

## **DECISION RECORD**

**RRT CASE NUMBER: 0807544**

**DIAC REFERENCE(S): CLF2008/121469**

**COUNTRY OF REFERENCE: Philippines**

**TRIBUNAL MEMBER: Nicole Burns**

**DATE: 12 February 2009**

**PLACE OF DECISION: Melbourne**

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

## **STATEMENT OF DECISION AND REASONS APPLICATION FOR REVIEW**

1. This is an application for review of a decision made by a delegate of the Minister for Immigration and Citizenship to refuse to grant the applicant a Protection (Class XA) visa under [s.65](#) of the [Migration Act 1958](#) (the Act).
2. The applicant, who claims to be a citizen of Philippines, arrived in Australia in the early 2000s 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 [Part 866](#) of Schedule 2 to the [Migration Regulations 1994](#).

## Definition of 'refugee'

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

10. The High Court has considered this definition in a number of cases, notably *Chan Yee Kin v MIEA* [1989] 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 the applicant was born in Province A, the Philippines, in the late 1900s. She is Catholic. She is separated from Person 1. She has children, Person 2 and Person 3 who live with Person 4 in Province B, the Philippines. Her siblings live in the Philippines. She worked in a store and as a professional whilst in the Philippines.

21. It is stated that in the early 2000s the applicant witnessed the murder of Victor Gardose, the vice Mayor of Tapaz Town, Capiz Province and his two bodyguards during the Barangay (village) Taft annual fiesta. She claims that she identified the culprits.

22. The delegate refused the applicant a protection visa on the basis that he found no nexus between the applicant’s fear of returning to the Philippines and the Convention. He also found that the essential and significant reason for the harm feared was criminal in nature.

### **The Tribunal hearing**

23. The applicant appeared before the Tribunal to give evidence and present arguments. The Tribunal also received oral evidence from her mother via the phone in the Philippines.

24. The applicant said she is from Province A, which is located in the Philippines. Her children have been living with her family members in the next province, Province B, since she separated from her Person 1 in the early 2000s. Prior to coming to Australia in the early 2000s she had been living between her family member’s house and the house of an individual called Person 5 in City I. She worked for Person 5’s.

25. The applicant said she left the Philippines because she is scared someone will harm her because she witnessed a politically-motivated murder in the late 2000s. She said strangers had followed her – at her family member place and in City I – ever since the incident.

26. The applicant described the crime she witnessed. She said in the early 2000s she attended the annual fiesta at Person 1 in Taft town, Capiz Province, with Person 3. They were staying at a family member’s house. The highlight of the fiesta was the coronation of the beauty queen. Her daughter was a contestant. The guest speaker was

the vice mayor of Tapaz municipality, Victor Gardose. At about 7pm Victor Gardose was on the stage of an open-air gym, about to proclaim the beauty queen, along with the captain of the barangay (Bitot Gimeno). Three masked gunmen drove past on two motorcycles and opened fire, killing Victor Gardose, two of his bodyguards (standing nearby, off stage) and Bitot Gimeno on the spot. One of the men stopped on his way from the scene, pointed a weapon at the applicant, and warned her against telling anyone what she had witnessed. The applicant was asked why these gunmen would have slowed down, whilst fleeing a murder scene, to threaten only her. She said it was because she was the only one close to the stage at the time (and Person 3). A few were killed on the spot: the applicant knew because she saw the bodies, covered in blood. Victor Gardose and Bitot Gimeno were shot and died on stage, whilst the two bodyguards were shot and killed below the stage.

27. The applicant said earlier that day whilst shopping in town some individuals had approached her and asked her what time the coronation began. She recognised them. The applicant was asked how she knew these individuals. She said she had spent time in Taft before (when she was married). On many occasions, such as school graduations or annual fiestas, the mayor would attend with his bodyguards. She recognised the masked armed gunmen as these three men because they were wearing the same clothes as when she had seen them earlier in the day.

28. The applicant was asked if anyone else witnessed these killings. She said that hundreds did, but most people were further away, separated from the stage by a road. The applicant had been waiting near the side of the stage, to take her daughter up on stage, when the killings occurred, on the side of the road closest to the stage.

29. The applicant was asked if she knew what kind of gun the gunmen used. She said it was a Type X weapon. The applicant was asked if she had seen a Type X weapon before. When pressed she said that she was not sure.

30. The applicant was asked if anyone had been arrested for these murders. She said no one had been arrested because the perpetrators were powerful. The case is still under investigation. There were some suspects but she was unsure who they were and what had happened to them. She said she did not want to be involved. She thinks the murders were politically motivated because Exmundo and Victor Gardose were fighting for the same mayoral position. Victor Gardose's widow actually won the elections in May 2007 against Exmundo and became mayor. The applicant said she thinks Exmundo lost the elections because many people believed he was the mastermind behind Victor Gardose's murder. However Exmundo was never arrested, nor any of his bodyguards, in connection with the murder. Some people were questioned but set free because no one came forward to give evidence.

31. The applicant said some time after the incident she reported what she had seen to the local police, at Taft police station. However the police did not take a statement and had warned her that the people she was talking about were very powerful. Strangers had started hanging around where she was staying. She knew they were strangers because the dogs kept barking. The strangers did not say anything to her and she did not actually see them because it was night. When she moved back to her family members house in Province A she also noticed strangers following her. This made Person 4 anxious so they moved to another of her family members, (Province B). She saw this particular stranger even when she boarded the transport to go to City I. The applicant was asked if this stranger following her ever approached her or said anything. She said he did not. Often she would try to hide, to lose him.

32. The applicant was asked what this stranger looked like. She said they looked like 'hoodlums' or 'underworld characters'.

33. The applicant has not returned to Tapaz, Taft or Barangay since the incident. Her former relatives told her one person was questioned in relation to the murders but no one came forward as witnesses. She has not heard of any other witnesses being harassed or threatened.

34. The applicant was asked if her family has received any threats. She said they had not. She is worried for her children though. The applicant was asked why she did not bring her children with her to Australia, given her concerns. She said it was because it would have been very difficult and hard for her.

35. The Tribunal brought to the applicant's attention some inconsistencies between her version of the incident and independent reports of the event. The Tribunal told the applicant that this was relevant because it could cast doubt on her claims about whether she witnessed the incident as claimed. The Tribunal noted the inconsistencies as follows:

- The applicant said the incident occurred on 27 December 2006 whereas various newspaper reports state that the murder of Victor Gardose occurred on 30 December 2006;
- The applicant said that Victor Gardose and Bitot Gimeno were killed whilst on stage however various newspaper articles report that they were shot and killed whilst in their jeep; and
- The applicant said four men had been shot and killed, including two of Victor Gardose's bodyguards. However the open source information available to the Tribunal indicates that only one bodyguard was killed; three men in total.

36. The applicant elected to respond to these inconsistencies at the hearing. She admitted that she might have the date wrong by a few days. She reiterated that Victor Gardose and Bitot Gimeno were on the gym stage when they were killed. She saw them arrive in a jeep, but they were on stage when they were shot. She is sure because she was there and she saw them. She also saw them shoot two bodyguards, killing four men in total.

37. The Tribunal noted that the incident the applicant claimed to have witnessed appeared to relate primarily to a criminal matter and therefore it was important to consider the effectiveness of state protection for witnesses to violent crime in the Philippines. The applicant was asked if she had told the police about these people following her. She replied that she had not because she was scared to and she had already learnt her lesson when she went to the police in Tapaz and Taft following the murders. When asked about the adequacy of witness protection in the Philippines the applicant replied that unless you are powerful, you do not have a voice. The applicant said she told some of her friends about what had happened and they advised her to leave the country because they also did not trust the system in the Philippines.

38. Person 4 also gave evidence by phone. She said everything the applicant said was true. The Tribunal asked why the applicant left the Philippines. She said it was because 'people' had threatened her and she was afraid of her safety. When she stayed with her in City J strangers followed her. These people still think she is somewhere in City J, they do not know she is in Australia. She was asked why these people want to harm the applicant. She replied that it was because of the incident. When asked by the Tribunal to explain, she said she was not confident to do so. The Tribunal asked her what the applicant had told her about the incident. She said she witnessed killings and had to escape. When asked who was killed the Person 4 said it was the mayor of a town but was unable to give a name or say from which town or when it happened. Person 4 said she felt unwell and handed the phone to one of the applicant's siblings,

visiting from overseas where she lives and works. The applicant's sibling said she had heard about the incident vaguely (about someone being murdered) but has not had much contact with her family in the Philippines.

39. The applicant said her sibling is not aware of the details because she only mentioned it to her briefly. She said Person 4 is definitely aware of the details but feels unwell, stressed and sad every time she has to recall the event.

40. The applicant was asked if she thinks these people linked to the murder will still try to harm her if she returned to the Philippines now. She said they would because the investigation is ongoing and they are still keeping an eye on her family. She said she is really scared.

## Country Information

### *Victor Gardose's murder: 30 December 2006*

41. Information regarding the murder of Victor Gardose is provided in a number of Philippine newspaper reports. These reports indicate that Gardose, vice mayor of Barangay town in the province of Capiz, was murdered at Tapaz (village) Taft on 30 December 2006, along with his bodyguard and a village chieftain. Gardose and his companions were about to attend the coronation of the beauty queen of the annual Tapaz religious fiesta.

42. The Philippine Daily Inquirer describes the incident in a report dated 31 December 2006, as follows:

Gardose, 39, died from two bullet wounds in the head, said Senior Supt. Cipriano Querol Jr., the Capiz police director, in a telephone interview.

Leonardo Gimeno Sr., 59, Caridad village chief, died of bullet wounds in the body while Gardose's bodyguard, Anthony Gequillo, 48, died of head wounds. The vice mayor's driver, Cornelio Gardose, 39, was unhurt.

The vice mayor and his companions had just arrived in Tapaz Taft on board his jeep at around 7:20 p.m. when they were gunned down near the village's civic center.

Two bonnet-wearing gunmen opened fire with .45-caliber pistols as the victims were alighting from the jeep.

Gimeno tried to flee the gunmen but was shot dead a few meters from the vehicle. The vice mayor who was seated in the back seat died inside the jeep along with Gequillo, said Querol.

The gunmen fled on a motorcycle driven by a third suspect going to Calinog town, Iloilo. Tapaz Taft is around seven kilometers from the "poblacion" or town plaza.

Gardose was about to attend the coronation of the beauty queen at the village's annual religious festival when he was gunned down. The villagers scampered to safety when they saw the bodies.

... Chief Supt. Geary Barias, Western Visayas police director, said they were not discounting politics as the motive of the killing.

Hours earlier, Gardose formally announced during a party in his Tapaz of San Julian that he would run for mayor in the May 2007 elections to replace Barangay Mayor Romualdo Exmundo who is in his third and last term. The two belong to the Liberal Party.

But Barias noted that there had been no record of violence among politicians in Barangay.

...While they were not discounting the involvement of New People's Army rebels, Barias said the killings were the work of hitmen.

"It was done by professionals," said Barias (Burgos Jr, N.P. 2006, 'Capiz town vice mayor, 2 others slain during festival Victor Gardose', *Philippine Daily Inquirer*, 31 December 2006).

43. A *GMANews.TV* report provides the following information on the shooting:

Gardose's driver Cornelio, 39, who survived, said they came from a family reunion and were at the Taft gym gate when they were cornered.

Initial investigation showed that at least two men shot Gimeno, who was at the front seat, and then at the driver, but the driver was not hit.

Gardose tried to escape but he was hit in the left portion of his head. His bodyguard, who was seated beside him, had gunshot wounds in the head, right arm, and left side of the body.

Police believe that the perpetrators are professional killers because no one was accidentally hit and the wounds inflicted were fatal ('Widow of slain Capiz vice mayor running for mayor' 2007, *GMANews.TV*, 7 February <http://www.gmanews.tv/story/29620/Widow-of-slain-Capiz-vice-mayor-running-for-mayor#> - Accessed 19 December 2008).

44. On 3 January 2007, the *Visayan Daily Star* reported that police had arrested Danilo Gelilang, a member of the Barangay police force and bodyguard of Mayor Romualdo Exmundo, in relation to the murder. Mayor Exmundo denied any involvement in the killings. The report cites Senior Supt. Rey Rafal, head of the Task Force Gardose, stating:

Rafal said Gelilang has a "history of being used by politicians" Investigators are determining reports that the policeman shot a supporter of a politician in the past election.

He said there is a "strong possibility" that (the killings) are election related. Investigators have discounted the involvement of New People's Army rebels, who are active in the area, or other groups.

... But Rafal did not want to comment when asked if Exmundo has been linked to the incident. He said the suspects are hired killers who are not from Barangay ('Slay of Barangay VM, 2 Others: Mayor's policeman-bodyguard apprehended' 2007, *Visayan Daily Star*, 3 January <http://www.visayandailystar.com/2007/January/03/police.htm> - Accessed 19 December 2008).

45. On 13 January 2007, a report released on the *Inquirer.net* website stated that the entire Barangay police force had been removed from the investigation and replaced by "members of the 605th provincial mobile group". According to Senior Supt. Rafal, Head of the Task Force Gardose, these actions were taken on account of

the policemen's "familiarity and closeness with the community and town officials" which could "affect the investigation of the case" as well as this being "a punishment for failing to prevent the killings" (Burgos, N.P. 2007, 'Entire police force sacked over killing of vice mayor', *Inquirer*, 13 January [http://newsinfo.inquirer.net/inquirerheadlines/regions/view\\_article.php?article\\_id=43184](http://newsinfo.inquirer.net/inquirerheadlines/regions/view_article.php?article_id=43184) – Accessed 19 December 2008).

46. Despite these steps having been taken in a bid to solve the murder of Victor Gardose and his companions, one year later the Cebu Daily News reported that Rosemarie Gardose, who had become the incumbent mayor of Barangay following the death of her husband, "lamented the slow march of justice for the slain town official and his two companions". The widow is quoted as saying that "the family was nowhere near finding the mastermind of the murder of her husband and his two companions, Carida village chief Leonardo Gemino and the vice mayor's bodyguard Anton Gequillo." In addition the report notes:

So far, only one suspect, Noel Fuentespina, has been charged with multiple murders in a case now pending at the Regional Trial Court (RTC) Branch 20 in Mambusao, Capiz.

But Fuentespina, the driver of former Capiz provincial board member Ronald Exmundo, has remained at large.

Witnesses also identified a Manuel "Boy" Beanisa, 44, as a possible suspect in the murders. He has not been charged.

Beanisa, a frustrated murder suspect who escaped from the Capiz provincial jail in 1985, was arrested in Manila last July and is now held at the Capiz Rehabilitation Center due to several pending cases not related to the Gardose murder.

Beanisa has denied any involvement in the Gardose murder.

Until Fuentespina is arrested, no one would know for sure who masterminded the killings, police earlier said ('Mayor laments slow grind of justice' 2007, *Inquirer.net* website (source: Cebu Daily News), 31 December [http://globalnation.inquirer.net/cebudailynews/visayas/view\\_article.php?article\\_id=109661](http://globalnation.inquirer.net/cebudailynews/visayas/view_article.php?article_id=109661) – Accessed 19 December 2008).

#### *Witness protection*

47. A 2008 report by the Immigration and Refugee Board of Canada discusses issues relating to "crime, police effectiveness and state response, including witness protection" in the Philippines. In considering the effectiveness of the Philippine National Police (PNP) in dealing with crime, the report cites the US State Department's *Country Reports for Human Rights Practices for 2006* which asserts that, despite steps being taken to rectify the situation, the PNP "has deep-rooted institutional deficiencies" and is often viewed by the public as being corrupt.

48. This information is pertinent when considering the level of police protection that may be offered to witnesses of violent crimes/political assassinations, despite the institution of the *Witness Protection, Security and Benefit Act in 1991*. While the Act entitles witnesses of "grave felonies" to benefits such as secure housing, relocation and/or change of personal identity at the expense of the Program, assistance in



obtaining a means of livelihood, financial assistance for the witness and their families, organisations such as Amnesty International, the Asian Human Rights Commission, and Human Rights Watch draw attention to inadequacies within the witness protection program. These are cited in the 2008 Immigration and Refugee Board of Canada report noted above, which states:

Various organizations have described problems with the witness protection program in the Philippines (AHRC 26 May 2006; Philippines 22 Jan. 2007, 75; HRW June 2007). In particular, the Melo Commission report states that the witness protection program lacks both the human and financial resources to protect witnesses of extrajudicial killings (Philippines 22 Jan. 2007, 75). Furthermore, the Asian Human Rights Commission (AHRC), an organization that works to promote and protect human rights in Asia (AHRC n.d.), describes the failure of the witness protection program as undermining the justice system (26 May 2006). Human Rights Watch (HRW) indicates that the government has not provided "credible assurances of protection" to witnesses (June 2007, 64). HRW researchers investigating extrajudicial killings found that citizens would rather attempt to ensure their own protection than rely on the government's witness protection program (*ibid.*, 62).

In 2007, a Filipino Senator put forward a resolution calling for an enquiry into the effectiveness of the witness protection program (Philippines 6 Sept. 2007). Senator Francis Escudero is quoted as saying that the witness protection program "falls short," and that it is distrusted by the public (*ibid.*). The opposition Senator notes that the witness protection program is administered by the Department of Justice, which interacts regularly with the Armed Forces and with the PNP (*ibid.*). He suggests that an improved program should be "insulated" from other government institutions (*ibid.*).

In contrast, the United States (US) reports that the witness protection program has been "strengthened and expanded" by the Philippines Department of Justice (US 24 Mar. 2007). Further information on how the program has been strengthened could not be found among the sources consulted by the Research Directorate (Immigration and Refugee Board of Canada 2008, *PHL102718.E - Philippines: Crime, police effectiveness and state response, including witness protection (2005-2007)*, 14 March).

49. In a 2008 report entitled *Witnessing Justice – Break the Chain of Impunity*, Amnesty International discusses problems within the criminal justice process, including failure to adequately protect witnesses in cases under investigation. In regards to investigations into political killings and enforced disappearances, the report states:

Few effective investigations have been conducted, and the arrest, prosecution and conviction of those responsible are rare. There are delays and deficiencies in each step of the criminal justice process. Many cases are never brought to court due to a lack of evidence, mostly because witnesses fear reprisals (p.1).

...Witnesses in cases under investigation by the authorities are particularly vulnerable to intimidation and reprisals, and sometimes even death. Many have complained repeatedly about the failure of the police to provide protection for them and their families, and said they have lost confidence in the ability of the Department of Justice to provide protection (p.3).

The *Witness Protection, Security and Benefit Act (1991)* does provide witnesses and close family members with housing, relocation and/or change of personal identity expenses, as well as a means of livelihood and medical treatment, but this rarely happens in practice. There are long court delays and protection is withdrawn if the case is unsuccessful, despite continuing threats. This is in clear violation of international law and standards, which provide for the protection of witnesses whenever and for as long as such protection is necessary, irrespective of the outcome of judicial or other proceedings. Penalties against those who harass witnesses (approximately US\$65 and/or imprisonment of six months to one year) have proved an inadequate deterrent (p.4) (Amnesty International 2008, *Witnessing Justice – Break the Chain of Impunity*, July, ASA 35/003/2008).

## **FINDINGS AND REASONS**

50. Based on a copy of her passport on file, the Tribunal finds that the applicant is a citizen of the Philippines.

51. The Tribunal does not accept that the applicant was a key witness to the murder of Victor Gardose (and two others) on 30 December 2006. It follows that the Tribunal does not accept the applicant's claim that she was known to be a witness to this particular event and followed (and intimidated) by 'strangers' for a period of time before coming to Australia. The Tribunal does not expect the applicant to recall fine details about the event and expects there to be a level of variation between her version and independent reports of the event. However the Tribunal found the discrepancies between the applicant's version of events and independent reports of the event to be significant. The Tribunal does not find it surprising that the applicant mixed up the dates of the incident by a few days. However the applicant was unable to provide plausible explanations for the other discrepancies about where Victor Gardose was shot and how many people were killed in total. Given the applicant claimed that she was waiting on the side of the stage with Person 3 and therefore was a key witness to the murders, the Tribunal expects her to know how many people were shot and the location. Given these discrepancies the Tribunal does not accept that the applicant was a key witness to the murder of Victor Gardose and two others on 30 December 2006 as claimed.

52. Apart from these significant discrepancies, at the hearing the applicant's explanation as to why she was at the annual fiesta and observations about the incident were akin to independent reports of the murders and the context in which they took place. The Tribunal is of the view therefore that the applicant may have been among the hundreds of others who were present at the coronation ceremony and may have seen some commotion taking place. However, for reasons outlined above, the Tribunal does not accept that the applicant was a key witness – because her story does not correlate with independent reports of the event - and therefore the Tribunal does not accept that one of the masked gunmen pointed a weapon at her body part when departing, threatening her. The Tribunal does not accept that the applicant was followed, purportedly by men linked to the murderers, on numerous occasions whilst in Taft town, at her family members' house in City J, or whilst staying at Person 5's house in City I. The Tribunal also does not accept that these strangers have continued to linger around Person 4's house in the Philippines whilst she has been in Australia. The Tribunal finds that there is no evidence to suggest that the applicant's children's safety or any other members of the applicant's family would be at risk because of what the applicant witnessed in December 2006. The Tribunal therefore does not accept that there is a real chance, now or in the reasonably foreseeable future, that the applicant

would be persecuted by the perpetrators of the murder of Victor Gardose because she witnessed the crime in 2006.

53. Even if the Tribunal were to accept that the applicant was targeted by the perpetrators of the murder of Victor Gardose because of what she witnessed in 2006, the Tribunal does not accept that the essential and significant reason for any interest in the applicant is for one of the five Convention reasons. The Tribunal has considered whether the applicant belongs to a particular social group of ‘people who have witnessed murders in the Philippines’. The Tribunal has considered whether such a group could constitute a particular social group within Philippines society, paying particular reference to *Applicant S v MIMA* [2004] HCA 25. In that case at [36] Gleeson CJ, Gummow and Kirby JJ stated:

...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”.

54. 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.

55. The Tribunal accepts there may be a collection of people who have witnessed violent crimes given the country information cited above which indicates that politically motivated killings are a feature of life in the Philippines. The Tribunal accepts the witnessing and capacity to give evidence against perpetrators of serious crimes is the common characteristic that unites this group of people and enables them to be set apart from society at large. The Tribunal notes, from country information, that the reporting of these crimes in the media would also establish this particular social group with a profile within a society. However, the Tribunal finds the essential and significant reason for the harm the applicant fears from the perpetrators of the murder of Victor Gardose is because of the particular information she possesses about a distinct criminal offence and not her membership of this particular social group. While the Tribunal recognises that a motivation of silencing potential witnesses does not preclude a finding that the persecution would be motivated by a Convention ground, it is satisfied that the persecutors in this case would not be motivated in any way by the applicant’s race, religion, nationality, political opinion or membership of a particular social group. As the Tribunal is satisfied that the essential and significant motivation behind any harm the perpetrator’s of Victor Gardose’s murder might inflict on the applicant is because of the threat she poses to them due to information she personally holds about their criminal activities, the Tribunal finds the harm is not Convention related.

56. The Tribunal has considered the effectiveness of state protection for witnesses of violent crime in the Philippines. The Tribunal notes, from the country information, that there are laws which provide protection measures for witnesses during judicial proceedings and the witness protection program has been expanded and strengthened. There are also reports which reveal significant deficiencies in the witness protection system in the Philippines. However these reports largely point to institutional inadequacies and do not indicate that the authorities would selectively and discriminatorily withhold state protection from the applicant for any Convention reason. Based on such country information, and the finding that the essential and significant motivation behind any harm the perpetrator's of Victor Gardose's murder might inflict on the applicant is because of the threat she poses to them due to information she personally holds about their criminal activities, the Tribunal does not accept that she would be denied state protection for any Convention-related reason.

57. Accordingly, the Tribunal finds that the applicant does not have a well-founded fear of persecution for a Convention reason in the Philippines in the reasonably foreseeable future.

## **CONCLUSIONS**

58. Having considered the evidence as a whole, the Tribunal is not satisfied that the applicant is a person to whom Australia has protection obligations under the Refugees Convention. Therefore the applicant does not satisfy the criterion set out in s.36(2)(a) for a protection visa.

## **DECISION**

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