

0803901 [2008] RRTA 457 (19 September 2008)

DECISION RECORD

RRT CASE NUMBER: 0803901

COUNTRY OF REFERENCE: Kenya

TRIBUNAL MEMBER: Wendy Boddison

DATE DECISION SIGNED: 19 September 2008

PLACE OF DECISION: Melbourne

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

- (i) that the first named applicant satisfies s.36(2)(a) of the Migration Act, being a person to whom Australia has protection obligations under the Refugees Convention; and
- (ii) that the second and third named applicants satisfy s.36(2)(b)(i) of the Migration Act, being the spouse and dependant respectively of the first named applicant.

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

1. This is an application for review of decisions made by a delegate of the Minister for Immigration and Citizenship to refuse to grant the applicants Protection (Class XA) visas under s.65 of the *Migration Act 1958* (the Act).
2. The applicants, who are wife and husband and their child (Child 1) claim to be citizens of Kenya. They arrived in Australia and applied to the Department of Immigration and Citizenship for Protection (Class XA) visas. The delegate decided to refuse to grant the visas and notified the applicants of the decision and their review rights by letter.
3. The delegate refused the visa application on the basis that the first named applicant is not a person to whom Australia has protection obligations under the Refugees Convention.
4. The applicants applied to the Tribunal for review of the delegate's decisions.
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 applicants have made a valid application for review under s.412 of the Act.
6. Also included in the application for review was the first and second named applicants' other child, Child 2 born in the early 2000s. In the early 2000s an officer the Tribunal contacted the applicants' representative and advised that as Child 2 was born after the delegate's decision was made and was not included in the delegate's decision the Tribunal did not have jurisdiction in relation to this child. The Tribunal also advised the applicants' representative at the hearing of this.
7. Pursuant to Regulation 2.08 children who are born after the delegate's decision is made, including those born during the course of a review by the Tribunal, are not taken to be included in the parent's visa application, and need to lodge a separate visa application. There is no Departmental decision in relation to Child 2 which the Tribunal can review therefore the Tribunal finds that it does not have jurisdiction in relation to the application for review by Child 2.

RELEVANT LAW

8. 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.
9. 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).

10. Section 36(2)(b) provides as an alternative criterion that the applicant is a non-citizen in Australia who is the spouse or a dependant of a non-citizen (i) to whom Australia has protection obligations under the Convention and (ii) who holds a protection visa.
11. 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’

12. 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.
13. The High Court has considered this definition in a number of cases, notably *Chan Yee Kin v MIEA* (1989) 169 CLR 379, *Applicant A v MIEA* (1997) 190 CLR 225, *MIEA v Guo* (1997) 191 CLR 559, *Chen Shi Hai v MIMA* (2000) 201 CLR 293, *MIMA v Haji Ibrahim* (2000) 204 CLR 1, *MIMA v Khawar* (2002) 210 CLR 1, *MIMA v Respondents S152/2003* (2004) 222 CLR 1 and *Applicant S v MIMA* (2004) 217 CLR 387.
14. 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.
15. There are four key elements to the Convention definition. First, an applicant must be outside his or her country.
16. 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.
17. Further, persecution implies an element of motivation on the part of those who persecute for the infliction of harm. People are persecuted for something perceived about them or attributed to them by their persecutors. However the motivation need not be one of enmity, malignity or other antipathy towards the victim on the part of the persecutor.

18. 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.
19. 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.
20. 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.
21. 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

22. The Tribunal has before it the Department’s file relating to the applicants. The Tribunal also has had regard to the material referred to in the delegate’s decision, and other material available to it from a range of sources.
23. The first and second named applicants appeared before the Tribunal in the early 2000s to give evidence and present arguments. The Tribunal also received oral evidence from Person 1 and Person 2.
24. The applicants were represented in relation to the review by their registered migration agent who attended the Tribunal hearing. For convenience the Tribunal will refer to the first named applicant as the applicant and the second named applicant as the applicant’s husband.
25. The applicant is an adult and was born in Town Z, Kenya. She is a member of the Tribe A and is religious. The applicant has lived all her life in Town Z.
26. In a statutory declaration accompanying her application the applicant explained that she arrived in Australia in the early 2000s on a visa with the intention to complete her studies at an education provider. She then planned to start studying a different course at a different education provider. She claimed that the situation in Kenya since the elections in the early 2000s had drastically deteriorated and she could not return home

for fear of losing her life in the violence that had already claimed the life of her family member and uprooted her entire family. The applicant's family had been dispersed by the violence in Kenya and after fleeing for their lives were sheltering temporarily in their local building. The authorities in Kenya had been unable to contain the violence and there were reports that the ruling party led by Kibaki was actually contributing to the violence. The violence was triggered by the elections when it was alleged by the opposition leader Odinga that they were rigged when Kibaki was re-elected for a second term. The violence was based on a mixture of political and racial violence as the ruling party, the opposition and their respective support bases were divided along tribal lines.

27. She explained that the ruling party's coalition was predominantly from the Bantu tribe which was made up of the Kikuyu and the Kamba. The opposition coalition was made up of the Nilotes which were made up of the Luo and Kalenjin. The ruling party leader Kibaki was a Kikuyu and his vice-president was Kamba. The opposition leader Odinga is Luo and his second in charge was a Kalenjin. Both parties enjoyed the support of their tribes.
28. In Kenya the majority of voters were expected to support the party that represented their tribe. Different regions in Kenya were traditionally dominated by different tribal groups. The applicant explained she did not fully understand the reason for the violence but from what she could gather most of the Bantu tribe descendent people lived in the areas south and north and east of Nairobi. Most of the Nilotes lived in the North and West of Nairobi. Over time this regional segmentation had changed due to migration and intermarriage, the regions still had strong majorities and minorities based on tribal origins and on occasions the minorities suffered some discrimination that escalated to violence. She provided examples of this.
29. Prior to the early 2000s elections the opposition leader Odinga stated publicly that if President Kibaki and his party were re-elected the vote would have had to have been rigged and his party would not accept such a loss and would allege electoral fraud.
30. In the early 2000s the applicant first heard on the news about the violence occurring in Kenya. In the early 2000s she contacted her Family Member I who informed her that the situation was very tense and that there had been acts of violence around their town but he was not sure what was going to happen. Her family had been given a strict amount of time to leave the house and never return to Town Z. The applicant and her family were Tribe A and grew up in Town Z. The applicant's husband was Tribe B. The applicant's family was specifically targeted after the elections as they were known to be of Tribe A origin. The applicant's Family Member I informed her that the family was not going to leave Town Z. They did not want to give up their property and they thought the violence would calm down. The applicant then contacted her Family Member II and asked her to take the applicant's children to the local building.
31. In the early 2000s she again contacted her Family Member II and learnt that the violence had escalated and the family was lucky to be alive. Every Bantu family was being targeted and their property destroyed. The applicant's family property had been destroyed. Her Family Member I only just escaped after he saw the neighbours' property being destroyed and ran to the local building to seek refuge. When he was at the local building he found out that the applicant's Family Member III had been beaten with a weapon and injured in his property. The applicant's Family Member II informed

her that it was too dangerous to go outside the local building as mobs of people roamed the streets armed with weapons and would physically abuse a Bantu person on sight.

32. The applicant claimed that the violence in Town Z and around Kenya was ongoing and the Kenyan government led by President Kibaki was unable to control it. Town Z was the place where the violence started and remained one of the worst effected areas. The applicant's family were unable to leave the local building grounds for fear of being killed. They were reliant on assistance to provide supplies for them. The applicant had been told nearly many people now lived in the local building and were in constant fear of being attacked.
33. The applicant believed that she could not return to Kenya as because of her family situation she would be targeted and risked being killed if she returned to Town Z. She would also not be safe in Nairobi where tensions remained high. Her Family Member IV, who lived close by her family in Town Z had been expressly warned not to aid the applicant's family or he would be targeted and his property destroyed. There were military and police road blocks on all major roads in Kenya. The applicant would be unable to reach Town Z without being stopped and her identification checked. No matter which tribe she was stopped by, they would both be persecuted due to their family situation and therefore targeted by both sides. She had continued to remain in constant contact with her family through her Family Member II's facilities and they continued to inform her that the situation was very dangerous and the government was useless to stop the danger. The applicant provided some country information in support of her application.
34. Further, she explained that she and her husband had been completely reliant on her late Family Member III who had been paying their living expenses and other expenses in Australia. Since her Family Member had been killed these payments had stopped.
35. The applicant was fearful of returning to Kenya as her family had been severely persecuted and her Family Member III killed. She had been given a place to study at her nominated education provider but was unable to take up that place because her Family Member III was no longer able to pay her expenses. At the time of the application she was pregnant with her child.
36. The applicant's husband is an adult and was born in Town Z, Kenya. He was a member of the Tribe B and religious. Prior to coming to Australia, he had worked as a worker on a property in Town Z, Kenya.
37. In a statutory declaration accompanying his application the applicant's husband explained that he came to Australia as his wife had been granted a visa. The post election violence in the early 2000s had drastically affected his family and his wife's family. He could not return home for fear of losing his life. His family had always lived in Town Z and they were labourers. His property was many kilometres from the town centre and some kilometres from his wife's family's home that was destroyed soon in the early 2000s. The applicant's Family Member IV had sent him a message to the effect, "Town Z is being destroyed and I think your wife's property is being destroyed as well". The applicant's husband then telephoned Family Member IV and requested that Family Member IV attempt to bring his wife's family to safety. The applicant's Family Member IV informed him that he was too scared to leave his own property and it was very dangerous to go near the Town Z town centre or near the

applicant's family home. Several farms had been destroyed and the applicant's Family Member IV feared for his safety as people knew that his relative was married to a Tribe A woman. The applicant's husband remained in contact with his relative and in the early 2000s his sibling informed him that his property had been destroyed and all his property had been removed. The applicant's Family Member IV's neighbour's farm had also been destroyed in the night. The applicant's Family Member IV's neighbour was Kalenjin but he'd been known to promote the current government so he had been targeted. Family Member IV also informed him that he had been threatened indirectly through his connections with the applicant. Threats had been made against the applicant and his wife to Family Member IV. The applicant had also been informed by a neighbour, Person 3, who was a Kalenjin who worked with a number of people of Bantu origins. Person 3's co-workers had fled Town Z during the violence but Person 3 had offered to hide some of their children in the hope that the violence would calm down. The militia came to Person 3's home and searched the home and took away the Bantu children and nobody knew what had become of the children.

38. The applicant claimed that he was in a similar position to his wife, as due to their family situation there was nowhere they could be safe in Kenya. Everybody knew that although he was a Tribe B he was married to a Tribe A. He feared for his life if he returned to Kenya.
39. The applicant's representative submitted that the applicant was a national of Kenya who came to Australia to study. She had been planning to continue her studies in Australia. She had no intention of claiming protection in Australia when she arrived. She had left children behind with her family and had every intention of returning. Her claim for protection was *sur place*. Her fear of persecution was based on the deteriorating political situation in Kenya which began about the time of the national elections in the early 2000s. Her fears were based on the experiences of her family with whom she had contact with by phone. Her family, including her children, fled to a local building which was where they remained. It was submitted that the tribal groups within Kenya amounted to particular social groups within Kenya society. It was submitted that while being a victim of generalised violence was not the basis for a claim under the Convention, it was also the case that if a person was subject to persecution on Convention grounds, and the state was unwilling or unable to protect them, that can be the basis of a Convention claim as a refugee, even if it took place in the context of civil war.

Evidence at the hearing

40. The applicant gave evidence (in the absence of her husband) that she lived in a small village, outside of Town Z. She lived on her husband's property. The property was their only source of income and she was not working. Her husband's relatives lived on the same property.
41. The applicant's relatives lived in the town of Town Z. Her Family Member V worked and her Family Member VI was deceased. Her Family Member V owned the property that they lived in since the late 1900s. She had siblings and they lived with her Family Member Vin Town Z. They were not married.
42. Her Family member III was a professional. They could see her Family Member III's residence from Town Z – it was quite nearby.

43. Before she came to Australia, although there were some problems between the tribal groups in the area, it was nothing like what flared up in December and January. The area, in which she lived with her husband, was all of his tribe. There was no-one from her tribe living in this area. They knew that she was different because she did not speak the local language. She spoke the language of her tribe. She did not really have any problems because her husband was generally by her side. There would only be minor things like people being rude to her. She said during the previous election she could remember people throwing stones and beating people who were not from the same tribe. There was an assumption that if you were from a certain tribe then you voted according to your tribal allegiances. If somebody from a tribe different from those in the area got elected then it was your fault this occurred. She said during these types of skirmishes the police took sides. If the police were Tribe A, because she was Tribe A, the police would rescue her. If the police were from a different tribe they would not do anything.
44. The applicant had never been involved in politics in Kenya other than voting. She had not campaigned in any elections. Although there were no overt problems there, the tribal divisions were always there and were simmering under the surface.
45. Her Family Member V, siblings and children were currently living away from their homes in Town Z. They had first sheltered in the local building for some time and then they went to where they currently are. During the unrest, her Family Member V's property had been destroyed down because he was not a Nilote. Since her family had been away from their homes, her Family Member V had been unable to work and her siblings and children had been unable to go to school. The family had never gone back to the house to see what had happened. They had not gone outside of where they currently were. As far as she was aware, her family was being supported who provided them with food. They could not go back to where they were living. In the early 2000s some people left the area and went back to Town Z and were killed. They had been threatened not to make the mistake to return to where they lived. Some people were killed by weapons.
46. She was in regular contact with her family in the area. She did not know what they were planning to do or how long they were planning to stay there. It was put to her, that things seemed to have currently calmed down in Kenya – that there had been a political solution to the problems after the elections. The applicant maintained that in Nairobi things had calmed down but things had not calmed down in Town Z. People still held grudges against each other. Her and her husband's property had been destroyed. This was because of their family situation. Family Member's V and Family Member VI's house was not destroyed. Her Family Member IV lived nearby and was keeping an eye on their property while they were away in Australia. She believed that if she went back to where she was living with her husband in the village she would not survive – she would be killed. Her husband was an outcast because of their family situation. Family Member IV had told him that they did not want to see his wife and children in the area. She was asked why she thought the situation would not calm down. She said that she wanted her children out of the area because there were diseases in the area. Family Member V's refused to take them and look after them because of the family situation and they felt that they could not help. If people were willing to attack children then she did not believe that things had calmed down. The children

were in school before all of this happened but they had not been able to go to school since the unrest.

47. Her Family Member III was killed in his home. There were no death certificates. The people that were killed in this unrest were buried in a mass grave because there were dead people everywhere.
48. She explained that she finished her studies in Australia in the early 2000s and graduated in the early 2000s. She was going to go on to study further at a different education provider but since her Family Member III had died he had been unable to send her any money. She had big problems if she returned because her husband was Tribe B and she was a Tribe A. This meant they were not accepted by either side. She could not go to Nairobi because Nairobi was dominated by the Kikuyu. She did not believe that the independent review into the violence would solve the issues that had been there for so long. Her family did not want to leave the area because they were scared and also because they had only been offered a small amount for resettlement. There was nowhere for them to go. She had heard that the United States was going to take some of the people from the area She feared going back to Kenya as her life would be in danger, as would the life of her children. If she was to go back she would die or the only place for her to go to was where they currently were where there was disease and hunger.
49. The applicant's husband gave evidence that before he came to Australia he worked as a farmer in a village on the outskirts of Town Z. He lived there with his wife and children. His wife's family lived in the township of Town Z. He said that when he and his wife married, people in the area did not like it but they did not do anything about it. He was told it was not good for the tribe for him to have married outside the tribe. There had previously been tribal clashes in the late 1900s but at that stage he was not married to his wife. His children were currently not going to school as they were not at their usual; residence. He is in regular contact with his Family Member VII He believed that if he returned he would be persecuted as he had been threatened because he married outside of his tribe. The only houses that were destroyed in his area were his own house and a neighbour's house – some distance away. The neighbours were also from another tribe. His wife's family's house was destroyed and his parents would not look after his children; neither would any of his siblings as they did not like the fact that his wife was from another tribe. He did not believe there was any place in Kenya where they would be accepted. The fighting had not affected them in the past. He did not know when his children would be able to leave the area and when they would be able to go to school. He did not know what his wife's family planned to do.
50. The visa applicant's sibling, Person 1, gave evidence via telephone from Kenya. She said that she was living in an area Town Z and had been there for some months. They would remain there until they found somewhere else to live. At this stage they did not know where they were going to go. They had no plans and they had no employment. They could not go back to where they used to live as they were afraid that they would be killed. They were chased away from their home. It was put to her by the Tribunal that things calmed down and she responded that she still believed that if they went home that they would be killed and that other problems would happen to them.
51. She was looking after the applicant's children. Family Member V could not look after the children because they were from a different tribe and would be discriminated

against. She described how things were so difficult in their current area – that there was no food, that there was no education for the children and there were a lot of diseases. They did not have any plans or money and did not know whether they could go and live anywhere else. The applicant could not return to Kenya as she would not be safe. She could not go back to her husband's place because she was from a different tribe and she would be attacked there.

52. The applicant's husband's Family Member VII, gave evidence. He stated that he feared for his relative's safety if he returned back to Kenya. There were serious tribal clashes earlier in the year and his relative had married outside the tribe and nobody wanted people marrying outside their tribe. He could be killed. He understood that his relative's children were in an area in Town Z. The people were still in the area as they were afraid to leave. He said that recently someone from the Kikuyu tribe came to the area and went to the market for business and he was killed. There were still these sorts of killings going on. It was not safe for them to come back. It was not safe for his children in the area where he grew up.

Independent Country Situation

53. The International Crisis Group report "Kenya in Crisis Africa Report no 137, 21 February 2008 details what occurred post election in the Rift valley:

The announcement on 30 December 2007 by the Electoral Commission of Kenya (ECK) that the incumbent President Mwai Kibaki was the winner of the presidential election has plunged the country into an unprecedented political, security and humanitarian crisis. Six weeks after proclamation of the contested results, protest riots, repression by security forces and revenge killings by supporters of both camps have caused over 1,000 deaths and more than 300,000 internally displaced persons (IDPs)...

Both coalitions, the Orange Democratic Movement (ODM) and the Party of National Unity (PNU), include leaders from the largest communities of the country but are supported by ethnically-rooted political constituencies that include fanatical followers. For PNU they are the Kikuyu, Embu, and Meru, who originate from the Central and Eastern Provinces and are strongly represented in the Nairobi Area, Coast Province and the Rift Valley as a result of migration. ODM's ethnic constituencies are Luo, Luhya and Kalenjin, who originate from Nyanza and Western Provinces and the Rift Valley and are equally strongly represented in the major towns. ODM also has a significant following among the coastal Muslims and in North Eastern Province.

In the slums of Nairobi, Kisumu, Eldoret and Mombasa, protests and confrontations with the police rapidly turned into revenge killings targeting representatives of the political opponent's ethnic base. Kikuyu, Embu and Meru were violently evicted from Luo and Luhya dominated areas, while Luo, Luhya and Kalenjin were chased from Kikuyu-dominated settlements or sought refuge at police stations.

Simultaneously, Kikuyu settlements, the largest migrant communities in the Rift Valley, were the primary victims of Kalenjin vigilante attacks that were reminiscent of the state-supported ethnic clashes of the mid-1990s....

54. The report notes that the conflict in the Rift valley was essentially over land. Further the politicians and the traditional chiefs had been inciting anti-Kikuyu violence for a long time and this increased before the polls. The net effect was that the Kikuyu were seen as the cause of all the region's ills.

55. In relation to the role of the police in the violence the report notes:

The role of the police in quelling the riots has been questionable, with considerable evidence that officers have taken sides and used terror tactics against slum dwellers. Kikuyu youths in Mathare 4A area reported that non-Kikuyu police watched helplessly as their houses were torched and property looted. The most officers did, they claimed, was to shoot in the air to scare away mobs. Non-Kikuyu victims made similar claims, giving numerous examples of people being hacked with machetes and their property looted as police watched or mocked the victims. In many cases, decisive police action came only when officers thought their tribes or those who voted with their communities were under siege.

One of the worst affected towns was lakeside Kisumu in the west, Odinga's heartland. Again most of those killed and displaced were Kikuyus, although scores of Luo youngsters are also said to have been shot dead by the police. Many Luo youngsters took to the streets in rage at the election results, burning down shops and cars. Street protests quickly degenerated into looting and other acts of criminality. The police in Kisumu are especially blamed for contributing to the high number of fatalities.

56. The report concludes:

The current uneasy calm in Kenya should not be misunderstood as a return to normalcy. The protracted political crisis has deep roots and could easily lead to renewed extreme violence. More is at stake than the collapse of Kenya itself. Kenya is the platform for relief operations in Somalia and Sudan, a haven for refugees from throughout the region, a regional entrepot, and a key anchor for long-term stabilisation of Rwanda, Uganda and Burundi. Paralysis of its infrastructure would deprive those countries of access to basic commodities, reduce trade opportunities, hamper foreign investment and see economic growth crippled. The quicker a comprehensive solution to the crisis in Kenya is found, the better the prospects will be for the entire region. The alternative – a collapsed economy, the evisceration of the democratic process and ethnic and territorial conflict – would have severe consequences for the whole of east Africa, and well beyond.

FINDINGS AND REASONS

57. The applicants arrived in Australia on validly issued Kenyan passports and the Tribunal accepts that they are nationals of Kenya.

58. When the applicant applied for a different visa in the early 2000s she provided her address as Town Z. Her child's birth certificate indicated that he/ she was born at Town Z. The applicant's birth certificate indicates that she was born in the same district, as was her husband. The applicant attended the Town Z school. Her Family Member III who provided the funds for her to study in Australia provided evidence that he was carrying on a business. The Tribunal accepts that the applicants originate from Town Z in Kenya.

[Country information about the applicants deleted in accordance with s.431 as it may identify the applicants]

59. The applicant claimed that her tribe the Tribe A . Her husband's tribe is from Tribe B.

60. Based on the country information quoted above the Tribunal accepts that Town Z was one of the epicentres of the post election violence. Based on this information the

Tribunal accepts that the applicant's Family Member V and siblings were forced to flee when their home was destroyed and that they are currently living in a different area in Town Z. The Tribunal accepts that the applicant and her husband's home was also destroyed down as she was a Tribe A living in a Tribe B area.

61. The Tribunal accepts that the post election violence was motivated by tribal allegiances and differences. Based on the country information the Kenyan authorities were either unable to protect those who were targeted, or responded according their own ethnic group, either only assisting those of their only ethnic group or doing nothing when those from opposing ethnic groups were targeted.
62. The Tribunal accepts that at the time the applicants applied for refugee status there was a real chance that the applicant, as a Tribe A living in Town Z area where the majority was Tribe B, faced a real chance of persecution for a Convention reason of ethnicity. The Tribunal accepts that the applicant's position had an added complication in that she has married a member of the Tribe B tribe. The Tribunal accepts that since the election tribal differences have become more acute.
63. However the country information suggests that since the political settlement in April 2008 the matter have calmed down. The Economist notes:

In the six months since Kenya's electoral crisis the country has, in many ways, done better than expected. About 1,500 Kenyans died in the weeks following a disputed election, but the killing has abated and efforts are under way to resettle some of the 300,000 people displaced in the violence. At the top of the new government of national unity relations between the president, Mwai Kibaki, and the prime minister and former leader of the opposition, Raila Odinga, are distant but respectful (A Finance Minister resigns http://www.economist.com/world/mideast-africa/displaystory.cfm?story_id=11708266 accessed 17 July 2008).
64. The Tribunal must consider whether there is still a real chance that the applicant would be persecuted in the reasonably foreseeable future on account of her ethnicity.
65. The Tribunal was persuaded by the evidence provided by the applicant, her husband and their relatives in Kenya that some of the applicant's children were in an area in Town Z. The applicant's husband's family would not care for their relatives, despite the well documented poor conditions in the camps, because they were of the wrong tribe. This suggests that tribal rifts are still severe in the area. They would not assist because they feared violence against them if they assisted children who had blood from the opposing tribe.
66. According to another report in July, there are continuing tensions between the President, Maai Kibaki and his opponent, Prime Minister Raila Odinga and that deep-seated problems were not being confronted.
67. There are various reports of individuals describing their fears of returning to their homes:

Mr Peter Kariuki, the chairman of the internal refugees at the Nakuru showground, has not been with his wife and three children since the violence broke out because she is from a different community.

He dismisses the construction of police posts in areas that witnessed the worst violence, saying the solution lies in resettling the displaced elsewhere.

Although the previous (Kanu) Government appointed a commission of inquiry to investigate the periodic violence in the country, the recommendations were never implemented. The report by a team headed by Mr Justice Akilano Akiwumi named powerful individuals behind the violence, but the Government did not take action.

The commission's report, finalised in 1999, also proposed ways, means and measures that ought to be taken to prevent, control and eradicate such clashes in future. It also established the origins and causes of such violence.

Mr Joseph Ngige, 60, who lost his son in this year's violence, says he will not return to Burnt Forest. "We are alive because we surrendered," he adds.

Mr Ngige rejected the Sh10,000 cash they were being offered to return to their homes, citing insecurity. Like others, he wants the Government to use the proceeds to buy them land elsewhere.

Mr Nicholas Kirwa, also from Burnt Forest, blames the recurrent skirmishes on unemployment and errant politicians who incite their followers into violence.

Mr Wilfred Ndolo, the director of Mitigation and Resettlement at the Ministry of Special Programmes, says the Government is trying to reconcile the communities to make the resettlement a success. According to him 217,000 people have been resettled while 25,000 are still in the 16 camps yet to close ("Three times unlucky in polls violence" 2008, Daily Nation, 25 July, <http://www.nation.co.ke/News/-/1056/442760/-/item/1/-/swc9jv/-/index.html> - Accessed 21 August 2008).

68. In June, a Catholic Information Service for Africa reported concerns about the haste with which the re-settlements process had been undertaken, with inadequate preparatory reconciliation groundwork:

Church leaders also say the government should have given peace and reconciliation a chance before embarking on the resettlement.

"The ethnic animosity that sparked the violence is still high and unless the host communities and displaced people are reconciled first, the mere deployment of police in volatile areas would not bring about peace," Archbishop Peter Kairo of Nyeri, chairman of the Catholic Justice and Peace Commission, said.

There is obvious evidence of ethnic tensions even in urban centers where a semblance of peace has returned. At the Mau Summit in Molo, the local matatu (taxi) termini initially manned by touts from the Kikuyu community are now manned by Kalenjin touts.

It is the same case at Londiani Market, previously dominated by Kikuyu traders. The entire market is now under Kalenjin domination, with the Kikuyu and Kisii "only welcome to buy".

One of the accusations levelled against the Kisii and Kikuyu was that they had taken over all local business in the Rift Valley. The Kalenjin seem intent on keeping them at bay ("Resettlement of IDPs flops due to intense ethnic hate" 2008, All Africa (source: Catholic Information Service for Africa) 10 June,

<http://allafrica.com/stories/printable/200806101058.html> - Accessed 20 August 2008).

69. Despite their differences, some attempts at improving relations between the main ethnic groups have been made, including, in Town Z, what have been described as ‘seed ceremonies’ initiated by the Roman Catholic bishop, Cornelius Arap Korir:

On a recent morning, as part of an ongoing series of “seed ceremonies,” Bishop Korir hands out bags of maize seed and fertilizer to members of the Kikuyu community of Illula, encouraging them to return, and to the neighboring Kalenjin community of Kapsoya, encouraging them to allow the Kikuyus to return.

“It takes a long time,” admits Bishop Korir, but the best way to get people together is development, he adds. “You make the project to be a peace project, like the season of planting. As they are planting, they are waiting, they are talking. The beginning was tough, but we keep on coming back, coming back.”

Sampson Baibai, an elder from Kapsoya representing the Kalenjin community, says that the troubles started after the elections, when many Kalenjins expected opposition leader Raila Odinga to win and accused the Kikuyu community of cheating when it was announced that he had lost to President Mwai Kibaki.

“One community was annoyed at the other who stole the election, and so they directed their anger to the community who had stolen the election,” says Mr. Baibai, as members of his community and of the Kikuyu community line up for seed. But after about a month, he and other elders began to talk across ethnic lines to stop the violence. “It took the initiative of the elders to talk to the young people and tell them that people have to live together as a community.”

Elijah Ng’ang’a, a Kikuyu elder at the ceremony, says that his people had wanted to return to their farms for many weeks, “but every time they tried to come back, they were chased away. That’s when we sat down and talked to them.” He also credits the bishop’s system of dispersing the seeds to farmers. “The seeds were being offered to both communities not just one – so that pulled people together – and that’s when they calmed down and decided to be together,” he says (“In Kenya’s hotbed of postelection violence, a bishop sows seeds of peace” 2008, Christian Science Monitor, 13 June, <http://www.csmonitor.com/2008/0614/p01s01-woaf.html> Accessed 21 August 2008).

70. The Tribunal also notes that despite the relative calm the underlying issues which triggered the violence have not been resolved. In the Town Z area the Kikuyu homes and business have been destroyed, if those in the current areas away from their homes are forced to leave there is currently no where for them to go and the country information suggests that some returnees have been threatened and driven away.
71. A “real chance” is a substantial chance, as distinct from a remote or far-fetched possibility; however, it may be well below a 50 per cent chance (see *Chan* above). It is not a remote or insubstantial chance that the applicant could be the subject of violence on her return and that violence would amount to serious harm. Matters in Town Z are still tense. The applicant is someone who has married across tribal boundaries and was living in an opposing tribal area. Her husband’s family have said it is not safe for her to return. It has not been safe enough for her children to live in this area. It is considered that they are safer in the current area. The Tribunal finds that although the risk has abated since the early 2000s it is still not a remote or far-fetched possibility that the

applicant would be persecuted in the reasonably foreseeable future if she returned to Kenya. Therefore there is a real chance that the applicant would be persecuted in the reasonably foreseeable future on account of her ethnicity.

72. The Tribunal has considered whether it is reasonable for the applicant to relocate to avoid the risk of persecution. As her husband is Tribe B she would not be able to relocate to an area that is majority Kikuyu or Tribe A They are in the position that they would not be accepted by either side. In these circumstances the Tribunal finds that it would not be reasonable for her to relocate to avoid the risk of persecution. The Tribunal finds that the applicant's fear of persecution is well founded and for reasons of her ethnicity and that she is a refugee within the meaning of the Convention.
73. The applicant's husband has made his own claims but has also claimed that he is a member of the applicant's family unit. As the Tribunal has found that the applicant is a refugee and the applicant's husband is a member of her family unit the Tribunal does not find it necessary to consider his claims.

CONCLUSIONS

74. The Tribunal is satisfied that the first named applicant is a person to whom Australia has protection obligations under the Refugees Convention. Therefore the first named applicant satisfies the criterion set out in s.36(2)(a) for a protection visa and will be entitled to such a visa, provided she satisfies the remaining criteria.
75. The other applicants applied as members of the first named applicant's family. The Tribunal is satisfied that they are the spouse and dependent of the first named applicant for the purposes of s.36(2)(b)(i). The fate of their applications depends on the outcome of the first named applicant's application. As the first named applicant satisfies the criterion set out in s.36(2)(a), it follows that the other applicants will be entitled to protection visas provided they meet the criterion in s.36(2)(b)(ii) and the remaining criteria for the visa.

DECISION

76. The Tribunal remits the matter for reconsideration with the following directions:
- (i) that the first named applicant satisfies s.36(2)(a) of the Migration Act, being a person to whom Australia has protection obligations under the Refugees Convention; and
 - (ii) that the second and third named applicants satisfy s.36(2)(b)(i) of the Migration Act, being the spouse and dependant respectively of the first named applicant.

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

Sealing Officer's I.D. ahead