

1103558 [2011] RRTA 705 (29 July 2011)

DECISION RECORD

RRT CASE NUMBER:	1103558
DIAC REFERENCE(S):	CLF2010/175001
COUNTRY OF REFERENCE:	The Philippines
TRIBUNAL MEMBER:	Pauline Pope
DATE:	29 July 2011
PLACE OF DECISION:	Sydney
DECISION:	The Tribunal affirms the decision not to grant the applicant a Protection (Class XA) visa.

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

1. This is an application for review of a decision made by a delegate of the Minister for Immigration and Citizenship to refuse to grant the applicant a Protection (Class XA) visa under s.65 of the *Migration Act 1958* (the Act).
2. The applicant is a permanent resident of the Philippines. She arrived in Australia on [date deleted under s.431(2) of the *Migration Act 1958* as this information may identify the applicant] August 2003 and entered the country on a passport issued to her in Manila by the Republic of China (Taiwan). She applied to the Department of Immigration and Citizenship for the Protection Visa [in] December 2010. The delegate decided to refuse to grant the visa [in] April 2011 and notified the applicant of the decision.
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] April 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 Regulations.

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, *Applicant S v MIMA* (2004) 217 CLR 387 and *Appellant S395/2002 v MIMA* (2003) 216 CLR 473.
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.
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. 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.

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

CLAIMS AND EVIDENCE

19. The Tribunal has before it the Department's file relating to the applicant. The applicant appeared before the Tribunal [in] June 2011 to give evidence and present arguments. The Tribunal also received oral evidence from the applicant's sister [name deleted: s.431(2)] and a friend [Mr A].

Application for Protection visa

20. According to the information provided by the applicant in the application for the Protection Visa she was born in Manila on [date deleted: s.431(2)]. She states that her religion is Roman Catholic. She is still legally married but separated from her husband in June 1992. The applicant states that her citizenship at birth is that of the Philippines and her current citizenship is also that of the Philippines. The applicant states that she travelled to Australia using a passport issued by the Taipei Economic and Cultural Office in the Philippines [in] May 2003.
21. The applicant provides information that she lived in [district deleted: s.431(2)], Manila from December 2000 until August 2003. She provides particulars of four periods during 1990, 1992, 1993 and 1999 when she went to Taiwan for employment reasons. She states that she completed 13 years of education in 1976. From 1983 until 1988 she worked as a bookkeeper in Makati.
22. The applicant provides the following information in relation to her claims. She is married and has two children. She says that from the time of her marriage her husband did not want to work and he did not support the children; he took advantage of her financial background and did not seek work himself. She states that he gambled and drank to excess. With alcohol he became abusive; she suffered physical violence from him and he made threats against her life.
23. The applicant states that she moved back to her parents' home and tried to avoid her estranged husband but he continued to pursue her. He wanted her to return to him. He then pursued her at her parents' home. She says that she was subjected to constant threats and abuse until the time she left the Philippines.
24. The applicant states that she is of Chinese ethnicity. She has held the nationality of Taiwan since the time she was young but she does not speak Chinese and would therefore find it difficult to live in Taiwan. Furthermore she is permitted to stay in Taiwan for periods of only up to 3 months on each occasion. She therefore decided to leave the Philippines and come to Australia. In doing so she left her two children behind in the care of her sister. She has two sisters in Australia who are now Australian citizens. She knows that they would protect her

from her estranged husband. She does not wish to return to the Philippines and is seeking to remain in Australia where she can contribute her services to the local community.

25. The applicant states that she fears that she returns to the Philippines her estranged husband will locate her; threaten and beat her even though they have now been separated for many years. She says he is addicted to drugs and he is an abusive man. She does not wish to return to the Philippines.

Decision of the delegate

26. The delegate deemed it unnecessary to interview the applicant in connection with the application for the Protection Visa and informed her of this by letter [in] February 2011.
27. In the decision record the delegate noted that the applicant has been estranged from her husband for 19 years and in that period she has been to Taiwan and has now been in Australia for a period of nine years. The delegate finds it unlikely that the applicant's estranged husband would attempt to find her or harm her after a separation of such a long period. Furthermore she finds even if he were to do so there are avenues available to the applicant and the children if they wish to seek support services upon her return to the Philippines.
28. The delegate finds that the applicant's claimed difficulties arise from her estranged husband; they are a private matter and beyond the scope of the Refugees Convention. The delegate notes that the applicant did not make contact or seek support from any of the organisations which might have afforded protection. She states that she did not do so because she believed that they would not protect her because they are not interested in her affairs. The delegate states that country information she has consulted satisfies her that the government of the Philippines does not condone violence against women or children.
29. The delegate was not satisfied that in the Philippines the applicant would be a woman at risk and therefore a member of a particular social group. The delegate did not accept that the applicant would be differentially treated by the authorities for that reason or indeed for any other Convention related reason.
30. The delegate concluded that the applicant does not have a genuine fear of harm and there is no real chance of persecution occurring to her in the Philippines.

Application for review

31. The applicant did not provide any additional information in support of the review application.

Hearing before the Tribunal

32. The Tribunal established that the applicant was born in Manila on [date deleted: s.431(2)]. Her father was born in China in a place the applicant knew only as [name deleted: s.431(2)]. Her mother was born in the Philippines. The applicant explained that she understands that her father went to the Philippines as a young man. He married there and whilst he continued to live there he never acquired Philippines nationality.
33. The Tribunal asked the applicant about her family. It heard that she is one of the youngest of seven children. She explained that the four eldest children became citizens of the Philippines when they turned 21 years of age. She recalls that their father engaged a lawyer to undertake this process for them at that time. The applicant further explained that the three younger

children in the family including the applicant herself did not acquire the Philippines citizenship in this way then or at any time subsequently. The applicant said that she has never held Philippines nationality, although she resides there and pays tax in the Philippines. The Tribunal heard that the applicant has a brother remaining in the Philippines. He also holds the nationality of the Republic of China (Taiwan). She has two sisters in Australia, both of whom are Australian citizens.

34. The applicant said that she obtained the first passport in 1990. She subsequently travelled to Taiwan on a number of occasions to undertake employment. She said that she was free to engage in any employment she chose. She was permitted to remain in Taiwan for limited periods in accordance with her visa. She said that she was permitted to remain in Taiwan for periods up to 6 months on each arrival. Her last visit to Taiwan was in 1999. Since that time she lived in Manila until she came to Australia in 2003. The Tribunal heard that the applicant does not have family ties in Taiwan. Her visits there to undertake employment were based on the superior economic conditions.
35. The Tribunal established that the applicant married [in] June 1984. She has two children now [ages deleted: s.431(2)]. Her children are living in the care of her sister in Manila at the present time. The applicant explained she is still legally married. Her older child maintains some limited contact with her father. Her younger child has no contact with the applicant's estranged husband. He is not the father of her younger child. Her children are both still studying.
36. The Tribunal asked about the history of the relationship. She said that when she went to Taiwan to work in 1990 the relationship was not good. They subsequently separated in 1992. She went to live with her aunt. Her estranged husband returned to live with his family in Pampanga. The last time she saw her husband was just prior to her visit to Australia in 1994. He wanted her to go back to him and was always putting pressure on her to return to the marriage. She remained fearful of him. Under the influence of drugs and alcohol he became very abusive. When she returned to the Philippines after visiting Australia in 1994 she went to live with her aunt.
37. The Tribunal asked the applicant what she fears if she returns to the Philippines. She replied that she remains fearful that her estranged husband might find her again. She does not wish to see him. She is afraid that he will try to use her.
38. The Tribunal observed that the applicant provided a statement from the Office of the Punong Barangay after she made the application for the Protection Visa. According to the statement which is dated [in] December 2010 she reported physical abuse by her husband to the Barangay over the period 1985 until 1992. She told the Tribunal that she approached the Barangay in relation to her situation and she was advised to put the matters on the record. The Tribunal asked her whether she ever called on the police to assist her during this violence or afterwards. She said that she did not. She explained that her husband always promised that he would not act in this way again but he continued to do so.
39. The Tribunal also discussed with the applicant statements she provided from [names deleted: s.431(2)] contained in the DIAC file. She said that these two women were her friends and one lived near her in the Philippines. As they have said in their statements they witnessed her poor treatment and the violence suffered from her husband [name deleted: s.431(2)].

40. The applicant said that she regrets her actions in staying unlawfully in Australia for many years. She realises that this was wrong. However she hopes that she can remain in Australia to continue the life she has established here.

Evidence of the sister of the applicant

41. The Tribunal heard of the steps taken by the witness, with the assistance of a legal representative who had been engaged by her father in order to acquire the Philippines nationality when she reached the age of 21. The witness told the Tribunal that she recalls that when she and her siblings were young and still at school they held Alien Registration Cards. This suggested to her that they did not hold Philippines nationality at that time. She said that it appears that their father did not have the funds to do this for the three younger children when they reached the age of 21. The witness also told the Tribunal what she observed and what she heard from the applicant about the status of the marriage and the treatment of the applicant by her husband.

Evidence of [Mr A]

42. [Mr A] told the Tribunal that he finds the applicant to be a kind and caring woman. He explained that he is in poor health. She assists him in his daily care. In the near future he must go to hospital for treatment and will rely on the applicant for care when he is discharged. The witness said that the applicant has been caring for him for about six or seven months. He told the Tribunal that he is concerned for the applicant's well-being. He knows that she does not wish to return to the Philippines.
43. The Tribunal established that the parties do not live together in a relationship. It heard that the applicant goes to [Mr A]'s house three times a week in order to care for him.

Material provided post hearing

44. After the hearing the applicant provided material discussed during the hearing. This evidence relates to receipts for payments made by the applicant on an annual basis to the Bureau of Immigration in Manila. In that material the applicant's nationality is described by the Bureau of Immigration as *Chinese*. As the applicant described this material to the Tribunal during the hearing it relates to her ongoing status as a permanent resident in the Philippines.

FINDINGS AND REASONS

45. There exist in the applicant's case a number of issues which could be quite complex factually and legally. However for the purposes of its assessment the Tribunal does not find it necessary to resolve the particular issues for the reason that on any view of the facts and the law relating to nationality she would not be entitled to a protection visa because she cannot satisfy the criteria in s.36(2).
46. In the application for the Protection Visa the applicant has described her nationality as being that of the Philippines. At the hearing she clarified that, although she was born in the Philippines she does not hold the nationality of that country. Her father was ethnic Chinese. According to the applicant he never acquired Philippines nationality. The Tribunal also heard that four of the applicant's older siblings acquired the nationality of the Philippines upon application when they attained the age of 21 years. The applicant did not do so. She holds a

passport and the nationality of the Republic of China (Taiwan). At the hearing she told the Tribunal that she lives permanently in the Philippines and she provided evidence subsequent to the hearing that she maintains the right to reside there and since being in Australia she has taken the necessary steps to renew that on an annual basis.

47. On the basis of the written evidence before it and the applicant's oral evidence the Tribunal finds that the applicant is not a national of the Philippines.
48. The applicant's passport which was sighted by the Tribunal was issued by the Taipei Economic and Cultural Office in the Philippines [in] May 2003. The passport describes the applicant as a *national of the Republic of China*. The passport bears an endorsement at page 8 *Entry and Exit Permit* issued by the Commissioner of Bureau of Immigration. According to the Permit the bearer is permitted to enter and exit the District of Taiwan, the Republic of China as long as the permit remains valid and for a stay of three months. The permit was issued on and 2003 and remains valid until [a date in] June 2004.
49. In relation to the applicant's nationality the Tribunal has considered whether her nationality of the Republic of China is "effective nationality" in offering protection from persecution in another country. The correct approach (under the Convention) to the assessment of cases involving multiple nationality was considered by the Full Federal Court in *Koe v MIMA (1997) 74 FCR 508*. In that case the Tribunal had found that the East Timorese applicant had both Indonesian and Portuguese nationality and so was excluded from the Convention because he could avail himself of the protection of Portugal. The Court held that the Tribunal did not err in finding that the applicant had Portuguese nationality, but that it did err by failing to consider the "effectiveness" of his Portuguese nationality as a distinct issue. It held that "nationality" where it first appears in the second paragraph of Article 1A(2) refers to nationality that is effective as a source of protection and not merely formal.
50. The Court explained that whether nationality is "effective" must be assessed in the light of all the circumstances of the particular case, and would extend to a range of practical questions, "parallel to those posed by the expression 'unable'" in the first paragraph of Article 1A(2). The considerations relevant in that case related to whether the applicant could genuinely access protection against return to the country in which he feared, and had a real chance of, being persecuted. The Court's reasoning, in reaching that conclusion, suggests that a country should not be regarded as a "country of nationality" for the purposes of Article 1A(2) if it does not provide protection from persecution in another country, notwithstanding that it may be a country of nationality under international law.
51. According to information provided by the Taiwanese Ministry of Justice from the Laws and Regulations Database of the Republic of China, accessed at www.ncpb.gov.tw/eng/laws/10.pdf the Immigration Act provides that Nationals with registered permanent residence may enter and/or exit the State without permission. Nationals without registered permanent residence in the Taiwan Area shall apply to the National Immigration Agency for permission to enter the State. Article 10 makes provision for a National without registered permanent residence in the Taiwan Area to make an application to the National Immigration Agency for permanent residence under certain conditions including fulfilling a residential requirement.
52. The applicant does not have registered permanent residence in the Taiwan Area. On the reasoning in *Koe v MIMA* and cited above, the Tribunal finds that for the reasons given above in relation to the restrictions placed on the applicant's right to enter and reside in the Republic

of China the applicant's nationality of the Republic of China is not "effective nationality" in that sense.

53. For the purposes of this assessment the Tribunal finds that the applicant is not a national of the Philippines. It finds that her nationality of the Republic of China is not "effective nationality" The Tribunal finds that the applicant is stateless. Her country of former habitual residence is the Philippines.
54. The applicant's only claim to protection is in relation to the Philippines. She has not made claims that she suffered or fears persecution in Taiwan (Republic of China). The Tribunal accepts the applicant's claim that the Philippines is the only country to which she can legitimately return. It accepts that whilst her passport describes her as a *national of the Republic of China* she is not a National with registered permanent residence in the Taiwan area. She does not have automatic right of entry nor can she remain there without restriction. As the applicant can only return to the Philippines and her claims are in relation to that country the Tribunal will consider her claims relevant to that country.
55. The applicant claims that she suffered violence in an abusive marital relationship which she abandoned in 1992. She does not wish to return to the Philippines because she fears that her estranged husband will locate her and continue to physically mistreat and abuse her. The Tribunal accepts that the applicant lived in an abusive marital relationship for a number of years as she has claimed. It accepts that she left the marriage in 1992 and returned to live with her family. The Tribunal accepts that the applicant has two children now [ages deleted: s.431(2)] and she left them in the care of her sister when she left the Philippines to come to Australia.
56. As the Tribunal put to the applicant a number of times during the hearing the marriage has effectively been over for some nineteen years. The applicant has not had contact with her estranged husband since at least 1994. She told the Tribunal that her children have very limited contact with him.
57. The Tribunal understands that the applicant has been in Australia for some eight years. She wishes to remain in Australia where she has two sisters. Currently she cares for an Australian citizen, [Mr A] whose wish it is that she be permitted to remain in Australia. [Mr A] gave evidence before the Tribunal and the Tribunal recognises that he has come to rely on the applicant to some extent for care.
58. Nevertheless the Tribunal must find that the applicant is not a refugee. In the first place the harm she claims to fear is private harm from a former partner whose poor behaviour was driven by excessive consumption of alcohol. The harm she fears has no Convention basis. Secondly, given the passage of time and the fact that there has not been any contact between the parties for some seventeen years the Tribunal finds that there is no real chance that the applicant will suffer serious physical abuse as she did in the past and whilst in the marriage if she returns to Philippines.
59. The Tribunal finds that the applicant's fear of Convention related persecution in the Philippines is not well founded. She is not a refugee.

CONCLUSIONS

60. The Tribunal is not satisfied that the applicant is a person to whom Australia has protection obligations under the Refugees Convention. Therefore the applicant does not satisfy the criterion set out in s.36(2)(a) for a protection visa.

DECISION

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