

**1209640 [2013] RRTA 702 (15 October 2013)**

**DECISION RECORD**

**RRT CASE NUMBER:** 1209640  
**DIAC REFERENCE(S):** CLF2012/55386  
**COUNTRY OF REFERENCE:** Kenya  
**TRIBUNAL MEMBER:** Giles Short  
**DATE:** 15 October 2013  
**PLACE OF DECISION:** Sydney  
**DECISION:** The Tribunal affirms the decision not to grant the applicants Protection (Class XA) visas.

Any references appearing in square brackets indicate that information has been omitted from this decision pursuant to section 431(2) of the *Migration Act 1958* and replaced with generic information which does not allow the identification of an applicant, or their relative or other dependant.

## STATEMENT OF DECISION AND REASONS

### INTRODUCTION

1. [Applicant 1, Applicant 2 and Applicant 3], are all citizens of Kenya. [Applicant 1] claims that he left Kenya because his life was being threatened by the Somalia-based terrorist organisation al-Shabaab which tried to recruit him in Mombasa. He claims that he fears that al-Shabaab will try to kill him if he returns to Kenya and he has also said that he fears that he may be killed by the police because they may think that he is a member of al-Shabaab. [Applicant 2 and Applicant 3] claim to be members of his family unit and have combined their applications with his application as permitted by the Regulations.
2. Their applications for protection visas were refused by a delegate of the Minister for Immigration and they have applied to this Tribunal for review of that decision. A summary of the relevant law is set out at Attachment A. The issues in this review are whether [Applicant 1] has a well-founded fear of being persecuted for one or more of the five reasons set out in the Refugees Convention in Kenya and, if not, whether there are substantial grounds for believing that, as a necessary and foreseeable consequence of his being removed from Australia to Kenya, there is a real risk that he will suffer significant harm.

### CONSIDERATION OF CLAIMS AND EVIDENCE

#### **Does [Applicant 1] have a well-founded fear of being persecuted for one or more of the five reasons set out in the Refugees Convention in Kenya?**

*[Applicant 1] claims*

3. [Applicant 1] was born in Nairobi and he has said that he attended school there between [years]. He has said, however, that he would go to Mombasa during school holidays and that from 2007 until [2010] he lived in Mombasa. At the hearing before me he produced a copy of his Kenyan identity card - giving his name as [name] which he said he produced to show that he had been living in Mombasa. With regard to the difference in his name [Applicant 1] said that he had not been able to obtain his identity card until he had gone to Mombasa because his father had been born in Mombasa. He said that he had had to use his grandfather's birth certificate and his father's birth certificate to get his identity card, hence the [name] which he said was his father's surname. I put to him that he must have produced identification documents to get his passport. [Applicant 1] said that his passport had been issued in Nairobi and he had produced his birth certificate which gave his name as [Applicant 1].
4. [Applicant 1] has said that during the three years after he finished school he worked in casual jobs in Kenya. He has said that he was planning to go university in Kenya but that he was not in a rush to go to university and that he also needed money. He has said that he also failed some subjects at high school so he had to re-sit some of his examinations before he could go to university. He has said that he and his wife met in high school and that she was pregnant with their older son when she first came to Australia to study in [year deleted]. He has said that their older son was born in Australia in [year] and that his wife brought him back to Kenya with her when she visited there in December 2008 so that she could continue her studies in Australia. He has said that he decided to take care of their son because his wife's family (who would otherwise have taken care of their son) are [a different religion] and he did not want their son to be brought up in [that faith]. He has said that he and his wife

married in Mombasa in December 2009 when she again returned to Kenya to visit and he then applied to come to Australia as a student. Their older son remains in Kenya while their younger son, who is included in the application, was born in Australia in [year deleted].

5. [Applicant 1] has said that [in] January 2010, he and his cousin, [Mr A], were coming from playing soccer when they were approached by three men who appeared to be of Somali descent. He has said that because his father was [Ethnicity 4] he looks like a Somali and that these men started talking to him in the Somali language. He has said that he told them that he was not Somali and that he did not understand the language. He has said that one of the men understood Swahili and started to engage them in a conversation about Islam. He has said that the men asked if he and his cousin had jobs. He has said that the men told him and his cousin that if they did not have any work they had some work for them and that what they were doing was in the cause of God. He has said that his cousin started arguing with them and that in the course of the argument they revealed that they belonged to al-Shabaab. He has said that the men told him and his cousin that they would give them time but that they should have made up their minds by the time they next met. He has said that they also told him and his cousin that they knew their names and where they lived.
6. [Applicant 1] has said that he and his cousin consulted the imam at their mosque and the imam explained that within Mombasa there were imams and sheikhs who were recruiting people to fight in Somalia and even within Mombasa. He has said that the imam advised them to go home and to stay indoors for some days. He has said that [the following week in] January 2010, he went out to watch a local soccer match and he then went to buy some groceries for his mother. He has said that on his way home he was grabbed by two men and pushed into an alley. He has said that he started struggling and he was punched and kicked. He has said that when he got up he recognised one of the men who had approached him and his cousin eight days previously. He has said that this man told him that he had been escaping them and that they had told him that they would catch up with him one day after they had given him time to think. [Applicant 1] has said that he told them that what they were doing was wrong in Islam. He has said that after this they got angry and they pushed him against a wall. He has said that the other guy was telling this man to finish him off and that this man put a knife close to his throat and cut him a bit. He has said that some passers-by intervened and the men from al-Shabaab ran away but he has said that they thought that they had left him for dead.
7. [Applicant 1] has said that he only suffered a slight cut and he was taken to a clinic where this wound was bandaged. He has said that he reported the attack on him to the police but that they did not accept that al-Shabaab had been responsible. He has said that they believed it had been a mugging. He has said that he told the imam what had happened and that on the advice of the imam he caught a bus to Nairobi the same night. He has said that his wife was staying with her family in Nairobi at the time and they came to Australia together [in] February 2010. [Applicant 1] has said that a month after he arrived in Australia he received an email threatening to harm him and his family because he had refused to join al-Shabaab and had told the police of their objectives. He has said that six months later he received a second email stating that they knew his whereabouts in Australia and would do all they could to reach him.
8. [Applicant 1] has claimed that a letter was also put under the door of his mother's house in Mombasa threatening that if they caught him they would finish him and that his mother also receiving threatening telephone calls regarding him until she changed her telephone number. He has said that his mother and his [sisters] moved to Nairobi in around March 2010 and that

his mother has had no further problems since then. He has said that he and his wife were planning to return to Kenya for a holiday in December 2011 when his mother told him that his cousin, [Mr A], who had returned to Kenya in November 2011, had been abducted and had been found dead near [a Suburb] in Mombasa. [Applicant 1] has said that after this his mother told him that there was no way he could come back home and that he should try to stay in Australia. [In] May 2012 he forwarded to the Department copies of a death certificate saying that [Mr A] had died [in] December 2011 with the cause of death being given as manslaughter and a letter on the letterhead of 'The Kenya Police' saying that he himself had been receiving death threats from al-Shabaab, that the police had been receiving similar reports from other individuals, some of whom had been tortured or who were believed to be missing, and that they were unable to protect him. At the hearing before me he said that his mother had told the police that he was seeking protection and had asked the police to provide her with this document.

9. [Applicant 1] has said that he fears that al-Shabaab will try to kill him if he returns to Kenya and that he will also place his family in danger. He has said that al-Shabaab believes that if you do not join them you are not a true Muslim and you deserve to die. At the hearing before me he said that he was afraid that, even if al-Shabaab did not kill him directly, they could inform the police that he was related to the al-Shabaab group. He said that he would be treated as if he was a member of al-Shabaab so he would be in trouble with the police. He said that there had been a number of incidents in which al-Shabaab had killed police officers so that when the police arrested someone on suspicion of belonging to al-Shabaab they did not follow due process to find out if the person was involved or not: the person would go missing and within two days they would be found somewhere dead.
10. I indicated to [Applicant 1] that it was not clear to me why he feared that the police would think that he was involved in al-Shabaab. [Applicant 1] said that if he went back to Kenya al-Shabaab could inform the police if he refused to join them. He said that he looked like a Somali person so he could still be in trouble and they could do a lot of things which could put his life in danger. He said that this did not mean that he would be arrested by the police straight away if he went back to Kenya but if he did not join al-Shabaab they could go to the police and report that he was part of the al-Shabaab group. He said that if he went back to Kenya and decided to surrender himself to the police station and to explain what had happened to him they could still think that he was a member of al-Shabaab who had just betrayed the group.
11. [Applicant 1] produced a printout of a list of terrorist attacks in Kenya in 2012-2013 from *Wikipedia*, a press report in relation to the execution of a hostage by al-Shabaab and a copy of the Human Rights Watch *World Report 2013* in relation to Kenya which he said he relied on to show that the police in Kenya were involved in extrajudicial killings. I put to him that he did not claim that he had ever been involved in al-Shabaab. He repeated that if he was to go home and this group of persons who were looking for him were not able to get him they might go to the authorities and report that he was part of al-Shabaab. He said that he was afraid of the police and he could not go to the police to seek protection from them. I put to him that he had gone to the police to report what had happened and he had produced the letter which he had said his mother had obtained from the police. [Applicant 1] said that he was still in Australia and he had not gone back to Kenya. I put to him that when he had reported that al-Shabaab had tried to kill him he had been in Kenya. [Applicant 1] said that the police had not believed that it had been al-Shabaab: they had said that it had been a mugging.

*Discussion of the claims*

12. When [Applicant 1] was interviewed by the primary decision-maker in relation to his application [in] May 2012 she put to him that the available information did not suggest that al-Shabaab was forcibly recruiting anyone. She noted that it was appealing to people who were very poor but there was nothing to suggest that it chased people across the country to recruit them nor that it would follow their movements overseas. [Applicant 1] said that he did not know if someone had set him and his cousin up but they had just approached them and had told them that they wanted them to join. He said that maybe it was because they had exposed the fact that they belonged to al-Shabaab and that they provided military training. He suggested that they had maybe tracked his movements overseas because he had gone to the police. He confirmed that he claimed that nothing had happened because he had gone to the police but he repeated that they had known that he had gone to the police.
13. [Applicant 1] produced a media report which referred to the police investigating at least six imams in Garissa in connection with encouraging Kenyan youths to join al-Shabaab. The report also quotes a Garissa resident as saying that al-Shabaab had attempted to recruit him through a religious leader based in Nairobi and that he had been threatened by al-Shabaab for reporting the religious leader to the Anti-Terror Police [Unit]. The primary decision-maker put to [Applicant 1] that he had not been in a position to provide the police with any information about al-Shabaab so he had not presented any threat to al-Shabaab. [Applicant 1] said that maybe the person who had approached him had been their leader. He said that he could identify this person. He also produced a media report saying that Kenyan men trained by al-Shabaab had thrown grenades in attacks and another media report claiming that two Muslim activists had been abducted by suspected police officers and later found dead in April 2012. He said that he could not trust the police.
14. At the hearing before me I put to [Applicant 1] that it was very difficult to accept that al-Shabaab would have approached him on the street as he claimed and that they would have attempted to force him to join their organisation by threatening to kill him. I put to him that the independent evidence showed that, as he had said that the imam had told him, al-Shabaab was recruiting people through imams or religious leaders. I put to him that there was nothing to suggest that they forced people like him to join them because they did not need to do this. They recruited people through imams and religious leaders and they recruited people by offering them money.<sup>1</sup> [Applicant 1] said that there was stuff which was happening in Kenya which was not covered in the media. I put to him that this was not just what was in the media: there was a very detailed report from a United Nations mission which had investigated these activities. [Applicant 1] said that it was true that al-Shabaab recruited people by force. He reiterated that he and his cousin had been approached on the street. I put to him that it was very difficult to accept that if they had really wanted to recruit him they would have approached him once and then eight days later they would have tried to kill him. [Applicant 1] said that it had not been eight days later that they had tried to kill him.

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<sup>1</sup> See United Nations Security Council, *Report of the Monitoring Group on Somalia and Eritrea pursuant to Security Council resolution 1916 (2010)*, 18 July 2011, S/2011/433, page 24 and Annex 2.2; Maureen Mudi, 'Mombasa protest against Shabaab', *The Star*, 9 April 2011, downloaded from <http://www.the-star.co.ke/local/coast/20400-mombasa-protest-against-shabaab>, accessed 7 May 2012; John-Allan Namu and Harith Salim, 'How al Shabaab recruitment agents lure Kenyans to Somalia', *Daily Nation*, 4 June 2011, downloaded from <http://www.nation.co.ke/News/How+al+Shabaab+recruitment+agents+lure+Kenyans/-/1056/1175046/-/dm4n9g/-/index.html-That>, accessed 4 May 2012; Bosire Boniface, 'Police investigate al-Shabaab recruitment in Kenya', *Sabahi Online*, 1 March 2012, produced by [Applicant 1] to the Department at folio 33 of the Department's file CLF2012/55386).

15. I put to [Applicant 1] that this was what he claimed. [Applicant 1] said that when they had caught up with him they had told him that they had already given him time. He said that they had not started beating him up for no reason. I put to him that he said that they had grabbed him off the street and had kicked and punched him. [Applicant 1] said that as they had grabbed him he had thought that it was a mugging and he had had to resist. He said that as he had been resisting he had been kicked and punched and then after he had got up he had realised that it had been one of them. He said that they had asked him if he had made his decision yet and he had told them that whatever they were doing was not right. He said that they had not been happy about that. He said that maybe he and his cousin had been targeted or set up.
16. I put to [Applicant 1] that it was very difficult to accept that he had been targeted and I put to him that it was also very difficult to accept that the letter he had produced from the police in Kenya was genuine. I asked [Applicant 1] if there was anything further he wished to say before I closed the hearing. He repeated that not everything that was happening in Kenya was reported in the media. He said that most of the stuff that happened was covered up. He said that it had been shown that forced recruitment happened in other parts but not specifically in Kenya. I put to him that he had produced newspaper reports to the Department which suggested that these matters were covered in the media. [Applicant 1] said that there were people who were being trained and there were people being forcibly recruited. He said that he had a document which he undertook to produce which showed that people were being forcibly recruited. After the hearing [Applicant 1] produced to the Tribunal a copy of a research response prepared for the Tribunal which refers to al-Shabaab carrying out amputations of limbs as punishments for robbery in the areas under its control in Somalia and suggests (on the basis of a single report of claims made by an alleged thief who had been punished in this way) that this is in reprisal for refusing to join the organisation. The response also quotes a media report referring to people willingly joining al-Shabaab in Somalia because they have been offered money.

### *Conclusions*

17. I accept that, as referred to in the research response produced by [Applicant 1], and as reported by Human Rights Watch, there are credible accounts of al-Shabaab forcibly recruiting men and boys in Somalia and, to a lesser extent, inside Somali refugee communities in Kenya.<sup>2</sup> However, as I put to [Applicant 1] in the course of the hearing before me, there is nothing in the independent evidence available to me to suggest that al-Shabaab is or has been forcing people like him in Kenya to join them. As I put to him, the independent evidence indicates that al-Shabaab has been recruiting Kenyan nationals to fight in Somalia through imams and religious leaders and by offering them money.<sup>3</sup> [Applicant 1] said that there was stuff which was happening in Kenya which was not covered in the media but, as I put to him, the evidence available to me does not just include media reports: it

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<sup>2</sup> Human Rights Watch, *World Report 2010* in relation to Kenya.

<sup>3</sup> See United Nations Security Council, *Report of the Monitoring Group on Somalia and Eritrea pursuant to Security Council resolution 1916 (2010)*, 18 July 2011, S/2011/433, page 24 and Annex 2.2; Maureen Mudi, 'Mombasa protest against Shabaab', *The Star*, 9 April 2011, downloaded from <http://www.the-star.co.ke/local/coast/20400-mombasa-protest-against-shabaab>, accessed 7 May 2012; John-Allan Namu and Harith Salim, 'How al Shabaab recruitment agents lure Kenyans to Somalia', *Daily Nation*, 4 June 2011, downloaded from <http://www.nation.co.ke/News/How+al+Shabaab+recruitment+agents+lure+Kenyans/-/1056/1175046/-/dm4n9g/-/index.html-That>, accessed 4 May 2012; Bosire Boniface, 'Police investigate al-Shabaab recruitment in Kenya', *Sabahi Online*, 1 March 2012, produced by [Applicant 1] to the Department at folio 33 of the Department's file CLF2012/55386).

includes a very detailed report from a United Nations mission which investigated these activities. The media report which [Applicant 1] himself produced to the Department likewise refers to the role of imams and preachers recruiting youths to al-Shabaab.<sup>4</sup>

18. [Applicant 1] has said that maybe he and his cousin had been targeted or set up but his own evidence with regard to what he claims happened does not suggest that he and his cousin were targeted as potential recruits. He has suggested that the approach was made in a chance encounter because he looks like a Somali. Moreover, as I put to him, I do not accept that if al-Shabaab had really wanted to recruit him they would have approached him only once and then tried to kill him eight days later. [Applicant 1] disputed this but his evidence is that in this second encounter they grabbed him off the street and he resisted because he thought it was a mugging. He has said that they only tried to kill him after he told them that what they were doing was wrong in Islam but I do not accept that if these people had actually been trying to recruit him they would have grabbed him off the street in this way to begin with.
19. As referred to above, in corroboration of his evidence [Applicant 1] has produced a death certificate in relation to his cousin and a letter on the letterhead of 'The Kenya Police' saying that he has been receiving numerous death threats from al-Shabaab, that the police have been receiving similar reports from other individuals, some of whom have been tortured or who are believed to be missing, and that they are unable to protect him. At the hearing before me [Applicant 1] said that his mother had told the police that he was seeking protection and had asked the police to provide her with this document. Given that [Applicant 1] has said that when he reported the attack on him to the police they did not believe that al-Shabaab had been responsible, saying that it had been a mugging, it is difficult to accept that they would then have written this letter two years later confirming that he was receiving death threats from al-Shabaab. As I put to [Applicant 1], I do not accept that this letter is genuine.
20. For the reasons given above I do not accept that [Applicant 1] was approached by men from al-Shabaab who tried to recruit him in January 2010, nor that they subsequently attacked him and left him for dead, nor that since then they have sent him threatening email messages, nor that they have also put a threatening letter under his mother's door nor that they have made threatening telephone calls to his mother. I do not accept that there is a real chance that, if [Applicant 1] returns to Kenya now or in the reasonably foreseeable future, he will be killed by al-Shabaab nor that they will attempt to force him to join their organisation. I likewise do not accept that there is a real chance that al-Shabaab will tell the police in Kenya that he is part of their organisation nor that there is a real chance that he will be suspected or perceived of being a part of al-Shabaab because he claims that he looks like a Somali as a result of having an [Ethnicity 4] father. I accept that [Applicant 1]'s cousin [Mr A] has unfortunately been killed but not that he was killed by al-Shabaab because he too refused to join the organisation.
21. I do not accept that there is a real chance that [Applicant 1] will be persecuted for reasons of any religious belief or political opinion imputed to him as a result of his refusal to join al-Shabaab or his appearance if he returns to Kenya. In his original application [Applicant 1] also expressed fears for the safety of his family if he returned to Kenya but for the reasons given above I do not accept that there is a real chance that they will be threatened, harmed or otherwise persecuted for reasons of their membership of the particular social group comprising his family or for reasons of any religious belief or political opinion imputed to

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<sup>4</sup> Bosire Boniface, 'Police investigate al-Shabaab recruitment in Kenya', *Sabahi Online*, 1 March 2012, produced by [Applicant 1] to the Department at folio 33 of the Department's file CLF2012/55386.

them as a result of their relationship with him. For the reasons given above I do not accept that either [Applicant 1] or his wife or their younger son has a well-founded fear of being persecuted for one or more of the five Convention reasons if they return to Kenya now or in the reasonably foreseeable future.

**Are there are substantial grounds for believing that, as a necessary and foreseeable consequence of [Applicant 1] being removed from Australia to Kenya, there is a real risk that he will suffer significant harm?**

22. Having regard to my findings of fact above I do not accept that there are substantial grounds for believing that, as a necessary and foreseeable consequence of [Applicant 1] being removed from Australia to Kenya, there is a real risk that he will be killed by al-Shabaab nor that they will attempt to force him to join their organisation. I likewise do not accept that there is a real risk that al-Shabaab will tell the police in Kenya that he is part of their organisation nor that there is a real risk that he will be suspected or perceived of being a part of al-Shabaab because he claims that he looks like a Somali as a result of having an [Ethnicity 4] father. I do not accept that there are substantial grounds for believing that, as a necessary and foreseeable consequence of [Applicant 1]'s wife and younger son being removed from Australia to Kenya, there is a real risk that they will suffer significant harm as a result of their relationship with him.
23. Having regard to my findings of fact above, I do not accept that there are substantial grounds for believing that, as a necessary and foreseeable consequence of [Applicant 1] and his wife and their younger son being removed from Australia to Kenya, there is a real risk that they will be arbitrarily deprived of their lives, that the death penalty will be carried out on them, that they will be subjected to torture, that they will be subjected to cruel or inhuman treatment or punishment or that they will be subjected to degrading treatment or punishment as defined. Accordingly I do not accept that there are substantial grounds for believing that, as a necessary and foreseeable consequence of [Applicant 1] and his wife and their younger son being removed from Australia to Kenya, there is a real risk that they will suffer significant harm as defined in subsection 36(2A) of the Act.

## **CONCLUSIONS**

24. For the reasons given above, I am not satisfied on the evidence before me that either [Applicant 1] or his wife or their younger son is a person in respect of whom Australia has protection obligations. Therefore neither [Applicant 1] nor his wife nor their younger son satisfies the criterion set out in paragraph 36(2)(a) or (aa) of the Act for a protection visa. It follows that they are also unable to satisfy the criterion set out in paragraph 36(2)(b) or (c) of the Act. As they do not satisfy the criteria for a protection visa, they cannot be granted the visa.

## **DECISION**

25. The Tribunal affirms the decision not to grant the applicants Protection (Class XA) visas.

Giles Short  
Senior Member



## ATTACHMENT A - RELEVANT LAW

26. In accordance with section 65 of the *Migration Act 1958* (the Act), the Minister may only grant a visa if the Minister is satisfied that the criteria prescribed for that visa by the Act and the Migration Regulations 1994 (the Regulations) have been satisfied. The criteria for the grant of a Protection (Class XA) visa are set out in section 36 of the Act and Part 866 of Schedule 2 to the Regulations. Subsection 36(2) of the Act provides that:

‘(2) A criterion for a protection visa is that the applicant for the visa is:

- (a) a non-citizen in Australia in respect of whom the Minister is satisfied Australia has protection obligations under the Refugees Convention as amended by the Refugees Protocol; or
- (aa) a non citizen in Australia (other than a non citizen mentioned in paragraph (a)) in respect of whom the Minister is satisfied Australia has protection obligations because the Minister has substantial grounds for believing that, as a necessary and foreseeable consequence of the non citizen being removed from Australia to a receiving country, there is a real risk that the non citizen will suffer significant harm; or
- (b) a non-citizen in Australia who is a member of the same family unit as a non-citizen who:
  - (i) is mentioned in paragraph (a); and
  - (ii) holds a protection visa; or
- (c) a non citizen in Australia who is a member of the same family unit as a non citizen who:
  - (i) is mentioned in paragraph (aa); and
  - (ii) holds a protection visa.’

### Refugee criterion

27. Subsection 5(1) of the Act defines the ‘Refugees Convention’ for the purposes of the Act as ‘the Convention relating to the Status of Refugees done at Geneva on 28 July 1951’ and the ‘Refugees Protocol’ as ‘the Protocol relating to the Status of Refugees done at New York on 31 January 1967’. Australia is a party to the Convention and the Protocol and therefore generally speaking has protection obligations to persons defined as refugees for the purposes of those international instruments.

28. Article 1A(2) of the Convention as amended by the Protocol relevantly defines a ‘refugee’ as a 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.’

29. The time at which this definition must be satisfied is the date of the decision on the application: *Minister for Immigration and Ethnic Affairs v Singh* (1997) 72 FCR 288.
30. The definition contains four key elements. First, the applicant must be outside his or her country of nationality. Secondly, the applicant must fear ‘persecution’. Subsection 91R(1) of the Act states that, in order to come within the definition in Article 1A(2), the persecution which a person fears must involve ‘serious harm’ to the person and ‘systematic and discriminatory conduct’. Subsection 91R(2) states that ‘serious harm’ includes a reference to any of the following:
- (a) a threat to the person’s life or liberty;
  - (b) significant physical harassment of the person;
  - (c) significant physical ill-treatment of the person;
  - (d) significant economic hardship that threatens the person’s capacity to subsist;
  - (e) denial of access to basic services, where the denial threatens the person’s capacity to subsist;
  - (f) denial of capacity to earn a livelihood of any kind, where the denial threatens the person’s capacity to subsist.
31. In requiring that ‘persecution’ must involve ‘systematic and discriminatory conduct’ subsection 91R(1) reflects observations made by the Australian courts to the effect that the notion of persecution involves selective harassment of a person as an individual or as a member of a group subjected to such harassment (*Chan Yee Kin v Minister for Immigration and Ethnic Affairs* (1989) 169 CLR 379 per Mason CJ at 388, McHugh J at 429). Justice McHugh went on to observe in *Chan*, at 430, that it was not a necessary element of the concept of ‘persecution’ that an individual be the victim of a series of acts:
- ‘A single act of oppression may suffice. As long as the person is threatened with harm and that harm can be seen as part of a course of systematic conduct directed for a Convention reason against that person as an individual or as a member of a class, he or she is “being persecuted” for the purposes of the Convention.’
32. ‘Systematic conduct’ is used in this context not in the sense of methodical or organised conduct but rather in the sense of conduct that is not random but deliberate, premeditated or intentional, such that it can be described as selective harassment which discriminates against the person concerned for a Convention reason: see *Minister for Immigration and Multicultural Affairs v Haji Ibrahim* (2000) 204 CLR 1 at [89] - [100] per McHugh J (dissenting on other grounds). The Australian courts have also observed that, in order to constitute ‘persecution’ for the purposes of the Convention, the threat of harm to a person:
- ‘need not be the product of any policy of the government of the person’s country of nationality. It may be enough, depending on the circumstances, that the government has failed or is unable to protect the person in question from persecution’ (per McHugh J in *Chan* at 430; see also *Applicant A v Minister for Immigration and Ethnic Affairs* (1997) 190 CLR 225 per Brennan CJ at 233, McHugh J at 258)
33. Thirdly, the applicant must fear persecution ‘for reasons of race, religion, nationality, membership of a particular social group or political opinion’. Subsection 91R(1) of the Act provides that Article 1A(2) does not apply in relation to persecution for one or more of the reasons mentioned in that Article unless ‘that reason is the essential and significant reason, or those reasons are the essential and significant reasons, for the persecution’. It should be remembered, however, that, as the Australian courts have observed, persons may be

persecuted for attributes they are perceived to have or opinions or beliefs they are perceived to hold, irrespective of whether they actually possess those attributes or hold those opinions or beliefs: see *Chan* per Mason CJ at 390, Gaudron J at 416, McHugh J at 433; *Minister for Immigration and Ethnic Affairs v Guo* (1997) 191 CLR 559 at 570-571 per Brennan CJ, Dawson, Toohey, Gaudron, McHugh and Gummow JJ.

34. Fourthly, the applicant must have a ‘well-founded’ fear of persecution for one of the Convention reasons. Dawson J said in *Chan* at 396 that this element contains both a subjective and an objective requirement:
- ‘There must be a state of mind - fear of being persecuted - and a basis - well-founded - for that fear. Whilst there must be fear of being persecuted, it must not all be in the mind; there must be a sufficient foundation for that fear.’
35. A fear will be ‘well-founded’ if there is a ‘real chance’ that the person will be persecuted for one of the Convention reasons if he or she returns to his or her country of nationality: *Chan* per Mason CJ at 389, Dawson J at 398, Toohey J at 407, McHugh J at 429. A fear will be ‘well-founded’ in this sense even though the possibility of the persecution occurring is well below 50 per cent but:
- ‘no fear can be well-founded for the purpose of the Convention unless the evidence indicates a real ground for believing that the applicant for refugee status is at risk of persecution. A fear of persecution is not well-founded if it is merely assumed or if it is mere speculation.’ (see *Guo*, referred to above, at 572 per Brennan CJ, Dawson, Toohey, Gaudron, McHugh and Gummow JJ)

### **Complementary protection criterion**

36. An applicant for a protection visa who does not meet the refugee criterion in paragraph 36(2)(a) of the Act may nevertheless meet the complementary protection criterion in paragraph 36(2)(aa) of the Act, set out above. The Full Court of the Federal Court has held that the ‘real risk’ test imposes the same standard as the ‘real chance’ test applicable to the assessment of ‘well-founded fear’ in the context of the Refugees Convention as referred to above (see *Minister for Immigration and Citizenship v SZQRB* [2013] FCAFC 33 at [246] per Lander and Gordon JJ with whom Besanko and Jagot JJ (at [297]) and Flick J (at [342]) agreed). ‘Significant harm’ for the purposes of the complementary protection criterion is exhaustively defined in subsection 36(2A) of the Act: see subsection 5(1) of the Act. A person will suffer ‘significant harm’ if they will be arbitrarily deprived of their life, if the death penalty will be carried out on them or if they will be subjected to ‘torture’ or to ‘cruel or inhuman treatment or punishment’ or to ‘degrading treatment or punishment’. The expressions ‘torture’, ‘cruel or inhuman treatment or punishment’ and ‘degrading treatment or punishment’ are further defined in subsection 5(1) of the Act.

### **Ministerial direction**

37. In accordance with Ministerial Direction No. 56, made under section 499 of the Act, the Tribunal is required to take account of policy guidelines prepared by the Department of Immigration and Citizenship - ‘PAM3: Refugee and humanitarian - Complementary Protection Guidelines’ and ‘PAM3: Refugee and humanitarian - Refugee Law Guidelines’ - and any country information assessment prepared by the Department of Foreign Affairs and Trade expressly for protection status determination purposes, to the extent that they are relevant to the decision under consideration.

### **Member of the same family unit**

38. Subsection 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 and that ‘member of the family unit’ has the meaning given by the Regulations for the purposes of the definition.

### **Credibility**

39. As Beaumont J observed in *Randhawa v Minister for Immigration, Local Government and Ethnic Affairs* (1994) 52 FCR 437 at 451, ‘in the proof of refugeehood, a liberal attitude on the part of the decision-maker is called for’. However this should not lead to ‘an uncritical acceptance of any and all allegations made by suppliants’. As the Full Court of the Federal Court (von Doussa, Moore and Sackville JJ) observed in *Chand v Minister for Immigration and Ethnic Affairs* (unreported, 7 November 1997):
- ‘Where there is conflicting evidence from different sources, questions of credit of witnesses may have to be resolved. The RRT is also entitled to attribute greater weight to one piece of evidence as against another, and to act on its opinion that one version of the facts is more probable than another’ (citing *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 259 at 281-282)
40. As the Full Court noted in that case, this statement of principle is subject to the qualification explained by the High Court in *Minister for Immigration and Ethnic Affairs v Guo* (1997) 191 CLR 559 at 576 per Brennan CJ, Dawson, Toohey, Gaudron, McHugh and Gummow JJ where they observed that:
- ‘in determining whether there is a real chance that an event will occur, or will occur for a particular reason, the degree of probability that similar events have or have not occurred for particular reasons in the past is relevant in determining the chance that the event or the reason will occur in the future.’
41. If, however, the Tribunal has ‘no real doubt’ that the claimed events did not occur, it will not be necessary for it to consider the possibility that its findings might be wrong: *Minister for Immigration and Multicultural Affairs v Rajalingam* (1999) 93 FCR 220 per Sackville J (with whom North J agreed) at 241. Furthermore, as the Full Court of the Federal Court (O’Connor, Branson and Marshall JJ) observed in *Kopalapillai v Minister for Immigration and Multicultural Affairs* (1998) 86 FCR 547 at 558-9, there is no rule that a decision-maker concerned to evaluate the testimony of a person who claims to be a refugee in Australia may not reject an applicant’s testimony on credibility grounds unless there are no possible explanations for any delay in the making of claims or for any evidentiary inconsistencies. Nor is there a rule that a decision-maker must hold a ‘positive state of disbelief’ before making an adverse credibility assessment in a refugee case.