recent Developments', International Helsinki Federation for Human Rights website, October [http://www.ihf-hr.org/viewbinary/viewdocument.php?doc\\_id=7121](http://www.ihf-hr.org/viewbinary/viewdocument.php?doc_id=7121)).
68. In the Tribunal's view, the racially hateful language that had infused the attacks on the applicant was not merely opportunistic. The applicant's race had almost certainly played a significant role in motivating or focusing the attention of the perpetrators of the attacks upon her. Having regard to the evidence before it, the Tribunal cannot rule out the possibility of the applicant being subjected to significant physical harassment as remote. As these incidents took place in a region dominated by Uzbeks, the Tribunal cannot be satisfied that relocation to another part of Kyrgyzstan would render remote the chance of the applicant encountering racially motivated harm.
69. The Tribunal finds that the essential and significant reason behind the harm feared by the applicant is the Convention ground of race. In this case, the applicant is placed in a more precarious position as a resilient educated, businesswoman who is likely to attract the attention of ethnic Kyrgyz who are moving into urban areas in greater numbers, displacing Uzbeks from their traditional professional niches (see Nourzhanov, *ibid*).
70. The second incident in [month, year], which culminated in the sexual assault, although perpetrated by the same [number] youth who had racially abused and humiliated her the day before, cannot be said to have been essentially and significantly motivated by the applicant's race. Rather, it appears that revenge for the police complaint lodged by the applicant against the youth was the essential motivating factor.
71. That said, in *MIMA v Khawar* (2000) 187 ALR 574, the High Court held that the Convention test may be satisfied by the selective and discriminatory withholding of state protection for a Convention reason from serious harm that is not Convention related. In the present case, having regard to the country information before it, the Tribunal cannot make a confident finding that the applicant would be able to access state protection in Kyrgyzstan for the reason of her Uzbek ethnicity.
72. Country information suggests that ethnic minorities in Kyrgyzstan have low confidence in the ability of the police to afford them protection (see 'Summary upon Results of the Sociological Research, Public Opinion of Residents of Osh City and Police Officers of

the Osh Police (UVD)' 2007, OSCE Centre in Bishkek website, 22 January [www.osce.org/item/23035.html](http://www.osce.org/item/23035.html)). The International Helsinki Federation for Human Rights has noted a deterioration in the representation of Uzbeks in public life in the previous year and the low numbers or non existence of ethnic Uzbeks in the law enforcement and police administration in Jalalabat, Osh and Kara-Su regions. The organisation noted that in fights between the Kyrgyz and the Uzbeks, the police always arrest only Uzbeks, no matter who is the perpetrator (International Helsinki Federation for Human Rights, *ibid*). According to Brent Hierman, a doctoral candidate at Indiana University whose subject is the trust exhibited by ethnic Uzbeks toward the Kyrgyz in Kyrgyzstan,

Neither the police nor the court system offer effective protection to any citizen of Kyrgyzstan, regardless of ethnicity. However, ethnic Uzbeks are targeted by corrupt police officers at a higher rate than are ethnic Kyrgyz. To a large degree this higher rate is symptomatic of a system-wide underrepresentation of Uzbeks in high positions; simply put, ethnic Uzbeks are less likely to have a patron or protector in a high position to shield them from the efforts of corrupt police and/or judges. This underrepresentation extends to the police force: given the number of Uzbeks living in Osh and Jalalabad cities, ethnic Uzbeks are grossly underrepresented (Hierman, *ibid*).

73. Having regard to the evidence before it, the Tribunal cannot make a confident finding that the applicant could access state protection in Kyrgyzstan in order to avoid the harm she fears. The Tribunal is satisfied that there is a real chance that she would be denied protection by Kyrgyz authorities from the harm she fears. The Tribunal is satisfied that the denial of state protection to the applicant would be for the reason of her Uzbek ethnicity.
74. For the reasons outlined above, the Tribunal is satisfied that the applicant's fear of persecution in Kyrgyzstan is well-founded.
75. There was no evidence before the Tribunal to suggest that the applicant has a right to enter and reside in any country other than Kyrgyzstan. The Tribunal finds that the applicant is not excluded from Australia's protection by s.36(3) of the Act.

## **CONCLUSIONS**

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

## **DECISION**

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

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

Sealing Officers ID: PRRTIR