

DECISION RECORD

RRT CASE NUMBER: 0802332

COUNTRY OF REFERENCE: Malaysia

TRIBUNAL MEMBER: Nicole Burns

DATE DECISION SIGNED: 17 July 2008

PLACE OF DECISION: Melbourne

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

STATEMENT OF DECISION AND REASONS APPLICATION FOR REVIEW

1. This is an application for review of a decision made by a delegate of the Minister for Immigration and Citizenship to refuse to grant the applicant a Protection (Class XA) visa under [s.65](#) of the *Migration Act 1958* (the Act).
2. The applicant, who claims to be a citizen of Malaysia, arrived in Australia and applied to the Department of Immigration and Citizenship for a Protection (Class XA) visa. The delegate decided to refuse to grant the visa and notified the applicant of the decision and her review rights by letter.
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 for review of the delegate's decision.
5. The Tribunal finds that the delegate's decision is an RRT-reviewable decision under [s.411\(1\)\(c\)](#) of the Act. The Tribunal finds that the applicant has made a valid application for review under [s.412](#) of the Act.

RELEVANT LAW

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

Definition of 'refugee'

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

10. The High Court has considered this definition in a number of cases, notably *Chan Yee Kin v MIEA* [1989] HCA 62; (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] HCA 19; (2000) 201 CLR 293, *MIMA v Haji Ibrahim* [2000] HCA 55; (2000) 204 CLR 1, *MIMA v Khawar* (2002) 210 CLR 1, *MIMA v Respondents S152/2003* (2004) 222clr1.html" class="autolink_findacts">222 CLR 1 and *Applicant S v MIMA* [2004] HCA 25; (2004) 217 CLR 387.

11. Sections 91R and 91S of the Act qualify some aspects of Article 1A(2) for the purposes of the application of the Act and the regulations to a particular person.

12. There are four key elements to the Convention definition. First, an applicant must be outside his or her country.

13. Second, an applicant must fear persecution. Under s.91R(1) of the Act persecution must involve “serious harm” to the applicant (s.91R(1)(b)), and systematic and discriminatory conduct (s.91R(1)(c)). The expression “serious harm” includes, for example, a threat to life or liberty, significant physical harassment or ill-treatment, or significant economic hardship or denial of access to basic services or denial of capacity to earn a livelihood, where such hardship or denial threatens the applicant’s capacity to subsist: s.91R(2) of the Act. The High Court has explained that persecution may be directed against a person as an individual or as a member of a group. The persecution must have an official quality, in the sense that it is official, or officially tolerated or uncontrollable by the authorities of the country of nationality. However, the threat of harm need not be the product of government policy; it may be enough that the government has failed or is unable to protect the applicant from persecution.

14. Further, persecution implies an element of motivation on the part of those who persecute for the infliction of harm. People are persecuted for something perceived about them or attributed to them by their persecutors. However the motivation need not be one of enmity, malignity or other antipathy towards the victim on the part of the persecutor.

15. Third, the persecution which the applicant fears must be for one or more of the reasons enumerated in the Convention definition - race, religion, nationality, membership of a particular social group or political opinion. The phrase “for reasons of” serves to identify the motivation for the infliction of the persecution. The persecution feared need not be *solely* attributable to a Convention reason. However, persecution for multiple motivations will not satisfy the relevant test unless a Convention reason or reasons constitute at least the essential and significant motivation for the persecution feared: s.91R(1)(a) of the Act.

16. Fourth, an applicant’s fear of persecution for a Convention reason must be a “well-founded” fear. This adds an objective requirement to the requirement that an applicant must in fact hold such a fear. A person has a “well-founded fear” of persecution under the Convention if they have genuine fear founded upon a “real chance” of persecution for a Convention stipulated reason. A fear is well-founded where there is a real substantial basis for it but not if it is merely assumed or based on

mere speculation. A “real chance” is one that is not remote or insubstantial or a far-fetched possibility. A person can have a well-founded fear of persecution even though the possibility of the persecution occurring is well below 50 per cent.

17. In addition, an applicant must be unable, or unwilling because of his or her fear, to avail himself or herself of the protection of his or her country or countries of nationality or, if stateless, unable, or unwilling because of his or her fear, to return to his or her country of former habitual residence.

18. Whether an applicant is a person to whom Australia has protection obligations is to be assessed upon the facts as they exist when the decision is made and requires a consideration of the matter in relation to the reasonably foreseeable future.

CLAIMS AND EVIDENCE

19. The Tribunal has before it the Department’s file relating to the applicant. The Tribunal also has had regard to the material referred to in the delegate's decision, and other material available to it from a range of sources.

20. According to her protection visa application, and oral evidence, the applicant was born in Malaysia and speaks, reads and writes Punjabi, Malay and English. Her religion is Sikh. Her ethnic group is Punjabi (Sikh). She was married to a Sikh man in the early 1980s. It was an arranged marriage. She has several children: [information deleted in accordance with [section 431](#) of the [Migration Act 1958](#) as it may identify the applicant]. Her parents live in Malaysia as do her siblings. She did not complete her education, and was married at a young age. She never worked outside the home, apart from a short stint as an admin assistant in the early nineties. She currently stays in accommodation provided by a community support group in City A.

21. In a statutory declaration [date & year specified] (submitted with the visa application) the applicant said she feared she would be physically harmed or even killed if she returned to Malaysia by her abusive husband. She said that he has abused her – physically and sexually at times – for most of their married life. She recalls the abuse became a lot more serious when she was pregnant with one of her children (around year specified), when his drinking intensified. Her parents picked her up after a particularly bad beating sometime in the early nineties and she lived with them for a while, only to return because her father was ashamed and she had no other option. The beatings became worse. The applicant estimates that her husband beat her at least once or twice a week, often severely. Over the years his abuse continued: in the form of beatings, verbal attacks, and possession of the applicant’s property (including passport) and taking control of her social life. Her children were also victims of her husband’s aggression, often when trying to protect their mother. She claims that [year specified] was the worse year in terms of abuse. She claims that her husband wanted her to convert to Religion X. She claims that she went to the authorities once, and her Child 1 went another time, following severe beatings. Each time the authorities provided a report, visited their house and spoke to her husband, then left and did nothing more. She claims to have called a person at a women’s organisation in the early 2000s who did not offer any assistance. She states that her husband has threatened to kill her many times. The applicant claims that a distant ‘relative’ helped her to escape to Australia.

22. The applicant states that she believes her husband treated her the way he did because she was his ‘wife’ – i.e. a possession. She fears that her husband will kill her if she returns to Malaysia as a form of honour killing. She claims that she will not be afforded protection because of the stigma attached to victims of domestic violence,

and because of authorities' corruption. She is also fearful to return to Malaysia as a woman with no male protection.

23. In another statutory declaration [date & year specified] the applicant said that she would not be able to relocate elsewhere in Malaysia to avoid her husband because he could track her down. She stated that her husband had threatened to throw acid on her if she divorced him. She stated also that she suffers from depression, lack of appetite, insomnia, anxiety, headache and nightmares. She attached a letter from a medical professional, from a Community Health Organisation, [date & year specified] to her submission. In it Person 3 states that, in his/her opinion, the applicant is unfit for work as a result of 'illness'.

24. The applicant submitted two translated reports as part of the visa application as follows:

- A report from the authorities dated [date & year specified], Authorities, detailing a complaint from the applicant's child. In it the applicant's child states that he/she tried to stop a fight between his/her parents, was unable to control his/her drunken father, who then hit him/her with his fist and '...pulled my hair, dragged me and smashed my head against a wall.' He/she stated that his/her mother has been abused by his/her father ever since they were married. He/she stated that he/she fears for his/her own safety, or members of his/her family in the future.

- A report from the authorities dated [date & year specified], detailing a complaint by the applicant. She states that her husband hit her with his fist and slapped her. She states that he always beats her and is an alcoholic. She is afraid and he has asked her to convert to Religion X. She wants her passport and wishes to leave home.

25. The applicant's representative provided a written submission to the Department, outlining numerous arguments why the applicant deserves protection. The representative lists numerous reasons for the harm the applicant purportedly fears if she has to return to Malaysia at the hands of her estranged husband, or 'local religious fanatics' for reasons of her membership of a particular social group, of 'women in Malaysia' (and additional 'alternative formations'). The representative argues that the applicant will be denied protection by the authorities, as part of the systematic discrimination against women '...which is both tolerated and sanctioned by the State' The representative referred to various case law (domestic and international) and independent country information in support of her submission.

26. The delegate refused the protection visa as she did not find that the group identified as 'women in Malaysia' (for the reasons identified by the applicant) constitutes a particular social group within the meaning of the Refugees Convention. She did not accept that the harm feared from the applicant's estranged husband was for a Convention reason: it was personal. She did not find that the difficulties resulting from being a divorced woman in Malaysia amount to harm resulting from a Convention reason. As well, she did not find that the Malaysian government would fail to provide the applicant with the same degree of protection as accorded to other nationals.

27. During the review stage the Tribunal received the following additional evidence:

- A statutory declaration from the applicant [date & year specified] stating that she is worried about her ability to give evidence at the hearing because of the poor state of her mental health (including memory loss). In

addition, she had recently remembered the following points she wanted to include in her submission:

- ➤ [Information deleted: [s.431](#)].
- ➤ Child 2 was beaten badly by her husband at times. He/she lodged a complaint with the authorities once but they did nothing (she does not have a copy).
- ➤ Often her husband beat her in the middle of the night and her screams would wake the neighbours who would call the authorities. The authorities would come, talk to her husband, then leave.
- ➤ Her children were powerless to protect her because they were also victims and feared her husband.
- ➤ She sustained many injuries from her husband's beatings and attached documents of when she presented at various emergency departments as evidence.
- A letter from the applicant's representative [date & year specified] in which she advised that the applicant was admitted to hospital on [date specified] due to her unstable mental health. He/she also voiced her concern that the delegate ignored relevant case law and made findings about the applicant's credibility without interviewing her;
- A letter of support from the Case Manager, of Organisation III (residential service for homeless women);
- A letter of support from the Organisation I; and
- A letter from a medical professional, which states that: the applicant was an inpatient from [dates specified]; she arrived acutely distressed due to fear of her husband and uncertain visa process; her likely diagnosis is 'adjustment disorder'; and possible other diagnoses are 'post-traumatic stress disorder, depression, psychosis'.

The Tribunal hearing:

28. The applicant appeared before the Tribunal to give evidence and present arguments. The Tribunal hearing was conducted with the assistance of an interpreter in the Punjabi (Indian/Pakistani) and English languages.

29. The applicant was represented in relation to the review by her registered migration agent.

30. The applicant said that she came to Australia, for the first time ever, in [year specified], fleeing from her husband whom she feared would kill her. She left her children behind. She knew no one in Australia – that was why she decided to 'escape' to Australia in the hope that her husband would be unable to track her down. She went straight to a Sikh temple in Town B from the airport, and stayed there for a short time until members of the temple were able to help her access relevant services.

[Information deleted: [s.431](#)].

31. The applicant said she was born in Malaysia and has several siblings who still live there, as do her parents. Before coming to Australia she lived in City C, several hours drive from her home town, in an apartment with her youngest children. She has not seen her parents for many years because they do not want to see her husband.

32. The applicant said she was married in the early 1980s and recalls that her husband first started to abuse her (physically, sexually and psychologically) when she became pregnant. She did not tell anyone initially out of fear and shame. After a

particularly bad night when her husband physically assaulted her the applicant's parents were informed by a relative (who lived nearby). Her parents came and took her and her children to live with them. During this time she had no contact with her husband, although he told her subsequently that he had gone to her parent's house and saw her on a few occasions, without her knowledge.

33. [Information deleted: [s.431](#)].

34. The applicant's husband did not change when she returned to him. His aggression became worse, fuelled by the fact that he had lost his job because he had been drinking on the job. Financially desperate, they moved in with the applicant's parents. This was in the early 1990s. The applicant's husband continued his abuse of the applicant during this time, often when her parents were not home. He also fought with her siblings, and mixed with some 'bad men' who drank excessively. Her father told her to take him away, before he seriously harmed one or more of her family members.

35. The applicant said shortly after she and her family returned to City C, [information deleted: [s.431](#)]. They moved to a nearby Sikh temple where they lived for several years. During this time she became acquainted with a person called Person 4 who volunteered at the temple. Person 4 was the only person she confided in about the abuse she was suffering. Initially Person 4 tried to talk to her husband, but to no avail.

36. The applicant said that her husband also beat her children. Child 2 took the brunt of his/her father's aggression, especially when he/she tried to shield his/her mother from harm. In one instance Child 2 was beaten so badly he/she suffered an injury. He/she ran away from home and reported the incident to the authorities, however they did nothing. On another occasion her Child 1 returned from Country E and was beaten by his/her father. He/she too lodged a complaint with the authorities, accompanied by the applicant and another sibling, who had also been beaten. She said her Child 1 screamed at the officers at the authorities to do something, but they refused. The authorities drove them home, talked to the applicant's husband privately and then left. She was beaten by her husband again for going to the authorities, so were her children.

37. Sometime in [year specified] the applicant said she went to the authorities herself following a severe beating by her husband. The authorities wrote a report, but did not do anything else.

38. Shortly after this incident the applicant called Person 4 for help. Person 4 took money from temple donations to purchase a ticket for her to Australia. In [year specified] the applicant snuck out of her house, walked some distance to Person 4's car, who then drove her to the airport. She changed her clothes – into new ones Person 4 had brought her – at a petrol station on the way. The applicant called Person 4 a few days after she arrived in Australia. Person 4 said that her children were praying at the temple at the time. Sometime in mid-[year specified] the applicant contacted Person 4 again, to see if she had any news of her children. Person 4 told her that she had not seen her children since then, and told her not to call him/her anymore, because he/she was afraid the applicant's husband might find out he/she had helped her escape.

39. The Tribunal asked if the applicant had sought help from anyone else. She replied that she called a crisis line in City C once, but the person was not helpful. She also confided in a medical professional who lived nearby that she was going to escape to Australia and asked her to keep an eye out for her youngest child, whom she was the most concerned about leaving. The medical professional said he/she already knew the applicant was abused: he/she lives across the street and had heard the neighbours

call the authorities on many occasions, only to leave after they had talked to her husband. The applicant said when the authorities came they would tell them to be quiet, because people were sleeping. Her husband would smile and act like a nice man. Then the authorities would leave.

40. The Tribunal asked the applicant why she decided to come to Australia. She said that no one knows her here. She said she had called her Child 2 in Country D and asked to go and stay with him/her. He/she refused, and told her not to bring trouble. She said she thinks this is because he/she was so badly hurt by his/her father, he/she does not want to have anything to do with their family. Child 1 in Country E lives in shared accommodation and therefore she would not be able to stay with him/her.

41. The Tribunal asked the applicant to elaborate on her claim in her application that her husband wanted her to convert to Religion X. She explained that her husband had talked about converting to Religion X himself in order to receive certain government benefits, although he never did.

42. The Tribunal asked the applicant if she had thought about divorce. She replied that she had talked to her father about this possibility but he did not agree because it is 'shameful' Her father never helped her. Her parents were born in Country F and therefore apart from her immediate family, all of her extended family live in Country F. Her siblings are scared of her husband - he has broken down doors before. She would not feel safe if she moved elsewhere in Malaysia, because her husband has contacts everywhere.

43. The Tribunal asked the representative to explain her statement in her submission that the applicant fears harm by 'local religious fanatics' The representative replied that she was referring more to men in society in general (or friends or relatives of the applicant's husband) who might assist, or be complicit, in any future harm against the applicant.

44. The Tribunal put to the applicant country information that indicated that there is less stigma attached to being a divorced woman in Malaysia today; and that a search of the sources did not locate specific information about separated or divorced women being more vulnerable to violence; or specific information on honour killings in these circumstances. The applicant replied that she knows her husband will kill her if she returns and that no one will help her. He will be waiting – it does not matter if the government is there or not. She has asked for help on numerous occasions for so long – from her father and the authorities - but they never did anything.

45. The applicant concluded that her mental state – due to what has happened to her and her fear of her future and her anxiety about her children – is unstable. She forgets things, and has regular nightmares.

46. The Tribunal received a report dated [date & year specified] from the applicant's counsellor/advocate from Organisation II as follows:

- the applicant presented as 'incredibly traumatised and distressed, which is consistent with victims of domestic violence'. "...this trauma is further compounded when there is a lack of social and legal support for the victims, as has been the case for the applicant.'
- As the applicant's children were both victims of, as well as witnesses to the violence, the applicant believes they have grown up living in fear of their father and would not support her – she has not contacted them due to fear that they will tell her husband where she is.
- In her opinion the symptoms the applicant has presented with '...are consistent with those outlined under the heading of Post Traumatic Stress in the Diagnostic and Statistical Manual of Mental Disorders (IV Ed).

- She found the applicant credible.

Country Information

47. In assessing the applicant's claims against the Convention grounds, the Tribunal considered information from a range of external sources regarding the situation for women in Malaysia, and specifically with regards to domestic violence and state protection.

Domestic Violence

48. The 2007 US Department of State report on human rights practices in Malaysia indicates that:

Violence against women remained a problem. During the year police received 3,264 domestic violence reports. Reports of rape and spousal abuse drew considerable government, NGO, and press attention. Under the Domestic Violence Act, anyone who wilfully contravenes a protection order by using violence against a protected person may be punished by imprisonment of up to one year and a maximum fine of \$556 (2,000 ringgit). In extreme cases, involving "grievous hurt" inflicted using a deadly weapon, the maximum imprisonment increases to 20 years. Women's groups criticized the act as inadequate and called for amendments to strengthen it. In their view the act fails to protect women in immediate danger because it requires separate reports of abuse be filed with both the Social Welfare Department and the police, causing delay in the issuance of a restraining order. Cases also require visible evidence of physical injury, despite its interpretation to include sexual and psychological abuse.

Sources indicate that statistics show a rise in violence against women in Malaysia. An article dated 12 March 2007 refers to "concern over a sharp rise in gender-related violence - especially rape and domestic abuse" in Malaysia. The article also refers to "Shahrizat Jalil, Minister for Women, Family and Community Development" agreeing "that abuse of women was often concealed because women were ignorant of their rights or were mistakenly acting in accordance with cultural practices." According to the article:

"Reported incidences of violence against women are only the tip of the iceberg," said Irene Fernandez who heads TENAGANITA, a leading human rights organisation. "Many cases go unreported because of fear and a conservative value system that pervades our society."

Even the government is alarmed by the statistics which show that 6.6 women are raped every day and is urging victims to come forward and report so as to ensure that the perpetrators are punished.

...The All Women's Action Society or AWAM, a grouping of women's non government organisations (NGOs), said rising violence against women is a primary concern of many women's groups. "Violence against women has escalated, going by reported cases alone. Besides rape, incidences of domestic violence have also increased year-on-year," said Honey Tan Lay Ean, executive director of AWAM (Kuppusamy, Baradan 2007, 'Malaysia-Women: Gender-related violence goes largely unpunished', *Inter Press Service*, 12 March 2007).

An Immigration and Refugee Board of Canada response to information request dated 22 August 2005 includes the following information on domestic violence in Malaysia:

Malaysia has enacted the Domestic Violence Act (1994) (Malaysia 1994; *The Daily Star* 7 Jan. 2005), has ratified the United Nations (UN) Women's Convention (with some reservations) but as of 2005 had not yet signed the Optional Protocol to the UN Women's Convention (AI 2005). Please see the attachment for a copy of the Domestic Violence Act of Malaysia 1995. Moreover, according to *Country Reports 2004*, the Domestic Violence Act addresses only violence perpetrated against women in the home, a restriction which women's groups believe makes the act inadequate (28 Feb. [2005, Sec. 5](#)). *Country Reports 2004* also cited the Women's Aid Organisation (WAO) as stating in June 2004 that legal protection was hindered due to a lack of cooperation between police, the social welfare department, and the judiciary (28 Feb. [2005, Sec. 5](#)).

Several sources have noted a rise in the number of domestic violence cases in Malaysia (Malaysian Bernama 2 Aug. 2005) and have stated that violence against women is a problem in Malaysia (Freedom House 2005; *Country Reports 2004* 28 Feb. [2005, Sec. 5](#)). On the other hand, statistics of domestic violence cases released by the Royal Malaysian Police show that there were 3,468 reported cases of domestic violence in 2000, 3,107 in 2001, 2,755 in 2002, 2,555 in 2003, and 1,207 in the first five months of 2004 (WCC n.d.a). For further details on the yearly number of reports of domestic violence by state, ethnicity, or age, please consult the Website of the Women's Centre for Change: <<http://www.wccpenang.org/dvstats.html>>(WCC n.d.a).

The Human Rights Commission of Malaysia has reportedly complained that there is a shortage of "adequate, well-funded and safe shelter homes for victims of domestic violence in [the states of] Sabah and Sarawak" (Malaysian Bernama 2 Aug. 2005). Citing activist organizations, *Country Reports 2004* indicated that the support network for victims of domestic violence was deemed inadequate, and that police required additional training to handle cases of violence against women, despite recent improvements in this area (28 Feb. [2005, Sec. 5](#)).

Citing the WAO, AFP claims that of the 700 cases of domestic violence that it addresses annually, a tenth complain of spousal rape, although many more cases apparently go unreported (23 Aug. 2004). According to Malaysian law, spousal rape is not a criminal offence, and despite the fact that a man who rapes his wife could in theory be charged with assault, *Country Reports 2004* claimed that as at the end of 2004 no man had been convicted under this clause (28 Feb. [2005, Sec. 5](#)). The Malaysian Human Rights Commission (AFP 23 Aug. 2004; BBC 23 Aug. 2004) and the Joint Action Group Against Violence Against Women (AFP 27 Aug. 2004) have called on the government to criminalize marital rape (ibid.; ibid. 23 Aug. 2004), a position that has met with opposition from some of the country's leading Muslim clerics (AFP 23 Aug. 2004; ibid. 27 Aug. 2004; BBC 23 Aug. 2004). The mufti of Perak state, Harussani Zakaria, feels that making marital rape a crime is against Islam (ibid.; AFP 23 Aug. 2004), and publicly stated that "[a] husband has the right to be intimate with his wife and the wife must obey" (AFP 27 Aug. 2004; BBC 23 Aug. 2004). Some Islamic lawyers supported the mufti's view, claiming "a woman may only refuse her husband sex if he has a sexually transmitted disease" (ibid.). This, in turn, led to the outrage of women's groups (ibid.) (Immigration and Refugee Board of Canada 2005, *MYS100433.E – Malaysia: Recourse available to women who are victims of sexual or physical abuse (January 2003 – August 2005)*).

49. Analysis about the shortcomings of the Domestic Violence Act (DVA) were articulated in a 2004 pamphlet from a women's organisation in Malaysia calling for the reform of the DVA because:

The DVA, which clearly sends out a message that DV is unacceptable, has contributed to changing and challenging mindsets, but there is still a deep-seated cultural belief and value that a wife, daughter or girl friend can be disciplined and dominated by the men in their lives.

...It is this deeply entrenched attitude that is the root cause of obstacles that women face ("Why Reform the Domestic Violence Act (DVA) 1994?" Women's Aid Organisation, www.wao.org.m/news/20050110dvabrochure)

Spousal Rape

The States parties report dated 12 April 2004 by Malaysia to the United Nations Committee on the Elimination of Discrimination against Women includes the following information in relation to spousal rape:

453. The law also stipulates that sexual intercourse by a man with his own wife is not rape and Malaysia does not have a provision on marital rape. However, there are three instances in which a man who has sex with his wife can be charged for rape:

(i) Where the wife is living separately from her husband under a decree of judicial separation or a *decree nisi* not made absolute;

(ii) Where the wife has obtained an injunction restraining her husband from having sexual intercourse with her; and

(iii) In the case of a Muslim woman living separately from her husband during the period of *'iddah* which is approximately a period of three months.

The report refers to the Malaysian police setting up of a Sexual Offences Unit in 1986 "to deal with rape and other sexual offences. In 1989, the legal penalties for rape were enhanced such that any person convicted for this offence faces an imprisonment term of not less than five years and not more than 20 years and is also liable to whipping" (United Nations Committee on the Elimination of Discrimination against Women 2004, 'Consideration of reports submitted by States parties under article 18 of the Convention on the Elimination of All Forms of Discrimination against Women – Combined initial and second periodic reports of States parties – Malaysia', United Nations Division for the Advancement of Women website, CEDAW/C/MYS/1-2, 12 April, pp. 115-117

<http://www.un.org/womenwatch/daw/cedaw/35sess.htm> – Accessed 16 May 2008).

The 2007 US Department of State report on human rights practices in Malaysia indicates that:

The penal code states that rape is punishable by a prison term of up to 30 years, caning, and a fine. According to the police, 3,177 rapes were reported during the year, compared with 2,435 in 2006. Spousal rape is not a crime, although a husband may be charged for causing hurt to his wife while attempting to force sexual relations with her

...Many government hospitals had crisis centres where victims of rape and domestic abuse could make reports without going to a police station. NGOs and political parties also cooperated to provide counseling for rape victims, but cultural attitudes and a perceived lack of sympathy from the largely male police force resulted in many victims not reporting rapes. According to the Ministry of Women, Family, and Community Development (MWFCD) and a leading women's NGO, only 10 percent of rape cases were reported to police. Women's groups noted that while some rapists received heavy punishments, including caning, other rapists received inadequate punishments.

Although the government, NGOs, and political parties maintained shelters and offered other assistance to battered spouses, activists asserted that support mechanisms for victims of domestic violence remained inadequate. There was a sexual investigations unit at each police headquarters to help victims of sexual crimes and abuse. Police responses and sensitivity to complaints of domestic violence continued to improve, but women's rights activists claimed that police needed additional training in handling domestic abuse and rape cases. (US Department of State 2008, *Country Reports on Human Rights Practices for 2007 – Malaysia*, March 2008, Section 5)

An *Associated Press Newswires* article dated 14 September 2007 refers to Malaysia making “it an offense for a husband to beat or threaten his wife to force her into having sex, but activists said Friday it failed to make marital rape a crime.” It is stated in the article that:

Under amendments to the penal code, which took effect last week, a husband who is found guilty of causing his wife “hurt or fear of death” to have sex with him can now face up to five years in jail.

The change, however, stops short of making marital rape a crime because another provision -- that a husband has the right to have sex with his wife -- had not been removed, said Maria Chin Abdullah, executive director of the Women’s Development Collective, a non-governmental group.

“(The amendment) doesn’t really help to resolve the whole issue of marital rape. It’s like they have made an amendment, but at the same time there is a way out,” she told *The Associated Press*. “The law doesn’t want to deal head-on with marital rape.”

Chin Abdullah said the change also did not provide for a minimum sentence, meaning those found guilty could be imprisoned for “as little as a day” (*‘Malaysia stops short of criminalizing marital rape, activists say’ 2007, Associated Press Newswires, 14 September 2007*).

State Protection

50. In relation to police corruption, the US Department of State report indicates that “[r]eported police offences included accepting bribes, theft, and rape; punishments included suspension, dismissal, and demotion.” The report also indicates that:

Police officers are subject to trial by the civil courts. Prime Minister Abdullah Badawi, who was concurrently minister for internal security, reported that there were 25 disciplinary actions against police officers during the year.

The government continued to focus police reform efforts on improving salaries, quarters, and general living conditions of police officers. The status of other reforms recommended in a 2005 police commission report, including the formation of an independent police complaints and misconduct commission, remained uncertain. NGOs complained that the government's efforts to implement the 2005 commission's recommendations lacked transparency.

In relation to government corruption, it is stated in the report that:

The law provides criminal penalties for official corruption. Government commitment to the effective implementation of the law remained unclear, and the media reported numerous cases of alleged official corruption. There was a broadly held perception of widespread corruption and cronyism within the governing coalition and in government institutions. The World Bank's worldwide governance indicators reflect that corruption was a problem. As of 2006 the ACA employed approximately 1,800 staff members nationwide. According to the ACA director general, the agency initiated the arrest of 492 individuals during the year. In August the government announced that civil servants who refuse or fail to declare their assets would face disciplinary actions and would be ineligible for promotion.

A deputy prime minister-headed panel investigating allegations of log smuggling by a member of parliament (MP) had not completed its investigation by year's end (US Department of State 2008, *Country Reports on Human Rights Practices for 2007 – Malaysia*, March, Sections 1(d), 3 & 5).

An article dated 26 September 2007 notes that Malaysia had "moved up by one rung in this year's Transparency International's Corruption Perceptions Index (CPI), ending a five year downward trend, Transparency International Malaysia (TI-Malaysia) president, Tan Sri Dr Ramon Navaratnam said today." According to the article:

Malaysia was ranked 33rd in 2002, 37th in 2003, 39th in 2004, 39th in 2005 and 44th in 2006.

"We are ranked at 43rd spot but with minimal improvement in the score, from 5.0 to 5.1," he told reporters here.

Although it was a small improvement it must be sustained, he said adding TI-Malaysia urged the government to step up the fight against corruption which was perceived to be a serious concern, especially among the public, officials and politicians ('M'sia at 43 of corruption perceptions index 2007, up one rung' 2007, *Bernama Daily Malaysian News*, 26 September).

An *Associated Press Newswires* article dated 15 June 2007 indicates that "Malaysian human rights groups said Friday that police abuse and corruption in the country have not stopped despite an independent commission's recommendations for sweeping changes." It is stated in the article that:

"Human rights continue to deteriorate," Yap Swee Seng, executive director of local organization Suaram, said at a meeting of human rights groups. "The culture of impunity is growing."

...A royal commission, set up in 2004, made 125 recommendations for changes in the police force to reduce crime, stop corruption and observe human rights.

Last year, Prime Minister Abdullah Ahmad Badawi announced that 81 recommendations had been implemented, 19 more would be implemented and 25 were still being studied.

But Suaram and Amnesty International Malaysia said few of the recommendations on human rights have been implemented. The implementation of the others has been unsatisfactory, they said.

...Opposition leader Lim Kit Siang, who also joined the panel discussion, said politicians pointed fingers at each other instead of cracking down on police abuse and corruption.

...But Denison Jayasooria of the Human Rights Commission of Malaysia expressed cautious optimism. “The progress has been slow and in some cases extremely slow ... (But) The police tone has changed... There are changes. There is light, even if it’s just twinkles” (Zappei, Julia 2007, ‘Malaysian groups say police abuse, corruption continue despite calls for change’, *Associated Press Newswires*, 15 June).

Malaysia has introduced various measures in an attempt to lessen the impact of corruption. Along with the United Nations Development Programme (UNDP), Malaysia has recently developed a “National Integrity Plan” to combat corruption in the public and private sectors, and to “enhance ethics and integrity” in civil society. In February 2007 guidelines for the National Integrity System (NIS) reform programme were published in a report titled *National Integrity System: A Guiding Framework*. According to this report, “[o]ver the years, money politics have plagued the Malaysian body politic, and it continues to do so”. It also states that the “greatest impact of corruption is on the poor, especially women and the disadvantaged – those least able to absorb its costs.” The functions of the Anti-Corruption Agency (ACA) and the powers of ACA officers, along with other watchdog agencies are described in the NIS report. The effectiveness of these institutions is also discussed, including the concern that the ACA and the Public Complaints Bureau (PCB) are placed under the Prime Minister’s Department and are therefore not independent bodies (Malaysian Institute of Integrity & United Nations Development Programme 2007, *National Integrity System: A Guiding Framework*, United Nations Development Programme – Malaysia website, February, pp. 45-49 http://www.undp.org.my/index.php?act=oth&oth_id=593 – Accessed 8 June 2007)

Honor killings

A search of the sources consulted found no information about honour killings having occurred in Malaysia.

A DFAT report dated 4 January 2007, on religious practices in Malaysia, states that:

...We have no knowledge of women being killed in Malaysia for marrying against their family’s wishes. ‘Honour killing’ would be punishable under Malaysian civil criminal law DIAC Country Information Service 2007, *Country Information Report No. 07/04 – Malaysia: Religious practices in Kedah* (sourced from DFAT advice of 4 January 2007), 5 January –

Commentary from Malaysian sources expresses the view that honour killings are not condoned by Islam. An article dated 7 July 2006 on the website of Aliran (a group which identifies itself as Malaysia’s “first multi-ethnic reform movement dedicated to justice, freedom and solidarity” and oldest human rights group), in referring to “‘honour killings’ and other immoral adjudications”, states that:

Such pre-Islamic tribal systems, erroneously ascribed to the teachings of Islam, are commonly found in the areas of the Indian Sub-Continent extending towards Arabia onwards to Africa, and they got exported to Europe and the West through migration. Such beliefs and traditions are still embedded deeply on some scattered communities, despite their being in modern societies.

The article does not mention Malaysia as a country in which honour killings occur ('Honour or horror?' 2006, Aliran Online website, 7 July <http://www.aliran.com/content/view/91/4/> – Accessed 10 April 2007).

FINDINGS AND REASONS

51. Based on copies of her passport on file, the Tribunal finds that the applicant is a Malaysian citizen.

52. The applicant, who is a female Sikh from Malaysia and mother of several children, fears that she will be harmed – possibly even killed – on return to Malaysia by her estranged husband who she claims has seriously abused her for most of their marriage. She fears that the authorities and her family (immediate and extended) will not protect her, because they have been unable to do so in the past, because they fear her husband, [information deleted: s.431] and because the authorities (and society more broadly) do not take domestic violence claims seriously.

53. The Tribunal accepts that the applicant is a Sikh from Malaysia who has been married and has several children. Based on the evidence before it (i.e. consistent and detailed oral and written evidence from the applicant, and the reports provided as evidence) the Tribunal accepts that the applicant was abused by her husband for most of her marriage. The Tribunal accepts that the nature of this abuse can be categorised as serious harm. The Tribunal accepts that the applicant's children were also physically abused, taking into account the report lodged by her child in [year specified]. The Tribunal accepts that the applicant attempted to seek state protection – through the authorities on numerous occasions and [information deleted: s.431] – but to no avail. The Tribunal accepts that whilst they helped her initially, the applicant's parents and siblings were too ashamed and fearful of her husband to help her. The Tribunal accepts, based on the evidence provided in the form of reports and assessment letters from qualified medical professional and trained case workers (with experience working with victims of domestic violence) that the applicant's physical, psychological and emotional well-being has been severely affected.

54. However, the existence of such abuse does not necessarily mean that the applicant is a refugee as defined under the Convention. This is dependent on an assessment of the applicant's claims to determine if the harm the applicant fears is for a Convention reason, as well as an assessment of the efficacy of state protection in Malaysia for victims of domestic violence, discussed below.

55. The applicant presented to the Tribunal as a credible witness. The Tribunal finds the evidence provided to the Tribunal, in the form of submissions, statutory declarations and oral evidence, highly consistent and offered without embellishment or overstatement. The Tribunal notes that the applicant included additional information about the nature and extent of her husband's purported abuse during the review stage. However the Tribunal considers this can be explained by the trauma and loss suffered by the applicant which has affected her memory more so than evidence of embellishment.

Convention Ground: 'Particular Social Group'

56. The applicant (via her representative) has advanced claims that the threats to her life are a consequence of her membership of one or more particular social groups variously described as:

- Malaysian women victims of domestic violence
- Malaysian women who are separated
- Malaysian women who are separated and who initiated the separation
- Malaysian women without male protection
- Malaysian women
- Malaysian women who suffer from psychological illness as a result of domestic violence

57. The Tribunal wishes to examine the existence of these social groups and determine whether the applicant's fears are well founded. The Tribunal will begin by considering whether 'Malaysian women victims of domestic violence' constitute a particular social group within the meaning of the Convention.

58. The definition of 'particular social group' has been the subject of much judicial consideration. The meaning of the expression 'for reasons of...membership of a particular social group' was considered by the High Court in *Applicant A's* case and also in *Applicant S*. In *Applicant S* Gleeson CJ, Gummow and Kirby JJ gave the following summary of principles for the determination of whether a group falls within the definition of particular social group at [36]:

...First, the group must be identifiable by a characteristic or attribute common to all members of the group. Secondly, the characteristic or attribute common to all members of the group cannot be the shared fear of persecution. Thirdly, the possession of that characteristic or attribute must distinguish the group from society at large. Borrowing the language of Dawson J in Applicant A, a group that fulfils the first two propositions, but not the third, is merely a "social group" and not a "particular social group"...

59. In *Applicant S* the High Court emphasised the relevance of cultural, social, religious and legal factors or norms in a particular society in determining whether a posited group is a particular social group in the society. In *Khawar (MIMA v Khawar)* (2002) 210 CLR), for example, McHugh & Gummow JJ stated:

The membership of the potential social groups which have been mentioned earlier in these reasons would reflect the operation of cultural, social, religious and legal factors bearing upon the position of women in Pakistani society and upon their particular situation in family and other domestic relationships. The alleged systemic failure of enforcement of the criminal law in certain situations does not dictate the finding of membership of a particular social group.

60. Therefore 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.

61. The applicant has provided a detailed and comprehensive account (both verbally and in writing) of her existence in an abusive, oppressive and often violent

marriage over a period of many years, perpetuated by her husband. Her children were also physically, emotionally and psychologically abused. Her husband controlled her social life and confiscated her passport. He threatened to kill her if she tried to leave.

62. It is claimed that the reason for this abusive behavior by the applicant's husband was a function of the status of women in Malaysia, and specifically vis-à-vis the role of 'wife'. The applicant initially kept quiet about the abuse, because she was ashamed and felt powerless. When she did seek help, through the authorities or her family, it was not forthcoming. Her family – her father in particular – was ashamed at her situation and wanted her to put up with it instead of bringing shame on her family. Her siblings did not intervene because they too were afraid of her husband. When the authorities responded to reports – either from herself or Child 1 or neighbors – they would consult the applicant's husband and then leave. They often told her to keep the noise down. Other 'professionals' she confided in – such as the medical professional who lived nearby and a person on the end of a help line – admitted they were powerless to help in such an environment. She claims that she was powerless to improve her circumstances. The expectation was that she should maintain the family honour, at the expense of her fundamental rights and freedoms.

63. Independent country information from various sources indicates that domestic violence in Malaysia remains a problem. According to a March 2007 *Inter Press Service* article, there has been a rise in reported cases of violence against women in Malaysia. Further, many cases go unreported, due to inadequate support mechanisms for victims and cultural attitudes. Country information indicates that although Malaysia criminalised domestic violence in 1994 through the Domestic Violence Act (DVA), enforcement remains weak due to deeply entrenched beliefs that women (be they wives, daughters or girlfriends) can be controlled and disciplined by the men in their lives. Spousal rape is not considered a crime in Malaysia.

64. In this case the Tribunal finds that the domestic violence that the applicant has been subjected to by her husband is attributable to women's social status in Malaysia and inferior position to which they are relegated in relation to their husbands. The Tribunal accepts the applicant's description of abuse over two and a half decades, as well as the description of her unsuccessful attempts to seek help – from the authorities, health professions, and members of her extended family. Taking into account the evidence before it as well as relevant country information, the Tribunal finds that 'Malaysian women victims of domestic violence' can be considered to be a group set apart from the rest of society because of factors related to deep-seated societal attitudes about women's roles and status in Malaysia. The Tribunal is satisfied that such a characteristic is not and does not constitute a shared fear of persecution. Accordingly, the Tribunal is satisfied that 'Malaysian women victims of domestic violence' can and do constitute a particular social group in the Convention sense. The Tribunal finds that the applicant is a member of this particular social group and that the applicant's membership of this particular social group is the essential and significant reason for the harm feared.

65. Given the above finding, the Tribunal does not need to consider whether the other formulations for 'particular social group' posited by the applicant's representative as listed above constitute particular social groups.

State Protection

66. In the *Khawar* decision, the High Court held that the 'serious harm' involved in persecution could be inflicted by persons who were not state agents (at 576-583 per

Gleeson CJ). The Court found that failure to offer protection from harm itself satisfies the Refugees Convention. Therefore, once a claim meets the threshold of serious harm – as the Tribunal has found in this case – the relevant consideration is whether effective state protection is available for the sexual and gender-based violence suffered by the applicant. As demonstrated in *Khawar*, it is not necessary that the harm is inflicted by the state, rather the emphasis is on the nexus between the harm suffered and the state’s ability or inability to protect the applicant, as discussed below.

67. The Tribunal finds that the applicant’s lack of standing in her marriage also means that, when subjected to differential treatment by a violent husband, there is a real chance that state protection would not be forthcoming. This is underscored by country information which indicates that the implementation of domestic violence laws is hampered by cultural attitudes about the role of women generally and status of wives in particular. Although domestic violence has been criminalised in Malaysia, there are major shortcomings in implementing the law. In this case the Tribunal notes that the authorities were called in to provide protection on a number of occasions over the years and yet failed to do so, and in many cases actually refused to help. The Tribunal is of the view that the authorities’ inaction suggests that domestic violence is generally treated as a private matter and that women are frequently afforded no official protection even if they lodge a formal complaint. It also reflects a prevalent social attitude that ‘wives’ are not worthy of protection from non-state actors (husbands, in this case).

68. With regards to spousal rape – which the applicant claimed she suffered on numerous occasions – there is no legal protection.

69. The Tribunal notes as well country information that indicates that whilst there have been concrete efforts to reform the police force, corruption remained a widespread concern. This is particularly relevant in this case, given that the applicant’s husband – the possible perpetrator of future harm – [information deleted: s.431].

70. Given this view of women, and the status of ‘wives’ in Malaysia, as well as numerous examples in the past where state protection was not forthcoming, despite the applicant’s (and Child 1’s’) pleas for help, the Tribunal finds that there is a real chance that the applicant would be denied adequate state protection to international standard from her husband if she were to return to Malaysia now or in the reasonably foreseeable future.

71. The applicant’s representative also argued that the applicant fears harm from her estranged husband, ‘or local religious fanatics’ on account of a number of other reasons including being a separated woman who left her husband; lacking male protection; and the fact that she suffers from mental illness. Given that the Tribunal finds that the applicant’s fear of persecution for reasons of her membership of a particular social group of ‘Malaysian women victims of domestic violence’ is well-founded, the Tribunal does not need to consider these other reasons.

72. A further consideration for the Tribunal is whether the applicant would be reasonably able to relocate to another part of Malaysia where she would be safe from harm from her husband. In this regard, the applicant gave evidence that she believed her husband would have the motivation and means to locate her if she returned to Malaysia: [information deleted: s.431]. He would be even more determined to track her down, given that she had left him and dishonored him. Additionally, in view of the applicant’s lack of education and work experience, the diagnosed symptoms of post traumatic stress disorder, her lack of financial capital and support from her family, and lack of ability to access an independent income it would not be reasonable, in the Tribunal’s view, for the applicant to relocate.

73. In considering all the circumstances of this case, the Tribunal finds that there is a real chance that the applicant would face persecution for a Convention reason if she were to return to Malaysia now or in the reasonably foreseeable future.

CONCLUSIONS

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

DECISION

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