

1008069 [2012] RRTA 302 (11 May 2012)

DECISION RECORD

RRT CASE NUMBER: 1008069
DIAC REFERENCE(S): CLF2010/70202
COUNTRY OF REFERENCE: Fiji
TRIBUNAL MEMBER: Andrew Rozdilsky
DATE: 11 May 2012
PLACE OF DECISION: Sydney
DECISION: The Tribunal remits the matter for reconsideration with the direction that the applicant satisfies s.36(2)(a) of the Migration Act.

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 to refuse to grant the applicant a Protection (Class XA) visa under s.65 of the *Migration Act 1958* (the Act).

The applicant who claims to be a citizen of Fiji, applied to the Department of Immigration for the visa on [date deleted under s.431(2) of the *Migration Act 1958* as this information may identify the applicant] May 2010.

2. The delegate refused to grant the visa [in] August 2010, and the applicant applied to the Tribunal for review of that decision.

RELEVANT LAW

3. 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. The criteria for a protection visa are set out in s.36 of the Act and Part 866 of Schedule 2 to the Migration Regulations 1994 (the Regulations). An applicant for the visa must meet one of the alternative criteria in s.36(2)(a), (aa), (b), or (c). That is, the applicant is either a person to whom 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), or on other 'complementary protection' grounds, or is a member of the same family unit as a person to whom Australia has protection obligations under s.36(2) and that person holds a protection visa.

Refugee criterion

4. Section 36(2)(a) 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 Refugees Convention.
5. 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.
6. The High Court has considered this definition in a number of cases, notably *Chan Yee Kin v MIEA* (1989) 169 CLR 379, *Applicant A v MIEA* (1997) 190 CLR 225, *MIEA v Guo* (1997) 191 CLR 559, *Chen Shi Hai v MIMA* (2000) 201 CLR 293, *MIMA v Haji Ibrahim* (2000) 204 CLR 1, *MIMA v Khawar* (2002) 210 CLR 1, *MIMA v Respondents S152/2003* (2004) 222 CLR 1, *Applicant S v MIMA* (2004) 217 CLR 387, *Appellant S395/2002 v MIMA* (2003) 216 CLR 473, *SZATV v MIAC* (2007) 233 CLR 18 and *SZFDV v MIAC* (2007) 233 CLR 51.
7. 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.
8. There are four key elements to the Convention definition. First, an applicant must be outside his or her country.
9. 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.

10. 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.
11. 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.
12. 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 being persecuted 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.
13. In addition, an applicant must be unable, or unwilling because of his or her fear, to avail himself or herself of the protection of his or her country or countries of nationality or, if stateless, unable, or unwilling because of his or her fear, to return to his or her country of former habitual residence. The expression 'the protection of that country' in the second limb of Article 1A(2) is concerned with external or diplomatic protection extended to citizens abroad. Internal protection is nevertheless relevant to the first limb of the definition, in particular to whether a fear is well-founded and whether the conduct giving rise to the fear is persecution.
14. 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.

Complementary protection criterion

15. If a person is found not to meet the refugee criterion in s.36(2)(a), he or she may nevertheless meet the criteria for the grant of a protection visa if he or she is a non-citizen in Australia to whom the Minister is satisfied Australia has protection obligations because the Minister has substantial grounds for believing that, as a necessary and foreseeable consequence of the applicant being removed from Australia to a receiving country, there is a real risk that he or she will suffer significant harm: s.36(2)(aa) ('the complementary protection criterion').

16. 'Significant harm' for these purposes is exhaustively defined in s.36(2A): s.5(1). A person will suffer significant harm if he or she will be arbitrarily deprived of their life; or the death penalty will be carried out on the person; or the person will be subjected to torture; or to cruel or inhuman treatment or punishment; or to degrading treatment or punishment. 'Cruel or inhuman treatment or punishment', 'degrading treatment or punishment', and 'torture', are further defined in s.5(1) of the Act.
17. There are certain circumstances in which there is taken not to be a real risk that an applicant will suffer significant harm in a country. These arise where it would be reasonable for the applicant to relocate to an area of the country where there would not be a real risk that the applicant will suffer significant harm; where the applicant could obtain, from an authority of the country, protection such that there would not be a real risk that the applicant will suffer significant harm; or where the real risk is one faced by the population of the country generally and is not faced by the applicant personally: s.36(2B) of the Act.

CLAIMS AND EVIDENCE

18. 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.
19. The applicant appeared before the Tribunal [in] February 2012 to give evidence and present arguments. The Tribunal also received oral evidence from the applicant's sister. The Tribunal hearing was conducted with the assistance of an interpreter in the Fijian and English languages.
20. The applicant was represented in relation to the review by his registered migration agent. The representative attended the Tribunal hearing.

Protection visa application

21. The applicant came to Australia to visit his sister. He has returned once to Fiji to attend his father's funeral.
22. The applicant claims to be a person with a severe intellectual disability. The applicant fears harassment, humiliation and serious physical harm in Fiji. There is no protection in Fiji for persons with severe intellectual disabilities, and such individuals are treated like "trash".
23. The applicant fears Fijian society in general, especially neighbours, youths and children. Persons with severe intellectual disabilities are looked at with contempt. The applicant is not able to make complaints as his impairment prevents him from communicating clear information.
24. The applicant claimed that police and other authorities in Fiji are disrespectful and show contempt for persons with intellectual disabilities.
25. In a statement in support of the application, the applicant's sister indicates that the applicant has severe intellectual disabilities, that he is unable to read, write, and that he is barely able to speak. Her brother fears harm from society in general. The applicant's father is deceased and his mother and siblings are in Australia.

26. The applicant has nowhere to go in Fiji. No one will care for him. He cannot go to the police. Persons with the applicant's condition in Fiji are abused and mistreated. The applicant was beaten, threatened and forced to work like a slave for his brother-in-law. He faced verbal and physical humiliation. Stones have been thrown at him, and he has suffered indignities.
27. In June 2007, stones were thrown at the applicant, he was verbally abused. The perpetrators could not be located. He has a permanent scar from the attack.
28. In mid-2006, the applicant was bashed by his brother-in-law for coming home late. This was a common occurrence. He would roam the city almost every day. He would pick up cigarette butts and worked as a gopher. He was often hired to do work but not paid. He faced threats that if he did not work, he would be taken to the police to be bashed. Children made fun of the applicant, abused him, threw things at him and insulted him. He was humiliated and abused by neighbours. He was assaulted by a neighbour's child.
29. If he returns to Fiji the applicant faces harassment and abuse and may die. His relatives are all outside Fiji now, and he would have no support there.

Delegate's decision

30. The delegate attributed the harm feared by the applicant to be due to a general lack of resource and found that it did not amount to serious harm for a Convention reason.

Review application

31. The applicant provided a number of medical certificates indicating that he suffers from a severe intellectual disability. He was referred for a full mental health service assessment. The [Mental] Health Centre found the applicant to have a limited cognitive capacity, and that he could not construct a narrative of past events he experienced. He presented as being anxious, suspicious, difficult to approach, gave limited responses and was unable to construct a coherent narrative.
32. In a submission by his representative, it was advanced that the applicant is a member of a particular social group, the mentally ill in Fiji without care or protection from close family members. There are no adequate services for the mentally ill.

The Tribunal hearing

33. At the hearing the applicant related abuse at the hands of his brother-in-law, neighbours, and youngsters. He also related threats.
34. The applicant has no education. He has some distant relatives in Fiji. He faced no problems for the police.
35. The applicant's sister testified that there is a lack of facilities in Fiji for persons with severe intellectual disabilities. His sister testified that she is now divorced and that her ex-husband who repeatedly physically harmed the applicant lives in the same village.

Documentary evidence

36. Documentary evidence before the Tribunal indicates that

Most of the available mental health professionals in Fiji are based at the St Giles Hospital...access to St Giles and its centralised services is therefore difficult for people living beyond the greater Suva area. Rural communities...suffer from and absence of mental health diagnostic and treatment services...; Domiciliary Services are provided to attempt to address this problem. Discharged patients are referred for follow-up to doctors and zone nurses within their localities, but none of these have specialist psychiatric training. There are no certificate trained psychiatric nurses in Fiji although moves have been taken recently to re-introduce a course at Fiji School of Nursing

Most disabled adults in Fiji have had a restricted formal education, face very limited employment prospects, have very few services or facilities to meet their special needs, and only qualify for financial assistance if they are otherwise destitute.

FINDINGS AND REASONS

37. The Tribunal first considered whether persons with severe intellectual disabilities in Fiji comprise a particular social group under the Convention refugee definition.
38. The Tribunal considered whether persons with severe intellectual disabilities share a common immutable characteristic. The Tribunal on the facts of the subject matter of this review finds that the group persons with severe intellectual disabilities in Fiji is identifiable by a characteristic or attribute common to all members of the group. The attribute is the fact that they suffer from a common characteristic or attribute, that being their severe disability, and for the same reason are identifiable. This attribute is immutable and unchangeable.
39. The Tribunal further finds that the social group is cognizable, and that in the circumstances of persons with severe intellectual disabilities, apparent requirements that the group be cognizable, that membership be defined by what a person is, rather than what a person has done.
40. The Tribunal concludes that persons with severe intellectual disabilities constitute a particular social group under the Convention.
41. The Tribunal finds that the harm feared on this basis would have no link to the Convention refugee definition.
42. The Tribunal accepts that the applicant was the victim of constant threats, harassment and taunts by members of the local populace, and his brother-in-law. Further, the documentary evidence is clear that facilities for persons with severe intellectual disabilities in Fiji are lacking, apart from one centre referred to in the documentary evidence in Suva. The Tribunal further notes that the applicant has no remaining family in Fiji, and that he has no support network either made up of family or any other individuals or support groups in Fiji.
43. The Tribunal next considered whether there is a real chance that the applicant would face persecution at the hands of the local populace, in the particular and unique circumstances of this claimant, as a person with severe intellectual disabilities with no remaining family members in Fiji.
44. The Tribunal finds that the harm suffered by the applicant in the past when considered on a cumulative basis, including frequent multiple assaults, harassment, intimidation, humiliation, ridicule, serious restrictions on the right to earn a livelihood, and the lack of state protection from these threats of harm in future for reasons of his membership of a particular social group, that accordingly there is a real chance that the applicant would face persecution in Fiji. In making this finding, the Tribunal considered the delegate's finding that the risk to the applicant arises from a lack of available resources to fund facilities for the intellectually disabled in the assessment by the Department of whether he satisfied the Convention refugee

definition. The Tribunal finds, however, that on a cumulative basis, the harm feared by the applicant amounts to persecution, and that therefore his fear is well-founded for a Convention reason.

45. The Tribunal further repeats its finds that the applicant has no remaining close relatives in Fiji who would be able to provide the care he requires and that state protection from the threat of harm from members of the local populace in Fiji is clearly lacking, and that the applicant has no close family remaining in Fiji. The Tribunal finds that the applicant has faced persecutory treatment at the hands of members of the local populace prior to his departure from Fiji.
46. The Tribunal has also noted the documentary evidence in relation to the facilities available to persons with a severe intellectual disability, and the apparent unavailability of services required by the applicant given his inability to care for himself, to seek the protection of the authorities according to the documentary evidence which indicates that the severely intellectually disabled are ridiculed and unable to seek or obtain protection from the authorities, and to avoid ridicule and a level of harassment by members of the local populace, including physical harm, taunts, ridicule, and continuous serious ongoing harassment due to his severe intellectual disability, which in the Tribunal's view amounts to persecution.

CONCLUSIONS

47. The Tribunal is satisfied that the applicant is a person to whom Australia has protection obligations under s.36(2)(a).

DECISION

48. The Tribunal remits the matter for reconsideration with the direction that the applicant satisfies s.36(2)(a) of the Migration Act.