

**1111292 [2012] RRTA 87 (22 February 2012)**

**DECISION RECORD**

**RRT CASE NUMBER:** 1111292

**DIAC REFERENCE(S):** CLF2011/149788

**COUNTRY OF REFERENCE:** Malaysia

**TRIBUNAL MEMBER:** Mary Urquhart

**DATE:** 22 February 2012

**PLACE OF DECISION:** Melbourne

**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 Malaysia arrived in Australia on [date deleted under s. 431(2) of the *Migration Act 1958* as this information may identify the applicant] November 2009 and applied to the Department of Immigration and Citizenship for the visa [in] September 2011. The delegate decided to refuse to grant the visa [on a further date in] September 2011 and notified the applicant of the decision.
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 [in] October 2011 for review of the delegate's decision.
5. The Tribunal finds that the delegate's decision is an RRT-reviewable decision under s.411(1)(c) of the Act. The Tribunal finds that the applicant has made a valid application for review under s.412 of the Act.

### **RELEVANT LAW**

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

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

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

10. The High Court has considered this definition in a number of cases, notably *Chan Yee Kin v MIEA* (1989) 169 CLR 379, *Applicant A v MIEA* (1997) 190 CLR 225, *MIEA v Guo* (1997) 191 CLR 559, *Chen Shi Hai v MIMA* (2000) 201 CLR 293, *MIMA v Haji Ibrahim* (2000) 204 CLR 1, *MIMA v Khawar* (2002) 210 CLR 1, *MIMA v Respondents S152/2003* (2004) 222 CLR 1, *Applicant S v MIMA* (2004) 217 CLR 387 and *Appellant S395/2002 v MIMA* (2003) 216 CLR 473.
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.
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. 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.

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.

#### **The primary application**

20. The department file reveals and the applicant confirms she was born in Jakarta Indonesia on [date deleted: s.431(2)]. She is of mixed Chinese and Indonesian ethnicity. The applicant identifies her religion as Christian. The file reveals that the applicant indicates that she was divorced in Indonesia in 1997.
21. The applicant first arrived in Australia [in] November 2009 on a TR 676 (tourist) visa that was valid until [a date in] December 2009. The applicant remained in Australia unlawfully from [a date in] December 2009 until she lodged an application for a Protection visa [in] September 2011 and was granted an associated bridging visa.
22. The department file reveals and the applicant confirms that [in] September 2011, her migration agent advised the department that the applicant did not wish to attend an interview to discuss her claims for a Protection visa.
23. The delegate records the applicant’s claims as follows:

*“The applicant claims that she ran away from her husband and his family because they want to kill me... they have threaten to take my life because I shame them. She states that her husband's family have tried to do to me in the past She further claims that the authorities are unable to protect her because they are always on the side of men.”*
24. The delegate records that based on information in the US State Department report on Indonesia released in April 2011, he accepts that Indonesian law prohibits domestic abuse and other forms of violence against women although violence against women was poorly documented. Never the less the delegate was not satisfied that the applicant, is a person to whom Australia has protection obligations and accordingly refused the application.

#### **The review**

25. The applicant appeared before the Tribunal [in] February 2012 to give evidence and present arguments. The Tribunal hearing was conducted with the assistance of an interpreter in the Malaysian and English languages.

26. The applicant was represented in relation to the review by her registered migration agent. Her agent did not attend the hearing.

*Summary of evidence at the hearing*

27. The applicant stated her full name and gave her date of birth as [date deleted: s. 431(2)]. She said she is aged [age deleted: s.431(2)]. She told the tribunal that ethnically she was of mixed race, her father being Chinese and her mother Indonesian. She said she was a Christian belonging to the Protestant Christian Church. The applicant said her mother, [details of siblings deleted: s.431(2)] resided in Indonesia. It was her evidence that her daughter is at [University] in Jakarta and that her son is at school. She said they do not see their father very often.
28. The tribunal asked the applicant her marital status she replied she was not separated. She said her husband was a Christian but is now a Muslim and this has been a big issue. She told the tribunal that she and her husband married in 1989 and that she had only been married once. The tribunal asked the applicant if it was her evidence that she was not divorced. In her response she said she was divorced and divorced in 2002 at Jakarta not in a court, only using a family divorce. The tribunal asked the applicant what she meant by this. She replied the marriage was not through the court so the divorce was not through the court. She said she and her husband married through the court and had no time to make it through the court. She said they were married at [church deleted: s. 431(2)] in Indonesia and her husband's name was [name deleted: s. 431(2)].
29. The tribunal asked her about her evidence that her husband became a Muslim and asked when this happened. The applicant replied in 2002. The tribunal asked again when it was that she and her husband divorced. The applicant replied in 2002. At this point, the tribunal asked the applicant, if anyone had helped her to prepare her application. She replied her representative [name deleted: s. 431(2)] had helped her. The tribunal asked the applicant if the contents of her application were true and correct. She said they were and there was nothing she wished to change. The tribunal referred to the application for review document, showing it to the applicant. That form indicates that the applicant's country of nationality is Malaysia. The tribunal asked the applicant if she had filled in that form. The applicant replied it was written by [name deleted: s. 431(2)]. The applicant said she was born in Jakarta and was Indonesian. The tribunal asked when she first came to Australia. She replied about December 2010. The tribunal asked if she was sure about this. She replied she came on a tourist visa for 3 months. The tribunal pointed out to the applicant that it had records that were different. Under 424 AA of the Act, the tribunal explained it had inconsistent information which may be adverse to her. The tribunal explained that the information in the movement records of the department indicated she came to Australia in November 2009 and asked if she wished to comment at this time. The applicant replied that was just a mistake. She was a little bit forgetful and there was a bit of tension in being at the hearing.
30. The tribunal asked the applicant what if anything happened to her when her visa expired. The applicant replied she was too scared to go back to Indonesia and she had to find some money for the children. She said her husband had threatened her that when she goes back she would have to become a Muslim which she does not want.
31. The tribunal asked the applicant to produce her passport which she did. It indicated it was issued [in] May 2009 in [Jakarta]. The applicant explained that this was not her first passport and an extended passport. She had obtained her first passport in 2002. She used it to go on

holiday to Korea for one week and also to travel to China for one week. The tribunal asked the applicant when it was that she travelled to China. She replied she could not remember.

32. The tribunal asked the applicant about her education in Indonesia. The applicant said she finished high school and then studied to be a high school teacher at [college deleted: s. 431(2)].
33. The tribunal asked the applicant when it was that she became an illegal non-citizen in Australia. She confirmed it was about 3 months after she arrived. The tribunal asked the applicant if she worked at that time. She replied sometimes she worked and sometimes people helped her. She said she worked on a farm. It was her evidence that she was currently being helped by some Turkish people who give her free accommodation in return for help cleaning the house. The tribunal asked the applicant if she sent money home to her children. She said if she had money she would send it, if there's no money she doesn't send it.
34. The tribunal asked the applicant, what family her former husband has in Indonesia. She replied he has a mother and [brothers]. The tribunal asked what the applicant's former husband did. She replied, she thought he had some business maybe. The tribunal asked what it was that he did for a living when they were married. She replied he was a supervisor in [an office]. The tribunal asked what work her former husband's brothers did. She said she was not sure what they were doing now because they had separated some years before. The tribunal examined the applicant's 866 C form in her application for protection to the Department of Immigration and pointed out that there were many sections that were not filled in. For example, the section that asks about qualifications. The tribunal pointed out the applicant had not filled in her teaching qualification but rather had indicated that the section was not applicable. The applicant then indicated that she did have a certificate of teaching which allowed her to teach standard primary school. She said that [name deleted: s. 431(2)], her representative had possibly not put everything in.
35. The tribunal asked the applicant what other work she did in Indonesia. The applicant replied that because teaching doesn't have good money, she also worked in an office. She said that was in 2002. At this point, the tribunal asked the applicant how she knew that everything in her application was true and correct. The applicant replied that in the process she asked her representative to write things down and she did and her representative would ask her questions and she would say yes.
36. The tribunal asked the applicant why it was that she left Indonesia. The applicant said it was because of the problems with her husband. She said these problems began when their first child was born. She said the problems with her husband were two fold. There were economic problems and there were religious differences. In relation to the economic problems, she said her husband was lazy and so she had to go out to work to find money.
37. In relation to the problems of religion, the applicant explained she was a Christian and that since her husband had become a Muslim, things had been very difficult as he wanted her to become a Muslim as well. It was her evidence that it was sometime between 1992 and 1994 that her husband became interested in Islam. She said it was in 1999 or 2000 that he truly became a Muslim and told her he was a Muslim. The tribunal asked the applicant when the last time she spoke to her husband was. She replied she has not spoken to him since being in Australia.

38. The tribunal asked the applicant if she was invited to an interview with the department. She said she was not sure. The tribunal asked the applicant again about her divorce and in particular when it was. The applicant said they were living separately in 1997 but sometimes her husband came to see her. She said he last came in 2009 and tried to force her and the children to become Muslims. That was the last time he came to the house. She said as a result, she ran away.
39. The applicant gave evidence about the treatment she received from her husband over a period of time saying the abuse included physical violence and that he hit her. This started when they were still living together and continued. The tribunal asked the applicant if she ever told anyone about the physical abuse from her husband. She replied she told her family and his family. The tribunal asked if she had ever reported it to the police. She said she did. She said the police came but in Indonesia 90% can't do anything.
40. The tribunal pointed out to the applicant that in her written application there was no mention of being forced to convert to Islam in her application and asked if she could explain this anomaly. The applicant explained that her representative hadn't put everything in. The tribunal asked the applicant if she had signed the declaration in the application. She agreed she had signed it, stating that the information was correct. The applicant told the tribunal that when the form was being filled in her representative had not asked her very many questions.
41. The tribunal asked the applicant what things her husband did to force her to convert to Islam. The applicant replied that she was very active in her Christian church and for her husband to become a Muslim this was not very good. The applicant said her husband was a strict Muslim and wants her to change her religion but she is stubborn and true to her religion and it is not possible for her to change. The applicant explained that since she was a very young child she had been close to her religion. She said she is active with the young children in imparting religion. She referred to bible class, singing the motivation for her religion and told the tribunal she is a leader of the singing of the congregation.
42. The tribunal indicated to the applicant it had some concerns that answers to questions in her application form did not match up to the evidence she was giving today, in particular, the tribunal asked if it was the case that she had worked in office administration in 1996. The applicant said that she had worked for 8 years in office administration from 1996. The tribunal pointed out that in her application, she writes her occupation as office administration and gives no indication that she is a school teacher. The applicant said this was because she had not been teaching for a long time. It was her evidence that she only taught from 1989 to 1993 or 1994. She told the tribunal, that sometime around about 1996; she started working in a [shop]. She did this for a year.
43. The applicant reiterated that she had left Indonesia because she was afraid of her husband because he had threatened her because he desires that she become a Muslim. He has threatened her with violence and has threatened to take the children. The applicant explained that the threats also came from his relatives. She said since her husband had become a Muslim, he had his whole family convert to Islam one by one including his mother, his brothers and their wives. The tribunal asked the applicant about threats from her former husband's family. The applicant said his family have threatened her and asked her to become a Muslim since their conversion. She said they came to her house and tried to force her which was very stressful. She said they threatened her and her children. She said his family want to take their children away. The applicant said that her former husband would sometimes go to the school where their son was or where their daughter was studying and threaten them. She

said he still threatens them now. It was her evidence that although her father is deceased her mother is aware of the problem. The applicant told the tribunal it is necessary for her mother to take the children to another area that her former husband doesn't know about from time to time. It was the applicant's evidence that in the past if her husband came, she would go and hide and try to avoid him at all costs. The tribunal asked the applicant if she had sought help from any women's shelters or organizations or the church. The applicant replied there were no such organizations or refuges for women as there are in Australia.

44. The applicant then gave an account of the abuse she had endured since her first child was born. She said when they married, she was a Christian, her husband was a Christian and all his family were Christians. However that has changed, and the threats and abuse to her are a result of him wanting her to become a Muslim.
45. The applicant told the tribunal she came to Australia with two friends but she does not know what has happened to them as they are not in contact and have all gone their own ways.
46. The applicant said she had sought medical help from hits and abuse from her husband. She said she had no evidence of this but she had been to the doctor who had looked at her bruises. She had medication prescribed. She said this was in about the year 2000. The tribunal asked the applicant if her former husband's family were ashamed of her. The applicant said her husband's family have tried to kill her with a knife. She said there was a big problem with them bringing a knife to her home to hurt her. The Tribunal asked if she reported this to police. The applicant said she was too afraid to go to the police but she told her mother. The applicant asked the tribunal for help, saying if she went back, there would be no one to help her. She said she lives only with her mother and the children. She has a brother but he lives far away and cannot protect her. She has sometimes had assistance from the church.
47. The tribunal had asked the applicant why she had stated that the police take the side of men and for that reason cannot protect her. The applicant indicated in Indonesia, women don't have the same respect and a wife is always scared of their husband.
48. The tribunal asked the applicant why she had delayed in lodging her application for protection given her claim to be so frightened when she fled Indonesia. She replied she couldn't find anybody to help her. The tribunal asked why she did not go to the Department of Immigration or the authorities. She replied she didn't understand what to do and she was afraid and she didn't know how to go about it.

### **Country information**

49. US Department of State 2011, 2010 Country Reports on Human Rights Practices, Indonesia, 8 April, [www.state.gov/g/drl/rls/hrrpt/2010/eap/154391.htm](http://www.state.gov/g/drl/rls/hrrpt/2010/eap/154391.htm) - Accessed Mon, 11 Apr 2011 02:11:08 GMT reports:

#### **Section 6 Discrimination, Societal Abuses, and Trafficking in Persons**

The constitution does not explicitly prohibit discrimination based on gender, race, disability, language, or social status. It provides for equal rights for all citizens, both native and naturalized. However, in practice the government sometimes failed to defend these rights.

#### **Women**



...The law prohibits domestic abuse and other forms of violence against women. However, domestic violence was a problem. Violence against women remained poorly documented by the government. Nationwide figures were unavailable. Officials from the Ministry of Women Empowerment stated that 11,469 cases of violence against women were reported from 20 provinces during the year. Most NGOs working on women and children's issues believed the real figure was far higher, noting the tendency of many victims to keep silent. Komnas Perempuan reported domestic violence was the most common form of violence against women.

Social pressure forced many women not to report spousal abuse. Through the month of October, the Women's Legal Aid Foundation received 722 complaints of spousal abuse, including rape and sexual harassment. Two types of crisis centres were available for abused women: government-run centres in hospitals and NGO centres in the community.

Nationwide the police operated "special crisis rooms" or "women's desks" where female officers received criminal reports from female and child victims of sexual assault and trafficking and where victims found temporary shelter.

...Although not explicitly mentioned, sexual harassment is against the law and is actionable under the criminal code.

...The law states that women have the same rights, obligations, and opportunities as men; however, it also states that women's participation in the development process must not conflict with their role in improving family welfare and educating the younger generation. The marriage law designates the man as the head of the family. Women in many regions of the country, particularly in Papua, complained about differential treatment based on gender.

Women faced discrimination in the workplace, both in hiring and in gaining fair compensation; however, there has been progress in that area. According to International Labour Organization (ILO) reports, women's hourly wages as a percentage of men's wages increased from 78 per cent in 2004 to 83 per cent in 2008. Women in administrative and managerial jobs reportedly earned more than their male counterparts in 2008. However, women were still underrepresented at the managerial level. According to the government, women constituted 43 per cent of all civil servants but less than 7 per cent of senior officials. Some activists said that in manufacturing, employers relegated women to lower-paying, lower-level jobs. Like their male counterparts, many female factory workers were hired as day labourers instead of as full-time permanent employees, and companies were not required to provide benefits, such as maternity leave, to day labourers. By law, if both members of a couple worked for a government agency, the couple's head-of-household allowance was given to the husband.

Jobs traditionally associated with women continued to be significantly undervalued and unregulated. For example, domestic labour receives little legal protection. Under the labour law, domestic workers are not provided with a minimum wage, health insurance, freedom of association, an eight-hour work day, a weekly day of rest, vacation time, or safe work conditions. Consequently, as reported by NGOs, abusive treatment and discriminatory behaviour continued to be rampant.

#### Section 4 Official Corruption and Government Transparency

The law provides criminal penalties for official corruption, and the government generally implemented these laws effectively. Despite the arrest and conviction of

many high-profile and high-powered officials, there was a widespread domestic and international perception that corruption was a part of daily life. Both the KPK and the AGO under the deputy attorney general for special crimes have jurisdiction over investigation and prosecution of corruption cases. During the year the KPK conducted 62 inquiries, 55 investigations, and 55 prosecutions. As a result of the KPK's prevention and prosecutorial activities, it recovered a total of approximately 170 billion rupiah (approximately \$18.8 million) in state assets. In addition, it prevented the loss of more than 500 billion rupiah (\$55.5 million) in state assets, according to the KPK's annual report. Between January and November, the AGO reported recovering 354.6 billion rupiah (\$34.9 million).

Widespread corruption throughout the legal system continued. Bribes and extortion influenced prosecution, conviction, and sentencing in civil and criminal cases. During the year the National Ombudsman Commission reported receiving 160 complaints of judicial corruption involving judges, clerks, and lawyers. Key individuals in the justice system were accused of accepting bribes and of turning a blind eye to other government offices suspected of corruption. Legal aid organizations reported cases often moved very slowly unless a bribe was paid.

As a result of an independent fact-finding team's investigation, President Yudhoyono formed a Task Force to Eradicate Judicial Mafia to investigate the network of case brokers and influence peddlers who act as intermediaries in judicial cases. As of December 9, the task force had received 3,483 complaints, with 667 cases related to land rights issues; 397 cases related to corruption, collusion, and nepotism; 262 cases of fraud and embezzlement; and 135 cases of extortion, bribery, abuse of authority, and document forgery.

Police commonly extracted bribes ranging from minor payoffs in traffic cases to large bribes in criminal investigations. Corrupt officials sometimes subjected migrants returning from abroad, particularly women, to arbitrary strip searches, theft, and extortion.

On September 1, the KPK named 25 suspects, primarily former and current members of parliament, as suspects in a bribery case related to vote buying during the 2004 selection of the Bank of Indonesia's senior deputy governor. At the end of the year, however, they had not questioned Nunun Nurbaeti, who allegedly distributed billions of rupiah in traveller's checks to buy votes to help elect Miranda Goeltom.

On March 31, Gayus Tambunan, a tax directorate official, was arrested in Singapore on corruption charges. Gayus allegedly bribed police, prosecutors, and a judge during an investigation of his case in tax court. Following his arrest, police investigated and arrested several persons in the police Criminal Investigations Division (CID). Following this arrest, Gayus allegedly bribed prison officials to obtain temporary release from prison on a number of occasions and reportedly led an active social life including international travel.

On May 10, police arrested Susno Duadji, former head of the CID, on suspicion of involvement in several corruption cases.

On August 4, the Supreme Court found As'ad Syam, regent of Muarojambi during the 1999-2004 period, guilty of corruption in the misuse of the regional government budget and sentenced him to four years' imprisonment.

Anticorruption reform appeared to have become a tool in a political power struggle with legislators and others criticizing members of President Yudhoyono's

administration over the 2008 bailout of Bank Century. At year's end neither the KPK nor other investigators had found any evidence of fraud on the part of the government in the bailout. KPK leadership continued to come under attack during the year, in particular deputy commissioners Bibit Samad Rianto and Chandra M. Hamzah.

50. US Department of State 2011, 2010 International Religious Freedom Report (July-December), 13 September, [www.state.gov/g/drl/rls/irf/2010\\_5/168356.htm](http://www.state.gov/g/drl/rls/irf/2010_5/168356.htm) - Accessed Thu, 15 Sep 2011 03:42:43 GMT

The constitution and other laws and policies protect religious freedom and, in practice, the government generally respected the religious freedom of the six officially recognized religions. However, certain laws, policies, and official actions restricted religious freedom, and in some instances the government failed to protect persons from discrimination and abuse based on religion.

There were reports of societal abuses and discrimination based on religious affiliation, belief, or practice. According to a leading nongovernmental organization (NGO), there were more than 50 attacks against members of the Ahmadiyya sect during 2010 and more than 75 attacks against Christians. Some hardline Muslim groups used violence and intimidation to close several churches, some of which were unregistered with the government. Some of the churches remained closed at the end of the reporting period. The government has prosecuted only a few perpetrators of these and past abuses...

51. Restrictions on Religious Freedom

The country has a long tradition of religious pluralism but certain laws, policies, and official actions restricted religious freedom, and the government sometimes failed to prevent discrimination by individuals against and abuse of others based on their religious belief.

## **FINDINGS AND REASONS**

52. The Tribunal does not have any information before it to suggest that the visa applicant is not an Indonesian citizen. She entered Australia on an Indonesian passport in her own name. There is no evidence that the applicant has the right to enter and reside in a safe third country under section 36(3) of the *Migration Act* 1958.
53. In her written application the applicant claims that she will be at risk of harm from her ex-husband and his family on her return to Indonesia because in the past they have threatened to kill her. At the hearing the applicant made fresh and more detailed claims that she fears harm from her former husband as he has converted to Islam and is forcing her and their children to convert to Islam.
54. At the outset the Tribunal records that in its view the interpretation services during the hearing at times bordered on the unsatisfactory. However, the applicant spoke some English and the Tribunal was in the circumstances prepared to continue the hearing. The Tribunal records the applicant's application for Protection contained scant detail. However, in her evidence to the Tribunal the applicant gave more detailed evidence in regard to her claims, her level of education, work history and circumstances. Though at times this evidence did not flow easily overall the Tribunal finds the applicant to be a credible witness. The Tribunal finds a convincing level of consistency in her oral evidence to the Tribunal in regard to her claims and circumstances.

55. The Tribunal accepts the visa applicant's claims of having suffered domestic violence at the hands of her former husband. Given her claims regarding domestic claims, and given her presentation at the hearing in which there were difficulties in terms of communication the Tribunal gave consideration to the applicant falling within the meaning of the Guidance on Vulnerable Persons issued by the Refugee Review Tribunal on 5 June 2009.
56. The Tribunal accepts the applicant is [age deleted: s.431(2)] and is a separated woman and mother of two [children]. The children and the applicant's mother reside together in Indonesia.
57. The Tribunal accepts the applicant's former husband resides in Indonesia and on the basis of the evidence before it accepts that he has converted to Islam.
58. The Tribunal notes and has considered that the applicant gave unclear and inconsistent evidence in relation to her marital status. She claimed initially to be separated. She also claimed to have divorced in 1997 and to have divorced in 2002. The applicant explained, and the Tribunal accepts the inconsistencies must be considered in light of a number of circumstances following her husband's conversion to Islam rather than because she was not being truthful
59. The Tribunal accepts the applicant and her husband were married in a Christian church in 1989. On the evidence before it the Tribunal accepts that early on the applicant and her husband had economic difficulties which led to the breakdown of the marriage. The problems arose at the time of the birth of their daughter. The Tribunal accepts that sometime between 1993 and 1995 the applicant's husband became interested in Islam, finally converting to it, in or about 1999 or 2000. During those years their marriage could be said to have failed. The Tribunal accepts the applicant's claim that her husband became abusive and threatening towards her as he wished for her to convert to Islam and that he continued in this up until the applicant departed for Australia.
60. The Tribunal accepts the applicant's evidence that her active involvement in her church embarrassed her former husband. The Tribunal accepts the applicant would not give up her Christian faith.
61. The Tribunal accepts the applicant's evidence that from 1997 on she lived separately from her husband after which he continued to come to her house and abuse her.
62. The Tribunal accepts that in 2009 the applicant "escaped" or ran away and that she has not spoken to her former husband since then.
63. The Tribunal accepts that due to the applicant's husband converting to Islam, and his desire for the applicant to also convert, the applicant suffered abuse and domestic violence. The Tribunal accepts that at least on one occasion the applicant required medical attention and on one occasion reported the abuse from her husband to police.
64. The Tribunal has considered carefully whether the domestic violence suffered by the applicant could in itself attract protection under the Refugee Convention and finds it could not. The Tribunal also notes the submission on behalf of the applicant's representative that should the application fail it would seek a referral for Ministerial Intervention under section 417 of the *Migration Act* 1958.

65. The Tribunal has considered the evidence in this application on the basis of the Convention ground of particular social group.
66. The meaning of the expression “for reasons of ... membership of a particular social group” was considered by the High Court in *Applicant A's* case and also in *Applicant S*. In *Applicant S* Gleeson CJ, Gummow and Kirby JJ gave the following summary of principles for the determination of whether a group falls within the definition of particular social group at [36]:
- First, the group must be identifiable by a characteristic or attribute common to all members of the group. Secondly, the characteristic or attribute common to all members of the group cannot be the shared fear of persecution. Thirdly, the possession of that characteristic or attribute must distinguish the group from society at large. Borrowing the language of Dawson J in *Applicant A*, a group that fulfils the first two propositions, but not the third, is merely a "social group" and not a "particular social group". ...
67. Whether a supposed group is a “particular social group” in a society will depend upon all of the evidence including relevant information regarding legal, social, cultural and religious norms in the country. However it is not sufficient that a person be a member of a particular social group and also have a well-founded fear of persecution. The persecution must be feared for reasons of the person’s membership of the particular social group.
68. Before a decision can be made that a person is a refugee by reason of his or her membership of a particular social group, the Tribunal must be satisfied that there is a relevant social group of which the applicant is a member, and the persecution feared is for reasons of membership of the group.
69. In *Applicant S*, Justice McHugh went on to explain that the collection of persons who comprise a particular social group must share a certain characteristic or element which unites them and enables them to be set apart from society at large. That is to say, not only must such persons exhibit some common element; the element must unite them, making those who share it a cognisable group within their society:
- The use of [the term “membership”] in conjunction with “particular social group” connotes persons who are defined as a distinct social group by reason of some characteristic, attribute, activity, belief, interest or goal that unites them. If the group is perceived by people in the relevant country as a particular social group, it will usually but not always be the case that they are members of such a group. Without some form of internal linking or unity of characteristics, attributes, activities, beliefs, interests or goals, however, it is unlikely that a collection of individuals will or can be perceived as being a particular social group. Those indiscriminately killed or robbed by guerrillas, for example, are not a particular social group.
70. The Tribunal accepts that the visa applicant is a member of a particular social group being “Indonesian women victims of domestic violence” or perhaps “Indonesian women who suffer from domestic violence as a result of their not converting to Islam” and that the group is set apart in society and is not distinguishable simply by a common fear of persecution and finds that “Indonesian women victims of domestic violence” or “Indonesian women who suffer from domestic violence as a result of their not converting to Islam” appropriately categorises and encompasses the particular social group to which the visa applicant belongs. The Tribunal is further satisfied that the characteristic that binds such group is not and does not constitute a shared fear of persecution. The Tribunal finds that the applicant’s membership of this particular social group is the essential and significant reason for the harm that she fears.

71. In the *Khawar* decision, the High Court held that once a claim meets the threshold of serious harm - as the Tribunal has found in this case - the relevant consideration is whether effective state protection is available for the harm feared by the applicant. As demonstrated in *Khawar*, it is not necessary that the harm is inflicted by the state; rather the emphasis is on the nexus between the harm suffered and the state's ability or inability to protect the applicant, as discussed below.
72. On the basis of country information in respect to the prevailing attitudes to women the Tribunal finds there is a real chance that is not remote, that effective state protection may selectively and discriminatorily be withheld from the applicant or not available to her. This is underscored by country information which indicates that the protection of women in Indonesia is hampered by cultural attitudes about the role of women generally and status of wives in particular, views on domestic violence and corruption in the State. The Tribunal finds that this could amount to serious harm amounting to persecution as outlined in s.91R of the *Act*
73. Based on independent country information, set out above, the Tribunal accepts the effectiveness of Indonesia's law enforcement agencies generally in protecting women in the applicant's circumstances and society as a whole is restricted by problems of police abuse and corruption.
74. The applicant ran away to Australia arriving in November 2009. The Tribunal accepts that she came with two friends but does not know what happened to them. The Tribunal notes the applicant became an illegal non-citizen in Australia three months after her arrival.
75. The Tribunal questioned the applicant about her delay in seeking protection in Australia given her claims to have fled Indonesia in fear. The applicant explained that she did not know anyone to help her and was afraid of approaching the government or immigration in Australia. The Tribunal accepts the applicant's explanation and is satisfied that the delay, although a relevant consideration in the assessment of this application, is not such as to erode the applicant's claim of holding a well-founded fear of persecution in the circumstances of this case.
76. A further consideration for the Tribunal is whether the applicant would be reasonably able to relocate to another part of Indonesia. The Tribunal finds in all the circumstances that it would not be reasonable for the applicant, at her stage in life, to re-build a life in a different part of Indonesia or that she would be safe if she did so. The Tribunal notes and takes into account that she is a single mother with a [a son] at school and a daughter who is also engaged in tertiary studies in circumstances where as stated by the visa applicant herself, her husband would be able to locate her and continue to threaten and harm her.
77. Having considered the evidence singularly and cumulatively the Tribunal finds that the visa applicant has a well-founded fear of serious harm on return to Indonesia. The Tribunal also finds that on the basis of the evidence before it the applicant's membership of a particular social group or number of social groups means that there is a real chance which is not remote that she will face persecution were she to return to Indonesia now or in the reasonably foreseeable future.

## **CONCLUSIONS**

78. 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**

79. 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.