0807351 [2009] RRTA 233 (4 February 2009)

DECISION RECORD

RRT CASE NUMBER:	0807351
COUNTRY OF REFERENCE:	Israel
TRIBUNAL MEMBER:	Adolfo Gentile
DATE:	4 February 2009
PLACE OF DECISION:	Melbourne
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 Israel, arrived in Australia in the early 2000s and applied to the Department of Immigration and Citizenship for a Protection (Class XA) visa. The delegate decided to refuse to grant the visa.

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 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.

20. The applicant appeared before the Tribunal in the early 2000s to give evidence and present arguments. The Tribunal also received oral evidence from Person A. The Tribunal hearing was conducted with the assistance of an interpreter in the Amharic and English languages.

21. The applicant was represented in relation to the review by his registered migration agent. The representative attended the Tribunal hearing.

22. The applicant's advisor, in a submission to the Tribunal, summarised the claims as follows:

[Information deleted in accordance with s.431 as information may identify applicant].

> According to the applicant, Ethiopian Jews are denied equal rights such as access to food and housing. They receive a lower standard of education with no chance to obtain employment. The applicant has been mistreated while studying and completing his military service. He has been regarded as a second class citizen due to his Ethiopian background
>
> The applicant strongly fears imprisonment if sent back to Israel, because he refuses to undertake further military service. He was once targeted to be killed at the Area 1 border because he refused to continue fighting.

23. The submission was accompanied by a copy of the delegate's decision and a number of articles from various internet sites. Nazret.com –*Ethiopian-Israelis protest racism in schools(12/12/07)*; Ynet – *Gilon: Ethiopians destroy, leave muck in their tracks, and pick through refuse bins(n.d)*; Ynet – *Ethiopians protest: You spilled our blood(n.d.)*; Yediot Ahronot – *How does one give boot to recently arrived immigrant? Nigger you are fired(n.d.)*; *Egged bus company driver barred security man from boarding vehicle on grounds of his Ethiopian background (23/7/08)*; *Apartheid in School: Ethiopians study in their own segregated classroom(n.d.)*; *What is black on the outside – and staying outside?(n.d.)*; *Rotten Apple? The whole plantation is infected (22/07/08)*; *Kindergarten teacher: "Ethiopians have a dark heart"(n.d.)*;

24. The applicant had initially provided the Department with a statement containing the same claims as indicated above to which were attached the same articles.

25. At the hearing the applicant indicated that he had moved to Israel (City I) from Ethiopia when he was a child. He finished studying, went to work then went into the army.

26. He described his service in the army and his time in Country W and City II as part of that service. He was initially working as a labourer in City I. He stated that he did not believe what they were fighting for. During his army leave he went to Country X and Country Y with his friend (another Protection Visa applicant).

27. He bemoaned the situation for Ethiopians in Israel; he gave examples of the discarding of blood donations from Ethiopians because of their race, the fact that children at school are taught from an early age to think that a black skin is bad.

28. He stated that he cannot accomplish anything in Israel; there are obstacles all the time because he is Ethiopian. He is discriminated against for this reason. He is living in Area 2 which is a predominantly Ethiopian area of City I.

29. Asked what he thought would happen to him if he returned he stated that he would be taken straight from the airport to fight the war.

30. The Tribunal also heard from Person A, a friend of the applicant's friend. Person A stated that he is of the Jewish faith and moved from Country Z to Australia after marrying an Australian resident. He stated that he visited Israel for a brief period in the early 2000s and he has friends and family in Israel He stated that there are about 120,000 Ethiopian Jews in Israel and he stated that they are discriminated against, certain privileges are denied them and they are called names. This has a big effect on their lives and on the family unit, whereby a lot of infighting ensues and the divorce rate is very high. He stated that they suffer persecution and drew an analogy between them and his experience in Country Z when he did his military service then he was called up to do further training. He stated that the situation of the applicant is not dissimilar and he and his friend would be reluctant to go back into the army. He said being black in the IDF means having to do the 'low end' work. He stated that they do not have the same rights as normal Israeli citizens, for example in the case of domestic disputes the authorities do not respond in a timely manner.

FINDINGS AND REASONS

31. The applicant is an adult male of Ethiopian ethnicity and Jewish religion. He travelled to Australia with a valid Israeli passport issued in his own name and an Australian visa issued in the early 2000s and subsequently extended. In light of the above evidence the Tribunal is satisfied that the applicant is a citizen of Israel and will consider his claims against that country. The applicant's claims are identical to his friend's who is also an applicant and they wanted their claims to be considered together; this was done but on separate applications.

32. The essence of the applicant's claims is that he will be persecuted on return because of his Ethiopian race. He has also claimed that he fears persecution because he does not wish to return to military service.

33. The applicant has claimed to having been called names at school and to having been treated adversely during his military service because of his race; he stated that he feels like a second class citizen in Israel. In his initial claims he had said that he was targeted to be killed because he refused to continue fighting at the Area 1 border and he also claimed to have escaped from military service.

34. In relation to his military service, the Tribunal notes the evidence provided at the hearing which indicated that the applicant had completed his compulsory period of military service from the time he was 18. He has described that he was posted to a unit in the normal course of events. He was discharged in the normal manner and is liable for further training or service along with all those who complete their compulsory military service. He has not indicated

that he has ever registered as a conscientious objector. There is no evidence before the Tribunal that the conscription laws in Israel are other than laws of general application. There is no evidence before the Tribunal that military personnel of Ethiopian background are treated differentially because of their race while in the military. The applicant has claimed one incident when he was asked to go first in relation to a weapon; nothing further about these circumstances has been advanced such that the Tribunal could determine that there was differential treatment for a Convention reason. The applicant's claims that he refused to serve are not congruent with the fact that he does not report any military charges or any summary punishment for refusing to serve, nor with the fact that he has completed the full term of his compulsory service. The Tribunal does not, therefore, accept that he refused to serve nor that he was targeted to be killed.

35. While the Tribunal understands the reluctance which the applicant may have to be asked to return to the front as a soldier and that he fears he may be imprisoned if he does not comply with his military obligations, given that the law on military service is a law of general application in Israel which is not being differentially applied to him for a Convention reason, the Tribunal finds that his claims in relation to military service are not Convention - related claims.

36. The other claims made by the applicant relate to treatment of Ethiopians by Israeli society in general. They include discrimination in employment, lack of opportunity and insults on the basis of race levelled at the applicant. The Tribunal notes the independent information, cited by the delegate, which is relevant and up to date. The issue for the Tribunal is whether this treatment can be said to constitute Convention persecution.

37. The Act at s. 91R, cited above, provides a non exhaustive list of examples of serious harm and the Tribunal is cognizant of the fact that serious harm need not be of a physical nature. The Tribunal accepts that the applicant has been from time to time insulted because of his race and that some rejections of employment opportunity may be due to his race. As to his claim of having his blood donations discarded, the Tribunal finds that the applicant has made this claim in a vague fashion in that the instance of this occurrence documented in an article has been appropriated by the applicant as his own without any evidence that he actually gave blood and that his blood was discarded. Similarly with the issue of segregation in school. Again there is a documented instance of an egregious practice but the connection to the applicant is tenuous. The applicant stated that he lived in a neighbourhood where most of the inhabitants were Ethiopian Jews. The evidence also points to the applicant having received an education and having been employed before his military service and since completing it, up to the time he left for Australia In addition, the articles provided in support of the applicant's claims are in themselves an indictment of the practices they document. They indicate that the society is appalled by such practices and that various government initiatives have been instituted to address the situation.

38. As unpleasant and repugnant some of the incidences of harm claimed by the applicant might be, it is not harm which can be considered serious harm in terms of the Convention. The applicant, for instance, cannot be said to have suffered or to be likely to suffer threats to his life or liberty, significant ill-treatment and economic hardship that threatens his capacity to subsist, denial of access to services and denial of the capacity to earn a livelihood. In addition the claimed harm is not harm perpetrated by the state and state mechanisms have condemned such harm and are making efforts to improve the situation.

39. Having considered the applicant's claims individually and cumulatively, the Tribunal finds that there is not a real chance that the applicant would, now or in the reasonably foreseeable future, be subjected to harm which could be construed as Convention persecution for reasons of his race or ethnicity or for any other Convention reason, should he return to Israel; accordingly, the Tribunal finds that the applicant does not have a well-founded fear of persecution for any Convention reason.

CONCLUSIONS

40. 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

41. 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.: R. Lampugnani