

**0803680 [2008] RRTA 341 (8 September 2008)**

**DECISION RECORD**

**RRT CASE NUMBER:** 0803680

**DIAC REFERENCE(S):** CLF2005/101774; CLF2006/120312; CLF2007/50;  
CLF2008/89019;

**COUNTRY OF REFERENCE:** Fiji

**TRIBUNAL MEMBER:** R Mathlin

**DATE DECISION SIGNED:** 8 September 2008

**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, who claims to be a citizen of Fiji, arrived in Australia and applied to the Department of Immigration and Citizenship for a Protection (Class XA) visa. The delegate decided to refuse to grant the visa and the applicant was purportedly notified of the decision by letter of the same date. However, that purported notification was apparently later found to have been defective, and, according to the Department's Integrated Client Services Environment Database records, the applicant was renotified of the decision and his review rights by letter at a later date.
3. The applicant applied to the Tribunal for review of the delegate's decision.
4. 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

5. 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.
6. 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).
7. 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'

8. 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.

9. 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.
10. 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.
11. There are four key elements to the Convention definition. First, an applicant must be outside his or her country.
12. 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.
13. 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.
14. 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.
15. 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.

16. 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.
17. 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**

18. The Tribunal has before it the Department's files CLF2008/89019, CLF2007/50, CLF2006/120312 and CLF2005/101774 relating to the applicant, and the Tribunal file
19. Information on CLF2007/50, which contains the protection visa application and the delegate's decision is summarised as follows.
20. According to information provided in the protection visa application, the applicant is a male adult. He came to Australia on a temporary visa several years ago. Soon after arriving he formed a de facto relationship with M, but they had no money to apply for residence on that basis. The applicant and M now have children. The applicant has siblings and his parents in Fiji.
21. The applicant claimed that in Fiji he served in the military for a short time when he was a young man. He claimed that he had specialised training. Fiji is currently under a military government, and the army is recruiting men of all ages who have served in the army. The applicant does not believe in the actions of the military and would refuse to serve. He will therefore be persecuted if he returns because of his political opinion. The applicant's family in Fiji have told him that he cannot return as he will be detained by the military and forced to fight.
22. He also stated that his partner, M, has a medical condition and he needs to be in Australia to care for their children.
23. The application was refused by the delegate who found that although there was some evidence of human rights abuses committed by the military following the December 2006 coup, there was no evidence to suggest that the applicant would be targeted for such abuse. There was no independent evidence to support his claim that former members of the armed forces were being forcibly recruited. The applicant did not claim to have ever been politically active, or to have ever expressed a political opinion. The delegate considered that he did not have a well founded fear of persecution in Fiji.
24. The applicant provided no additional information to the Tribunal in support of his application for review.
25. The applicant was invited to attend a hearing. The day before the scheduled hearing he telephoned the Tribunal and informed an officer that he would be unable to attend the hearing as he had no money. He requested that the hearing be postponed for some weeks, at which time he expected to have some money. The applicant was asked whether he would prefer to attend the hearing by video link and he agreed to this. The applicant appeared before the Tribunal by video link on the scheduled date.

26. The applicant said that he arrived in Australia in a specified year and had never been back to Fiji since then. His parents and siblings are from a village in the interior of Fiji. He rings his family from time to time when he has enough money.
27. He said that he finished high school and then took an apprenticeship in the Fijian Army. He remained for a couple of months but left because a relative did not want him to serve in the army as they did not want him to do peacekeeping duties overseas. The applicant said that he had not been required to sign up for a set period. He had done no military training and had not handled a weapon.
28. He said that he does not want to return to Fiji because a relative has said that everyone who ever joined the army has to go back to the army. He does not want to do this because he has heard that the army has been bashing people since the military coup of December 2006; he does not want to be involved in such things.
29. The Tribunal put to the applicant that it had searched the Internet and its own country information databases, but it had not been able to confirm this claim from any independent source. The applicant said that this was what a relative had told him – that he would probably join the army again, and the army had taken over the country. The Tribunal put to the applicant that even if these reports were true, it seemed unlikely that someone such as himself, who had served a few months of an apprenticeship, would be forced to join up again. The applicant agreed that this seemed unlikely, but he said that a lot of people have left and the army needs recruits.
30. The Tribunal asked whether the applicant had heard this information from any source other than his relative and he said that people who come over to Australia to visit say this as well.
31. The applicant said that it is better for him to stay in Australia, he loves this country and he wants to be able to care for his children who are Australian citizens. His partner, their mother, has a medical condition and he wants to be here for her as well, although he did state in evidence that she had taken up with another man.
32. The Tribunal told the applicant that it had not been able to find any independent confirmation of his claim about former members of the armed forces being called up, but it would conduct further research, and if necessary he would be invited to provide further comments.

#### *Country information*

33. Following the hearing the Tribunal was able to locate additional information about the applicant's claims. As background, in December 2006 armed forces commander Commodore Voreqe Bainimarama overthrew the government of Prime Minister Laisenia Qarase in a bloodless coup, announced the establishment of an interim military government, and dissolved Parliament. According to the United States Department of State *Country Report on Human Rights Practices* for 2007, "On January 5, the interim military government was replaced by a nominally civilian interim government ("the interim government"), headed by Bainimarama as prime minister. Bainimarama and his Military Council controlled the security forces. There were numerous instances in which elements of the security forces acted independently." The Report goes on to detail a number of instances in which members of the Fijian Armed Forces abused their

powers, for example, by assaulting persons regarded as political enemies, or as criminal elements.

34. Numerous reports located by the Tribunal after the hearing indicate that army reservists were called up prior to, and just after the coup. They were required to guard the President's office and undertake the new government's "clean up" campaign. On Sunday 26 November 2006, *The Fiji Times* reported that "all army and navy reserves" were called up, and that Commodore Bainimarama stated that "these army territorial forces and navy reserves were expected to stay in camp for 12 months". The purpose of the call up was, according to the Commodore, to stop anyone entering the President's Office: Raicola, V., Marau, M. and Nand, A. 2006, 'Military reservists recalled to 'guard Fiji President'', *The Fiji Times*, 26 November, <http://www.fijitimes.com/story.aspx?id=52344> – Accessed 21 August 2008. Other news reports published on 26 November 2006 by *Agence France Presse* and *ABC News Online*, refer to "hundreds of reservists" and "more than 1000 territorial force personnel" being recalled over the weekend for the purposes of preparing for a "clean up" campaign of the present government: 'Fiji military raises stakes as government showdown looms' 2006, *Agence France Presse*, 26 November.

35. According to some reports, more than half of those recalled did not respond:

"More than half of the reserve soldiers who were called to assemble at the army's headquarters did not turn up.

This was confirmed yesterday by army spokesman Major Neumi Leweni, who said of the 3000 reserve soldiers, less than 1000 reported to Queen Elizabeth Barracks in Nabua on Saturday. Major Leweni did not elaborate on the turnout, which has been labelled by several senior military officers as a very poor turnout.

Major Leweni said there were only 500 reserve soldiers who turned up and this did not include FTG (Force Training Group in Nasinu.).

He said he was still awaiting an update from the camps in Nadi, Lautoka and Labasa.

The reserves were recalled a week after their annual camp.

Checks on the army camps in the Western Division also revealed a poor turnout.

A senior officer said that some of the reserves he met simply refused to go to camp.

"They said that they were warned by their civilian bosses not to go to camp," he said.

Army commander Commodore Voreqe Bainimarama said that among other things, the reserves were being recalled to guard Government House"

'Poor turnout by Fiji reserve soldiers' 2006, *The Fiji Times*, 28 November  
<http://www.fijitimes.com/story.aspx?id=52438> – Accessed 21 August 2008.

There are no reports of adverse consequence or punishment of reservists who did not attend the call up.

36. According to later media reports, for example, "Fiji lifts emergency imposed after December coup", CX179634,

<http://www.alertnet.org/thenews/newsdesk/SYD273137.htm>, Accessed on 21 June 2007), the state of emergency which was imposed following the coup in December 2006 was lifted in June 2007. Other media reports indicate that, shortly afterwards, in July 2007, the army reserves were disbanded for economic reasons: see <http://www.reuters.com/article/latestCrisis/idUSSYD225298?sp=true> – Accessed 22 August 2008.

## **FINDINGS AND REASONS**

37. The applicant claims to be a citizen of Fiji Based on the identity documents on file and his own evidence the Tribunal accepts that this is the case, and will assess his claims to refugee status as against Fiji, as his country of nationality.
38. The applicant claims that he applied for a protection visa, having been informed by a relative in Fiji that if he returned he would be called up to serve in the Fijian Army. The applicant claims that because he does not agree with the Army's role in the December 2006 military coup, and subsequent human rights abuses in which members of the armed forces were involved, he would refuse to serve and would be persecuted, for reason of his political opinion or a political opinion imputed to him.
39. The Tribunal accepts, based on the applicant's oral evidence given at the hearing, that he served several months of an apprenticeship with the Fijian Armed Forces as a young man. On the basis of this oral evidence, the Tribunal finds that, contrary to the written claims in his protection visa application which were not repeated at the hearing, the applicant did not wear a uniform or handle a weapon; nor was he required to sign up for a specified period of service. The Tribunal prefers the applicant's oral evidence on this point because it was provided to the Tribunal first hand, under oath and unequivocally. The Tribunal is satisfied that the applicant has had no further involvement with the Fijian Army since he left. Based on the applicant's own oral evidence, the Tribunal finds that he was an apprentice; he did not wear a uniform or carry a weapon; and he did not finish his apprenticeship. In these circumstances, the Tribunal is not satisfied that the applicant is now or was then a member of the Fijian Army reserve.
40. The Tribunal accepts that, as the applicant was informed by his family, Fijian Army reservists were called up at around the time of the December 2006 coup. The applicant's oral evidence is broadly consistent with the independent reports referred to above in this respect. The Tribunal is also satisfied, based on these reports, that a large number of the recalled reservists did not show up at all; and that the state of emergency imposed after the coup was lifted in June 2007, shortly before the army reserve was reportedly disbanded. There is no evidence before the Tribunal to suggest that reservists who did not respond to the call up have been punished or subjected to any adverse treatment.
41. Based on the findings and evidence set out above, the Tribunal is not satisfied that the applicant was in fact a member of the Fijian Army reserve, or that he would for any reason have been subjected to the call up in December 2006. Nor is it satisfied that the applicant would now be required to serve in the Army if he were to return. Even if the Tribunal is wrong on this point, and the applicant had been eligible for the call up in December 2006, the Tribunal is not satisfied that his failure to report would lead the government or the military authorities to assume that he was opposed to the military coup, or that he was an opponent of the current government. Nor is it satisfied that there

is a real chance that he would be subjected to punishment or adverse treatment amounting to persecution as a result of not complying with the call up. There is no evidence before the Tribunal to suggest that the army, since December 2006, has made any attempt to locate the applicant, in order to force him to report, or to punish him for failing to do so. There is no evidence before the Tribunal of persons who failed to report, of which there were many, being mistreated or persecuted. Moreover, the Tribunal is satisfied, based on the independent reports referred to above, that the state of emergency, in the context of which the former reservists were called up, no longer exists; and is therefore satisfied that if the applicant were now to return he would not be required to serve in the army.

42. While the Tribunal accepts that the applicant may be opposed to the current Fijian government, there is no credible evidence before it to suggest that he would, if he returned, express his opposition in any manner that might result in his persecution.
43. On the evidence before it, the Tribunal is not satisfied that there is a real chance that the applicant would face persecution for any Convention reason if he were to return to Fiji now or in the reasonably foreseeable future. Accordingly his fear of persecution is not well founded.
44. The Tribunal has noted the applicant's claims about his family situation, but these are not relevant to the Tribunal's consideration of his claims under the Refugees Convention, and the Tribunal has no power to recommend the grant of a visa on humanitarian or compassionate grounds.

## CONCLUSION

45. 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

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

I certify that this decision contains no information which might identify the applicant or any relative or dependant of the applicant or that is the subject of a direction pursuant to section 440 of the *Migration Act 1958*.

Sealing Officer's I.D. PRMHSE