1110650 [2012] RRTA 126 (5 March 2012)

DECISION RECORD

RRT CASE NUMBER:	1110650
DIAC REFERENCE(S):	CLF2011/155552
COUNTRY OF REFERENCE:	Korea, Republic Of
TRIBUNAL MEMBER:	Bruce MacCarthy
DATE:	5 March 2012
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 the Republic of Korea ("Korea") was born in Australia on [date deleted under s.431(2) of the *Migration Act 1958* as this information may identify the applicant] January 2007 and applied to the Department of Immigration and Citizenship for the visa [in] September 2011. The delegate decided to refuse to grant the visa [in the same month] and notified the applicant of the decision. 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.

3. The applicant applied to the Tribunal [in] October 2011 for review of the delegate's decision. The Tribunal finds that that decision is an RRT-reviewable decision under s.411(1)(c) of the Act and that the applicant has made a valid application for review under s.412 of the Act.

RELEVANT LAW

4. 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.

5. 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). 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'

6. 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; ...

7. 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.

8. 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.

9. There are four key elements to the Convention definition. First, an applicant must be outside his country. 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.

10. 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. 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.

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 he has 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 probability of the persecution occurring is well below 50 per cent. In addition, an applicant must be unable, or unwilling because of his fear, to avail himself of the protection of his country or countries of nationality.

13. 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.

Credibility

14. When determining whether a particular applicant is entitled to protection in Australia, the Tribunal must first make findings of fact on the claims he has made. This may involve an assessment of the credibility of the applicant. When assessing credibility, the Tribunal should recognise the difficulties often faced by asylum seekers in providing supporting evidence and should give the benefit of the doubt to an applicant who is generally credible but unable to

substantiate all of his claims. However, it is not required to accept uncritically each and every assertion made by an applicant. Further, the Tribunal need not have rebutting evidence available to it before it can find that a particular factual assertion by an applicant has not been made out. Nor is it obliged to accept claims that are inconsistent with the independent evidence regarding the situation in the applicant's country of nationality. See *Randhawa v MILGEA* (1994) 52 FCR 437 at 451, per Beaumont J; *Selvadurai v MIEA & Anor* (1994) 34 ALD 347 at 348 per Heerey J and *Kopalapillai v MIMA* (1998) 86 FCR 547.

15. If the Tribunal were to make an adverse finding in relation to a material claim made by an applicant but were to find itself unable to make that finding with confidence, it must proceed to assess the claim on the basis that the claim might possibly be true. (See *MIMA v Rajalingam* (1999) FCR 220).

CLAIMS AND EVIDENCE

16. The Tribunal has before it the Department's file relating to the applicant. The Tribunal also has had regard to other material available to it from a range of sources.

17. As the applicant is [age deleted: s.431(2)] years old, his father is acting on his behalf and appeared before the Tribunal [in] February 2012 to give evidence and present arguments. The Tribunal also received oral evidence from the applicant's mother. The Tribunal hearing was conducted with the assistance of an interpreter in the Korean and English languages.

Relevant prior migration history

18. According to information set out in the decision under review, a copy of which the applicant provided to the Tribunal, the applicant's parents do not hold substantive Australian visas. Since they last arrived in Australia, "they have been pursuing a number of avenues to remain in Australia, including a failed Protection visa application in 2004 and unsuccessful judicial review." The decision states that the Minister declined to exercise his public interest powers [in] August 2011.

19. The applicant, having been born in Australia on [date deleted: s.431(2)] has been granted a series a Bridging visas since August 2009 in connection with his parents' dealings with the Department.

20. The Department's movement records indicate that the applicant's father's last substantive visa was a subclass 686 visa granted [in] December 2001. It expired [in] May 2002. He last arrived in Australia in August 2002, as the holder of a Bridging visa. The applicant's mother's only substantive visa was a subclass 976 visa granted [in] November 2001, with which she arrived in Australia in December 2001. That visa expired [in] March 2002.

Protection visa application

21. According to information provided on the applicant's behalf in his protection visa application forms and accompanying documents, he is a [young] boy. He has been attending a [preschool]. He holds a Korean passport which was issued in April 2010. Answers in his application indicated that his only close relatives are his parents [though information provided to the Tribunal on the applicant's behalf indicates that he has an elder [sibling] who is an Australian citizen].

22. In explaining his reasons for seeking protection, it was said on his behalf that his parents had not been granted visas and that he was awaiting a decision of the Human Rights Commission ("HRC") and would apply for citizenship of Australia.

23. It was stated that the applicant cannot understand to talk to other Koreans because he speaks English. He was growing up in Australia and had been to preschool for a year and a half. It was said that there was "too much different education background between Australia and South Korea." He had never been in Korea and it would be hard for him to understand Korean culture.

24. Question 12 in the protection visa application form 866B invited the applicant as follows:

> "Please list all the documents you need to provide with this application and indicate when you will be providing them. If you are (sic) cannot provide certain documents, indicate this in the table and provide details at question 13."

25. The spaces left for responses to this question were left blank. He did not indicate that there were any documents he was intending to provide later or which he could not provide. Question 13 said, "If you cannot provide a document, please indicate which document and explain why." Again, those completing the application forms on his behalf left blank the space provided for an answer to that question. The Tribunal interprets these responses as indicating that those acting in the applicant's behalf were not aware of any documentary evidence which might support his written claims.

Application to the Tribunal

26. When the applicant applied to the Tribunal, he enclosed a copy of the delegate's decision but did comment on it. However, his father submitted a statement on his behalf in which he said that the applicant had been growing up in Australia with his [sibling] who was an Australian citizen and was expecting to attend his [sibling]'s school in 2012. He said the applicant had never been to South Korea and it would be hard for him to understand Korean culture and society. He said there was too much difference between the Korean an Australian education systems. He said that he wished his son to be able to live in Australia with his [sibling]. He said he had made a complaint to the HRC, and enclosed a copy of a letter written to the Department by the HRC regarding the complaint.

27. The letter indicated that the applicant's father had lodged a complaint on behalf of himself and his family alleging breach of human rights under the *International Covenant on Civil and Political Rights* and the *Convention on the Rights of the Child* It appears that the complaint concerns the fact that the Minister had not intervened in the family's case to allow the applicant and his parents to remain in Australia with the applicant's [sibling].

28. In the decision under review, the delegate noted that the applicant had claimed to be unable to return to Korea because of his unfamiliarity with Korean society, education and culture. For the purposes of his assessment of the matter, the delegate said that he accepted that the applicant was accustomed to his Australian environment and would be "to some degree unsettled if required to relocate to South Korea.". However, the delegate was of the view that, given his "tender age," the fact that he had yet to commence primary education and the fact that he was living with his Korean speaking parents, "this unsettlement could be expected to abate very quickly."

29. Further, the delegate was of the view that the applicant's claim of difficulty in adjusting to Korean society was not a "claim to fear harm so serious as to amount to persecution" and that the fear was not "grounded in any Convention nexus."

Evidence given at the hearing

30. This summary of the evidence given at the hearing is not set out in strict chronological order. Some issues discussed at different times have been grouped together for greater clarity. The Tribunal has also omitted some matters which have proved not to be material to its decision, or which merely repeat or confirm details provided on the applicant's behalf in his protection visa application forms.

31. After explaining the procedures of the hearing, the Tribunal ascertained that the applicant's parents were satisfied of the accuracy of the answers given in his protection visa application forms. The applicant's father told the Tribunal that his wife's sister-in-law had translated the questions asked in the application forms and completed the forms based on their answers. She had later confirmed with her the details which had been written down. The applicant's father said he had some understanding of written English and was aware of what had been said on his son's behalf. The parents confirmed that they were satisfied that the information given to the Department was a complete and accurate account of the circumstances which had prompted them to seek protection on their son's behalf.

32. To confirm its understanding of the key elements of the applicant's claims, the Tribunal read out the following précis of them:

> Your son was born in Australia [age] years ago. He has never been to Korea and has commenced his education in Australia. You believe it will be hard for him to adjust to life in Korea because he is unfamiliar with Korean culture and because the Korean education system is different.

The parents accepted this as a fair summary of their son's situation and claims, though the father said there was an additional point. He said that their son would face hardship if he was separated from his older [sibling], who was an Australian citizen.

33. The Tribunal noted that the applicant had been described as a Christian in his application forms. It said it presumed the entire family were Christians, and attended church in [City 1]. The applicant's father confirmed that this was the case. He said they attended services conducted in Korean at a particular church. The Tribunal asked what language the parents used to speak to the child. The father said they spoke to him in Korean. The Tribunal spoke briefly to the boy, who was present at the hearing, and asked him to say something in Korean about the school he attended. He replied (in Korean) that "school is fun."

34. Noting that the applicant had submitted a copy of the decision under review to it without comment, the Tribunal said it assumed that parents did not take issue with any statement of fact in that decision. The applicant father said that the family were in a hurry and had not paid a lot of attention to what was put in the application at the time. He said the family needed more time to prepare. The Tribunal said it did not understand why the family would have been in a hurry at the time they lodged the application for protection. The child was now [age deleted: s.431(2)] years old and the family presumably had had [period deleted: s.431(2)] years in which they could have lodged an application.

35. The father said that the family were pursuing other avenues in an attempt to secure permanent residence for himself, his wife and his son so that they could remain in Australia with [their other child who is an Australian citizen]. They therefore had not sought protection at that stage and were awaiting the outcome of an application to the Minister. However, as their visas were about to expire, they had to lodge the application in a hurry.

36. The Tribunal said that, in all the circumstances described by the parents, it seemed difficult to accept that the child did not understand Korean culture. His father said that the family left Korea a long time ago. The applicant had now had two years of preschool and one year of kindergarten in Australia. He said that most people wanting to come to Australia do so because the education in Australia is better than in Korea He said that his son had some difficulty in communicating with people who had only recently arrived from Korea The Tribunal expressed the view that it would be easier for the applicant, born to two Korean parents, to adapt to life in Korea than it would be to a Korean-born child of a similar age adapting to life in Australia.

37. The boy's mother said that the applicant speaks English at home to his [sibling] and it would be hard for him to leave [his sibling] behind in Australia.

38. The Tribunal asked the applicant's father what the family would do if he, his wife and the applicant had to return to Korea. It asked whether they would leave the [other child] behind in Australia with relatives or would take [the other child] with them to Korea The father said that he had tried not to think about such a possibility.

39. The Tribunal said that it would have thought the family would have discussed what they might do in such circumstances. The parents had unsuccessfully sought Protection visas, and the applicant had also been refused a Protection visa. Therefore, unless the decision under review were to be overturned, the status quo was that the applicant and his parents would have to return to Korea Thus, their return was a distinct possibility, and had been for some time.

40. The applicant father said that his [other child] was about to go into high school and that [their eldest child] had clearly expressed the view that [they] wished to study at a [high school]. The Tribunal said that it was very clear that every member of the family wanted to remain in Australia, but asked the father what the family would do in the hypothetical event that no favourable decision was made in respect of the applicant. He said that, if it came down to that hypothetical situation, the family would take their [eldest child] back with them to Korea He said, however he would do everything in his power to fight any decision to send him, his wife and his son back to Korea He acknowledged that he had already successfully fought the family's removal from Australia for sufficient time to allow his [eldest child] to secure Australian citizenship.

41. His wife said that she had spent almost all her married life in Australia, having come to here when she was newly married. If she were to return to Korea she would feel that all her time in Australia was wasted. The applicant's father said that they had originally come to Australia for the purposes of study. When asked to elaborate, he in essence said that it was always his intention to try to get a job in Australia and remain here permanently.

42. The Tribunal said that, even if it were to accept that the applicant had a greater familiarity with Australian culture than he did with Korean culture (a matter on which it had yet to decide), it had to consider whether any difficulty of adjusting to Korean culture would constitute "serious harm," having regard to examples of serious harm as set out in s.91R(2) of the Act. The applicant's mother said that, while in theory Korea had a democratic culture, there were many things wrong with that culture. She said that some people were bullied because of their appearance or because of "material issues." She said that her older sister's son was staying in Australia. He had come here to study though his real aim was to stay here and escape the special distractions which existed in Korea. She explained that these "special distractions" were such things as bullying. She said that Korean children often formed little cliques, and that those

excluded faced bullying. The Tribunal said that such behaviour was not unknown in Australian schools.

43. The Tribunal said that, leaving aside the issue of whether or not the applicant would face harm amounting to persecution in Korea, there was nothing before the Tribunal which would suggest that any difficulty he might face would arise for any one or more of the five Convention reasons. Referring to the mother's comments about "appearances," the Tribunal observed that there was nothing about the child's appearance which would set him apart from other Korean children. If the Tribunal were not satisfied that the applicant faced harm for a Convention reason, then it would be obliged to affirm the decision under review, even if it were to conclude that he faced harm which was serious enough to amount to persecution

44. The parents were asked if they wished to make any comment on the issue of Convention nexus. The applicant's father said he had no comment to make. The applicant's mother said that she understood the point the Tribunal was making but she asked the Tribunal to consider the family's circumstances. She said that, if she were to return to Korea, she would not have many relatives there. She said she only had her mother and two [siblings] living in Korea. The Tribunal asked about the father's family situation. He said that his parents and two brothers lived in Korea though he had two [siblings] living in Australia.

45. The hearing concluded.

FINDINGS AND REASONS

46. The applicant claims to fear persecution in Korea, because he would have difficulty in adjusting to life in that country, having spent his first [period deleted: s.431(2)] years in Australia He claims that there is too much of a difference between the Korean and Australian educational systems. It has also been claimed on his behalf that he might face harm if he were required to be separated from his [older sibling].

47. The Tribunal finds, on the basis of the applicant's passport and answers given in his protection visa application forms, and that he is a citizen of Korea. He is obviously outside his country of nationality. The Tribunal has therefore assessed his claims as against Korea as his country of nationality.

48. The Tribunal notes that the applicant's father has lodged a complaint with the HRC on behalf of the family in relation to a decision by the Minister not to intervene and substitute a more favourable decision in relation to applications by himself, his wife, and the applicant. The Tribunal does not consider that the fact that this complaint was made raises further claims under the Convention in relation to the applicant.

49. It has been claimed on the applicant's behalf that he would find it difficult to adjust to life in Korea, having spent his early years in Australia His parents have said that the Korean education system is significantly different from the system in Australia, to which he is accustomed. In considering this claim, the Tribunal notes that his parents speak to him in Korean in the family home. It also notes that the family attend church services conducted in Korean. While the Tribunal accepts that the applicant's preschool and kindergarten education has been undertaken in an English-speaking environment, and that he speaks English to his elder [sibling] and the home, the Tribunal is satisfied that the child understands Korean and is comfortable speaking the language.

50. While the applicant is clearly the product of Australia's multicultural environment, it is satisfied that he is familiar with Korean culture, albeit that of expatriate Koreans in Australia. Nevertheless, having regard to the child's young age, the Tribunal does not believe that he would find it difficult to adapt to Korean culture, or to the Korean education system, if he were to go to Korea, having a basic grounding in the Korean language and culture. The Tribunal is not persuaded that any adjustment difficulties he might experience (whether to the culture or the educational system) and, are sufficiently serious as to amount to persecution, having regard to the examples of serious harm set out in s.91R(2) of the Act.

51. The Tribunal has also considered the evidence of the applicant's mother regarding the fact that Korea has a culture which includes bullying on the basis of appearance and material issues. However, there is nothing about the applicant's appearance which would set him apart from other Korean children, and there is nothing before the Tribunal to suggest that he would be distinguishable on the basis of "material issues."

52. Moreover, as discussed with the family at the hearing, there is nothing before the Tribunal which would suggest that the essential and significant reason for any hypothetical bullying which the applicant might experience at some time in the future would be one or more of the Convention reasons.

53. The Tribunal is therefore not satisfied that, if the applicant were to go to Korea, there would be a real chance that he would face harm amounting to persecution for any Convention reason.

54. In reaching this conclusion, the Tribunal has noted the claim made on the applicant's behalf that he might face harm as a result of separation from his elder [sibling]. While accepting the father's evidence that he will do all in his power to ensure the family remains in Australia, it also notes that he said that, if he, his wife and the applicant were to return to Korea they would take their [other child] with them, even though she is an Australian citizen. The Tribunal therefore finds that there is no possibility that the family will be split up. This leads the Tribunal to find that the applicant himself will not suffer harm as a result of any hypothetical separation from his [sibling].

55. In this regard, the impact on the [sibling] of any departure from Australia is not relevant to the Tribunal's decision, as she is not a party to the present application.

CONCLUSIONS

56. The Tribunal is not satisfied that the applicant is a person to whom Australia has protection obligations under the Refugees Convention. Therefore he does not satisfy the criterion set out in s.36(2)(a) for a protection visa.

DECISION

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