

1108973 [2011] RRTA 950 (7 November 2011)

DECISION RECORD

RRT CASE NUMBER:	1108973
DIAC REFERENCE(S):	CLF2011/109695
COUNTRY OF REFERENCE:	Papua New Guinea
TRIBUNAL MEMBER:	Belinda Wells
DATE:	7 November 2011
PLACE OF DECISION:	Adelaide
DECISION:	The Tribunal affirms the decision not to grant the applicant a Protection (Class XA) visa.

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 Papua New Guinea, arrived in Australia on [date deleted under s.431(2) of the *Migration Act 1958* as this information may identify the applicant] February 2011 and applied to the Department of Immigration and Citizenship for the visa [in] July 2011. The delegate decided to refuse to grant the visa [in] August 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] August 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 and Tribunal's files relating to the applicant. The Tribunal also has had regard to other material available to it from a range of sources.
20. According to the application the applicant is a [age deleted: s.431(2)] year old female Papua New Guinean citizen of Catholic religion, who arrived in Australia [in] February 2011 travelling on a Papua New Guinea ("PNG") passport, as the holder of a visitor visa which was valid until [a date in] March 2011.
21. In her application the applicant states that she was married in [Town 1], PNG [in] December 1975. She states that she has a husband, [name deleted: s.431(2)], two daughters aged approximately [ages deleted: s.431(2)] years of age, and a son aged approximately [age deleted: s.431(2)] years of age, and they all live in PNG. She also states that she has a mother and two brothers living in PNG.
22. The applicant states in her application that from the time that she was born until June 2009 she lived in [Village 2]. She states that from June 2009 to July 2009 she lived in [location deleted: s.431(2)] in Brisbane, and then from July 2009 to February 2011 she again lived in [Village 2], before coming to Australia. She states that from February 2011 to July 2011 she lived in [suburb deleted: s.431(2)] in South Australia, before being detained at Adelaide Immigration Transit Accommodation in July 2011.
23. The applicant states that her occupation in PNG was home duties and that in Australia she has worked in fruit picking. She did not provide any information about her education.
24. In her application the applicant states that she is seeking protection in Australia so that she does not have to return to PNG.
25. The applicant provided a statement dated [in] July 2011 in support of her application, in which she provided the following information:
 - She is married and has three children. Her husband and children are in PNG. She has a mother who lives in PNG, and two brothers.
 - When she got married she became the property of her husband. This meant that she belonged to him, and that he was able to dictate everything that she could do. She was treated like a slave and she was not allowed to have an opinion. She was forced to work under harsh conditions and all proceeds from her work went directly to her husband.
 - Once she was married she was cut off from her own family. Her family received a dowry of 30 pigs and 5,000 kina for her and once they received this this believed that she could not come back to them.

- When her eldest child was in [school year deleted: s.431(2)] her husband married a second wife. This meant that the small garden that she used to grow resources and support the family was divided into two, and she struggled to support her family. Once her husband's second wife lived on the property she had to support her own children, and this was very difficult.
- He husband eventually married a third wife. This meant that the property was again divided to provide resources for the new wife. She approached her husband to let him know that she was struggling to look after her children. He became violent and he broke her jaw. She was in hospital for three weeks. After that he tied her up and his second wife smashed a bottle over her head.
- She was fearful for her life and so she escaped to live on her mother's land. As her father had died, her mother had her own small piece of land. This allowed her to support her children for a short period but it was extremely difficult.
- Her mother's land will be inherited by her brothers after her mother's death, and she will not be entitled to it. Her brothers are upset that she left her husband and brought shame on the family.
- She was scared for her wellbeing as the consequences of bringing shame on your family are very harsh.
- She also fears what her husband may do to her because she left him.
- She fears that if she returns to PNG she may be persecuted by her husband, and also by her family as they feel that she has brought shame on them. She fears that they will mistreat her because she has not completed her duty of being a wife and because by walking away she has shamed her family.
- Her family accepted the dowry and they cannot give this back. This angers her husband as well as her family.
- As a woman she has no rights in PNG. The PNG authorities are not interested in preventing violence and persecution against woman, which is endemic in PNG. It is in the culture of the country and has been for a long time.

Previous visitor visa applications

26. The Department obtained information from other Departmental files about visitor visa applications lodged by the applicant. It obtained a copy of an "Application for General Tourist to Visit Australia for Tourism" form (form 48R) in which the applicant applied for a visa in order to visit Australia. This application form dated [in] December 2010 provides the following information:
- The applicant wishes to visit Australia from [a date in] December 2010 until [a date in] January 2011, and wishes to stay for three months;
 - Her date of birth is [date deleted: s.431(2)], and her current address is in [location deleted: s.431(2)];

- No children will be travelling with her. She does not have a spouse, or any children, who will not be travelling with her;
 - She does not have any relatives, friends or contacts in Australia;
 - She wants to visit Australia for the Christmas break holiday;
 - She works as a babysitter/house girl. As to the issue of maintaining herself financially whilst in Australia, she has provided a bank statement from her boss.
 - In August 2009 she also applied for a tourist visa to Australia, and this application was granted.
 - She was assisted in completing this form by [Ms A].
27. As part of the tourist visa application the applicant completed and provided to the Department a form entitled “Details of Relatives Form” In this form the applicant stated that she was born on [date deleted: s.431(2)] and provided information about her two parents and her two brothers. However the parts of the form that provide space for an applicant to provide information about her children (if any), her spouse (if any), and her spouse’s family members, have been left blank.
28. The Department’s file in relation to the applicant’s tourist visa application also contained the following documents:
- Letter from [Mr B] dated [in] December 2010 stating that he is planning to take his family members to Cairns to spend Christmas and New Year in Australia, and their expenses in Australia for the ten days will be taken care of by the [Company 4] of which he is the principal owner.
 - Certificate of marriage for [Mr B] and [Ms A]; and
 - Business registration certificate for the business ‘[Company 4]’, and ANZ bank account statement for [Company 4].
29. [In] August 2011 the delegate decided to refuse to grant the visa, after interviewing the applicant [on a previous date in] August 2011.

The Tribunal Review

30. The applicant applied to the Tribunal [in] August 2011 for review of the delegate’s decision. The applicant was represented in relation to the review by her registered migration agent.
31. The Tribunal received a submission from the applicant’s representative which set out country information about various issues. The applicant did not provide any documentary evidence to the Tribunal prior to the hearing.
32. The applicant appeared before the Tribunal [in] November 2011 to give evidence and present arguments. The Tribunal hearing was conducted with the assistance of an interpreter in the Pidgin (PNG) and English languages.

33. The Tribunal asked the applicant whether she had brought her passport to the hearing, and whether the Tribunal could look at her passport. The security guard who was accompanying the applicant then handed the applicant's PNG passport to the Tribunal.
34. The applicant said that she was born in [Village 3] and she lived on her father's land there until she married and moved to her husband's land. She said that she had three children and when her oldest daughter was in [school year deleted: s.431(2)] at school she left her husband's land and returned to live on her father's land at [Village 3].
35. The applicant said that her oldest daughter is now [age deleted: s.431(2)] years of age. The applicant said that when she left her husband she took her three children with her. She said that her oldest daughter is now married and lives with her own husband, and her son and her youngest daughter live on her father's land. She said that her son goes to school and he is in [school year deleted: s.431(2)].
36. The applicant said that she has not talked to her husband since she left his land. She said that she has seen him in [Town 1], but she has not talked to him.
37. She said that her husband's village is close to her father's land in [Village 3]. She said that it takes about 3 hours in total by car and bus to travel from her husband's village to [Town 1], and then on to [Village 3].
38. The applicant said that she left her husband because her husband told her to leave his land. She said that when her husband got married to his second wife he gave the second wife half of whatever she had in her gardens; and then when he married his third wife he gave that half to his third wife, and so she had nothing left.
39. The applicant said that her husband took all of her belongings out of the house and told her to leave. She said that he hit her and told her to leave, and he said that if she stayed he would cut her.
40. The applicant said that her husband had never asked her to come back to live with him. She said that if she went back he would kill her.

Living on her father's land

41. The applicant said that she has been living on her father's land ever since she left her husband, when her oldest daughter was in [school year deleted: s.431(2)]. She said that the land is very small and there are a lot of people living on the land, including her three brothers and their wives and their many children.
42. The Tribunal asked the applicant how she supported herself and her children before she came to Australia. She said that she lived on her mother's garden, growing everything in the gardens. She said that if they needed something from the shops they sold something from the garden. She said that there were people who lived nearby who had coffee gardens, and she would pick coffee for them and then use the money to buy cigarettes and betel nut and sell that.
43. The applicant said that she has never been to school, and she cannot read or write.
44. The applicant said that her father is dead. She said that her mother's health is all right but she is a little sick. She said that her mother will probably live for one or two more years. The applicant

said that she gets on all right with her mother. The applicant said that she has one sister, who is married and lives in [Town 1].

45. The applicant said that her three brothers all live on her father's land and none of them like her living on the land, as the land is too small for everyone.
46. The Tribunal asked the applicant how her brothers had expressed their dislike of her living on her father's land. She said that when she had picked coffee in her mother's garden her brother had fought with her; and when she had gone to the sweet potato garden her brother's wife had come and fought with her. She said that she didn't say anything because when a woman gets married she loses all her rights to her land, and she does not have the right to talk back to her brother.
47. The applicant said that she fought about this issue on two occasions. She said that on one occasion her brother gave her a black eye; and then on another occasion the wife of another brother took an iron and hit her in the back of the head and broke her head.
48. The applicant said that this happened two times and after that she didn't go back to her mother's gardens because if she did they would do that to her again.
49. The applicant said that this happened a few years before she came to Australia.
50. The applicant said after this happened she supported herself by selling cigarettes and betel nut on the roadside, and she would use that to buy soap and cooking oil. She said that sometimes when her mother picked her coffee she would sell the coffee and she would secretly give her the money. The applicant said that she couldn't grow food for herself as she didn't have any land. She said that after she was prevented from using her mother's garden she couldn't pick coffee herself anymore.
51. The Tribunal asked the applicant how she would support herself if she was still living on her father's land in [Village 3] and her mother died. The applicant said that she was not sure.
52. The applicant said that before she left for Australia she told her children that she was going to Australia and she would come back. The Tribunal asked the applicant how her younger two children would support themselves and get enough to eat whilst she was away. The applicant said that they go in and out amongst the others. She said that she wasn't able to look after them. She said that she just left them and came to Australia.
53. The Tribunal asked the applicant whether she had visited Australia before, prior to the present visit. She said that she previously visited in 2009. She said that she didn't apply for a protection visa during that trip because she didn't know about protection visas.
54. The applicant said that she didn't know about protection visas when she was travelling to Australia this time. She said that she only learnt about them when a group of them were discovered by the Immigration people and the other people that she was with applied for protection visas. She said that all of this group of people was from PNG.

Whether Relocation Possible

55. The Tribunal asked the applicant whether she had ever thought of going to live in Port Moresby or Lae or some other area of PNG. The applicant said that she had thought about that but if she went there she would have no land or money, so she just stayed where she was. She said that she didn't go to school so she didn't know very much, so she just stayed where she was.

56. The applicant said that she has relatives in other villages and towns but they are not close relatives; they are “one talks” and they don’t like looking after people. She said that if some of them gave her food they wouldn’t give her money; and if they gave her money they wouldn’t give her food.
57. The applicant said that she couldn’t live on the land of her daughter’s husband, as that is something that they would be very ashamed of.
58. The Tribunal asked the applicant where she would be living if she hadn’t come to Australia. She said that she would still be living on her father’s land at [Village 3], even if they continued to fight or hit her because where else would she go. The Tribunal said that earlier in the hearing she had said that they weren’t fighting with her or hitting her anymore because she wasn’t using her mother’s garden anymore. The applicant said that that was true. She said that they hadn’t done that to her since she stopped going to her mother’s garden. She said that they still tell her that they don’t want her there, but where else can she go?

Fears if returned to PNG

59. The Tribunal asked the applicant whether she feared that anyone would harm her if she returned to PNG. The applicant said: “Yes. My brothers would still not want me to be on their land. They would continue to want me to go back to my husband. But he would do the same to me as well.”
60. The Tribunal asked the applicant what she meant when she said “he would do the same to me” The applicant said that her husband has given everything that she had to his other wives, and that if she went back she wouldn’t have anything. She said that she wouldn’t survive.
61. The Tribunal asked the applicant whether she would like to provide any other information about her situation. The applicant said that she would. She said that she came to Australia before and went back. She said that people asked her why she came back, as Australia is a better place to live. She said that she didn’t know anything back then, and so when she came to Australia a second time she thought that she would just overstay and stay. She said that she had heard that Australia looked after people who came on boats, even those who overstayed, and so when Immigration found them she hadn’t thought that she would be questioned and they would ask to send her back. She said that PNG is a small country that is very close to Australia and she would have thought that Australia would be more welcoming to people from PNG.
62. The applicant’s representative said that the applicant is claiming that she will be persecuted in Australia because of her membership of a “particular social group”. He said that the applicant obviously doesn’t have protection in PNG. He said that her mother is an old lady and will not live for a long time, and after she dies the applicant won’t have protection from her. The representative said that the applicant won’t be able to stay on her father’s land. He said that the country information shows that the applicant wouldn’t be able to get protection from the police.
63. The Tribunal asked the applicant and her representative whether they would be providing any documents in support of her case. The Tribunal said that the country information provided in the representative’s submission indicates that it is often difficult to provide evidence of customary marriages and the birth of children in PNG. The Tribunal said that it accepts the applicant’s evidence that she had a husband and that she has children.
64. The applicant said that she will not be providing any documents about her case. She said that she would have liked to provide a document that talks about the sort of lifestyle that she has lived

and that she doesn't have any garden and cannot look after her children. She said that in PNG you can get any document you like through bribery, but she doesn't have any money to pay for documents.

Other Evidence

Domestic violence in PNG

65. A recent report from Doctors Without Borders/*Médecins Sans Frontières* (MSF) dated 16 June 2011 states that there has been 'almost no progress' in the last two decades to solve the widespread problem of domestic violence in PNG. It indicates that because a violent husband has paid the 'bride price' he is able to go to his wife's family and bring her back – and he would then be able to commit further violent assaults on her.¹²

66. An article in the *PNG Post Courier* dated 4 June 2008 indicates that a woman who had sought refuge with her family was sent back because of the bride price:

*She said she took refuge with her family for weeks but they had to send her and the children back because of bride price.*³

67. Amnesty International in its May 2011 submission prepared for the Universal Periodic Review of PNG, found that the bride price exacerbated the problem; and family members were at times themselves abusive and violent towards the victim:

*Women victims of violence are often subjected to undue pressure from family and members of the community to "settle" serious criminal charges by way of compensation payments alone. In other cases, when women do lodge complaints, they are intimidated, threatened and even beaten up by close relatives, including their violent partners. Women's groups working with female survivors of violence often face intimidation and harassment by family members of the women victims or by the perpetrators themselves.*⁴

68. An anthropological study of the problem of domestic violence in Papua New Guinea carried out in 1992 by the University of Waterloo, Ontario, Canada, found that the victim's family may condone the violence against her:

Regardless of the level of violence, a woman's relatives are unlikely to intervene if they think she is guilty of the offense for which she is beaten. For instance, the relatives of one woman whose husband attempted to kill her with an axe for suspected adultery, agreed with his assessment of her behavior. Consequently they not only

¹ Doctors without Borders 2011, Report summary - *Papua New Guinea: Hidden and Neglected. Treating Survivors of Family and Sexual Violence*, 16 June – <http://www.doctorswithoutborders.org/publications/article.cfm?id=5390&cat=special-report> – Accessed 13 October 2011<Attachment>

² Doctors without Borders 2011, *Papua New Guinea: Hidden and Neglected: the Medical and Emotional needs of survivors of family and sexual violence in Papua New Guinea*, 16 June, p.17, - <http://www.doctorswithoutborders.org/publications/reports/2011/06-15-Papua-New-Guinea-Sexual-Domestic-Violence%20report.pdf> – Accessed 14 October 2011.

³ Rai, F. 2008, 'Bride price contributes to violence in homes', *PNG Post Courier*, 4 June.

⁴ Amnesty International 2011, *Papua New Guinea Violence against women, sorcery-related killings and forced evictions*, May, <http://www.amnesty.org/en/library/asset/ASA34/005/2010/en/b7901ff6-603a-4de9-9f0b-0814514a2f2d/asa340052010en.pdf> - Accessed 13 October 2011.

failed to interfere but, when she begged them to take her with them out of Kaliai, refused to help her flee the area.⁵

Protection provided by PNG authorities

69. Various sources indicate that despite various statements by PNG authorities condemning domestic violence, women in PNG generally have very little access to practical help to protect themselves from domestic violence.
70. In a report published in 2003, Miriam Yawa, a Chief Inspector of the Royal PNG Constabulary, pointed out that legally in PNG women are often placed in the role of jural minor (that is they are not considered capable of representing their own interests autonomously, and their kinsmen have authority over them):

Legally in Papua New Guinea the woman is often placed in the role of a jural minor. An extreme example is the case of a young woman being offered to a rival clan as a part payment of compensation during a tribal fight. In our local village courts issues of family violence are treated as minor or an offence, not against the woman herself, but against her people.

There is a marked reluctance for police to deal with the issue of family violence. Women reporting family violence are more often than not sent away. The excuse given by the police is that it is a family matter, to be sorted out by the family. In cases where police do intervene it is usually to 'counsel' the parties and send them away.⁶

71. The United Nations Special Rapporteur on torture and other cruel, inhuman, inhuman or degrading treatment or punishment, issued a report in February 2011, after his mission to PNG in 2010. He found that domestic violence was widespread in PNG and there was no effective State mechanism to address it.⁷ Moreover he found that women had no adequate legal means of redress when they were the victims of domestic violence:

There is no existing legislation that criminalizes domestic violence in Papua New Guinea. As such, cases of domestic violence fall under the provisions of common and aggravated assault found in the Criminal Code. For its part, the Royal Papua New Guinea Constabulary has the Standing Order on Domestic Violence, issued in 1987, instructing police to treat cases of domestic violence with the same seriousness as any other assault. As a preventive measure, women may petition district courts to issue a protection order or require another person to enter a "good behaviour bond".

In 2002, the Criminal Code Act was amended through the Sexual Offences and Crimes against Children Act to make spousal rape and sexual harassment criminal acts. However, in the village court system, chiefs may negotiate compensation or traditional apologies as a

⁵ Ayers Counts, D. 1992, 'The Fist, the Stick, and the Bottle of Bleach: Wife Bashing and Female Suicide in a Papua New Guinea Society', 12 May, p.4 – <http://anthropology.uwaterloo.ca/WNB/FistStick.html> - Accessed 14 October 2011.

⁶ Yawa, M. [undated] 'Gender and Violence' Australian Institute of Criminology website. (<http://www.aic.gov.au/conferences/policewomen3/> - Accessed 23 October 2003).

⁷ United Nations Human Rights Council 2011, *Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Addendum: Mission to Papua New Guinea*, UNHCR Refworld website, 7 February, (p2, para. 69, 79) - <http://www.unhcr.org/refworld/pdfid/4d8718932.pdf> - Accessed 1 September 2011.

*form of resolution for offences committed against women, including rape and domestic violence.*⁸

72. Human Rights Watch reported in September 2005 that the police response to victims of domestic violence could be abusive because women in PNG have a low status; moreover some police staffers were guilty of domestic violence themselves:

The low status of girls and women is also reflected in discrimination against them in education, health care, and access to paid employment; heavy unpaid workloads; polygamy; and poor access to justice. For example, as explained below, police often refuse to respond to complaints of sexual or domestic violence or sometimes demand sex from victims. ...

*Domestic violence was prevalent in police barracks, and that reports of domestic violence were not taken seriously.*⁹

73. According to the most recent US Department of State report on human rights practices in PNG dated 8 April 2011, local village and district courts were hesitant to interfere directly in domestic matters. Village courts regularly ordered that compensation be paid to an abused spouse's family in cases of domestic abuse rather than issue a domestic court order.¹⁰ Communities viewed domestic violence as a private matter and there was a lack of women's shelters – only three privately run shelters were available in Port Moresby.¹¹ A report dated 22 July 2010 states that it is not possible to estimate how many shelters are available in PNG.¹² Amnesty International made an appeal in 2009 for more shelters for women who suffer from domestic violence.¹³
74. According to an article dated 31 March 2010 by Doctors Without Borders/Médecins Sans Frontières (MSF), women who have been victims of violence are not able to access hospital care easily because there are few hospitals in PNG:

*... accompaniment was necessary because the hospital, one of only a handful in the country, is always busy and offers neither confidentiality nor a safe room for victims of violence. Many patients, therefore, are too afraid to go to the hospital on their own.*¹⁴

⁸ United Nations 2011, *Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Addendum: Mission to Papua New Guinea*, UNHCR Refworld website, 7 February, (para. 31-32) - <http://www.unhcr.org/refworld/pdfid/4d8718932.pdf> - Accessed 1 September 2011.

⁹ Human Rights Watch 2005, *"Making Their Own Rules": Police Beatings, Rape, and Torture of Children in Papua New Guinea*, Vol.17, No.8(C), September, (p.19, 86).

¹⁰ US Department of State 2011, *Country Reports on Human Rights Practices for 2010 – Papua New Guinea*, April, Section 1. e. Civil Judicial Procedures and Remedies; Section 6. Women.

¹¹ US Department of State 2011, *Country Reports on Human Rights Practices for 2010 – Papua New Guinea*, April, Section 1. e. Civil Judicial Procedures and Remedies; Section 6. Women.

¹² 'Ridding Papua New Guinea of 'Big Man' culture will take time, change of mindsets, delegate says, presenting first report to women's anti-discrimination committee', 2010, *States News Service*, (sourced from the United Nations) 22 July.

¹³ Amnesty International 2009, *Nowhere safe to go: More women's shelters needed in Papua New Guinea*, ASA 34/003/2009 <http://www.amnesty.org/en/library/asset/ASA34/003/2009/en/5ceb0239-16e5-49cf-bdeb-5efbc5fe25a0/asa340032009en.pdf> - Accessed 28 April 2010.

¹⁴ Doctors without Borders 2010, 'Papua New Guinea: Speaking out about violence', 31 March - <http://www.doctorswithoutborders.org/news/article.cfm?id=4355&cat=field-news> – Accessed 13 October 2011.

FINDINGS AND REASONS

75. The applicant claims that she is a PNG citizen. In her written statement dated [in] July 2011 she claims that there is a real chance that if she returns to PNG she will be seriously harmed by her husband or her brothers because she is a married woman, and because the PNG authorities will not protect her against such violence because she is a woman.
76. The applicant did not put forward any claims that indicated that she may be harmed if she returns to PNG as a result of her race, religion, nationality, or political opinion. The Tribunal therefore focussed on the Convention ground of “particular social group”.
77. The Tribunal accepts, on the basis of the applicant’s PNG passport, which she provided to the Tribunal, that the applicant is a PNG citizen and is outside her country of nationality.

“Particular social group”

78. The Tribunal considered whether there is a real chance that the applicant will be seriously harmed if she returns to PNG because of her membership of a “particular social group” The Tribunal considered whether the groups “married woman in PNG” and “women in PNG” are particular social groups; and if so, whether the applicant is a member of these groups.
79. The meaning of the expression ‘for reasons of ... membership of a particular social group’ was considered by the High Court in *Applicant A v MIEA* (1997) 190 CLR 225 (“*Applicant A’s case*”) and also in *Applicant S v MIMA* (2004) 217 CLR 387 (“*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". ...
80. 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.
81. The country information set out above indicates that in PNG members of the group “married woman in PNG” and members of the group “women in PNG” are regarded as having common attributes which distinguish them from society at large and which are not the shared fear of persecution. As a result, the Tribunal finds that in PNG each of these groups is a particular social group.
82. The Tribunal finds, on the basis of the applicant’s oral evidence, that the applicant is a woman who was married to a husband in a customary marriage, and it therefore finds that if the applicant was living in PNG she would be a member of both of these groups.

Feared Persecution by Non-State agents

83. The applicant claimed that the persons who may persecute her are her husband and her brothers.
84. The Tribunal considered whether non-State agents may constitute a potential source of persecution.
85. In *MIMA v Khawar* (2002) 210 CLR 1 (“*Kharwar*”) Gleeson CJ cited with approval the following statement of Lord Hope of Craighead in *Horvath v Secretary of State for the Home Department* [2001] 1 AC 489 (“*Horvath*”) at 497-8, as reflecting the relationship between persecution as the inflicting of serious harm and the responsibility of a country as a protector of human rights:
- ... in the context of an allegation of persecution by non-state agents, the word ‘persecution’ implies a failure by the state to make protection available against the ill-treatment or violence which the person suffers at the hands of his persecutors. In a case where the allegation is of persecution by the state or its own agents the problem does not, of course, arise. There is a clear case for surrogate protection by the international community. But in the case of an allegation of persecution by non-state agents the failure of the state to provide the protection is nevertheless an essential element. It provides the bridge between persecution by the state and persecution by non-state agents which is necessary in the interests of the consistency of the whole scheme.*
86. Gleeson CJ held that persecution may result from the combined effect of the conduct of private individuals and the state or its agents; and that a relevant form of state conduct may be tolerance or condonation of the inflicting of serious harm in circumstances where the state has a duty to provide protection against such harm: at [30]. Justice Kirby took a similar approach in *Kharwar*, adopting the formula “Persecution = Serious Harm + The Failure of State Protection”: at [118].
87. In *MIMA v Respondents S152/2003* (2004) 222 CLR 1 at [20] – [23], Gleeson CJ, Hayne and Heydon JJ followed the reasoning in *Horvath*, stating that where the persecutor is a non-state agent, the willingness and ability of the state to protect its citizens may be relevant to whether the fear is well-founded, whether the conduct giving rise to the fear is persecution, and whether the applicant is unable or, owing to their fear, unwilling to avail themselves of the (external) protection of their country of nationality.
88. It is clear that the state concerned is not required to guarantee the safety of its citizens from harm caused by non-state persons. In *MIMA v Respondents S152/2003* Gleeson CJ, Hayne and Heydon JJ observed that “no country can guarantee that its citizens will at all times and in all circumstances, be safe from violence”: at [26]. Justice Kirby similarly stated in *S152/2003* that the Convention does not require or imply the elimination by the state of all risks of harm; rather it “posits a reasonable level of protection, not a perfect one”: at [117].
89. What is required for the purposes of Article 1A(2) has been described in several ways. The joint judgment in *S152/2003* refers to the obligation of the state to take “reasonable measures” to protect the lives and safety of its citizens, including “an appropriate criminal law, and the provision of a reasonably effective and impartial police force and justice system” (at [26]) or a “reasonably effective police force and a reasonably impartial system of justice” (at [28]), indicating that the appropriate level of protection is to be determined by “international standards”, such as those considered by the European Court of Human Rights in *Osman v United Kingdom* (1998) 29 EHRR 245. Thus, an unwillingness to seek protection will be justified for

the purposes of Article 1A(2) where the state fails to meet the level of protection which citizens are entitled to expect according to international standards. While the joint judgment in *S152/2003* gives support to the use of “international standards” as a benchmark of adequate protection levels, it does not necessarily require an administrative decision maker to identify and specify the “international standards” against which to assess a particular country’s responses to a claimed fear of persecution by non-state agents.

90. Some guidance can be found in Australian case law predating *S152/2003*. In *Prathapan v MIMA* (1998) 47 ALD 41 at first instance, Madgwick J referred to “a reasonable level of efficiency of police, judicial and allied services and functions, together with an appropriate respect on the part of those administering the relevant state organs for civil law and order, and human rights, in a modern and affluent democracy” as ordinarily amounting to effective and “available” protection.
91. In *Khawar*, Kirby J drew a distinction between those countries that, however imperfectly, provide agencies of the law and non-discriminatory legal rules to address the problem of domestic violence from those countries that, for supposed religious, cultural, political or other reasons, consciously withdraw the protection of the law from a particularly vulnerable group within their society. Persons in Australia who are unwilling to avail themselves of the protection of their country where that country falls in the former category do not fall within the Refugees Convention. However, depending upon the evidence and the facts found, the Convention may well be available to persons from the latter category of country: at [130] – [131].

Well-founded fear of persecution

92. The Tribunal considered whether the applicant has a well-founded fear of being persecuted for reasons of her membership of the particular social groups “married women in PNG” and/or “women in PNG”.
93. The Tribunal considered the applicant to be a credible witness. The Tribunal finds that during the hearing the applicant gave her evidence honestly and openly, and did not embellish her claims. The Tribunal finds that the on-site interpreter used during the hearing was professional and interpreted in the first person, and he appeared to be interpreting what was said by the applicant and the Tribunal without adding additional material.
94. The Tribunal accepts the applicant’s evidence that she cannot read and write, and that she did not read or complete any of the visa application forms that she lodged.
95. The Tribunal has listened to a recording of the interview conducted by a Departmental officer. The Tribunal finds that the interpreter used during the interview was not interpreting in the first person (and instead used phrases such as “She is saying that..”), and was not interpreting accurately what was said by the applicant and the Departmental officer during the interview. As a result, the Tribunal places less weight than usual on the information provided by the applicant during the Departmental interview.

The applicant’s husband

96. In the applicant’s statement prepared by her representative the applicant states that she fears that if she returns to PNG she may be persecuted by her husband because she left him.
97. The Tribunal finds, on the basis of the applicant’s evidence during the hearing, that there is not a real chance that the applicant’s husband will seriously harm her if she returns to PNG.

98. The Tribunal finds, on the basis of the applicant's evidence, that the applicant has not spoken to her husband since she left him. The Tribunal finds that the applicant left her husband when her eldest daughter was in [school year deleted: s.431(2)], and her eldest daughter is now about [age deleted: s.431(2)] years old. The Tribunal finds, on the basis of the applicant's evidence, that the applicant's husband demanded that she leave him, and he has never threatened her or asked her to come back to live with him despite the fact that he has seen her sometimes in [Town 1].
99. The Tribunal also finds that although the applicant's three brothers are unhappy about her living on their father's land, there is not a real chance that the applicant will return to live with her husband. The Tribunal accepts the applicant's evidence that she believes that her husband would kill her if she went back to live with him, and that her husband has given away everything that she has and so she wouldn't have anything and so she wouldn't survive.
100. The Tribunal finds, on the basis of the applicant's evidence, that the applicant has lived on her father's land ever since she left her husband. The Tribunal finds that a few years before the applicant came to Australia one of her brothers gave her a black eye, and on another occasion the wife of another brother hit her on the back of her head with an iron, because she was using her mother's garden to grow food, and as a result she has not been able to grow food in her mother's garden (which is on her father's land) since that time.
101. The Tribunal finds, on the basis of the applicant's evidence, that the two violent incidents mentioned above occurred a few years before the applicant came to Australia, and that after these two incidents the applicant's brothers and their wives were not violent to the applicant because she stopped using her mother's garden. The Tribunal finds that after this the applicant continued to live on her father's land and supported herself by selling cigarettes and betel nut on the roadside and her mother also secretly gave her money after selling the coffee that she had grown.
102. The Tribunal also notes that prior to coming to Australia the applicant purchased an airfare which she used to travel to Australia; and that the applicant either had funds for this or someone either gave her or lent her these funds.
103. The Tribunal finds, on the basis of the applicant's evidence at hearing, that the applicant does not have any intention of returning to her husband in the future and there is not a real chance that her brothers will force her to do so. The applicant said during the hearing that if she hadn't come to Australia she would still be living on her father's land at [Village 3]. She said that her brothers no longer fight with her since she stopped going to her mother's garden. She said that her brothers "still tell me that they don't want me there; but where else can I go?"

The applicant's brothers

104. The Tribunal also considered whether there is a real chance that the applicant's brothers would seriously harm her if she returned to PNG.
105. The Tribunal finds, as mentioned above, that a few years before the applicant left for Australia one of her brothers, and the wife of another brother, were violent towards her because she was growing food in her mother's garden, but as a result of these two incidents the applicant stopped using her mother's garden and there was then no further violence.
106. The Tribunal finds, on the basis of the applicant's evidence, that the applicant does not have any intention of using her mother's garden if she goes back to PNG.

107. The Tribunal therefore finds that there is not a real chance that the applicant's brothers or their wives would seriously harm the applicant in the foreseeable future if she returns to PNG.
108. The Tribunal finds, on the basis of the applicant's evidence, that when the applicant's mother dies the applicant's brothers will inherit their father's land, and the applicant may become further impoverished as she would then lose the financial assistance that she has received from her mother. The Tribunal notes that the applicant told the Tribunal that since she had not been able to use her mother's garden she had also sold cigarettes and betel nut on the roadside to make money.
109. The applicant did not state that her brothers would require her to leave their father's land after her mother dies. The Tribunal finds, on the basis of the applicant's evidence, that the applicant has lived on her father's land for many years, and that the applicant's brothers have allowed her to live on the land without threat of violence as long as she does not use the land to grow food or coffee. The Tribunal finds that the applicant's brothers could have forced her to leave her father's land whilst her mother has been alive, but have not done so.
110. The Tribunal therefore finds that there is not a real chance that the applicant's brothers will seriously harm her in the reasonably foreseeable future.
111. The Tribunal also finds that there is no evidence to indicate that the applicant's mother may die in the reasonably foreseeable future. The Tribunal considers that there is insufficient evidence to make a finding about how long the applicant's mother may live. The applicant stated during the hearing that her mother is likely to live for another one or two years. However the Tribunal notes that the applicant has no medical training herself and she did not provide any medical evidence to support this statement.
112. The Tribunal therefore finds, for the reasons provided above, that the applicant does not have a well-founded fear of persecution.
113. As the Tribunal has found that the applicant does not have a well-founded fear of being persecuted by her husband or her brothers in the reasonably foreseeable future, the Tribunal did not consider it necessary to make findings about whether the reason for any harm feared was the applicant's membership of a particular social group, or whether the PNG State has a duty to provide protection against the harm feared.

CONCLUSIONS

114. The Tribunal is not satisfied that the applicant is a person to whom Australia has protection obligations under the Refugees Convention. Therefore the applicant does not satisfy the criterion set out in s.36(2)(a) for a protection visa.

DECISION

115. The Tribunal affirms the decision not to grant the applicant a Protection (Class XA) visa.