

**1001089 [2010] RRTA 513 (22 June 2010)**

**DECISION RECORD**

<b>RRT CASE NUMBER:</b>	1001089
<b>DIAC REFERENCE:</b>	CLF2009/161739
<b>COUNTRY OF REFERENCE:</b>	Lebanon
<b>TRIBUNAL MEMBER:</b>	Jennifer Ellis
<b>DATE:</b>	22 June 2010
<b>PLACE OF DECISION:</b>	Melbourne
<b>DECISION:</b>	The Tribunal affirms the decision not to grant the applicant a Protection (Class XA) visa.

## **STATEMENT OF DECISION AND REASONS**

### **APPLICATION FOR REVIEW**

1. This is an application for review of a decision made by a delegate of the Minister for Immigration and Citizenship to refuse to grant the applicant a Protection (Class XA) visa under s.65 of the *Migration Act 1958* (the Act).
2. The applicant, who claims to be a citizen of Lebanon, last arrived in Australia [in] September 2009 and applied to the Department of Immigration and Citizenship for a Protection (Class XA) visa [in] December 2009. The delegate decided to refuse to grant the visa [in] January 2010 and notified the applicant of the decision and his review rights by letter [on the same date].
3. The delegate refused the visa application on the basis that the applicant is not a person to whom Australia has protection obligations under the Refugees Convention.
4. The applicant applied to the Tribunal [in] February 2010 for review of the delegate's decision.
5. The Tribunal finds that the delegate's decision is an RRT-reviewable decision under s.411(1)(c) of the Act. The Tribunal finds that the applicant has made a valid application for review under s.412 of the Act.

### **RELEVANT LAW**

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

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

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

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

10. The High Court has considered this definition in a number of cases, notably *Chan Yee Kin v MIEA* (1989) 169 CLR 379, *Applicant A v MIEA* (1997) 190 CLR 225, *MIEA v Guo* (1997) 191 CLR 559, *Chen Shi Hai v MIMA* (2000) 201 CLR 293, *MIMA v Haji Ibrahim* (2000) 204 CLR 1, *MIMA v Khawar* (2002) 210 CLR 1, *MIMA v Respondents S152/2003* (2004) 222 CLR 1 and *Applicant S v MIMA* (2004) 217 CLR 387.
11. Sections 91R and 91S of the Act qualify some aspects of Article 1A(2) for the purposes of the application of the Act and the regulations to a particular person.
12. There are four key elements to the Convention definition. First, an applicant must be outside his or her country.
13. Second, an applicant must fear persecution. Under s.91R(1) of the Act persecution must involve “serious harm” to the applicant (s.91R(1)(b)), and systematic and discriminatory conduct (s.91R(1)(c)). The expression “serious harm” includes, for example, a threat to life or liberty, significant physical harassment or ill-treatment, or significant economic hardship or denial of access to basic services or denial of capacity to earn a livelihood, where such hardship or denial threatens the applicant’s capacity to subsist: s.91R(2) of the Act. The High Court has explained that persecution may be directed against a person as an individual or as a member of a group. The persecution must have an official quality, in the sense that it is official, or officially tolerated or uncontrollable by the authorities of the country of nationality. However, the threat of harm need not be the product of government policy; it may be enough that the government has failed or is unable to protect the applicant from persecution.
14. Further, persecution implies an element of motivation on the part of those who persecute for the infliction of harm. People are persecuted for something perceived about them or attributed to them by their persecutors. However the motivation need not be one of enmity, malignity or other antipathy towards the victim on the part of the persecutor.
15. Third, the persecution which the applicant fears must be for one or more of the reasons enumerated in the Convention definition - race, religion, nationality, membership of a particular social group or political opinion. The phrase “for reasons of” serves to identify the motivation for the infliction of the persecution. The persecution feared need not be *solely* attributable to a Convention reason. However, persecution for multiple motivations will not satisfy the relevant test unless a Convention reason or reasons constitute at least the essential and significant motivation for the persecution feared: s.91R(1)(a) of the Act.
16. Fourth, an applicant’s fear of persecution for a Convention reason must be a “well-founded” fear. This adds an objective requirement to the requirement that an applicant must in fact hold such a fear. A person has a “well-founded fear” of persecution under the Convention if they have genuine fear founded upon a “real chance” of persecution for a Convention stipulated reason. A fear is well-founded where there is a real substantial basis for it but not if it is merely assumed or based on mere speculation. A “real chance” is one that is not remote or insubstantial or a far-fetched possibility. A person can have a well-founded fear of persecution even though the possibility of the persecution occurring is well below 50 per cent.
17. In addition, an applicant must be unable, or unwilling because of his or her fear, to avail himself or herself of the protection of his or her country or countries of nationality or, if

stateless, unable, or unwilling because of his or her fear, to return to his or her country of former habitual residence.

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

### **CLAIMS AND EVIDENCE**

19. The Tribunal has before it the Department's file relating to the applicant. The Tribunal also has had regard to the material referred to in the delegate's decision, and other material available to it from a range of sources.

#### **The visa application**

20. The applicant is [age deleted: s.431(2)] and was born in [Location A], Lebanon. He has lived in [Location A], Lebanon since at least 1999. He underwent 4 years of education and worked as a mechanic from 1998 until 2006. He worked in a factory from June 2006 until he departed Lebanon in September 2009. He had previously visited Australia between June and October 2006. His parents and 6 of his siblings reside in Lebanon while one sister and two brothers reside in Australia.

21. The applicant made a statutory declaration which accompanied his protection visa application. In it the applicant stated:

1. I make this statement with reference to my application for a protection visa and with reference to the United Nations Convention and protocol relating to the definition of refugees.

2. I am claiming persecution on the Convention related grounds of Religion and Implied Political Beliefs.

3. I am a Lebanese national and have no other nationality or right to enter or reside in a third country.

4. I was born on [date of birth], at [Location A], Lebanon.

5. I was born a Sunni Muslim but am now a practicing member of the Bahai faith.

6. I have never been married.

7. I originally arrived in Australia on [date] September 2009, on a visitor's visa.

8. My usual occupation is a Mechanic.

9. In May 2005, whilst working in Beirut I met a girl who is Baha'i faith. We had a long relationship and it was she who introduced me to this faith. I was very much in love with her and initially I was interested in the faith simply as a means to win her over.

10. As she preached to me I got to know other members of her family who are also members of the Bahai faith, my interest in this religion grew. I along with my partner and other members of her family would attend secret pray group meetings in the homes of other members of the Bahai faith.

11. I converted to the Bahai faith in October 2006 and remain a committed member.
12. Prior to my own conversation I had known very little about the Baha'i faith. However, I was very keen on knowing more about this faith. My partner and her family have been members of the Bahai faith for over twenty years. They were formally Shiite Moslems and have continued to covertly practice their faith because as like Sunni Moslems Shiites do not accept Bahaism.
13. The Bahai faith is not officially recognised in my country and converts to this faith is considered haram.
14. It is a common practice amongst Bahai's to maintain their Moslem identity and continue worshipping in the Mosque in an effort to avoid being persecuted.
15. My family and relatives would not accept my conversion as it would bring dishonour to my family. I come from a very conservative family who also reject my relationship with my partner as she is not Sunni Moslem.
16. My family would not hesitate to seriously harm me if they discover that I am a follower of the Baha'i faith. They would also be very hostile towards my partner because they would blame her for taking me away from the Sunni faith.
17. We remain an underground religious organisation and our members constantly fear for their lives. Given the extremely hostile attitude towards our faith by mainstream Moslems, our ability to worship remains limited. In Beirut we face a very serious threat from the radical Shiite group Hizbollah and in the north we also face threat from the growing tide of Sunni radicalism.
18. After I arrived in Australia I have maintained contact with my partner who continues to reside with her family in Lebanon. We are planning to be married and I have promised to ensure that she joins me in Australia. We cannot openly practice our faith in Lebanon without facing the threat of serious harm by members of my immediate family or relatives. I cannot rely on the Lebanese authorities to offer me effective protection, because they are loath to intervene in religious matters or matters concerning family honour.
19. I have previously avoided harm in Lebanon because of the extreme precaution that I have been forced to undertake. However, we face the daily threat of being discovered and seriously harmed. I am forced to curb my religious activity and avoid being discovered by outwardly displaying that I remain a Sunni Moslem.
20. There is growing Islamic fundamentalism in Lebanon amongst both mainstream Moslem groups (Shiites and Sunni's). Both groups totally reject conversion to another non Islamic faith. Both my partner and I will need to remain extremely vigilant in not revealing our faith in an effort to avoid serious harm.
22. By letter dated [in] December 2009 the applicant was invited to attend an interview with the delegate scheduled for 1.30pm [in] January 2010. By facsimile dated [in] December 2009 the applicant's migration agent stated that the applicant would attend at the interview. However [in] January 2010 the applicant's migration agent advised that the applicant would not be attending the interview as he did not wish to be interviewed.
23. [In] January 2010 the delegate refused the application.

## **The review application**

24. The applicant applied for review [in] February 2010.
25. By letter dated [in] March 2010 the Tribunal wrote to the applicant advising that it had considered all the material before it relating to the application, but it was unable to make a favourable decision on that information alone. The Tribunal invited the applicant to give oral evidence and present arguments at a hearing at 10.30 am [in] April 2010.
26. [In] March 2010 the applicant advised the Tribunal that he would attend the hearing as scheduled but early [in] April 2010 the Tribunal received a facsimile from the applicant's migration agent requesting a rescheduling of the hearing due to illness and stating that a medical certificate would be faxed later that day. Later that day the Tribunal received a medical certificate dated [in] April 2010 stating that the applicant "has a medical condition and will be unfit for work or study for [sic]. He is receiving treatment for the period from [date] April 2010 to [date] April 2010 inclusive."
27. The Tribunal granted this request and [in] April 2010 the Tribunal wrote to the applicant inviting him to give oral evidence and present arguments at a hearing to be rescheduled to 10am [in] May 2010. The applicant was advised that if he did not attend the hearing, the Tribunal may make a decision on the case without further notice. The applicant was further advised that any future requests for postponement of the hearing on medical grounds would require more detailed medical evidence indicating how his condition affected his ability to attend the Tribunal.
28. The Tribunal did not receive any notification from the applicant that he would attend the hearing scheduled [in] May 2010. The applicant did not appear before the Tribunal on the day and at the time and place at which he was scheduled to appear. In these circumstances, and pursuant to section 426A of the Act, the Tribunal has decided to make its decision on the review without taking any further action to enable the applicant to appear before it.
29. The applicant was represented in relation to the review by his registered migration agent.

## **FINDINGS AND REASONS**

30. The applicant did not appear before the Tribunal at the time and place at which the applicant was scheduled to appear. Accordingly, the Tribunal finds that subsection 426A(1) of the Act applies and the applicant is not entitled to appear before it.
31. The applicant claims to be a citizen of Lebanon and of no other country. He travelled to Australia on a valid Lebanese passport and has made claims against no other country. Therefore for the purposes of the Convention the Tribunal has assessed his claims against Lebanon as his country of nationality.
32. In order to be a refugee under the Convention, it is necessary for the applicant to be outside of his country of nationality and for him to hold a well-founded fear of persecution for at least one of the five grounds listed in the Convention. The mere fact that a person claims fear of persecution for a particular reason does not establish either the genuineness of the asserted fear or that it is "well-founded" or that it is for the reason claimed. It remains for the applicant to satisfy the Tribunal that all of the statutory elements are made out. Although the concept of onus of proof is not appropriate to administrative inquiries and decision-making, the relevant facts of the individual case will have to be supplied by the applicant himself or

herself, in as much detail as is necessary to enable the examiner to establish the relevant facts. A decision-maker is not required to make the applicant's case for him or her. Nor is the Tribunal required to accept uncritically any and all the allegations made by an applicant. (*MIEA v Guo & Anor* (1997) 191 CLR 559 at 596, *Nagalingam v MILGEA* (1992) 38 FCR 191, *Prasad v MIEA* (1985) 6 FCR 155 at 169-70).

33. The applicant has claimed to fear persecution on the basis of his religion and imputed political beliefs. The applicant has stated that he was born a Sunni Moslem but is now a practising member of the Baha'i faith. He said in his statutory declaration that in May 2005 while working in Beirut he met a girl who was of the Baha'i faith. He started to attend secret group meetings and converted to the Baha'i faith in October 2006. He said the Baha'i faith is not officially recognised in Lebanon and converts are considered haram. He said his family in Lebanon would not accept his conversion as it would bring dishonour to them and they would not hesitate to seriously harm him. They would be very hostile to his partner for taking him away from the Sunni faith. He said that the ability of Baha'i to worship remains limited and that there is a growing threat from the radical Shitte [sic] group Hizbollah and from Sunni radicalism. He claimed that the Lebanese authorities would not offer any protection.
34. The Tribunal does not accept, based on the limited evidence before it that the applicant has converted to the Baha'i faith. The applicant has claimed that he fears persecution in Lebanon for the Convention ground of religion. However there is insufficient evidence before the Tribunal that the applicant has converted to the Baha'i faith. The applicant declined an invitation to appear before the Tribunal and therefore the Tribunal has not been able to ask the applicant about the current status of his interest in, or involvement with, the Baha'i faith. Based on the current evidence before the Tribunal, it does not accept that the applicant has converted to the Baha'i faith and finds that the applicant does not face a real chance of persecution in Lebanon, either on the ground of religion or imputed religion.
35. In his statutory declaration the applicant claimed that he also feared persecution on the Convention grounds of implied political beliefs. There is nothing in his statutory declaration that gives rise to such a claim. The applicant declined an invitation to appear before the Tribunal and therefore the Tribunal has not been able to ask the applicant about this aspect of his claim.
36. The applicant has made no claim of any past persecution in Lebanon for a Convention reason. His claim is essentially that he may be subject to serious harm from his family if he were to return to Lebanon because he is in a relationship with a Baha'i woman and had converted to the Baha'i faith. He claims that his family would not hesitate to inflict serious harm on him if he returned to Lebanon. He has claimed that State authorities will not protect him from his family if he returns to Lebanon.
37. Based on the evidence currently before it, the Tribunal does not accept that the applicant's family in Lebanon would seek to harm him as claimed by the applicant.
38. The Tribunal finds that rejection or ostracism by one's own family does not constitute serious harm as required under section 91R of the Act. In *MMM v Minister for Immigration and Multicultural Affairs* (1998) 90 FCR 324, the applicant claimed that his family would disown him if they discovered his homosexuality. The Court held that such treatment could not be regarded as persecution within the meaning of the Convention as it is a purely private matter, and the general standards of civilised countries do not suggest that adults not under a disability have a right to protection when, for private reasons, their families reject them.

While that case did not involve consideration of the statutory test for persecution as set out in s.91R(1) of the Act, his Honour's reasoning would suggest that familial rejection would be likely to fall well short of the statutory requirements.

39. There is very limited evidence available to the Tribunal in relation to the applicant's claims. The Tribunal was not able to question the applicant about his relationship with his Baha'i girlfriend, his family in Lebanon or his involvement and claimed conversion to the Baha'i faith as he failed to attend the hearing when it was scheduled for a second time. The Tribunal was therefore not able to test the applicant's evidence. The Tribunal accepts that the applicant may have a relationship with a Baha'i woman. The Tribunal accepts that the applicant may have an interest in the Baha'i faith. However having regard to the limited evidence before it, the Tribunal does not accept that the applicant's family in Lebanon would seek to inflict serious harm on the applicant if he returned to Lebanon as a result of his relationship with a Baha'i woman in Lebanon or for the reason of his religion or imputed religion. The Tribunal does not accept that there is a real chance that he would face serious harm from his family in Lebanon on the basis of his religion or imputed religion or on any other Convention ground.
40. For these reasons, the Tribunal finds that there is no real chance that the applicant would be persecuted for a Convention reason if he were to return to Lebanon now or in the reasonable foreseeable future. Accordingly the Tribunal finds that the applicant does not have a well-founded fear of persecution for any Convention reason now or in the reasonable foreseeable future if he returns to Lebanon.

#### **CONCLUSION**

41. 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**

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