

0805254 [2008] RRTA 322 (17 September 2008)

DECISION RECORD

RRT CASE NUMBER: 0805254

DIAC REFERENCE(S): CLF2008/107191

COUNTRY OF REFERENCE: Nigeria

TRIBUNAL MEMBER: Hugh Wyndham

DATE DECISION SIGNED: 17 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 Nigeria, 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 notified the applicant of the decision and his review rights by letter.
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 to give evidence and present arguments
21. The applicant was represented in relation to the review by his registered migration agent. The representative attended the Tribunal hearing.

Primary claims

22. The applicant stated in his primary application that he was born in Lagos, Nigeria,. He had had a number of years of primary and secondary education and had subsequently trained . He stated that, between particular years, he lived in one location. Then until he left for Australia, he lived in hiding in Lagos.
23. With his application, he submitted a Statutory Declaration stating his claims, the substantive part of which reads as follows:
 1. "In my protection visa application a number of the dates are approximate only. Where I am unsure of an exact date, I have used "1 January". Some of the years used in the application are also approximations.
 2. I fear that I may be killed or experience other serious harm amounting to persecution for reasons of political opinion if I return to Nigeria because of my membership of the Movement for the Emancipation of the Niger Delta (MEND).
 3. I joined MEND in about [year] because I lived in the Niger Delta. My mother comes from that area and after living there I came to see that the government was not treating people in the area well. There are no health or education facilities and the people suffer every day because of this. I had been thinking of joining for some time and finally decided to become a member.
 4. At the time I joined MEND was an illegal organization. I went to meetings twice a week.
 5. We met in private homes owned by members of the group. There were up to 200 people at some meetings. At the meetings we discussed the problems of the area and the fact the government needed to provide more facilities.
 6. We wrote letters to the Federal Government asking for them to provide better facilities. We also participated in demonstrations in the streets. I participated in these demonstrations about 10 times. The army and police often came, but I always managed to run away.
 7. On [date] I was in a demonstration which was attacked by the army. I was beaten by soldiers and received a serious injury to my head. I was then arrested and taken to an army barracks. About 40 people were arrested on this occasion. A number of people, including me, managed to escape during the night.

8. On [date] I was in another a demonstration which was again attacked by the army. I was [injured] Other members of MEND took me to a native doctor who treated me. I still have a scar on my [body] from this.
 9. Also on [date] my house and workshop were bombed by soldiers. A number of houses of MEND members were also bombed and destroyed at this time. After that I went to live at a friend's house in the same area.
 10. After this the police and army knew that I was a member of MEND. They had a photograph of me and were looking for me to arrest me, but because I was no longer living in the same place, they could not find me.
 11. I continued to participate in MEND demonstrations and meetings but I managed to avoid any serious problems. On [date] I went to [location] with MEND to join a protest. Many people were killed during this demonstration, but I managed to escape. After the violent repression of this demonstration I decided that it was too dangerous for me to remain in the area and in [date] I went to Lagos. I stayed with different friends in Lagos.
 12. In [date] I learned that members of MEND had discovered that my father was Yoruba and because of this they had decided that I was government spy. I found out about this from a friend who telephoned me in Lagos. He told me that members of the group were looking for me in [location] and in Lagos.
 13. In [date] I decided that I should try and find asylum outside Nigeria. With the help of a friend I obtained a visa and went to [Country A]. In [Country A] I spoke to people in shops and they told me I could not apply for refugee status there, so I had to return to Nigeria. I managed to get to and from Nigeria without being detected and arrested because my friend [Person A] arranged for me to avoid the normal migration and security checks at the airport. I had to pay bribes for this.
 14. After returning to Lagos I remained in hiding. [Person A] agreed to help me to leave. I paid him and he arranged for me to get a visa to come to Australia [event] He also arranged for me to enter the airport through the cargo entrance onto the tarmac and then onto the plane. I paid him [money] to arrange this. He also arranged for my passport to be stamped so that it appeared that I had gone through the normal formalities at the airport.
 15. I am afraid that I will be killed by the army or my former comrades in MEND if I return to Nigeria.”
24. Accompanying his application were copies of what was said to be a MEND identification card, academic record, drivers licence and birth certificate.

Review claims and evidence

25. The applicant submitted to the Tribunal what was said to be a death certificate for his mother and a receipt for the hospital treatment of his wife. He also submitted a copy of what was said to be an e-mail from a friend in Nigeria, who referred to his mother having been killed and his wife attacked and having disappeared, with his children. He was urged to stay away from Nigeria. These documents were submitted under cover of a submission from his adviser, in which she commented at length on the reasons adduced by the Delegate for his decision.
26. Subsequent to his hearing, the applicant submitted a video recording on DVD of his mother's funeral and a flier announcing her death and funeral arrangements.
27. At hearing, in response to questions, the applicant expanded on the details of his personal history. I informed the applicant that I had lived for 3 years in Nigeria and had travelled all over the country. I said that I was puzzled by the claim in his primary application that, in a particular year, members of MEND, an organisation which was overwhelmingly Ijaw, had

discovered that his father was Yoruba. I said that his name was Yoruba and what it meant. The applicant confirmed what it meant and that MEND was predominantly Ijaw. He said that new members entered MEND during a specific time and these looked at him with suspicion.

28. I asked the applicant a number of questions about MEND – whether he recognised certain prominent personalities and his knowledge of MEND policy objectives and the Kaiama Declaration. (This Declaration was issued at the end of the All Ijaw Youths Conference which was held in the town of Kaiama on 11 December 1998. It is one of the more important statements of Ijaw aims in the conflict in the Nigerian delta.) He was not able to respond convincingly, if at all, to my questions and had never heard of the Kaiama Declaration.
29. I asked the applicant if he spoke Ijaw. He said that he did not. I asked him what language he spoke at home with his parents. He said he spoke English, which he also spoke with his colleagues in MEND. He had learned to speak Yoruba at school and did not know his father's dialect.
30. I also questioned the applicant's claim that his only activity had been to participate in demonstrations, which was not the activity for which MEND had gained its notoriety. The applicant said that that was all he did.

FINDINGS AND REASONS

31. I accept that the applicant is a citizen of Nigeria
32. I accept none of the applicant's claims essential to his application for protection. There are several independent reasons:
 - (a) I do not accept the applicant's claims as to his ethnicity. His mother's name identifies her as Yoruba almost as clearly as his own name does; the photo of his mother on the funeral flier shows her wearing a typical Yoruba head scarf, which was also what the women were wearing at her funeral, as shown in the DVD which he submitted and which I watched; she was buried in a predominantly Yoruba area, not elsewhere, where the applicant claims she is related to a high profile family;
 - (b) I do not accept that members of MEND would not know from the start that he was Yoruba – for the reasons discussed with him at hearing. I do not believe his explanation that new arrivals caused his problems; if he had already been accepted and had proven his loyalty, new arrivals would not so easily be able to cause him problems;
 - (c) His lack of knowledge of MEND further undermines my belief in his claims, as does his claim that his only activity was to participate in demonstrations;
 - (d) I do not accept that any person could belong for several years to an organisation overwhelmingly Ijaw without speaking the language, at least to some extent;
 - (e) His account of events on a specified date conflicts fundamentally with the many published accounts of the army attack. In particular, published reports do not mention MEND at all;

33. I do not accept that the applicant was ever a member of MEND or the organisation he claims preceded it and which changed its name to MEND (but of whose existence no evidence has to date been found and which is not referred to in any histories of MEND). I do not accept that he was obliged to flee, having been identified as or accused of being a spy. I do not accept that anyone at all is looking for him with a view to doing him harm.
34. I do not accept that any of these things would occur if he were to return to Nigeria.
35. In all the circumstances, I give no weight to the e-mail message he received from a friend in Nigeria, which I believe is purely self-serving. I am prepared to accept, without finding, that his mother has died and that his wife has had hospital treatment. But nothing in what the applicant has submitted provides details as to how his mother died. The hospital receipt says nothing about the purpose or nature of his wife's hospital treatment. The applicant submitted a medical request form for his wife, but there is no information on it or elsewhere as to why she was to receive specific treatment. Given my findings about the more central claims made by the applicant, I do not accept that his mother or his wife were attacked as a result of his association with MEND. I do not accept that his wife and children are in hiding or missing.
36. As a result, I do not accept that there is a real chance of the applicant suffering harm amounting to persecution in Nigeria for reason of his real or imputed political opinion, his membership of a particular social group or for any other Convention reason.
37. I find that the applicant does not have a well founded fear of persecution in Nigeria for a Convention reason.

CONCLUSIONS

38. I am 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

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

<p>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 <i>Migration Act 1958</i>. Sealing Officer's I.D. PRDRSC</p>
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