

**1101038 [2011] RRTA 307 (14 April 2011)**

**DECISION RECORD**

**RRT CASE NUMBER:** 1101038

**DIAC REFERENCE(S):** CLF2010/93762

**COUNTRY OF REFERENCE:** Uganda

**TRIBUNAL MEMBER:** Suzanne Leal

**DATE:** 14 April 2011

**PLACE OF DECISION:** Sydney

**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 Uganda, arrived in Australia [date deleted under s.431(2) of the *Migration Act 1958* as this information may identify the applicant] July 2010 and applied to the Department of Immigration and Citizenship for a Protection (Class XA) visa [in] July 2010. The delegate decided to refuse to grant the visa [in] January 2011 and notified the applicant of the decision and her review rights by letter dated [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] February 2011 for review of the delegate's decision.
5. The Tribunal finds that the delegate's decision is an RRT-reviewable decision under s.411(1)(c) of the Act. The Tribunal finds that the applicant has made a valid application for review under s.412 of the Act.

### **RELEVANT LAW**

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

### **Definition of 'refugee'**

9. Australia is a party to the Refugees Convention and generally speaking, has protection obligations to people who are refugees as defined in Article 1 of the Convention. Article 1A(2) relevantly defines a refugee as any person who:

owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence, is unable or, owing to such fear, is unwilling to return to it.

10. The High Court has considered this definition in a number of cases, notably *Chan Yee Kin v MIEA* (1989) 169 CLR 379, *Applicant A v MIEA* (1997) 190 CLR 225, *MIEA v Guo* (1997) 191 CLR 559, *Chen Shi Hai v MIMA* (2000) 201 CLR 293, *MIMA v Haji Ibrahim* (2000) 204 CLR 1, *MIMA v Khawar* (2002) 210 CLR 1, *MIMA v Respondents S152/2003* (2004) 222 CLR 1 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. In addition to its own file, the Tribunal has before it the Department's file relating to the applicant's claim for protection and the Departmental papers for her application for a subclass 456 visa.
20. Included on file are the following documents:
  - Treatment notes for the applicant dated [in] February 2010, providing a diagnosis of clinical malaria and depression;
  - Birth record for the applicant confirming her birth on [date deleted: s.431(2)] in [Village 1] to [name deleted: s.431(2)] (father) and [name deleted: s.431(2)] (mother);
  - Letter addressed to [the applicant's mother] from [Uncle A] and dated [in] January 2010, which states 'we instruct u to bring your daughter [name] for this year's cutting ceremony as we already have a man for good works that is fulfilling her marriage to be her husband. We her uncles and the elders of the village have all of us agreed that she be prepared and brought here near her future husband to be';
  - Uganda Certificate of Education for the applicant dated [year deleted: s.431(2)] and listing her school as [school deleted: s.431(2)]
  - Uganda Advanced Certificate of Education for the applicant dated [year deleted: s.431(2)] and listing her school as [school deleted: s.431(2)]
  - Statutory declaration by [name deleted: s.431(2)], mother of the applicant;
  - Statutory declarations by the applicant dated [in] November 2010 and [a later date in] November 2010;
  - Confirmation of selection for admission to [university] for the applicant in the degree of [course deleted: s.431(2)], commencing [in] August 2010;
  - Letter from [Uncle C] to the Australian High Commission dated [in] March 2010 which states, in part, '[the applicant] is currently for her long vacation, after completion of her advanced level studies at [college]. This will last up to August 2010 when she enrolls into University';
  - Confirmation of the applicant's registration at [college deleted: s.431(2)] for [years deleted: s.431(2)];

- Letter from Pastor [name deleted: s.431(2)] dated [in] March 2010 confirming that the applicant is a member of the [church and town deleted: s.431(2)], where she volunteers as a children's minister;
- Letter of support for the applicant by [MP and constituency deleted: s.431(2)] dated [in] March 2011;
- Letter from the Office of the Clerk to Parliament, Parliament of Uganda, certifying that [MP deleted: s.431(2)] is a Member of Parliament representing [constituency deleted: s.431(2)];

21. The applicant provided a lengthy statement in support of her claims, part of which is reproduced below:

I was born on [date] in [Village 1] in Jinja district, which is located in eastern Uganda. I am the only biological child of my father and mother. My father passed away from liver failure when I was [age]. After my father passed away, my mother and I moved from [Village 2] in Kapchorwa to the home of my mother's parents in Kampala. About one year later, my mother re-married. After my mother re-married, my mother and I moved into my step-father's home.

I completed my High School Certificate in [year]. I was offered a place in a Bachelor program at the [university] in [town] for the 2010 program year; unfortunately however, due to my current situation, I was unable to commence my course.

In [date], I was 12 years of age at the time, two of my uncles (my father's brothers) made a surprise visit to my family's home in Kampala; prior to that day, these uncles had not had any contact with our family for over 8 years. I was at school at the time of their visit however when I returned home from school later that evening my mother informed me that my uncles had visited our home and had told her that it was time for me to return back to Kapchorwa for the purpose of carrying out the traditional rituals and customs, including female genital mutilation (hereinafter referred to as FGM). My mother was completely opposed to this however my uncles refused to listen to her. My mother knew that she would be unable to change my uncle's minds about this issue thus she decided to send me to a catholic boarding school, [name], in the hope that I would be safe there. I spent the next four years completing my secondary studies at [school], I only returned home for a short trip each August during the school holidays; I spent the remainder of my school holidays at the home of my aunty in [town]. I successfully completed my secondary studies (year 10) in [year]. In [year], I went to a catholic boarding school, [name], to complete my high school studies (year 12). I successfully completed my high school studies in [year].

Throughout secondary school and high school, I lived in constant fear. My uncles and clan leaders repeatedly ordered my mother (through demand letters and telephone calls) to reveal my location so that they could get me and take me to my village in Kapchorwa and perform FGM on me and the other traditional rituals and customs as required by the Sabiny clan tradition; after which they planned to have me married. My mother refused to reveal my location to them

On [date] January 2010, my mother received a further letter from my uncles notifying her that the clan leaders had demanded that I be taken to the village this year for the purpose of carrying out the traditional rituals and customs, including FGM; the letter stated that I was getting too old and that my future husband was ready to pay a dowry

and was ready to get married to me as soon as the traditional rituals and customs, including FGM, had been completed (which was due to take place in December 2010). The letter further stated that they were going to pick me up around early August 2010, just before the harvesting season began, so that I could be home in Kapchorwa in time for my aunties to help me prepare for the big cutting session (December 2010).

Since [date], I have been constantly afraid of being taken to the village and having the traditional rituals and customs carried out on me, including FGM. However, after my mother received this letter on [date] January 2010 I believed that I could no longer avoid my uncles' plans for me. I became extremely depressed, weak and even collapsed.

On [date] March 2010, my uncles called my mother and told her that they had found a man for me to marry; the man (whose name I do not know) was more than 30 years of age and a witchdoctor from Kapchorwa. The majority of my clan elders supported the selection of this man as my husband and so they had decided that I would marry him. My mother opposed the idea of me marrying this man however, once again, they ignored her objections. My mother was told that I would have to undergo the process of FGM in December 2010 and thereafter I was to marry this man. This news was extremely terrifying for me and my mother however there was nothing that we could do about it. My [Uncle C](my mother's brother), saw how distressed and terrified my mum and I were and so he offered to help me to leave Uganda. I subsequently applied for a temporary business visa to Australia, for the purpose of attending a [church] conference. I entered Australia on [date] July 2010.

I believe that if I were to return to Uganda my father's family (in particular my uncles) and clan members of [Village 2] in Kapchorwa will harm, harass, and/or kill me. My father's family (in particular my uncles) and clan members of [Village 2] in Kapchorwa have made it very clear (via their various letters and threatening telephone calls) that they will, forcibly if need be, take me to the village and make me a part of the December 2010 traditional ritual cutting season of FGM and force me to undergo FGM. Since I am a member of the Sabiny tribe, my father's family has the right (under the Ugandan law) to take me away from my mother and force me follow the traditional rituals and practices including FGM. I believe that if I were to return to Uganda my father's family (in particular my uncles) would harm/mistreat me because I am a Christian and Christianity is not accepted in [Village 2].

I believe that if I were to return to Uganda I will be forced to marry the witchdoctor who is waiting for me in [Village 2] in Kapchorwa. As a witchdoctor, he believes in Satan and professes the sacrificing of people for achieving a particular outcome, such as power, money, fertility etc. I understand that this particular witchdoctor does not have a lot of money and I am afraid that if I return to Uganda and am forced to marry him that he will sacrifice me in the hope of gaining money and power.

If I were to return to Uganda, I do not believe that the authorities in Uganda can or will protect me for the following reasons:

(a) Under the Ugandan law, my father's family has the right to forcibly take me away from my mother and take legal custody of me because I have already passed the age of 7 years. Therefore, the authorities cannot protect me from being forcibly taken away from my mother.

(b) Although the practice of FGM is illegal in Uganda, this law is not enforced by the authorities in Uganda and thus the authorities cannot protect me from FGM.

(c) There is no law in Uganda which prohibits forcing a person to get married. Thus, the authorities cannot protect me from being forced to marry the witchdoctor from [Village 2] in Kapchorwa because they do not have the legal authority to do so.(d) If I was targeted and harassed/harmed by my father's family for my Christian views, the authorities would be unable to protect me because the authorities would perceive it as being a tribe issue and they would not get involved.

There is no place in Uganda where I could be safe. My father's family believes that I am a member of the Sabiny tribe by virtue of the fact that my father was a member of the Sabiny tribe. They believe it is their duty to ensure that I comply with all of the rituals and customs applicable to women in the Sabiny tribe, including FGM. Thus, no matter where I go in Uganda, I believe that they will look for me and when they find me they will forcibly carry out the FGM process (and other traditional rituals and practices) on me.

22. In her statutory declaration dated [in] July 2010, the applicant's mother stated that:

On [date] I was contacted by my late husband's brothers, [Uncle B] and [Uncle A] who informed me and insisted that my daughter ([name]) had already attained the rightful age to perform the Sebei clan traditional rituals and customs of Female Genital mutilation (FGM). In addition, they averred that the cultural process would guarantee my daughter a husband and bear healthy children...On [date] January 2010 I received another letter from my late husband[ 's brothers] and their clan elders demanding that I prepare my daughter for the Sebei cultural rituals this year's cutting season December, 2010, a cultural process which I honestly do not believe in as a Christian... ever since [year], I have lived under a lot of pressure to provide absolute protect to my daughter from all the threats in her life such as being kidnapped by my in laws and forcing her to undergo the process of FGM against her will and Christian belief and have come to believe that if my daughter returns home, my late husband's in laws will forcefully cause my daughter to perform the Sebei clan traditional rituals and customs (Female Genital Mutilation).

23. In support of her application for support from [welfare organisation and name deleted: s.431(2)], counsellor with [organisation deleted: s.431(2)], provided the following assessment in relation to the applicant:

Thank you for your referral of [the applicant]. I conducted an assessment on [date] July 2010. [The applicant] reports a range of signs and symptoms associated with post-traumatic stress, anxiety and severe depression including: agitation; disturbed sleep; low mood; reduced energy; intrusive thoughts and images associated with past experience and fears for her future; social withdrawal; poor concentration and memory; anhedonia; reduced appetite; and weight loss.

### **Application for a Protection Visa**

24. [In] July 2010, the applicant applied for a protection visa. In her application, she made the following claims:

- That as the daughter of her late father, a Sabiny man, the applicant is also a member of the ethnic Sabiny group and that she is under the authority of her paternal uncles who have allocated her in marriage to a witchdoctor from her traditional village;
- That she fears being psychologically, physically and sexually abused by the witchdoctor who has been chosen to be her husband;

- That prior to her arranged marriage, she would be forced to undergo the process of Female Genital Mutilation at the December 2010 cutting season. She fears that by being circumcised, she will be exposed to the risk of HIV/AIDS, Tetanus or infection through the use of unsterilized instruments in the procedure;
- That, on learning of her uncle's intention to marry her to a witchdoctor and to have her circumcised, the applicant collapsed and was hospitalised for depression;
- That in [year deleted: s.431(2)], the brothers of her late father had visited the applicant's mother to have the applicant circumcised at the cutting ceremony for that year;
- That the applicant's mother had arranged for the applicant to attend boarding school as a way of hiding her from her paternal uncles and protecting her from circumcision
- That in spite of recent fights for the ban of Female Genital Mutilation, the practice of FGM continues in the applicant's tribal village;
- That if she were not to be circumcised in Uganda, she fears being taken to Kenya and circumcised there.
- That, with the assistance of her maternal uncle, she applied to attend [a conference] in Australia as a way to escape being circumcised and being married off to a witchdoctor from her tribal village.

### **Interview with the delegate**

25. [In] November 2010, the applicant attended an interview with a delegate of the Department of Immigration. At interview, the applicant gave evidence consistent with that contained in her statutory declarations.
26. On the basis of country information before her, the delegate queried the applicant's contention that she would still be liable to circumcision despite being [age deleted: s.431(2)]. She also queried the decision of the applicant's mother to send her to boarding school, speculating that rather for protection the decision may instead have been made on the basis that the boarding school was less expensive than other schools situated in Kampala. The applicant refuted this, telling the delegate:
 

She sent me for safety, not because it was cheaper, because she knew people wouldn't come for me. No one would get me on my way to school, no one would get me on my way back from school and I really felt that she thought she sent me to boarding school for safety.
27. The applicant confirmed that she would spend most of her holidays living with her aunty who lived only a short distance from the applicant's boarding school.
28. In response to the delegate's contention that the applicant would be safe provided she were to move away from Kampala where her mother and step-father were living, the applicant stated:

...but then I was going to university and everyone has access to the lecture rooms and everyone has access to any place, and I don't feel safe, I feel that they would still get me.... Uni is a big place, there is internet everywhere, they can log in, in any uni website and check for the names of the people and find them that way.

29. The applicant stated that despite her age, she believes that female genital mutilation can occur:

at any age so long as you are from the Sabinu tribe, it is supposed to be carried out. I believe that if I went back to Uganda, my uncles would still get me even if I was [age], they would still get me into the female genital circumcision and they would still force me to marry the witchdoctor.

30. The delegate also queried the fact that, despite fears for her safety, upon finishing her secondary education, the applicant found work near her family home. The applicant explained that she had sought work to assist in paying for her own personal items, given that her mother could not afford to do so and given that her stepfather provided her with limited support. She felt that, although there was some risk inherent in working, it was for a limited period only, namely from January to June 2010; she was close to home and could run home, if necessary.
31. The delegate also queried the applicant's failure to see a counsellor following her admission to hospital for depression. The applicant replied that the counselling sessions were very expensive, that her mother did not have the money to pay for them and that she hadn't asked her stepfather or her uncle to pay for them.
32. The applicant agreed with the delegate that laws prohibiting female circumcision had been passed in April but stated that 'the law is not enforced. No-one enforces the law.' She didn't think the police would do anything to assist as it would be seen to be a 'personal, tribal matter.'
33. A statement by the applicant dated [in] November 2010 was sent to the Department to clarify issues raised in the delegate's interview with the applicant.
34. The applicant stated that, according to Sabinu tribal customs, if a Sabinu girl does not have Female Genital Mutilation carried out on her:
- she will always be perceived as a girl;
  - she will not be perceived as respectful and grown up;
  - it is perceived as a curse;
  - it is believed that the girl will bear cursed and/or ill children;
  - she will be unable to marry a responsible and respectable husband;
  - she will be prevented from doing certain things, such as milking a cow.

35. According to the applicant:

All girls who are part of the Sabinu tribe are required to undergo FGM; it is something which a girl must do before she marries; age is irrelevant. For example, one of my first cousins (on my father's side) got married at the age of 23 years and

just before she got married, she had FGM performed on her. I do not believe that there is less risk of FGM being carried out on me because I am over the age of 16 or 17 years. My father's family will do everything within their power to find me and ensure the FGM procedure is carried out on me; especially because my father has passed away they see it as their responsibility to ensure that I fulfill my customs as a member of the Sabinu tribe.

36. The applicant clarified why she believes that she would be at greater risk of being located by her uncles were she to attend university:

There are many high schools in Uganda whereas there are only a few main universities in Uganda, perhaps 7 or 10, therefore I believe that it would be easy for my uncles to find me if I returned to Uganda and started university. In Uganda, the universities publish the names of their students on their websites and thus it would be easy for my uncles to find out which university I was attending. Once they found out which university I was attending, it would be easy for them to access me in the university because the university is open and everyone has access to it. In comparison, there are many boarding schools in Uganda, furthermore they do not publish the names of their students on their websites; because of these factors it was difficult for my uncles to find out which boarding school I attended. Even if they were able to find out which boarding school I attended, they would be unable to get access to me inside the boarding school because of the strict visiting rights.

37. The applicant explained her decision to obtain employment from January 2010 as follows:

I started working in early January 2010 as a waitress at [business] and as a clothing shop assistant at [business]. I started working because I needed to financially support myself; my mother is not very well off and apart from my school fees, which my step father paid, she found it very difficult to pay for other things which I needed. I was not very close with my step father and therefore I felt uncomfortable asking him for money. About a week after I started working, my mother received a letter from my uncles notifying her that they were going to come for me in August and take me to the village to prepare me for the FGM procedure. The letter scared me; I became anxious and worried however I had to continue working because of my financial situation. As frightened as I was, it was important for me to continue working so that I could get some of the basic things that I needed, such as sanitary products.

My step father and I were not very close; he paid for my schooling however he did not pay for any of my other expenses, such as sanitary products, toiletries, etc. I didn't mention anything about my relationship with my step father in my asylum claims because I did not believe that it was relevant; my step father had nothing to do with my claims for asylum.

38. [In] January 2011, the delegate made a decision to refuse the grant of a protection visa to the applicant. In her decision, the delegate did not accept the applicant's evidence that her paternal uncles continued to contact her mother after [year deleted: s.431(2)] to request that the applicant be circumcised. The delegate did not accept that the applicant was forced to remain in hiding from her uncles for the subsequent [period deleted: s.431(2)] years, fearing abduction back to Kapchorwa; nor that she finally decided to leave Uganda in 2010 because her uncles wrote a letter instructing her to return to the village later in the year to undergo Female Genital Mutilation and be married to a witchdoctor. The delegate was satisfied that after [year deleted: s.431(2)], the applicant's uncles ceased any attempts to convince the applicant to allow herself to be subjected to Female Genital Mutilation or to be involved in an arranged marriage, and that, given that the applicant has been living in a stable, urban, middle-class family for the last fourteen years, supported by a responsible non-Sabinu male,

her uncles would be unlikely to make any such further attempts in the future. On that basis, the delegate was not satisfied that there was a real chance that, on return to Uganda and in the reasonably foreseeable future, the applicant would be forced to undergo Female Genital Mutilation, an arranged marriage or conversion away from Christianity, or that she would be subjected to any other serious harm amounting to persecution. For these reasons, the delegate found that the applicant's fear of persecution was not well-founded.

### **Tribunal hearing**

39. The applicant appeared before the Tribunal [in] April 2011 to give evidence and present arguments. The Tribunal also received oral evidence, by telephone, from her maternal uncle, [Uncle C].
40. The applicant was represented in relation to the review by her registered migration agent who provided comprehensive submissions in support of the application but who did not attend the hearing.
41. The applicant provided the Tribunal with details of her family background, confirming that her late father was a member of the Sabiny tribe while her mother is a member of the Muganda tribe. In Uganda, tribal membership is passed through the father which is why the applicant is also a member of the Sabiny tribe. According to the applicant, Female Genital Mutilation is a cultural practice particular to the Sabiny tribe.
42. The applicant's parents, both farmers, were living in the province of Jinja at the time of her birth. Soon afterwards, they moved to her father's tribal village [Village 2] (which is also the applicant's tribal village) in Kapchorwa, where they stayed until shortly after the death of the applicant's father. The applicant and her mother then lived with the applicant's maternal grandparents until the applicant's mother remarried, at which point the applicant and her mother moved to Kampala to live with the applicant's stepfather and older stepbrother and stepsister.
43. The applicant told the Tribunal that although her stepfather fed her and helped to pay her school fees, he did not treat her as well as he treated his own children. When the applicant spoke to her mother about this, her mother told her that she had to put up with it.
44. The applicant told the Tribunal that her late father had a large extended family, including an older brother, [Uncle A], and a younger brother, [Uncle B]. In accordance with Ugandan tradition, paternal uncles are called 'father' by their nephews and nieces and are seen to have paternal rights over their nephews and nieces, which includes deciding what they feel is appropriate for that child.
45. After leaving the village in Kapchorwa, the applicant and her mother had no contact with the applicant's two paternal uncles until the applicant was 12 years old when the uncles approached the applicant's mother in [year deleted: s.431(2)] requiring the applicant to return to the ceremony to be circumcised at the 'Cutting ceremony' in [date deleted: s.431(2)]. According to the applicant, cutting ceremonies occur in the Sabiny tribe in the December of every even year.
46. The applicant did not want to be circumcised and her mother is against the practice. To keep her safe from the applicant's uncles, the applicant's mother enrolled her in a boarding school

in Mpigi province, away from Kampala, but close to where the applicant's maternal aunt lived.

47. The applicant doesn't agree that she is at less danger of circumcision now that she is [age deleted: s.431(2)]. She told the Tribunal that it is the custom that all Sabiny women are cut. The applicant has even heard stories of Sabiny woman being circumcised after their death, to show respect to their ancestors. The applicant's cousin, [name deleted: s.431(2)], the daughter of another of her father's brothers or stepfathers, had been circumcised when she was 23 years old.
48. The applicant completed her A level examinations at boarding school in [year deleted: s.431(2)], achieving a score high enough to allow her entrance in 2010 into her chosen course in [course deleted: s.431(2)].
49. In January 2010, the applicant's paternal uncles instructed her mother to take the applicant to the village later in the year to prepare her for the cutting ceremony in December 2010. They instructed the applicant's mother to speak to one of the applicant's paternal aunts so that the applicant could be schooled in the traditions of the Sabiny tribe. The applicant's mother was also told that a husband had been found for the applicant, who is a witchdoctor in the village.
50. The applicant describes a witchdoctor as follows:

A witchdoctor is not a good person. He carries out evil spells on people. Non-religious people believe that this is good and that witchdoctors can do miracles. Witchdoctors believe that they can gain power through sacrifice
51. She told the Tribunal that witchdoctors have been known to perform human sacrifices.
52. She gave the following reasons for not wanting to be forced into such a marriage: she believes that she is too young to be married; she had anticipated completing her education prior to marrying and wishes to marry a partner of her choosing rather than one who has been chosen for her; she is fearful of how she may be treated by the witchdoctor, in particular that she may be sacrificed by him.
53. Both the thought of being circumcised and being forced into marriage with a tribal witchdoctor made the applicant become extremely anxious, to the point of collapse. Following her collapse, she was admitted into hospital for a week.
54. It is the applicant's view that the authorities would not protect her either from being forcibly circumcised or forcibly married. This is because the applicant believes that the police would not assist without payment and that even if they were to take a statement from her, no action would be taken in the matter.
55. If the applicant did not fear persecution on the basis of being forcibly circumcised or forcibly married off to the tribal witchdoctor, she would have stayed in Uganda where she had gained entrance to her university of choice, [university deleted: s.431(2)], to study the course of her choice, namely [course deleted: s.431(2)]. She would like to have stayed in one of the university's hostels. She told the Tribunal that had she not feared for her safety, she would not have left Uganda and would never have come to Australia.
56. She confirmed that her maternal uncle, [Uncle C], had paid for her to come to Australia to attend a [conference] in Sydney and organised her visa for her. This was a means of enabling

the applicant to leave Uganda so that she would no longer be faced with the threat of genital mutilation or forced marriage to a witchdoctor from the Sabinu tribe.

57. On her arrival in Australia, the applicant told the Tribunal that she knew nobody. At the [conference], she met a Ugandan family who offered her temporary accommodation with them and then arranged for her to live in [suburb deleted: s.431(2)] in accommodation for asylum seekers. Since [February] 2011, the applicant has been living in [suburb deleted: s.431(2)] with members of the [community deleted: s.431(2)] who also offer accommodation to asylum seekers. The applicant spoke of the difficulties in arriving in a country where she knew no one and was unfamiliar with the immigration processes. On the advice of the Ugandan family she had initially stayed with, the applicant went to the Department of Immigration to apply for protection. She told the Tribunal that, if granted protection in Australia, she would be an upstanding citizen of the country.
58. The applicant's uncle, [Uncle C], gave evidence to the Tribunal by telephone. He told the Tribunal that he was the director of [a company] and is the maternal uncle of the applicant. He confirmed that the applicant's father had died when she was very young and that the family of her father had later made contact with the applicant's mother to inform her of their intention to circumcise her. [Uncle C] advised the applicant's mother to place the applicant in a boarding school to keep her protected from her father's family. [Uncle C] contributed to the applicant's education. Following the completion of her secondary education, the applicant's family continued to pursue her, intending to marry her off to a witchdoctor.
59. [Uncle C] told the Tribunal:

I know this institution in Uganda. It is a cultural practice for witchdoctors to sacrifice their wives, other people, children. [The applicant] is a very beautiful girl and I find her father's family to be very stupid.
60. [Uncle C] told the Tribunal that the applicant then became very depressed and was hospitalised. [Uncle C] told the Tribunal that when the applicant found out about the [conference] in Australia, [Uncle C] assisted her with the visa process, which included lodging an application with the Australian embassy in Nairobi, as there is no embassy in Uganda. He also paid for her airline ticket to Australia, with the hope that the applicant would be able to gain asylum in Australia.
61. He told the Tribunal that he did not believe that the applicant's safety could be guaranteed were she to return to Uganda. This is because of the dangers inherent in marrying the applicant off to a witchdoctor and in the practice of Female Genital Mutilation. He was not confident that the applicant would be protected against being circumcised, despite laws recently being passed to prohibit the practice. He told the Tribunal:

It's a funny system in Africa. The laws are not put into effect. There is a lot of abuse of human rights. For example, the laws say that if arrested, a person must be brought before the courts within 48 hours, however people are detained in safe houses for years. There are sacrifices by witchdoctors, that's the reality in Uganda. I don't have the chance to talk to the international community. There is lots to do about human rights in Africa. Our legislators have betrayed us.

## Independent information

### *Female Genital Mutilation in Uganda*

62. According to the World Health Organization, 0.6% is the estimated prevalence of Female Genital Mutilation in girls and women aged 15-49 years in Uganda . According to the US Department of State, the prevalence of FGM in Uganda is less than 5% of the female population (US Department of State 2001, Prevalence of the Practice of Female Genital Mutilation (FGM): Laws Prohibiting FGM and their Enforcement; Recommendations on How to Best Work to Eliminate FGM , p.47 and World Health Organization 2008, Eliminating female genital mutilation: an interagency statement UNAIDS, UNDP, UNECA, UNESCO, UNFPA, UNHCHR, UNHCR, UNICEF, UNIFEM, WHO , UNHCR website, Annex 3, p.29).
63. According to the US Department of State, Female Genital Mutilation in Uganda is practised by the Sabinu ethnic group in rural Kapchorwa District and the Pokot ethnic group along the northeastern border with Kenya. (US Department of State 2009, 2008 Country Reports on Human Rights Practices – Uganda , 25 February, Section 5 ‘Children’)
64. An article dated 30 June 2008 in New Vision reports that REACH programme statistics show that “6198 women underwent genital mutilation between 1990 and 2004 in Kapchorwa” (‘Uganda : Genital Mutilation – Women Grapple With a Deadly Tradition’, New Vision , 30 June, allAfrica.com website <http://allafrica.com/>)
65. According to Sara Horsfall, Texas Wesleyan University and Rebecca Salonen, Godparents Association Inc,

Circumcision season falls during the November/December school holidays of even-numbered years for both boys and girls, though some are cut in the off-years if they wish to marry. Girls who avoid cutting usually relent under heavy social pressure and intimidation from relative and neighbors despite the promise of lifelong pain and the possibility of death (Kuka 1998). Even a woman who manages to get married prior to cutting is likely to be pressured into it after marriage by her in-laws.

A three-week festival accompanies circumcision and cutting when girls of about 15 years old and boys of 17 or 18 from throughout the region are initiated. It is a big occasion for everyone. Once the season is declared open by the elders, for about three weeks male circumcision candidates run through the villages of the District, collecting gifts and congratulations from friends and relatives, who often join in the run to the next village. During this time, a boy collects the foundation for the bride price to be offered for a newly circumcised girl to be his wife. Female cutting candidates do not tour the district but remain in the family homestead, where they are prepared for what is to come...On the night before the cutting is to take place, age cohorts and school mates gather together, separated by gender. Girls dance all night and the accompanying singing and drumming resounds throughout the area. Around dawn the next morning, the “secrets” and history of the culture are imparted to the initiation candidates. Young men and women are exhorted never to reveal their tribal secrets to uncircumcised Sabinu or to outsiders. Then comes the cutting and circumcision, performed in separate places. (Traditionally men could not be present during the ceremonies for girls, but this appears to have changed somewhat in recent years.) Sabinu girls are expected to be brave during the procedure. They are not restrained. They lie down in turn on the cutting mat with their arms extended over their heads. After pulling up their skirts and arranging their legs to allow the procedure they do not blink an eye in reaction to the cuts. ...After the excision, the

girls are allowed to recover without much aftercare. The wound is traditionally treated with cow's urine...Cutting and circumcision not only make the passage into adulthood, they mark the beginning of community and civic responsibility. Prior to the cutting, a girl is not allowed to speak in public, in front of those who have already been circumcised. She is considered "only a girl," and may not even undertake important women's tasks such as milking cows and drawing grain from the communal granary. However, after she is cut she is accepted as a woman, with all the prerogatives granted by the Sabiny, including full rights to leadership as an elder among the tribe.

(Horsfall, Sara & Salonen, Rebecca 2000, Female Genital Mutilation and Associated Gender and Political Issues Among the Sabiny of Uganda , March, Stop FGM website <http://www.stopfgm.org/stopfgm/doc/EN/90.pdf> – Accessed 24 May – Attachment 19 ).

66. In an article dated 13 October 2008 in New Vision , Sam Anguria, member of the Gulu Gender-Based Violence Group describes the cultural significance of Female Genital Mutilation to the Sabiny:

The Sabiny attach a lot of importance to female genital mutilation (FGM), which explains why it has existed for centuries.

Firstly, it is a rite of passage for preparing young girls for womanhood, marriage and responsibility. Regardless of age, an uncircumcised woman is considered a girl and cannot be trusted with any position of responsibility, including talking in public. She is considered a coward and a shame to the clan and family. Therefore, one would rather please the clan and family by getting circumcised other than remaining a "girl." Secondly, an uncircumcised woman is a victim of stigma and discrimination She cannot perform certain responsibilities like milking cows, getting food from the granaries and collecting cow-dung from kraals for plastering huts. Few peers would have her as a friend and she is always a laughing stock for the community. This is because she is considered unclean. This stigma may explain why uncircumcised Sabiny women who elope into marriage go back to their parents for circumcision. Thirdly, before the circumcision, the candidates are taken to secluded places where they meet with elderly women to talk to them on how to "manage" their homes, including their husbands. Confidential information is passed on to the candidates and they are told never to reveal the information until death. They are told that breaking this rule leads to premature death. Fourthly, when a girl braves circumcision she brings a lot of pride to the family and she is showered with lots of gifts. It is also assurance that she is fit for marriage and therefore a source of bride wealth for the family.

(Anguria, Sam 2008, 'Uganda : It is Wrong for Police to Fight Against FGM', New Vision , 13 October, allAfrica.com website <http://allafrica.com/> – Accessed 25 February 2009).

67. An article dated 10 January 2009 in The Monitor reports on the circumcision of 20 married women in a village in Kapchorwa. The article notes that these women "had successfully survived the knife but the sanctions by the society and the overall stigma were so severe, life became unbearable. After running out of options and ideas the poor women, desperate and frustrated, yielded to the knife." (Tegulle, Gawayo 2009, 'Sabiny married women turn to circumcision', The Monitor , 10 January [http://www.monitor.co.ug/artman/publish/opinions/Sabiny\\_married\\_women\\_turn\\_to\\_circumcision\\_77984.shtml](http://www.monitor.co.ug/artman/publish/opinions/Sabiny_married_women_turn_to_circumcision_77984.shtml))

### *Forced marriage in Uganda*

68. According to a report published by the UN Human Settlements Programme in April 2002, there are five types of marriage and subsequently five marriage laws in Uganda. The report notes that customary marriages are the most common and are often carried out without the consent of the girl.

At present, five types of marriages are recognised in Uganda: civil, Christian, Hindu, Muslim and customary marriages. Marriage must be monogamous if contracted under the Marriage Act of 1902, the African Marriage Act of 1903 or under the Hindu Marriage and Divorce Act of 1962. However, the Customary Marriages Decree of 1972 and Islamic law both allow polygamous marriages. In practice, customary marriages are most common, and are based on the payment of dowry or 'bride price', a tradition that contributes to the view of many men that 'women are their property', and is often carried out without the consent of the girl. Since the girl's parents receive the bride price, cases of girls being 'sold' by the parents are frequent. If a woman under a customary marriage wants divorce, she will need to pay back the dowry (Benschop, Marjolein 2002, 'Chapter Three: *Uganda, Rights and Reality: Are women's equal rights to land, housing and property implemented in East Africa?* , April, UN Human Settlements Programme website, p.79

[http://www.unhabitat.org/publication/hs66702e/rr\\_chp3.pdf](http://www.unhabitat.org/publication/hs66702e/rr_chp3.pdf) – Accessed 24 May 2005 – Attachment 26 ).

69. An article dated March 2001 in UNICEF's *Innocenti Digest* reports that women in Uganda are specifically not granted by law the right to "full, free and informed consent" to their marriage. (UNICEF 2001, 'Early Marriage Child Spouses', *Innocenti Digest* , No. 7, March, p.8 <http://www.unicef-icdc.org/publications/pdf/digest7e.pdf> – Accessed 23 May 2005)

### *Recent legislation outlawing Female Genital Mutilation in Uganda*

70. According to the 2010 *Country Reports on Human Rights Practices* by the US Department of State:

The Sabinu ethnic group in rural Kapchorwa District and the Pokot ethnic group along the northeastern border with Kenya practiced FGM, despite local laws that prohibit the practice. On March 17, President Museveni signed into law the 2009 Prohibition of Female Genital Mutilation Bill. The law establishes that neither culture, religion, nor the consent of the victim are allowable defenses and establishes penalties of up to life imprisonment for the practice. The government, women's groups, and international organizations continued to combat the practice through education. These programs, which received some support from local leaders, emphasized close cooperation with traditional authority figures and peer counseling. On July 29, the Constitutional Court declared the practice of FGM unconstitutional.

Despite the government ban, thousands of girls were subjected to FGM over the year, with one newspaper article reporting that approximately 820 girls were subjected to the practice in December alone in the districts of Kapchorwa, Bukwo, Kween, and Amudat. The police arrested several individuals involved in promoting the ritual. For example, on November 31, police arrested Jennifer Katungo, Patrick Chemonges, Flora Chebet, Juliet Cheseva, and Isaac Chemonges for their involvement in FGM practice in Binyiny subcounty, Kween District. Hearing of the case was pending. In December police arrested four girls under the age of 16 and five parents for their involvement in an FGM ritual in Kween District. The girls were released after questioning, and the parents were sentenced to two months community service. In December police in Bukwo District arrested Margret Chemutai, Brunei Chematene, Boniface Kabunga, and Julius Malinga for practicing FGM. On December 8,

Chemutai pled guilty and was sentenced to four months in prison for circumcising eight girls. Chematene, Kabunga, and Malinga pled not guilty and were remanded to prison pending hearing of the case.

(US Department of State 2011, *2010 Country Reports on Human Rights Practices*, 8 April, [www.state.gov/g/drl/rls/hrrpt/2010/af/154375.htm](http://www.state.gov/g/drl/rls/hrrpt/2010/af/154375.htm) - Accessed Mon, 11 Apr 2011)

71. In an article dated 6 November 2010, Frederick Womakuyu (reporting for New Vision) indicates the dim prospects for criminalisation in significantly reducing the incidence of Female Genital Mutilation, given the strong opposition of Sabiny (Sebei) elders in Kapchorwa District to obeying, much less enforcing, national laws against the practice:

Elders in Bukwo and Kapchorwa districts are preparing to circumcise over 200 girls next month despite a new law banning the practice. They swear that the whole tribe would rather go to prison than abolish a custom they inherited from their ancestors.

The practice, commonly referred to as female circumcision, is mostly practiced among the Sabiny, who occupy Bukwo and Kapchorwa districts on the northern slopes of Mt Elgon. The United Nations categorises it as female genital mutilation (FGM) because it damages a woman's sexuality and leads to various complications. FGM refers to the removal of the external female genitalia.

Accordingly, last December parliament passed a law banning female circumcision. President Yoweri Museveni signed it into law on March 17, 2010 and it took effect on April 9, 2010. The law argues that FGM infringes on the rights of the woman and also leads to health hazards, including excessive bleeding, death, birth complications and exposure to illnesses. The law criminalises the practice, calls for prosecution of offenders and protection of victims. Anyone caught doing it faces 10 years in jail or life imprisonment if the victim dies.

But the Sabiny are unfazed by this law. The vice-chairman of Bukwo district, John Chelangat, says over 200 girls are being prepared for the practice beginning on December 1 and neither he nor other political leaders are able to stop it. The men like it because circumcised women are less interested in sex and are, therefore, less likely to have extramarital affairs. The girls do not want to be considered outcasts, so they go for the knife.

"This is a very sensitive period and no politician will talk about abolishing FGM because we shall lose votes. Myself, I will not talk about FGM because I know this will land me into the political dustbin," says Chelangat.

Consequently, as the December 1, 2010 circumcision nears, preparations to grace the ritual are in high gear in Sebei region.

Kokop Chebet, 70, a mentor from Matibeyi village in Suam sub-county-Bukwo, says she has received applications from over 20 girls wishing to be prepared for the ritual.

"They came to me in January and I have been training them on how to go through the ritual. They told me they want to become women like others because they are tired of being scolded by the community that still calls them girls because they are not cut," she adds.

Alice Kokop, 65, another mentor from Suam says she has also received about 15 applications from girls in Kabei sub-county wishing to be cut.

Other girls are to come from Chesower and Bukwo Town Council sub-counties. "I have already taken them through a series of trainings and they are about to be ready. We shall cut the first group in the first week of December," Kokop explains.

Asked about the law prohibiting FGM, the two said a law cannot stop the cultural rite of the Sabiny people unless the community agrees with it...The Sabiny people claim they do not fear the law and they are ready to die for FGM. "This law was not initiated or brought by the people of Sebei. It was brought by the people who do not understand why we carry out circumcision," adds Alice Kokop.

(Frederick Womakuyu, 'Over 200 Sabiny Girls To Be Circumcised', The New Vision, 6 November 2010, <http://allafrica.com/stories/201011081387.html>)

72. Geof Maga, reporting for *Afrika-News*, describes the problems of enforcing the legislative prohibition on Female Genital Mutilation:

Despite the practice having been banned outright in the eastern African country since last year, some 200 young girls from the Sebei tribe have "willingly" registered to be circumcised in December this year.

The practice, which is common among people from the Sebei tribe of Bukwo and Kapchorwa districts at the foot of mountain Elgon, 400 kms east of Kampala, is categorized by World Health Organization as Female Genital Mutilation due to the damage it causes to circumcised women's sexuality. It also leads to various complications.

But with all the government official's concern, no politician has dared to remind the people of Sebei of the illegality of the practice due to the pending elections. They fear that any attack on the practice could cost them vital votes due to the fact that many local people there revere circumcision. A law against Female Genital Mutilation has been in place in Uganda for several months.

(<http://fgcdailynews.blogspot.com/2010/11/female-circumcision-and-ugandan.html>)

[MP deleted: s.431(2)]

73. The website Ugee! Uganda Online confirms that in 2008, [name deleted: s.431(2)] was elected Member of Parliament for [constituency deleted: s.431(2)]. ([source deleted: s.431(2)])

*Witchdoctors in Uganda*

74. The following article published on 7 January 2010 in *The Telegraph* (UK) describes the practice of human sacrifices by Ugandan witchdoctors:

Witch doctors in Uganda have admitted their part in human sacrifice amid concerns that the practice is spreading in the African country.

One man said he had clients who had captured children and taken their blood and body parts to his shrine, while another confessed to killing at least 70 people including his own son.

The latter has now given up the ritual and is campaigning to stamp it out, according to BBC News.

The African country's government claimed human sacrifice was on the increase.

According to officials trying to tackle it, the crime is directly linked to rising levels of development and prosperity - and an increasing belief that witchcraft can help people get rich quickly.

During its investigation, to be broadcast on Thursday on Radio 4 and Newsnight, the BBC team witnessed anti-sacrifice campaigners torching the shrine of a witch-doctor in northern Uganda, who agreed to give up the practice. He said clients came to him in search of wealth.

"They go and capture other people's children. They bring the heart and the blood directly here to take to the spirits," he said.

"They bring them in small tins and they place these objects under the tree from which the voices of the spirits are coming."

The witch doctor, who said he was paid 500,000 Ugandan shillings (around £160) for a consultation, denied any direct involvement in murder or incitement to murder, saying his spirits spoke directly to clients.

Moses Binoga, the assistant police commissioner who is head of the Ugandan anti-human sacrifice and trafficking task force, said there were 26 murders thought to be part of ritual sacrifice last year compared with three cases in 2007.

"We also have about 120 children and adults reported missing whose fate we have not traced," he added. "From the experience of those whom we recovered, we cannot rule out that they may be victims of human sacrifice."

<http://www.telegraph.co.uk/news/worldnews/africaandindianocean/uganda/6944292/Human-sacrifices-on-the-rise-in-Uganda-as-witch-doctors-admit-to-rituals.html>

## **FINDINGS AND REASONS**

### **Country of Nationality**

75. The applicant claims to be a citizen of Uganda. At hearing, the Tribunal sighted a current Ugandan passport in the applicant's name. On this basis, the Tribunal accepts that the applicant is a Ugandan citizen.

### **Assessment of claims**

76. The applicant claims to fear persecution on the basis of her social group, namely that as a member of the Sabiny tribe, she faces forced Female Genital Mutilation and forced marriage. The Tribunal accepts that the essential and significant reason for the claimed fear is the Convention reason of social group, namely membership of the Sabiny tribe.
77. The issue before the Tribunal is whether the applicant has a well-founded fear of persecution: that is, whether the applicant has a genuine fear based on a real chance of persecution.
78. The applicant claims to have been born on [date deleted: s.431(2)] to her father, [name deleted: s.431(2)], a member of the Sabiny tribe, and her mother, [name deleted: s.431(2)], a member of the Muganda tribe. By virtue of the system of patriarchal lineage in place in Uganda, the applicant claim to be a member of the Sabiny tribe. The applicant also claims that as a member of the Sabiny tribe and given that her father is deceased, she is bound by the authority of her paternal uncles. The applicant claims that in [year deleted: s.431(2)], two of

her paternal uncles first contacted the applicant's mother to advise that the applicant should return to her village of [Village 2] in Kapchorwa to undergo the ritual of Female Genital Mutilation, a cultural prerequisite for all female members of the Sabiny tribe. The applicant claims that in order to protect her from this procedure, her mother sent her to boarding school where, she believed, the applicant would be safe from her uncles. The applicant claims that in 2010, her uncles wrote to her mother instructing her to bring the applicant to Kapchorwa for the December 2010 cutting ceremony to prepare her for marriage to a man chosen for her. The applicant claims that the husband chosen for her is a local witchdoctor, who is much older than her and who she fears, given witchdoctors' reputation for sacrifice and disapproval of Christianity. The applicant claims that following her graduation from school, she was no longer able to be protected by the rigours of the boarding school structure and upon her entrance to university, would be easily found by her uncles given the open access to universities and the location of entrants' details on the internet. The applicant claims that it is for this reason that her maternal uncle paid for her to leave the country by applying to attend [a conference] in Australia, with the aim of seeking asylum in Australia.

79. The Tribunal found the applicant to be a credible witness whose evidence was internally consistent and accorded with the independent information sourced by the Tribunal. She was able to clarify to the Tribunal's satisfaction those issues that had been of concern to the delegate, in particular the age at which female members of the Sabiny tribe might be circumcised; the reasons behind the decision by the applicant's mother to send her to boarding school; the nature of her relationship with her stepfather, her reasons for working during the period January to June 2010 and her safety within Uganda as a whole.
80. The Tribunal accepts that the applicant was born in Uganda in [year deleted: s.431(2)] to a father from the Sabiny tribe and a mother from the Muganda tribe. As the daughter of a Sabiny man, the Tribunal accepts the evidence of the applicant, as corroborated by the independent country information set out above, that she is also a Sabiny woman and as such, is under the authority of the brothers of her late father.
81. The Tribunal accepts the independent information that Female Genital Mutilation is routinely practised within the Sabiny tribe and that all Sabiny women are expected to be circumcised. The Tribunal accepts the independent evidence that whilst such a procedure is commonly practised on adolescent girls, there is independent evidence of its practice on both married and unmarried women up to the age of 49 years. The Tribunal accepts the independent information that a Sabiny man expects his betrothed to be circumcised prior to their marriage. The Tribunal accepts the independent evidence that Female Genital Mutilation exposes a woman to health hazards including excessive bleeding, death, birth complications and exposure to illnesses.
82. The Tribunal accepts the independent evidence that forced marriage remains common amongst Sabiny tribe members. The Tribunal accepts the applicant's evidence that her uncles have arranged for her to marry an older witchdoctor from Kapchorwa and that the applicant is opposed to such a marriage on the basis that she is fearful of witchdoctors and fears she would be badly treated because of her Christian faith.
83. The Tribunal accepts that there is a real chance that, if the applicant returns to Uganda now or in the reasonably foreseeable future, she will be subjected to Female Genital Mutilation and forced marriage.

84. The Tribunal finds that the essential and significant reason for this happening would be her membership of the particular social group of female members of the Sabiny tribe.
85. In *Applicant S v Minister for Immigration and Multicultural Affairs* (2004) 206 ALR 242 at [36] Gleeson CJ, Gummow and Kirby JJ gave the following summary of principles for the determination of whether a group falls within the definition of a ‘particular social group’:
- 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”.
86. The Tribunal accepts that in accordance with these principles, female members of a particular tribe, in this case, the Sabiny tribe, form a ‘particular social group’ for the purposes of the Refugees Convention in that they have identifiable characteristics or attributes common to all members of the group and which distinguish them as a group from society as a whole: see *Minister for Immigration and Multicultural Affairs v Khawar* (2002) 210 CLR 1 at paragraphs [32] to [35] per Gleeson CJ, and at paragraphs [81] to [83] per McHugh and Gummow JJ.
87. The Tribunal finds on the basis of country information and the evidence before it that there is a particular social group for the purposes of the Convention comprising female members of the Sabiny tribe. The Tribunal is satisfied that this group is identifiable by attributes common to all members of the group. It is also satisfied that the common characteristics and attributes to all members of the group is not the shared fear of persecution and that the possession of the attributes distinguishes the group from society at large. The Tribunal finds that the applicant is a member of this particular social group.

#### *Serious harm*

88. The Tribunal accepts that if the applicant is subjected to Female Genital Mutilation on her return to Uganda, she is, according to the independent information, at risk of excessive bleeding, infection and death. The Tribunal also accepts that if the applicant is taken back to the village of [Village 2] in Kapchorwa, there is a real chance she will be married to the man chosen for her by her paternal uncles, namely a local witchdoctor, and that in light of the applicant’s Christian faith, may be at risk of physical ill-treatment by her proposed husband for this reason. The Tribunal considers that the persecution that the applicant fears therefore involves ‘serious harm’ as required by paragraph 91R(1)(b) of the Migration Act in that it involves a threat to her life or at least significant physical harassment or ill-treatment. The Tribunal finds that the persecution which the applicant fears involves systematic and discriminatory conduct, as required by paragraph 91R(1)(c), in that it is deliberate or intentional and involves her selective harassment for a Convention reason, namely as a female member of the Ugandan Sabiny tribe.

#### *State Protection*

89. The Tribunal accepts the independent evidence before it that since April 2010, there has been legislation prohibiting the practice of Female Genital Mutilation in Uganda.

90. In this case, then, to the extent that the threats to the applicant are not state-sanctioned, the issue arises as to whether state protection is available to the applicant in all the circumstances.
91. Harm from non-state agents may amount to persecution for a Convention reason if the motivation of the non-State actors is Convention-related, and the State is unable to provide adequate protection against the harm. Where the State is complicit in the sense that it encourages, condones or tolerates the harm, the attitude of the State is consistent with the possibility that there is persecution: *MIMA v Respondents S152/2003* (2004) 222 CLR 1, per Gleeson CJ, Hayne and Heydon JJ, at [23]. Where the State is willing but not able to provide protection, the fact that the authorities, including the police, and the courts, may not be able to provide an assurance of safety, so as to remove any reasonable basis for fear, does not justify an unwillingness to seek their protection: *MIMA v Respondents S152/2003* (2004) 222 CLR 1, per Gleeson CJ, Hayne and Heydon JJ, at [28]. In such cases, a person will not be a victim of persecution, unless it is concluded that the government would not or could not provide citizens in the position of the person with the level of protection which they were entitled to expect according to international standards: *MIMA v Respondents S152/2003* (2004) 222 CLR 1, per Gleeson CJ, Hayne and Heydon JJ, at [29].
92. On the evidence before it, including that provided by the applicant as corroborated by the independent evidence before it, the Tribunal finds that the existence of legislation outlawing the practice of Female Genital Mutilation has not, in fact, stopped the practice. According to the independent evidence cited above, 200 Sabinu girls were registered to be circumcised at the cutting ceremony in December 2010, despite laws prohibiting the practice. The independent evidence also states that local authorities are loath to implement the laws because they see the matter as one of cultural practice that should not be interfered with. Furthermore, local politicians are loath to ensure the laws are upheld for fear of losing votes amongst their constituencies.
93. In light of this evidence, the Tribunal finds that, despite the passing of legislation banning the practice of Female Genital Mutilation in Uganda, the level of state protection is not adequate to provide the applicant with the level of protection that she was entitled to expect according to international standards.
94. In light of the independent evidence and given that customary marriages, including arranged marriages, are accepted by the Ugandan authorities, the Tribunal finds that state protection meeting international standards would not provide adequate protection to the applicant against harm. The Tribunal finds that the fact that a marriage has been arranged for the applicant puts her at an even greater risk of being forced to submit to Female Genital Mutilation in preparation for the marriage.
95. In light of the above evidence and discussion, the Tribunal finds that there is real chance, now or in the reasonably foreseeable future, that the applicant would be persecuted for reasons of her membership of a social group, namely that of female members of the Sabinu tribe, should she return to Uganda. For this reason, the Tribunal finds that the applicant's fear of persecution for a Convention reason is well-founded.
96. The persecution involves serious harm for the purpose of s91(1)(b) of the Act. The Tribunal also finds that the withholding of state protection as discussed above involves systematic and discriminatory conduct for the purpose of s91R(1)(c).

### *Relocation*

97. The Tribunal has considered whether it would be possible for the applicant to return to Uganda to relocate to another part of the country to avoid persecution.
98. The Tribunal finds that the applicant has now completed her secondary education, has gained entrance to university and wishes to pursue tertiary education. On the evidence before it, the Tribunal accepts that details of students studying at universities throughout Uganda are available on the internet, which would make the applicant easy to locate, regardless of her place of study. For this reason, the Tribunal finds that the applicant's uncles would seek and be able to locate her throughout Uganda. It is for reason that the Tribunal finds that the applicant's fear of persecution is nation-wide rather than localised. Consequently, a finding of relocation is not relevant in this matter.

### **Third country protection**

99. Section 36(3) of the Act provides that Australia is taken not to have protection obligations to a non-citizen who has not taken all possible steps to avail himself or herself of a right to enter and reside in, whether temporarily or permanently and however that right arose or is expressed, any country apart from Australia, including countries of which the non-citizen is a national.
100. The Tribunal is satisfied that the applicant does not have a legally enforceable right to enter and reside in any country other than her country of nationality, Uganda. The Tribunal finds that the applicant is not excluded from Australia's protection by subsection 36(3) of the Act (see *Applicant C v Minister for Immigration and Multicultural Affairs* [2001] FCA 229; upheld on appeal, *Minister for Immigration and Multicultural Affairs v Applicant C* (2001) 116 FCR 154).

### **CONCLUSIONS**

101. 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**

102. 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.