

0903016 [2009] RRTA 664 (28 July 2009)

DECISION RECORD

RRT CASE NUMBER: 0903016

DIAC REFERENCE(S): CLF2009/6803

COUNTRY OF REFERENCE: Ghana

TRIBUNAL MEMBER: Peter Tyler

DATE: 28 July 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 Ghana, arrived in Australia on [in] and applied to the Department of Immigration and Citizenship for a Protection (Class XA) visa [in] January 2009. The delegate decided to refuse to grant the visa [in] April 2009 and notified the applicant of the decision and his review rights by letter dated [in] April 2009.
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 2009 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 following personal details of the applicant and the written claims are contained in the protection visa application dated [in] January 2009.

Application for Protection Visa

21. The applicant claims to be a citizen of Ghana. The applicant was born in Accra, Ghana and attended ten years of school in [town deleted in accordance with s.431(2) of the Migration Act as it may identify the applicant]. He is 21 years of age, speaks English and Ga, and speaks, reads and writes Twi and is a Christian. He described his occupation as [sportsman] and unemployed.
22. The applicant arrived in Australia [in] November 2008 travelling on a Ghanaian passport as part of his country's [sport] team.
23. In the application for a protection visa the applicant claimed that he left Ghana, where he lived in poverty without food, shelter, clothing or employment and that he had always moved from place to place trying to find a job. He was chosen to represent Ghana in [a sporting competition in Australia]. He stated that he fears going back to Ghana because he believes he has no place to sleep and it is easy for armed robbers and drug addicts to attack him. He has already been beaten and attacked with a knife in the past and he is scared he will be killed. He believes the authorities cannot protect him and that due to the current economic and political situation it is impossible for the government and authorities to assist or protect him.

Application for Review

24. Following the primary decision to refuse the protection visa an application for review was lodged [in] April 2009 not further claims or documents were received from the applicant.
25. The applicant appeared before the Tribunal [in] June 2009 to give evidence and present arguments. The Tribunal also received oral evidence from his friend, [Person A] and [Person B], the pastor of the church he attends in [Australia]. The Tribunal hearing was conducted with the assistance of an interpreter in the Twi and English languages.
26. The applicant told the Tribunal that his mother died in 1993 and that he lived with his father and step-mother until his father died after which he continued to live with his

step mother until he was thrown out of home in 2001. At that time he was 14 years of age. He has two older sisters who he has not seen since their father's funeral in 2000. He says he does not know if his step mother is still alive.

27. The applicant said that he completed ten years of school, from kindergarten to junior secondary. He said that he has been unemployed since 2001 and earned money to feed himself by selling newspapers on the streets. He said that he also went to the market area where he would assist people by carrying items for them in return for which he received tips. He claims to have tried to get a job but that nobody wants to help street boys.
28. The applicant told the Tribunal that he has no future in Ghana and that he sleeps in doorways where, on one occasion in 2006, he was been beaten by drunks and drug users. He was sleeping in front of a clothing store when a group of three people told him to go away and when he refused they attacked him and injured him with a belt buckle. He said the reason they attacked him was because they wanted his spot. The applicant claims that, as he had no money he was unable to seek medical treatment so he treated his wounds with traditional medicine. He did not report the attack to the police as he believes they do not take street boys seriously. This was the only incident on which the applicant was attacked.
29. The applicant said that he was afraid to go back to Ghana because he does not know where he will stay, that he will have to go back to the same bad situation as before, he does not know what he will eat, he had a bed here but will have to sleep on concrete in Ghana, there is nobody to help him and he will die if he goes back.
30. [Person A] claims to be a very good friend of the applicant and that they met in 2001. They live near each other and meet each morning. He said that he was aware that the applicant was attacked and received injuries to his left shoulder and arm. [Person A] said that he assisted with the treatment of the injury by rubbing traditional ointment into the wound. He said that he also feared returning to Ghana and that there was no one there to protect them. He told the Tribunal that there various people who attacked him and the applicant were committing criminal acts against them and that the state does not protect homeless people.
31. [Person B] said that, from his own experience, he believes the situation for the applicant will be tough in Ghana, that "veranda boys" such as the applicant and [Person A] will be vulnerable to anything and that they have nothing. He said that the authorities do not take them seriously and that they have no money to bribe police therefore they do not tend to report things.
32. The Tribunal asked the applicant if he wished to make any further comments and he said that his difficulties were also because he was not on the local tribe in Accra. The Tribunal asked if that meant he was claiming that the persecution he suffered was also due to his race and he responded by saying that it was and also because of the cumulative effect of his race and homelessness.
33. The Tribunal asked the applicant whether it was possible for him to move to another part of Ghana where there are more people of his own tribe and he said that there was but unless he spoke in the same dialect, they would "look at him from a different angle" and he would still suffer persecution because he would be homeless.

COUNTRY INFORMATION

A report from the United States Bureau of Democracy, Human Rights and Labor ([2008 Country Reports on Human Rights Practices](#)) February 25, 2009 states as follows:

Ghana is a constitutional democracy with a strong presidency and a unicameral 230-seat parliament. The population is approximately 22 million. In the December election the opposition National Democratic Congress (NDC) won both the presidency and control of Parliament, marking Ghana's second successful peaceful transition of power between political parties. The election was judged by domestic and international observers to be free and fair. While civilian authorities generally maintained effective control over security forces, there were some instances in which elements of the security forces acted independently of government authorities.

The government generally respected human rights, but human rights problems continued, including: deaths resulting from the excessive use of force by police; vigilante violence; harsh and life-threatening prison conditions; police corruption and impunity; prolonged pretrial detention; forcible dispersal of demonstrations; corruption in all branches of government; violence against women and children; female genital mutilation (FGM); societal discrimination against women, persons with disabilities, homosexuals, and persons with HIV/AIDS; trafficking in women and children; ethnic discrimination and politically and ethnically motivated violence; and child labor, including forced child labor.

According to a report from the State Department of the United States dated March 2009 its analysis of the government and political conditions states:

The government of John A. Kufuor appeared to enjoy broad support among the Ghanaian population as it pursued a domestic political agenda based upon public commitment to the rule of law, basic human rights, and free market initiatives. The government took steps to strengthen freedoms of expression by repealing colonial-era criminal libel laws, dropping a number of libel suits against journalists, abolishing sometimes abusive community tribunals, and introducing legislation to establish a juvenile justice system. As part of its anti-corruption efforts the Kufuor government pursued some high-profile cases, including the prosecution of its Minister of Youth and Sports and several former high-level government officials. On September 3, 2002, Ghana inaugurated its National Reconciliation Commission, a South Africa-style commission established to investigate human rights abuses under Ghana's former military regimes. The National Reconciliation Commission completed its hearings in July 2004 and submitted its final report with recommendations in October 2004. The government responded with a White Paper in April 2005, accepting the recommendation to establish a Reparation and Rehabilitation Fund for victims of abuse, as well as directing security forces to study carefully the various recommendations on recruitment, training, and deployment. Narcotics trafficked through Ghana to Western Europe and North America also pose a significant challenge for Ghana.

The same report makes the following observation about the state of Ghana's economy:

Ghana was recognized for its economic and democratic achievements in 2006, when it signed a five-year, \$547 million anti-poverty compact with the United States' Millennium Challenge Corporation. The compact focuses on accelerating growth and poverty reduction through agricultural and rural development. The compact has three main components: enhancing the profitability of commercial agriculture among small farmers; reducing the transportation costs affecting agricultural commerce through improvements in transportation infrastructure, and expanding basic community services and strengthening rural institutions that support

agriculture and agri-business. The compact is expected to contribute to improving the lives of one million Ghanaians.

Ghana's stated goals are to accelerate economic growth, improve the quality of life for all Ghanaians, and reduce poverty through macroeconomic stability, higher private investment, broad-based social and rural development, as well as direct poverty-alleviation efforts. These plans are fully supported by the international donor community.

UK Home Office Country Information key documents (Released August 2008) states as follows:

The Foreign and Commonwealth Office, Country Profile, 3 January 2008 noted the following regarding Ghana's economy: "Ghana's economy has always been dependent on a small number of key exports principally gold and cocoa. Gold dominates the mining sector and contributes 30% of foreign exchange earnings. Ghana also produces diamonds, manganese and bauxite. Ghana is also a major cocoa producer. In 2006, with an output of 740,000 tonnes, it has retained its position as the second largest producer in the world, a position it had not held for three decades before 2003. Cocoa production is subject to volatile prices and the vagaries of the weather. This makes the economy vulnerable. Since 2001 the Kufuor administration has achieved some success in stabilising the macro economy, helped initially by high gold and cocoa prices, through the introduction of tighter monetary, fiscal and exchange rate policies. As Ghana's economy continues steady growth, power supply is an increasing problem. A large amount of remittances come in from Ghana's extensive diaspora, much of which is invested in the booming property sector in the main cities. Ghana is trying to diversify its sources of external funding, including in the successful international commercial bond issue in September 2007. Ghana's economic prospects were given a further boost with the announcement in June 2007 of significant oil finds off the coast..."

"Ghana's current IMF agreed three year Poverty Reduction Strategy (PRS) finished in October 2006. Loans attached to it amounted to around US\$258 million. The Government has started its intention to sign up to the IMF's policy support instrument and implement its own growth and poverty reduction strategy. In July 2004 Ghana reached Heavily Indebted Poor Countries HIPC completion point. Ghana's debt has been massively reduced as a result of this."

The website for the Commission on Human Rights and Administrative Justice in established by the Ghanaian government, www.chrajghana.org accessed on 23 July 2009 contains the following

MANDATE

The Commission on Human Rights and Administrative Justice exists to protect fundamental human rights and to ensure good governance for every person in Ghana. The Commission was given a broad mandate to achieve this mission by the 1992 Constitution of Ghana and by its enabling Act, Act 456, in 1993.

The Commission's mandate is threefold. It encompasses:

1. A National Human Rights Institution
2. An Ombudsman, an agency which ensures administrative justice
3. An anti-corruption Agency for the public sector

The Commission was vested with this broad and inclusive mandate for several reasons. International standards for National Human Rights Institutions, including the Paris Principles, recommend that National Human Rights Institutions in developing countries be given a broad mandate within the constitution, so they can use their limited resources to the greatest possible effect. Additionally, issues of administrative injustice and corruption often occur along with human rights abuses, and one body can more effectively address all three (3) situations. The Commission reports to Parliament annually on the performance of its functions.

ADMINISTRATIVE JUSTICE

The Commission is mandated to protect and promote administrative justice to ensure that the government and its officers are accountable and transparent. The Commission ensures that the administrative organs of the State provide equal access to employment and services and that they are administered fairly. In particular, this function of the Commission is to ensure that public officials avoid arbitrariness or bias in their actions. The Administrative Justice functions of the Commission replace the office of the Ombudsman, created by the Ombudsman Act of 1970, which investigated administrative decisions to ensure justice. This mandate is contained in Articles 218 (a), (b) of the 1992 Constitution and Section 7 (1) (a), (b) of Act 456.

The Commission is mandated to investigate complaints concerning injustice and unfair treatment of any person by a public officer and to: Investigate complaints concerning the functioning of the Public Services Commission, the administrative organs of the State, the Armed Forces, the Police Service and the Prison Service in so far as the complaints relate to the failure to achieve a balanced structuring of those services or equal access by all to the recruitment of those services or fair administration in relation to those services (Article 218(b)).

FINDINGS AND REASONS

34. The applicant claims to be a national of the Republic of Ghana and arrived in Australia on a Ghanaian passport. The Tribunal accepts that the applicant is a Ghanaian national and, for the purposes of the Convention, has therefore assessed his claims against Ghana as his country of nationality.
35. The Tribunal accepts that the applicant lived in poverty without food, shelter and clothing or employment. It accepts that he fears going back to Ghana because he believes he has no place to sleep and it is easy for armed robbers and drug addicts to attack him, that he has already been beaten and attacked on one occasion in 2006, and he is scared he will be killed. The Tribunal also accepts that the applicant fears persecution because of his race in its own right and as part of the cumulative effect of it and his homelessness.
36. Having regard to the information contained in the State Department of the United States and the UK Home Office Country Information reports referred to above, the Tribunal is satisfied that the government is addressing the issue of poverty, both in its own right and in conjunction with international organisations, by implementing plans to reduce the level of poverty. There is nothing in the reports to suggest that people in Ghana are subject to poverty for Convention related reasons. Accordingly, the Tribunal finds that the applicant's poverty and his lack of food, shelter and clothing, in the past or into the reasonably foreseeable future, are not for Convention related reasons.

37. The Tribunal has considered the applicant's claims under section 91R(2). Whilst the Tribunal accepts that the applicant was not employed by another party, it does not accept that he suffered such significant economic hardship that it threatened his capacity to subsist. On his evidence the applicant has been able to earn money in his own right from selling papers and from tips he receives in assisting people at the market. Further, the Tribunal regards the fact that he can play [a sport] at a relatively high level indicates that his diet is sufficient for him to be regarded as healthy and that it has enabled him to earn and income.
38. The Tribunal is satisfied that the applicant is a member of the particular social groups being homeless people, a member of the Ga ethnic group and homeless people who are members of the Ga ethnic group, and has considered his claims in these contexts.
39. The Tribunal has considered whether the attack on the applicant in 2006 could amount to persecution within the meaning of the Convention. The term 'persecution' is not defined in the Refugee Convention. However there is a significant body of domestic law on the meaning of 'persecution' in the Convention context. One of the leading cases concerning the meaning of persecution is the decision of the High Court in *Chan and Applicant A*.
40. The types of harm that may constitute persecution are not limited. In *Chan* it was recognised that persecution has traditionally taken a variety of forms of social, political and economic discrimination. In *Applicant A*, Justice McHugh observed that (at 258):
- Persecution for a Convention reason may take an infinite variety of forms from death or torture to the deprivation of opportunities to compete on equal terms with other members of the relevant society. Whether or not conduct constitutes persecution in the Convention sense does not depend on the nature of the conduct. It depends on whether it discriminates against a person because of race, religion, nationality, political opinion or membership of a social group.*
41. According to the applicant, the reason for the attack was that he refused to leave his sleeping location when his attackers told him to. The Tribunal does not accept that the motivation for the attack relates to the applicant's race, religion, nationality, political opinion or membership of a social group. The Tribunal pointed out its views during the hearing and told the applicant that it believed the attack on him was a criminal act. The applicant agreed that the attack was criminal in its nature and the reason was so that they could occupy his sleeping place. The Tribunal finds that the attack on the applicant was not for Convention related reasons.
42. In coming to the finding above, the Tribunal has been mindful of the fact that there are occasions where criminal conduct can, either by itself or in conjunction with other conduct, be characterised as persecution for a Convention reason. The Tribunal is satisfied that the essential and significant reason for the attacks on the applicant were for criminal purposes. Furthermore, the Tribunal finds nothing to suggest that there was any motivation for the attacks, other than criminal intent or that any future attacks will be motivated for a Convention reason.
43. According to the report from the United States Bureau of Democracy, Human Rights and Labor ([2008 Country Reports on Human Rights Practices](#)) February 25, 2009 referred to above, Ghana is a stable multiparty parliamentary democracy. The government

generally respected the rights of its citizens. The law provides for freedom of assembly and association, and the government generally respected this right in practice. The law provides for the right of association, and the government generally respected this right in practice. The constitution provides for freedom of speech and expression. An independent press, an effective judiciary and a functioning democratic political system combined to ensure freedom of speech. A robust domestic and human rights group operates without government restriction, investigating abuses and publishing their findings on human rights cases. The law provides for freedom of movement, and the government generally respected this in practice.

44. Although the applicant did not report the attack on him in 2006 to the police, the Tribunal is satisfied that Ghana has put in place reasonable measures to protect the lives and safety of its citizens, including an appropriate criminal law, and the provision of a reasonably effective and impartial police force and judicial system. The Tribunal also finds that if threats or attacks were to be perpetrated against the applicant for any Convention related reason, there is a functioning police force and an independent judicial system where members of the judiciary are accountable for their decisions on appeal. Furthermore, there is a functioning Human Rights Commission to which citizens can report breaches of their rights.
45. The evidence before the Tribunal does not support the applicant's claim that he would not obtain state protection in Ghana or that such protection would be denied or withheld because of his ethnicity as a Ga or his membership of a particular social group being homeless, or his homelessness as a member of the Ga ethnic group.
46. Considering the applicant's claims on a cumulative basis, the Tribunal does not accept that the applicant faces a real chance of persecution in the reasonably foreseeable future for a Convention reason.
47. The Tribunal finds that there is no real chance that the applicant will face persecution for any Convention reason if he were to return to Ghana now or in the reasonably foreseeable future

CONCLUSIONS

48. 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

49. 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. prrt44