

1313046 [2014] RRTA 198 (7 March 2014)

DECISION RECORD

RRT CASE NUMBER: 1313046
COUNTRY OF REFERENCE: Libya
TRIBUNAL MEMBER: Josephine Kelly
DATE: 7 March 2014
PLACE OF DECISION: Sydney
DECISION: The Tribunal affirms the decision not to grant the applicant a Protection (Class XA) visa.

Any references appearing in square brackets indicate that information has been omitted from this decision pursuant to section 431(2) of the Migration Act 1958 and replaced with generic information which does not allow the identification of an applicant, or their relative or other dependant.

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 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 Libya, applied to the Department of Immigration for the visa [in] January 2013 and the delegate refused to grant the visa [in] August 2013.
3. The applicant appeared before the Tribunal on 27 February 2014 to give evidence and present arguments. The Tribunal hearing was conducted with the assistance of an interpreter in the Arabic and English languages.
4. The applicant was represented in relation to the review by his registered migration agent. The representative attended the Tribunal hearing.

RELEVANT LAW

5. The criteria for a protection visa are set out in s.36 of the Act and Schedule 2 to the Migration Regulations 1994 (the Regulations). An applicant for the visa must meet one of the alternative criteria in s.36(2)(a), (aa), (b), or (c). That is, the applicant is either a person in respect of whom Australia has protection obligations under the 'refugee' criterion, or on other 'complementary protection' grounds, or is a member of the same family unit as such a person and that person holds a protection visa.

Refugee criterion

6. Section 36(2)(a) provides that a criterion for a protection visa is that the applicant for the visa is a non-citizen in Australia in respect of 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).
7. Australia is a party to the Refugees Convention and generally speaking, has protection obligations in respect of 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.
8. 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.
9. There are four key elements to the Convention definition. First, an applicant must be outside his or her country.

10. 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)). Examples of 'serious harm' are set out in 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.
11. 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.
12. 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.
13. 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 being persecuted for a Convention stipulated reason. 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.
14. 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. The expression 'the protection of that country' in the second limb of Article 1A(2) is concerned with external or diplomatic protection extended to citizens abroad. Internal protection is nevertheless relevant to the first limb of the definition, in particular to whether a fear is well-founded and whether the conduct giving rise to the fear is persecution.
15. Whether an applicant is a person in respect of 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.

Complementary protection criterion

16. If a person is found not to meet the refugee criterion in s.36(2)(a), he or she may nevertheless meet the criteria for the grant of a protection visa if he or she is a non-citizen in Australia in respect of whom the Minister is satisfied Australia has protection obligations because the Minister has substantial grounds for believing that, as a necessary and foreseeable consequence of the applicant being removed from Australia to a receiving country, there is a

real risk that he or she will suffer significant harm: s.36(2)(aa) ('the complementary protection criterion').

17. 'Significant harm' for these purposes is exhaustively defined in s.36(2A): s.5(1). A person will suffer significant harm if he or she will be arbitrarily deprived of their life; or the death penalty will be carried out on the person; or the person will be subjected to torture; or to cruel or inhuman treatment or punishment; or to degrading treatment or punishment. 'Cruel or inhuman treatment or punishment', 'degrading treatment or punishment', and 'torture', are further defined in s.5(1) of the Act.
18. There are certain circumstances in which there is taken not to be a real risk that an applicant will suffer significant harm in a country. These arise where it would be reasonable for the applicant to relocate to an area of the country where there would not be a real risk that the applicant will suffer significant harm; where the applicant could obtain, from an authority of the country, protection such that there would not be a real risk that the applicant will suffer significant harm; or where the real risk is one faced by the population of the country generally and is not faced by the applicant personally: s.36(2B) of the Act.

Section 499 Ministerial Direction

19. In accordance with Ministerial Direction No.56, made under s.499 of the Act, the Tribunal is required to take account of policy guidelines prepared by the Department of Immigration – PAM3 Refugee and humanitarian - Complementary Protection Guidelines and PAM3 Refugee and humanitarian - Refugee Law Guidelines – and any country information assessment prepared by the Department of Foreign Affairs and Trade expressly for protection status determination purposes, to the extent that they are relevant to the decision under consideration.

CONSIDERATION OF CLAIMS AND EVIDENCE

20. The issue in this case is the applicant's credibility. For the following reasons, the Tribunal has concluded that the decision under review should be affirmed.
21. The applicant seeks protection from Australia because he is an actual or imputed Gaddafi supporter because he:
 - accepted a scholarship from the Gaddafi regime;
 - has political objections to tribal rule, militias and rampant religious fundamentalism which will inevitably bring him to the adverse attention of those groups and there is no protection from central authorities; he objects to aligning himself to a militia for protection;
 - is a member of [Tribe A] which supported Gaddafi and which is targeted by anti-Gaddafi militias;
 - is from [District 1] in southern Libya, an area renowned for support of the Gaddafi regime;
 - his two brothers left [Libya] shortly after fall of Gaddafi due to militias' threats;

- his parents and siblings have been subjected to recurrent short term periods of displacement due to ongoing politically motivated violence and remain internally displaced because of threats of ruling militias, and have not returned to their home village due to ruling militias; there is no protection by central authorities or legitimate application of law.
22. The applicant also claimed that he has not returned to Libya given prevailing security concerns and persistent pattern of politically motivated human rights abuses and general lawlessness. He fears general anarchy as militias and tribes practise autonomous rule, including extrajudicial executions and kidnappings. There is a lack of central control, dysfunctional administration, endemic corruption and tribal factional influences. The country is unstable, the society fragmented, divided along tribal, political, cultural and religious lines with political retribution.
 23. Consequently the applicant fears that he will suffer significant harm, torture, cruel or inhuman treatment or punishment or degrading treatment or punishment if he returns to Libya.
 24. The applicant provided the following country information:
 - 28 April 2013 report “Gunmen surround foreign ministry in Libya capital”;
 - 29 April 2013 “Gunmen keep Libyan foreign ministry under siege”;
 - 7 May 2013 “Libya gunmen keep up siege on ministries”;
 - 10 June 2013 “Deadly clashes in Libya as protesters demand disbanding of militias” about the Libya Shield militia, Benghazi (an umbrella group of brigades based in Benghazi);
 - 19 September 2012 “Militia Rule in Libya” (re assault on the American diplomatic mission in Benghazi on the anniversary of 9/11);
 - 5 July 2012 “Libya: Rule of Law or Rule of Militias?”
 - 13 March 2013 “Libyan militias promise wealth in unstable nation”;
 - 17 February 2012 “Libya 1 year later: militias rule”;
 - 4 July 2012 Libya: “Militia stranglehold corrosive for rule of law”;
 - 13 October 2012 “Libyan Government Struggles to Rein in Powerful Militias NY times.com”
 - September 2012 “Militias Become Power Centers in Libya”.
 25. The Tribunal does not accept the applicant’s claims for the following reasons. There is no country information that supports the applicant’s claim that his [tribe] supported Gaddafi and has been targeted by anti-Gaddafi militias. When the Tribunal pointed that out to the applicant, he claimed that late in 2013 in Zueela in the south of Libya, the Al Tabu militia killed some [Tribe A] people because they supported Gaddafi. He saw it on Facebook but did not get that evidence. There is no corroborative evidence before the Tribunal of that claim which does not answer the Tribunal’s concern in any event. The Tribunal does not accept that evidence.
 26. The Tribunal has taken into account the reports of NATO airstrikes on [Town 2] in [2011] and one report that referred to [Town 2] as a Gaddafi loyalist stronghold referred to in the decision-record, but they do not support the specific claims the applicant makes in relation to his tribe and the Misrata militia. Further, that there are reports of reprisals from anti-Gaddafi militias on residents of other towns because of their perceived support of Gaddafi, referred to in the decision-record, reinforces the Tribunal’s concerns about the applicant’s claims.

27. There is no country information before the Tribunal supporting his claim that [District 1], from where he comes in southern Libya, is renowned for support of the Gaddafi regime. There is no country information supporting his claim at the hearing that the Misrata militia entered [Town 2], his home town in 2011 or 2012. When the Tribunal raised that with the applicant, he claimed that they had killed someone from his tribe. There is a great deal of information about militias and tribes in Libya, as illustrated by the country information the applicant provided in support of his claims and that referred to in the decision-record that the applicant provided to the Tribunal. The Tribunal does not accept that there has been a lack of media reporting of incidents he relied on.
28. There are inconsistencies in the applicant's claims. That the applicant was unable to specify the date on which the Misrata militia entered [Town 2] more precisely than saying that it was in 2011 or 2012 is inconsistent with such a significant event occurring which he claimed has resulted in his family constantly relocating in Libya and two of his brothers fleeing Libya. His claim that he does not know the date exactly, does not answer the Tribunal's concern.
29. In his application, he claimed that his parents and siblings have not returned to their home village due to ruling militias. At the hearing he said that last month they were in the [Town 2] area and a month before that in [Town 3] and sometimes in Tripoli. He also said at the hearing that he could not say whether two of his brothers were living or not living in the family house in [Town 2] because they keep relocating from [Town 2], to [Town 3] and Tripoli. The Tribunal finds that the applicant's evidence at the hearing was that sometimes his [family] relocated together, to their home in [Town 2], which is inconsistent with his claim in the application. The Tribunal makes that finding taking into account that it might be argued that the applicant meant that his family could not return permanently but could come and go. However, the Tribunal does not accept that his family of eight people would come and go to [Town 2] when the "ruling militias" are the source of the threat to them and the politically motivated violence.
30. At the hearing the applicant said that his brothers were targeted by the militias because they were involved in festivals, hanging out flags and singing. When the Tribunal pointed out that he had told the delegate during the departmental interview, as recorded in the decision-record, that they had been targeted because they were training people and distributing ammunition, the applicant said that he did not think that was the case. This is yet another inconsistency in the applicant's evidence.
31. The applicant's claim that he was an actual or imputed supporter of Gaddafi because he accepted a scholarship from that regime is inconsistent with the fact that the current regime approved his changing his course in [date]. He also renewed his passport through the Libyan embassy in Australia [date]. The Tribunal has taken into account the claim that he will be imputed by the militias to be a Gaddafi supporter because of his scholarship, but does not accept that claim given the two acts of the new government and that the Tribunal has not been provided with country information to support the claim. The country information referred to by the delegate in the decision-record also does not support this claim. Country reports do not indicate systematic targeting and intimidation of scholarship holders by former rebel fighters, extremists or other militias.
32. For the above reasons, the Tribunal does not accept that the applicant is a credible witness and does not accept his claims for protection. It does accept that the central government in Libya has had difficulty in ruling Libya, that there are hundreds of militias in Libya, and that Libya is a fragmented society divided along tribal, political, cultural and religious lines. The

Tribunal does not accept that any member of the applicant's immediate family has suffered any harm for any of those reasons or at all. It does not accept that his family has been subjected to short term periods of displacement due to ongoing politically motivated violence and remain internally displaced because of threats of ruling militias and have not returned to their home village due to ruling militias. It does not accept two of his brothers [fled] because of threats from militias.

33. In making those findings, the Tribunal has taken into account the applicant's claims that two of his cousins were [killed] because they were from [Tribe A] and were considered to support the Gaddafi regime. Given the reports of violence in that city, the Tribunal accepts that they were killed, but does not accept that their deaths were for the reasons the applicant claimed because it does not accept that he is a credible witness.
34. The applicant also said that one was fighting in the army and the other was a student in a military academy and that they both died in 2012 but he could not be more precise as to the dates they died. He said that he had a document from Facebook that listed them both. The document was not provided to the Tribunal. Nor was a translation. Although the representative flagged at the hearing that they would be provided after the hearing, he advised the Tribunal after the hearing that he was not going to make any further submission.
35. For the above reasons, the Tribunal is not satisfied that the applicant is a supporter of the Gaddafi regime or will be imputed to be such by a militia or militias or anyone else if he returns to Libya because of one or more of the following reasons:
 - accepted a scholarship from the Gaddafi regime;
 - has political objections to tribal rule, militias and rampant religious fundamentalism which will inevitably bring him to the adverse attention of those groups and there is no protection from central authorities; he objects to aligning himself to a militia for protection;
 - is a member of [Tribe A] which supported Gaddafi and which is targeted by anti-Gaddafi militias;
 - is from [District 1] in southern Libya, an area renowned for support of the Gaddafi regime;
 - his two brothers left [Libya] shortly after fall of Gaddafi due to militias' threats;
 - his two cousins were killed because they were actual or perceived Gaddafi supporters;
 - his parents and siblings have been subjected to recurrent short term periods of displacement due to ongoing politically motivated violence and remain internally displaced because of threats of ruling militias, and have not returned to their home village due to ruling militias; there is no protection by central authorities or legitimate application of law;
 - he will be identified as pro-Gaddafi when stopped at a militia checkpoint.
36. The Tribunal does not accept that the applicant has political objections to tribal rule, militias and rampant religious fundamentalism which will inevitably bring him to the adverse

attention of those groups and there is no protection from central authorities; he objects to aligning himself to a militia for protection. That he has continued to study in Australia under both Libyan regimes does not indicate any strong political views. Although he claimed his family with Gaddafi supporters, the Tribunal does not accept that any member of his immediate family has been threatened or harmed, and does not accept that his cousins were killed, for that reason. It does not accept that his family were Gaddafi supporters.

37. The Tribunal does not accept that the applicant will be harmed if he returns to Libya by religious fundamentalists. The Tribunal accepts that there are some Islamist militias among the many militias in Libya but does not accept that the applicant will be harmed by them. It does not accept that religious fundamentalism is “rampant” in Libya.
38. The applicant claimed that he has not returned to Libya given prevailing security concerns and persistent pattern of politically motivated human rights abuses and general lawlessness. He fears general anarchy as militias and tribes practise autonomous rule including extrajudicial executions and kidnappings. There is a lack of central control, dysfunctional administration, endemic corruption and tribal factional influences. The country is unstable, the society fragmented, divided along tribal, political, cultural and religious lines with political retribution. The Tribunal does not accept that the applicant will suffer harm if he returns to Libya for any of those reasons.
39. The Tribunal is not satisfied that there is a real chance that the applicant will suffer serious harm in the reasonably foreseeable future if he returns to Libya for a Convention reason.
40. The Tribunal is not satisfied that the applicant has a well-founded fear of persecution for a Convention reason if he returns to Libya.
41. For the reasons given above, the Tribunal is not satisfied that the applicant is a person in respect of whom Australia has protection obligations under the Refugees Convention. The applicant does not satisfy s.36(2)(a) of the Act.
42. Having concluded that the applicant does not meet the refugee criterion in s.36(2)(a), the Tribunal has considered the alternative criterion in s.36(2)(aa).
43. The applicant claimed that he has not returned to Libya given prevailing security concerns and persistent pattern of politically motivated human rights abuses and general lawlessness. He fears general anarchy as militias and tribes practise autonomous rule including extrajudicial executions and kidnappings. There is a lack of central control, dysfunctional administration, endemic corruption and tribal factional influences.
44. Consequently the applicant fears that he will suffer significant harm, torture, cruel or inhuman treatment or punishment or degrading treatment or punishment if he returns to Libya.
45. For the reasons given above, the Tribunal does not accept that the applicant’s immediate family has suffered harm in Libya or has had to flee Libya because of a threat of harm. It does not accept that his family were Gaddafi supporters. It does not accept that he will be regarded as a Gaddafi supporter for any of the reasons he claimed, for the reasons given above. The Tribunal finds that members of his family have been able to remain in Libya unharmed throughout the turmoil of 2011 to date. The Tribunal does not accept that the applicant will suffer harm because of the state of the Libyan government, the militias, the

tribes, general lawlessness and lack of central control, if he returns. In making that finding, the Tribunal has taken into account the deaths of his two [cousins]. The applicant claimed that one was in the army and one was studying at a military school. Accepting that is so, those circumstances are quite different from the applicant's circumstances or the circumstances of his immediate family members. It does not accept that he would suffer harm because he is related to those family members or a member of the same tribe.

46. The Tribunal is not satisfied that there are substantial grounds for believing that, as a necessary and foreseeable consequence of the applicant's being removed from Australia to Libya, there is a real risk that he will suffer significant harm.
47. There is no suggestion that the applicant satisfies s.36(2) on the basis of being a member of the same family unit as a person who satisfies s.36(2)(a) or (aa) and who holds a protection visa. Accordingly, the applicant does not satisfy the criterion in s.36(2).

DECISION

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

Josephine Kelly
Member