

1009355 [2011] RRTA 120 (8 February 2011)

DECISION RECORD

RRT CASE NUMBER: 1009355
DIAC REFERENCE(S): CLF2010/79231
COUNTRY OF REFERENCE: Thailand
TRIBUNAL MEMBER: Alison Murphy
DATE: 8 February 2011
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 Thailand, arrived in Australia on [date deleted under s.431(2) of the *Migration Act 1958* as this information may identify the applicant] September 2008 and applied to the Department of Immigration and Citizenship for a Protection (Class XA) visa [in] June 2010. The delegate decided to refuse to grant the visa [in] October 2010 and notified the applicant of the decision and her review rights by letter [on the same date].
3. The delegate refused the visa application on the basis that the applicant is not a person to whom Australia has protection obligations under the Refugees Convention.
4. The applicant applied to the Tribunal [in] October 2010 for review of the delegate's decision.
5. The Tribunal finds that the delegate's decision is an RRT-reviewable decision under s.411(1)(c) of the Act. The Tribunal finds that the applicant has made a valid application for review under s.412 of the Act.

RELEVANT LAW

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

Definition of 'refugee'

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

outside the country of his former habitual residence, is unable or, owing to such fear, is unwilling to return to it.

10. The High Court has considered this definition in a number of cases, notably *Chan Yee Kin v MIEA* (1989) 169 CLR 379, *Applicant A v MIEA* (1997) 190 CLR 225, *MIEA v Guo* (1997) 191 CLR 559, *Chen Shi Hai v MIMA* (2000) 201 CLR 293, *MIMA v Haji Ibrahim* (2000) 204 CLR 1, *MIMA v Khawar* (2002) 210 CLR 1, *MIMA v Respondents S152/2003* (2004) 222 CLR 1 and *Applicant S v MIMA* (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.

The primary application

20. The applicant states in her application for a protection visa lodged [in] June 2010 that she was born on [date deleted] in Bangkok, Thailand, that she speaks, reads and writes Thai and English and that she is a Buddhist. She states that she is a Thai citizen by birth, that she travelled to Australia [in] September 2008 on a student visa and that she entered Australia on a student E visa issued in Bangkok [in] March 2008.
21. She states that she attended [university deleted] in Bangkok from May 1995 to March 1999 and that she holds a [qualification deleted]. She states that her occupation before she came to Australia was in [details relating to employment deleted].
22. She states that she first came to Australia [in] March 2008 but returned to Thailand in April 2008 to get some documents, before again entering Australia [in] September 2008.
23. In her reasons for claiming protection, the applicant states (in summary):
 - Her father died while she was at elementary school and her mother married another man who raped her when she was twelve years old;
 - He gave her to another man who took her to a place where young boys and girls are sold for sex for tourists. When she was staying there, nothing could save her and the children were beaten if they said no. Her mother couldn't help her and her parents and neighbourhood considered her evil;
 - A man took her for sex and she told him her story. He hid her in another place and gave her the chance to finish her education, but continued to have a sexual relationship with her;
 - One day he said that he would help her to go overseas and never see such bad society. He arranged for her to come here. She plans to fight the child sex trade if she gets a chance;

- She has no family and hates the society which permits child sex. She was traumatised and suffered stress and depression. She doesn't wish to see that evil situation but rather to contribute globally to the fight against child sex;
- She has had mental rest in Australia. Psychologically she hated men and their deeds. She doesn't wish to see other children passing through her experience as it hurts her mind;
- If she returns to Thailand, she feels that mentally she will not be normal because the scars of her past are still in her mind. If she had anyone who understood her problem she would rehabilitate but instead she was seen as evil and as if she was happy to be engaged in child sex.
- The authorities cannot or will not protect her if she returns because they do not care about destroying the next generation, rather use them for their temporary advantage.

24. The applicant lodged a number of other documents together with her protection visa application, being:

- A certified copy of the front pages of her Thai passport, issued [in] December 2007 and expiring [in] December 2012;
- A letter from [agency deleted] dated [in] May 2007 stating that the applicant was employed by [employer deleted] from [a date in] February 2006 to [a date in] May 2007 at a salary of [deleted] baht and that she left voluntarily;
- A letter from [employer deleted] dated [in] December 2007 stating that the applicant was hired [in] July 2007 as a collection officer at a salary of [deleted] baht;
- An Australian Government Overseas Student Confirmation of Enrolment indicating that the applicant was enrolled at [college deleted] from [a date in] March 2008 to [a date in] September 2008;
- Transcript of academic results from [university deleted] noting that she was admitted [in] May 1995 and graduated [in] March 1999 having completed a [degree deleted] with distinction.

The interview

25. The applicant was interviewed by the delegate in Melbourne [in] September 2010 with the assistance of a Thai interpreter. In that interview she elaborated on her written claims and gave evidence that was materially consistent with evidence she presented at the Tribunal hearing.

The delegate's decision

26. [In] October 2010 the delegate decided to refuse to grant the applicant a protection visa, noting in her reasons the following:

- She found no reason at interview to doubt the applicant's credibility in terms of her claimed experiences in Thailand and sympathised with her experience of long term sexual abuse;
- UNHCR guidelines define "particular social group" as a group of persons who share a common characteristic other than their risk of being persecuted, or who are perceived as a group by society. The characteristic will often be one which is innate, unchangeable or which is otherwise fundamental to identity, conscience or the exercise of one's human rights;
- The test for whether a person falls within the definition of a "particular social group" was formulated by the High Court in Applicant S v MIMA [2004] HCA 25 as per Gleeson CJ, Gummow and Kirby JJ 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'.

- The delegate did not accept that "sexually abused women" constituted a particular social group because they cannot be said to have a unifying characteristic that distinguishes them from broader society;
- The harm feared by the applicant does not constitute persecution under paragraph 91R(1)(a) as a Convention ground is not the essential and significant reason for the persecution feared;
- The delegate found that state protection was not withheld from the applicant for a convention reason and rejected the applicant's claim that the Thai Government is ineffective and unable to afford her effective protection that is in accordance with international standard.

Other documentary evidence before the Tribunal

Sexual exploitation in Thailand

27. Independent country information before the Tribunal suggests that all forms of prostitution remain illegal in Thailand. Nevertheless, prostitution is conducted openly throughout most of Thailand and the trafficking and sexual exploitation of women and children remain serious issues confronting the country.¹
28. Estimates of the number of sex workers in Thailand vary significantly. In 2009, Thailand's government reported that there were 73,917 adult prostitutes officially registered in the country. The US Department of State, however, reported that NGOs

¹ Ekachai, S. 2010, 'Ending prostitution an uphill battle', *Bangkok Post*, 14 August <http://www.bangkokpost.com/news/local/190990/ending-prostitution-an-uphill-battle> – Accessed 5 January 2011 – Attachment 1

believe the real figure to be closer to 300,000.² Freedom House concurs, reporting that in 2010 there were between 200,000 and 300,000 women and children working as prostitutes in Thailand³, while other sources argue that the number could be much higher⁴.

29. The precise numbers of under-age sex workers in Thailand is not known. The US Office of the National Commission of Women's Affairs estimates that in 2008 there were "between 22,500 and 40,000 Thai nationals below age 18 engaged in prostitution"⁵ while in 2007, the Thai government, academics and NGOs estimated that the number was probably closer to 60,000⁶ and one source makes the claim that the number could be as high as 800,000⁷.
30. The weight of available country information accepts that a significant proportion of sex workers in Thailand are unwilling participants, forced into prostitution at an early age. Some of these girls consent to becoming prostitutes due to the dire economic conditions of their families, however a substantial proportion are little more than children who have been sold by their parents into prostitution. Despite the illegality and frequency with which this is said to occur, the US Department of State reported that no parents were arrested for such acts in 2008⁸. A portion of the demand for child sex workers in Thailand comes from international tourists and Bangkok remains a major destination for sex workers and sex tourists.

Role of the Thai State in protecting victims of sexual exploitation

31. Since 1996 Thailand has undergone significant law reform and introduced a number of services to both adults and minors, citizens and foreigners, who have fallen victim to sexual exploitation and/or trafficking. Independent country information indicates that despite these efforts, corruption and under-resourcing have undermined the effectiveness of the state's reforms, with the US Department of State noting that local officials with commercial interests in prostitution often protected the practice⁹.
32. Child prostitution is illegal under Thailand's *Prostitution Prevention and Suppression Act* 1996, which sets out penalties including fines and imprisonment. According to the

² US Department of State 2010, *2009 Country Reports on Human Rights Practices – Thailand*, 11 March, Section 6

³ Freedom House 2010, 'Freedom in the World – Thailand', June

<http://www.freedomhouse.org/template.cfm?page=22&year=2010&country=7932>

⁴ Pusurinkham, S. (undated), 'Child Prostitution in Thailand', A Globe of Witnesses website

<http://www.thewitness.org/agw/pusurinkham.121901.html> – Accessed 15 January 2010

⁵ US Department of Labor 2009, *2008 Findings on the Worst Forms of Child Labor – Thailand*, UNHCR Refworld, 10 September <http://www.unhcr.org/refworld/docid/4aba3ebe37.html>

⁶ US Department of State 2010, *2009 Country Reports on Human Rights Practices – Thailand*, 11 March, Section 6

⁷ Pusurinkham, S. (undated), 'Child Prostitution in Thailand', A Globe of Witnesses website

<http://www.thewitness.org/agw/pusurinkham.121901.html> – Accessed 15 January 2010

⁸ US Department of State 2009, *Country Reports on Human Rights Practices for 2008 – Thailand*, 25 February, Section 5

⁹ US Department of State 2009, *Country Reports on Human Rights Practices for 2008 – Thailand*, 25 February, Section 6

US Department of State, “those who procure children for prostitution face strict penalties, and the punishment is more severe if the minors involved are under 15”¹⁰.

33. In August 2010, the *Bangkok Post* described the *Prostitution Prevention and Suppression Act* as a legal breakthrough, noting that the amended *Anti-Human Trafficking Law* also seeks to curtail the trafficking of women and girls from neighbouring states into Thailand for use in the sex industry. Commentators have suggested that the primary weakness in the implementation of these laws is that they “have proved weak in the face of strong cultural bias against sex workers and the systematic corruption in Thai officialdom”¹¹. Indeed, commentators frequently accuse the Thai police of protecting the agents behind under-age sex worker trafficking¹²
34. The US Department of State has observed in this regard:

Some local officials, immigration officials, and police reportedly either were involved in trafficking directly or took bribes to ignore it. Penalties vary according to the age of the victim and the method of trafficking. . .

Official corruption facilitating the most severe forms of trafficking in persons was generally at the low- and mid-levels. Police personnel were poorly paid and were accustomed to taking bribes to supplement their income. . . . Compromised local police protected brothels and other sex venues from surprise raids. . . . Officials found complicit in any part of the illegal economy rarely were prosecuted but instead were moved to positions thought to limit opportunities for future corruption. (US Department of State 2006, Section 5)
35. Asia Watch reports that the Thai government has made little concerted effort to investigate or punish its own agents involved in the trafficking of women, rather that it’s research suggest that the Thai police and border officials are directly involved with procurement and trafficking for the purposes of sexual exploitation.
36. In tandem with legal reform, the Thai government has established centres where both child and adult victims of exploitation and trafficking can seek shelter and other services. The Thai government also operates a hotline to receive complaints regarding child labour and maintains a “child labour rescue unit for emergency cases involving physical harm or confinement of the child”¹³ Reports in the Thai media indicate that brothels employing child sex workers are sometimes raided and brothel owners and agents prosecuted.
37. The *Bangkok Post* recently reported that in the past officials who launched raids against brothels who use underage or trafficked prostitutes often received threats and intimidation. The paper interviewed one official from Udon Thani who states that in

¹⁰ US Department of State 2010, *2009 Country Reports on Human Rights Practices – Thailand*, 11 March, Section 6

¹¹ Ekachai, S. 2010, ‘Ending prostitution an uphill battle’, *Bangkok Post*, 14 August <http://www.bangkokpost.com/news/local/190990/ending-prostitution-an-uphill-battle> – Accessed 5 January 2011 – Attachment 1

¹² Brinkley, J. 2008, ‘Thailand cops protect sex-slave trade’, *SFGate*, 14 September http://articles.sfgate.com/2008-09-14/opinion/17158917_1_brothels-younger-girls-agents – Accessed 15 January 2010 – Attachment 7

¹³ US Department of Labor 2009, *2008 Findings on the Worst Forms of Child Labor – Thailand*, UNHCR Refworld, 10 September <http://www.unhcr.org/refworld/docid/4aba3ebe37.html> – Accessed 6 January 2011 – Attachment 5

2007 “she found a sealed white envelope with her name on it. In the package was (sic) a .357 bullet and a sheet of paper with the message: ‘The next time it will be delivered at your home.’” According to the paper, “[t]wo weeks earlier, the child welfare official had joined a police raid on brothels in the provincial town, where 10 under-age Lao girls were rescued. ‘It was a gesture of retaliation – obviously from members of the Lao child prostitution ring’”¹⁴ Such intimidation, combined with police corruption and a child’s reluctance to testify against family members means that the number of prosecutions is likely to remain modest into the near future.

Discrimination against sex workers in Thailand

38. While the prostitution industry remains technically illegal in Thailand, working or having worked as a prostitute has been decriminalised. Nevertheless, the *Bangkok Post* reports that despite decriminalisation, a “strong cultural bias against sex workers” endures in Thai society and that some police continue to target prostitutes, rather than brothel owners. Commentators note that although the *Prostitution Prevention and Suppression Act* provides that sex workers are not subject to arrest except when they are loitering in public places, police often ignore this. Lawyer and former national human rights commissioner, Naiyana Supapueng, stated in 2010 that:

Despite legal amendments, it is still the sex workers who are legally and socially punished while customers, procurers and sex business operators remain largely intact. This legal ambivalence stems from sexual double standards which condones men’s quest for sexual pleasures outside marriage but condemns women who sell sex as bad women¹⁵.

39. The same article quotes human rights lawyer Siriwan Vongkietpaisan as stating that despite provision in the 1996 law for victims to be paid compensation:

... the authorities and social activists tend to focus on the raid-and-rescue missions without being able to pursue the court case till the very end to get compensation for the victims. When the traffickers are declared bankrupt, for example, the authorities are too tied up with their routine work to go through the complicated legal process to confiscate the traffickers' properties and get the money for the victims.

Without money to start a new life, many of them are forced with the harsh reality to return to the flesh trade again.

40. A report considered by CEDAW June 2004 submits:

Prostitution is not accepted in Thai society, but viewed as an immoral occupation involving sexual promiscuity. Traditional attitudes still consider women’s status as lower than that of men, and that women should remain virgins until their marriage. After marriage, a woman is expected to remain faithful to her husband and to be a good wife and mother. A prostitute, therefore, brings shame and humiliation to her entire family (*CEDWQ 2004, Consideration of reports submitted by States parties under article 18 of the Convention on the Elimination of All Forms of Discrimination*

¹⁴ Kaopatuttip, S. 2010, ‘Too Young to Choose’, *Bangkok Post*, 7 March <http://www.bangkokpost.com/news/investigation/34056/too-young-to-choose> – Accessed 5 January 2011 – Attachment 13

¹⁵ Ekachai, S. 2010, ‘Ending prostitution an uphill battle’, *Bangkok Post*, 14 August <http://www.bangkokpost.com/news/local/190990/ending-prostitution-an-uphill-battle> – Accessed 5 January 2011 – Attachment 1

against Women; Combined fourth and fifth periodic report of States parties: Thailand, CEDAW/C/THA/4-5, 24 June).

The Tribunal hearing

41. The applicant appeared before the Tribunal [in] January 2011 to give evidence and present arguments. The Tribunal hearing was conducted with the assistance of an interpreter in the Thai and English languages.
42. The applicant told the Tribunal that her father died when she was about eight years old and that her stepfather came to live with herself, her mother and her sister when she was about nine. She stated that he raped her for the first time when she was about twelve at a time when her mother was out of the area at a funeral and her sister was not home. She said that she told her sister and mother but that they didn't believe her. She stated that her stepfather continued to rape her for about three months before taking her by car to a place where there were other children and telling her to play with some friends while he attended to some things. She said that she didn't know what they did there but that the other children told her that they had to provide sex services for foreign tourists. She waited for her stepfather but he did not return.
43. There were ten or more children at this place as well as three men who told them what to do. The first day she was told what services were offered and the next day she had to perform them. She was required to service 6-7 men per day.
44. After she had been there for three or four months, a man called [Mr A] came and she provided him with sexual services. He asked her why she had come here and she told him her story. He asked her if she wanted to go to live with him where he would sponsor her to get an education and improve her life if she continued to provide him with sexual services. She felt she had no choice and that it would be best if she were educated so she went with him.
45. He took her to stay at a terrace house where she lived by herself. It had two bedrooms and one bathroom and she was always the only person living there. She was locked into the house and couldn't get out.
46. He spent five to six hours with her every day, accompanying her each time she left the house. She wasn't allowed to go anywhere alone and the house was always kept locked. He required her to provide him with sexual services. She had to wait for him to come before she could do the shopping or leave the house. Apart from attending school and doing the shopping, she never left the house.
47. He enrolled her in a new school and dropped her off and picked her up each day. She had school friends but they were not close. She was too ashamed to tell anyone at the new school what was happening.
48. A few months after she began living at this house, he took her back to her family home to speak to her mother and sister. Her mother still didn't believe her when she told her what had happened to her, perhaps because she saw her come to the house with a man. She has not seen her mother or sister again, but neighbours told her that her sister married and moved to England a few years ago.

49. She first tried to get away when she was 15 or 16 years old. He found her walking away and took her back to the house. He told her to stay in the house and not to go anywhere.
50. As she got older, she did not get more freedom from him to come and go. When she was at university, she didn't have to attend every day and he only came to see her on the days she did have to attend. She couldn't go anywhere by herself because the house was locked and he wouldn't allow her to. She found out later that he had his own family through friends who saw him walking with his children, although she has never met his family.
51. She was [age deleted] when she finished university. She wanted freedom to go out with her friends but he found her a [job] under the supervision of his friend where she worked for about six years. The money she earned was paid into her bank account. He told her that he was responsible for everything she needed and didn't need the money and she gave it to him every month.
52. She had more freedom when she was at work although he still took her there and picked her up. She had lunch with friends and told a friend what was happening. Her friend felt sorry for her but could not help her and also told her that this particular man had helped her and she should be grateful.
53. [Mr A] decided she should come to Australia. She asked him why and he told her that he wanted her to have a better life, not to live in a society like that of Thailand. She thinks that he realised what he did to her was wrong and he sent her to study in Australia.
54. The Tribunal asked her whether she would have come to Australia if it had been up to her. The applicant responded that if it had been up to her, she would have gone far, far away from Thailand because she could not forget about what had happened to her and other children in the sex industry there. He told her it would be the best thing for her to come to Australia.
55. The first time she came to Australia she needed documents to do with her education that he did not give her before he left. He had given her \$700 when she left Thailand which she used to pay her bond and to live on in Australia. She had no-one in Australia and could not speak English, so it was very difficult for her in Australia and she went back to Thailand. She had about \$100 left when she returned to Thailand.
56. She returned to him and lived under the same conditions she had done before. He asked her why she had returned and she told him she needed some documents and that it was difficult for her to survive in Australia by herself. He wasn't pleased because he said he had chosen the best thing for her and encouraged her to go back to Australia the second time. During the 4-5 months that she was in Thailand, she thought she might have some more freedom from him but this wasn't the case and she thought she could get freedom if she travelled back to Australia.
57. The Tribunal asked the applicant why [Mr A] would send her to Australia after keeping her locked up for so many years. The applicant responded that half of her was grateful to him for supporting her while the other half of her thought she was locked in but that

she had no choice. She said that she didn't really know why he did it, but that she received a better education and he didn't have to pay for sex.

58. The Tribunal asked the applicant if she thought that [Mr A] believed she would stay with him all her life. The applicant responded that she didn't think so because she thought that if he wanted her to stay he would have raised it with her. She stated that she was always just thinking about today and tomorrow and her circumstances made long term planning impossible. When asked why she didn't just leave [Mr A], she said she did try but she couldn't because she didn't have any money.
59. The applicant told the Tribunal that after remaining in Thailand for 4-5 months, she returned to Australia. She initially thought that [Mr A] would continue to contact her while she was in Australia because he had chosen her path. She was able to contact him by phone during the first week she was here, but after that was unable to get through. She was confused when she couldn't get in touch with him.
60. He had given her about \$200 when she left Thailand for the second time which she could live on for about two weeks. She worked in a restaurant where she met a woman called [Ms B] who helped her with somewhere to stay. [Ms B] knew a person called [name deleted] who helped her to fill out the immigration forms.
61. The applicant told the Tribunal that her visa was valid for seven months and her first English course went for six months. [Mr A] had paid the course fees in full before she started but for 4-5 months of that course she was back in Thailand. When she returned to Australia she asked for an extension of her course for one month and after that worked in a restaurant where she met [Ms B].
62. She wanted to find work so that she could continue to study but then she realised it would involve a lot of extra money and also she needed an extension of her visa. She could not contact [Mr A] and thought if she wanted to stay in Australia she needed to help herself. She initially wanted to apply for a tourist visa so that she could work and continue her studies but found out that she could not work on a tourist visa.
63. The applicant stated that her friend [Ms B] lets her stay at her place but not all the time and that she moves around, also staying with other Thai people. Some people give her money for transport and food.
64. The Tribunal asked the applicant what she feared would happen if she returned to Thailand. The applicant stated that she feared that [Mr A] would find her and that she still remembered the things that had happened to her as a child which she couldn't go back and face.
65. The Tribunal asked the applicant why he would find her when he had arranged for her travel to Australia on two occasions. The applicant stated that [Mr A] had considerable power in Thailand and she believed he knows where she is to this day, even though he doesn't contact her. She stated that she feared that if he found her, she might be forced to return to living in the same conditions.
66. The Tribunal asked the applicant why she couldn't move to another part of Thailand and start her own life away from [Mr A], given that she was young and university educated. The applicant stated that at first she had thought she could do that but that

although she had experience [working], she believed he could find her there through his connections and communications and she had no experience at other kinds of jobs. She believes that if he finds her, he will just put her back in the same conditions she was in before as she is all alone in Thailand, without family, and has only him.

67. The Tribunal adjourned the hearing for a short period. Upon resuming, the Tribunal advised the applicant that it had reflected on the evidence she had given so far and considered her to be a credible witness. The Tribunal indicated that it accepted in broad terms the evidence she had given about her past, but needed to ask her further questions about what she would face if she returned to Thailand in the future.
68. The applicant stated that she held very serious fears for her safety from [Mr A] if she were to return to Thailand. She feared that he might find her and that she could not tell what would happen, but that he might do unexpected things to her.
69. The Tribunal put to the applicant that [Mr A] must have expected her to return to Thailand at some point as she only entered Australia on a temporary visa. The applicant stated that in Thailand the process was that a person would initially apply to do a short course and then extend to study another course and that [Mr A] knew that she wouldn't stop at six months, because during the [years] that she was with him she couldn't go anywhere and so spent all her time reading and studying.
70. The Tribunal put to the applicant that it was difficult to see why [Mr A] would be angry at her for returning to Thailand in circumstances where she had never had a permanent visa in Australia and would always have been required to return. The applicant responded that she could not tell what he would think but that he believed that he had chosen the right path for her and that she should start a new life.
71. The Tribunal asked how [Mr A] could force her to return to her old living conditions, to which she responded that she knew he had certain powers to find out things and that he is capable of doing all sorts of unexpected things. She stated that he has businesses and that some of his contacts are illegal and are connected with sex services and drugs. She stated that she became more aware of these things as she got older and she heard things about supplying drugs. All she could do is keep quiet in order to survive. She believes he was involved but she is not sure what kind of ranking he has.
72. The applicant stated that [Mr A] used to ask her to provide sex services to others but she didn't reply. When asked by the Tribunal what she feared would happen if he found her and she refused to go back to him, the applicant stated that she feared physical abuse and being made to provide sex services.
73. When asked why the police could not protect her from this, the applicant stated that they wouldn't be interested in things that hadn't yet happened. When asked if they would be interested if those things had happened, the applicant stated that they would record it but that it would be hard to tell if they would take action because [Mr A] has power because of his involvement in drugs and sex. When asked where he gets his power, the applicant stated that she didn't know but that it would usually be from police or politicians.
74. When asked why she couldn't live in another part of Thailand, the applicant stated that she believed he would find her wherever she was in Thailand and that he would be

notified if she re-entered the country. When asked how he could find this out, the applicant stated that it was because of his power and influence. When asked if [Mr A] had ever suggested that she work in the sex industry in Australia, the applicant stated that he had not but that other people had suggested it to her.

75. The applicant stated that she feared having to return to Thailand to live in the same or worse conditions and that she also feared for her own safety and that he might hurt her. She also feared that she may have to offer herself again in the sex industry and that the time she spent living with [Mr A] was not much different to working in the sex industry.
76. The Tribunal asked the applicant why she couldn't return to [work]. She stated that she feared that [Mr A] would find her because of his contacts in the [industry], telling the Tribunal that he had organised her previous employment and that she was under the supervision of his friend. She stated that she thought that if that were the path he had chosen for her, he wouldn't have sent her to Australia to study, because he said he wanted her to study and improve her life and didn't want her to go back to the same living conditions. But he had also told her that if she were in Thailand, one day she would have to go back and do what she had done before.
77. The Tribunal asked why, if [Mr A] had removed her from those things in the past, he would not do so in the future. The applicant stated that he had done it for his own purposes, so that he could use her. She stated that he had chosen a path for her in Australia and that if she were to return to Thailand, he wouldn't protect her from those things anymore. She stated that he would find her and that she would have to return to the same living conditions.
78. When asked how he could force her to go back, the applicant stated that she didn't know but that she believed he could because he would tell her that he had supported her and that she should be grateful and that she wouldn't be able to refuse. She stated that making a statement to police would be useless because he has power and influence. She stated that sometimes she had thought that he might have kept other girls as well, but that this was only her thinking and she didn't know. She stated that keeping quiet had always been the best thing to help her survive.
79. The Tribunal asked the applicant about the timing of her application for a protection visa, noting that she arrived in Australia for the second time [in] September 2008 on a student visa that expired one month later [in] October 2008, yet she didn't apply for a protection visa until [a date in] June 2010, nearly two years later. The applicant said that she had previously sought the assistance from the [Red Cross] in about February or March 2010, adding that she was not sure if it was called the Red Cross. Other Thai people had suggested this to her and she went there to try but that they told her that according to their regulations they couldn't help her. She then applied again in about June 2010 with the assistance of [name deleted], whom she met through [Ms B].
80. The Tribunal asked the applicant whether she had considered returning to Thailand when her visa expired. The applicant stated that she had initially thought about it, but that when she thought about what had happened and what could happen, she wanted to find money to continue studying. She knew that if she were to apply for a tourist visa she could not work but then she met [Ms B] at the restaurant and that [Ms B] has been helping her. She stated that she sometimes stayed with [Ms B], but not all of the time,

adding that this week she had stayed with [Ms B] for three days and for the other four days she had stayed at other places, including a Thai temple with a nun she has met and sometimes at the Cambodian temple.

FINDINGS AND REASONS

81. The applicant is a [age deleted] woman. She travelled to Australia on a valid Thai passport issued in her own name and an Australian student visa, certified copies of which are held on the Department file. It is not suggested that she has any connection to any other country. The Tribunal finds that she is a citizen of Thailand and has considered her claims against that country.
82. The applicant was not represented in relation to her application for review, nor in her dealings with the Department. Quite understandably, much of the evidence she gave was distressing to her and she had some difficulty articulating legal submissions and arguments relevant to her case.
83. It is important to adopt a reasonable approach when making findings of credibility. In *Minister for Immigration and Ethnic Affairs and McIllhatton v Guo Wei Rong and Pan Run Juan* (1996) 40 ALD 445 the Full Federal Court, Foster J sounded a cautionary note at 482:

... care must be taken than an over-stringent approach does not result in an unjust exclusion from consideration of the totality of some evidence where a portion of it could reasonably have been accepted.
84. As a preliminary matter, the Tribunal notes that it found the applicant to be a credible witness and that she gave her evidence in a manner which this Tribunal found persuasive. Although not directly articulated by the applicant, the Tribunal understands the essence of the applicant's claims to be that she fears persecution if she is forced to return to Thailand for reasons of her membership of a particular social group. She claims she cannot be protected by authorities in Thailand.
85. The applicant claims to have been sold into sexual servitude by her step-father when she was twelve years old. She claims that she was left at a brothel where she was forced to provide sexual services to foreigners and that she was taken from that brothel after three or four months by one of her clients from that brothel, being [Mr A]. The applicant claims that she was effectively held captive by [Mr A] for 18 years, being kept in a locked house and forced to provide sexual services to him. The applicant claims that she was not permitted to leave that house unaccompanied, but that [Mr A] took her to and from school and later university and work and accompanied her whenever she left the house. Having regard to the evidence presented in conjunction with the independent country information, the Tribunal accepts the truth of these claims.
86. The Tribunal is satisfied that at the age of twelve, the applicant was recruited for the purpose of exploitation in sexual servitude when she was left at a brothel by her step-father. The Tribunal is satisfied that she continued to be exploited in sexual servitude during the years she lived with [Mr A], noting that she was a young child when she first went to live with him and cannot be taken to have consented to any of the events that occurred for the remainder of her childhood.

87. The Tribunal is further satisfied that the applicant remained in sexual servitude to [Mr A] during her early adulthood, accepting that the particular combination of her age, the sudden and traumatic end to her family life and the ongoing lack of any family support or protection made her entirely dependent on [Mr A] for her subsistence. The Tribunal considers that even if the applicant's physical escape from the house in which she was kept by [Mr A] were possible, her vulnerabilities were such that she had no real choice except to accept his support, including the conditions which he imposed upon her life. The Tribunal is satisfied that these conditions included requiring her to provide him with sexual services on an ongoing basis and prohibiting her from leaving the house unaccompanied.
88. The applicant gave evidence that she believed [Mr A] was involved in supplying drugs and sexual services, claiming he is a man of some power and influence. The Tribunal has no reason to doubt the applicant's evidence, having accepted that she met him as a twelve year old when he visited the brothel in which she was working and that he kept her essentially captive for the next 18 years, during which she spent significant time in his company.
89. The Tribunal is satisfied that the sexual servitude already endured by the applicant involves serious harm, including deprivation of liberty, physical and mental harassment and economic hardship. The Tribunal finds that the applicant has been subject to serious harm.
90. The Tribunal is further satisfied that if the applicant returned to Thailand, there is a real chance that she would again be subject to serious harm by [Mr A] or his associates amounting to persecution as outlined in s 91R of the Act. Thus the Tribunal is satisfied that the applicant's fear of persecution on return to Thailand is well-founded.
91. In making this assessment, the Tribunal notes that she was an indentured sex worker between the ages of twelve and thirty, during which time she was initially required to service 6-7 men per day at a brothel and later a single person, [Mr A]. She was placed into that position by her step-father, has had no contact with her mother and sister since she was twelve, has no other family support and has been entirely dependent for her subsistence on the person who kept her in sexual servitude for some eighteen years. She has discussed her position with one friend as an adult, who was unable to help her and told her she should be grateful to [Mr A] for supporting her.
92. The Tribunal has given consideration to the applicant's level of education, noting that she holds a [qualification deleted] and was [employed] for several years in Thailand, such employment being arranged for her by [Mr A] through his acquaintances. However the Tribunal considers that notwithstanding those things, the applicant remains highly vulnerable to further exploitation and persecution given her other vulnerabilities, including her long dependence on [Mr A], her past experiences as a sex worker and her lack of family support.
93. The Tribunal acknowledges that the applicant was unable to provide any plausible explanation for the actions of [Mr A] in arranging her travel to Australia, nor shed any light on his motives for doing so. These actions and [Mr A]'s expressed concern for the applicant's well-being do not on the face of it sit easily with the applicant's other evidence as to his past behaviour and her fears for the future. However the Tribunal

formed the view that the applicant has herself reflected on these matters and the answers are simply not known to her.

94. Although the Tribunal accepts that the applicant's travel to Australia was arranged by [Mr A], his motives for doing so are unknown to the Tribunal. However given the exploitative history between [Mr A] and the applicant, the Tribunal does not accept that the applicant's best interests were the driving factor nor that they formed any significant part of that decision, observing that the applicant has survived in Australia for two years with no visible means of support.

Is the feared persecution for a Convention reason?

95. In *Chan v MIEA* it was recognised that persecution has traditionally taken a variety of forms of social, political and economic discrimination.¹⁶ Justice McHugh in *Applicant A & Anor v MIEA & Anor*, observed that

Persecution for a Convention reason may take an infinite variety of forms from death or torture to the deprivation of opportunities to compete on equal terms with other members of the relevant society. Whether or not conduct constitutes persecution in the Convention sense does not depend on the nature of the conduct. It depends on whether it discriminates against a person because of race, religion, nationality, political opinion or membership of a social group¹⁷.

96. There is no evidence to suggest that the applicant faces persecution because of her race, religion, nationality or political opinion. The evidence in this matter has led the Tribunal to consider whether the applicant is a member of a particular social group for the purposes of the Convention.

97. The High Court considered the matter in *Applicant S v MIMA (2004)* 206 ALR 242, stating:

The determination of whether a group falls within the definition of "particular social group" in Art 1A(2) of the Convention can be summarised as follows. 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.

98. The Courts have held on a number of occasions that occupational groups can constitute a particular social group in society. In *Ram v MIEA (1995)* 57 FCR 565 at 568, Burchett J described the situation in Cambodia under Pol Pot where "teachers, lawyers, doctors and others . . . were regarded as potentially dangerous to the new order" as textbook examples of persecution for membership of a particular social group. In *Nouredine v MIMIA (1999)* 91 FCR 138, Burchett J cited "prostitutes almost anywhere" as an illustration of a particular social group.
99. In the present case the Tribunal considers that the group of "sex workers in Thailand" is identifiable by the characteristic that all its members are workers in the sex industry in Thailand. The common characteristic or attribute is not a shared fear of persecution. As evidenced in the country information cited above, sex workers in Thailand clearly

¹⁶ (1989) 169 CLR 379 at 430 per McHugh J.

¹⁷ (1997) 190 CLR 225 at 258, per McHugh J.

occupy a distinct position in Thai society by reason of their occupation in the sex industry. The Tribunal accepts that sex workers possess a characteristic which distinguishes the group from society at large and is satisfied that the applicant is a member of this group, having been an indentured sex worker between the ages of twelve and thirty.

100. [Mr A] is a private individual who has engaged in criminal activities in respect of the applicant which have caused her serious harm in the past. The Tribunal has found that there is a real chance that the activities of [Mr A] and his associates may continue to cause the applicant serious harm in the future. In order for [Mr A]'s actions towards the applicant to constitute persecution for a Convention reason, there must be present systematic and discriminatory conduct because of the applicant's race, religion, nationality, political opinion or membership of a social group

101. The High Court in *MIMA v Khawar* (2002) 210 CLR 1 confirmed that the Convention test may be satisfied by the selective and discriminatory withholding of state protection for a Convention reason from serious harm that is not Convention related (as per Gleeson CJ at [30]-[31]):

Persecution may also result from the combined effect of the conduct of private individuals and the state or its agents; and a relevant form of state conduct may be tolerance or condonation of the inflicting of serious harm in circumstances where the state has a duty to provide protection against such harm. As was noted earlier, this is not a case in which it is necessary to deal with mere inability to provide protection; this is a case of alleged tolerance and condonation . . .

Where persecution consists of two elements, the criminal conduct of private citizens, and the toleration or condonation of such conduct by the state or agents of the state, resulting in the withholding of protection which the victims are entitled to expect, then the requirement that the persecution be by reason of the Convention grounds may be satisfied by the motivation of either the criminals or the state.

102. In the same matter, Kirby J concluded that persecution is a construct of the two separate but essential elements of serious harm and failure of protection, stating (at [121]):

[E]ven if the Tribunal in the present matter were of the opinion that one ingredient in the Convention definition of persecution, namely the family threats and violence against the respondent by non-state actors, was not (as it concluded) committed for reasons of the respondent's actual or perceived membership of a particular social group, that would not be the end of the matter. If the respondent could show that her well-founded fear of being persecuted was "for reasons of" her being a member of a particular social group because state protection was unavailable to her, that would be enough to meet the Convention requirement.

103. In the same matter, Justices Gummow and McHugh emphasised that:

It should, in our view, be accepted that, whilst malign intention on the part of State agents is not required, it must be possible to say in a given case that the reason for the persecution is to be found in the singling out of one or more of the five attributes expressed in the Convention definition, namely race, religion, nationality, the holding of a political opinion or membership of a particular social group. . .

Secondly, and this is crucial for the basis propounded above, the persecution in question lies in the discriminatory inactivity of State authorities in not responding to

the violence of non-State actors. Thus, the harm is related to, but not constituted by, the violence.

104. In this case, the Tribunal is satisfied that [Mr A] is a private individual who has committed serious and violent acts against the applicant and that there is a real chance he will continue to do so in the future. The Tribunal is also satisfied that the applicant is a member of a particular social group, being sex workers in Thailand. On the basis of the country information before it, the Tribunal is also satisfied that notwithstanding recent legal moves to decriminalise prostitution, there is an ongoing failure of protection of sex workers by the Thai state as a result of a strong cultural bias against sex workers in Thailand together with high levels of official corruption. The Tribunal is satisfied that such a withholding of protection amounts to the discriminatory inactivity of State authorities who will not respond to that harm as a result of the applicant's membership of the particular social group of Thai sex workers.
105. Applying the analysis of the High Court in *Khawar*, the Tribunal concludes that the applicant faces a real chance of serious harm by non-state agents if she returns to Thailand now or in the reasonably foreseeable future. The Tribunal finds that the serious harm she would face from these non-state agents is not Convention motivated, but rather a consequence of criminal acts of [Mr A] and/or his associates. The Tribunal further finds that the applicant would be selectively and discriminatorily withheld state protection from this harm by the Thai state (Thai authorities) for reasons of her membership of a particular social group of Thai sex workers. Accordingly, the Tribunal finds that the applicant has a well-founded fear of persecution for a Convention reason.
106. The Tribunal has considered whether the applicant could relocate to another part of Thailand to avoid the harm feared. The Tribunal notes that she has no family support or other support and that she has been entirely dependent for a period of some eighteen years on a man who kept her captive and required her to provide sexual services to him. Little is known by the applicant about the business affairs of [Mr A], but the Tribunal has accepted that he is involved in supplying drugs and sexual services and that he is a man of some power and influence. He has connections in the [industry deleted] and organised the applicant's past employment. The industries in which he works are not localised and the Tribunal is not satisfied that his business affairs or influence are necessarily local to the Bangkok area. The Tribunal finds that relocation within Thailand to avoid the harm is not reasonable for the applicant in these circumstances.
107. There is no evidence before the Tribunal that the applicant has a right to enter and reside in any third country for the purposes of s 36(3) of the Act and, accordingly, the Tribunal finds that she does not have any such right.

CONCLUSIONS

108. 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

109. 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.