

**0801520 [2008] RRTA 150 (2 May 2008)**

**DECISION RECORD**

**RRT CASE NUMBER:** 0801520

**DIAC REFERENCE(S):** CLF2007/184991

**COUNTRY OF REFERENCE:** Latvia

**TRIBUNAL MEMBER:** Andrew Jacovides

**DATE DECISION SIGNED:** 2 May 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 Latvia, 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.
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 Parts 785 and 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 file CLF2007/184991, with the protection visa application and the delegate's decision. The Tribunal also has the Refugee Review Tribunal (RRT) file 0801520, with the review application, and two Refugee Review Tribunal files related to visa applications by the applicant's relatives.
20. The applicant appeared before the Tribunal to give evidence and present arguments. The Tribunal hearing was conducted with the assistance of an interpreter in the Russian and English languages.

### *Department file CLF/184991*

21. The applicant stated in his protection visa application that he was a citizen of Latvia. He indicated that he lived at the same address for many years until his departure for Australia. He stated that he was married but separated from his wife. The applicant indicated that he had family living in Australia.
22. The applicant claimed that he began to receive regular threatening telephone calls after Relative A was granted refugee status in Australia. He claimed he was told that Relative A had humiliated the prestige of independent Latvia. He claimed that the caller or callers threatened to kill him. The applicant stated that he changed his telephone number but the calls resumed and several months later he reported the matter to the local police. He stated that the police did not believe him and they did not register his complaint.
23. The applicant claimed that a few days after he reported the matter to the local police he was detained by the police at his home and taken to an office for investigation. He stated that a man in civilian clothes told him that persons like him and Relative A were humiliating the Republic of Latvia and that they should be eliminated. He stated that several days later, an incident happened. The applicant claimed that he contacted the central police and reported the death threats. He claimed that the police did not accept his application and they did not provide a reason.
24. The applicant claimed that several weeks prior to his departure for Australia he received a threatening telephone call and he subsequently suffered a medical condition. He stated that he realised that nobody in Latvia would help him so he came to Australia where he could apply for a protection visa and be with his family. He claimed that if he returns to Latvia he will be in grave danger.
25. The delegate did not accept that the applicant provided a credible account of his circumstances in Latvia and on that basis his claims were rejected. The delegate went

on to find that even if the applicant's claims were found to be credible, Australia did not owe protection to him because he was a citizen of a European Union (EU) country and he could live anywhere in the EU.

*RRT file 0801520*

26. The applicant essentially argued in the review application that he did not agree with the delegate's decision. The applicant stated that persons like him, who led a prosperous and comfortable life in Latvia, would not flee to the other side of the world without serious reasons to do so. He argued that the government of Latvia and the authorities are implicated in human rights violations. In support of his claims he provided a copy of the US Department of State human rights report relating to Latvia.

*RRT files for the applicant's relatives*

27. [Information about the applicant's relatives' protection visa applications deleted in accordance with s.431 as it may identify the applicant]
28. There is no information from these sources which is adverse to the applicant's case.

*The hearing*

29. The applicant was accompanied to the hearing by Relative A. He essentially repeated claims previously provided to the Department and the Tribunal. He stated that several months prior to his departure for Australia he began to receive threatening anonymous telephone calls. He stated that the callers accused him and Relative A of dishonoring Latvia. The applicant claimed that several weeks later he was detained by several men at his home and taken to an office for investigation. He assumed that he had been arrested by the police, because they wore uniforms which appeared to be police uniforms, but there was no signage on the car or the office which indicated that they were the police. He stated that a person in civilian clothes talked to him about his attitude towards Latvia. He stated that he referred to comments he had made to his colleagues which were considered to be critical of Latvia. The applicant stated that the conversation began politely but gradually became more aggressive and they began to insult each other. He stated that the man threatened to kill him because he had expressed views against Latvia. The applicant stated that he did not know exactly why he was targeted but he assumed that it had something to do with Relative A who fled to Australia. He stated that Relative A did not give him all the details but he knew some of the difficulties he had in Latvia. The applicant stated that his job may further contributed to the adverse interest he received from the persons threatening him. He stated he worked as a labourer. He claimed that he was detained for two hours and essentially he was told to stop expressing opinions against Latvia.
30. The applicant claimed that a few days after he was released an incident happened. He assumed that the persons who detained him were involved. He stated that they were trying to frighten him into having a medical condition.
31. The applicant stated that initially he approached the local police to report the threatening telephone calls. He stated that they tried to calm him down but they could not assist him. He stated that after he was detained he went to the central police station to report the unlawful detention and the harassment he suffered while he was detained.

The applicant stated that the police went through all the records but they could not find any reference to the detention and they could not verify that he was detained by the police. He stated the police told him that there was no record of his arrest and they could do nothing to investigate his complaint.

32. The Tribunal asked the applicant if he knew any of the persons who targeted him. He stated that he did not know any of the men. He was asked if it was made clear to him why he was being harassed. He stated that he was targeted because he expressed views against Latvia. He stated that he had talked to his colleagues and others about Relative A's case and he told them that Relative A was granted refugee status in Australia.
33. The applicant stated neighbors and former colleagues in Latvia had told him that someone had made enquiries about him. He was asked if he knew the person. He stated that his colleagues were too frightened to ask. The applicant stated that the persons who harassed him before will harass him again if he returns to Latvia. He stated that they will kill him.
34. The Tribunal referred to the US Department of State, *Country Reports on Human Rights Practices – 2007*, released 11 March 2008. The Tribunal commented that the information on Latvia indicates that human rights conditions continue to improve in Latvia as the country becomes more integrated into the EU. The Tribunal commented that citizens of Latvia have access to a reasonable level of protection provided by the state. The applicant stated that he did not know if conditions have improved because he has been in Australia.
35. The Tribunal commented that because the applicant was a citizen of Latvia, and Latvia was part of the European Union, it may consider whether he can avoid the harm he anticipates in Latvia by living in another EU country. The applicant appeared surprised by the Tribunal's comment and stated that he did not know anything about moving within the EU. The Tribunal commented that as a citizen of Latvia he had the right to enter and reside in other EU countries.
36. The Tribunal indicated to the applicant that it had information regarding the EU which indicated that as a citizen of Latvia he could freely enter and reside in any of the other EU countries. The Tribunal commented that it looked at one example, as to whether he can enter and reside in the UK, and found that there are no restrictions on Latvians entering and residing in the UK. The Tribunal commented that he had to have identification papers, such as a passport, but that was not an issue for him because he did have a passport.
37. The applicant stated that he knew nothing about EU arrangements. The Tribunal referred to material which indicated that he was free to enter and reside in any of the EU countries. The Tribunal referred to the Europa internet site ([www.ec.europa.eu](http://www.ec.europa.eu)), which provides details on provisions and laws for free movement within Europe, residence, employment, social security benefits, and other rights/obligations, for citizens of EU countries who want to live in other EU countries. The applicant stated that he knew nothing about these arrangements. However, after the Tribunal began to provide details from the material it had, the applicant stated that he knew that he could enter and reside in other EU countries but he did not want to live in Europe. He stated that other EU countries were close to Latvia and the persons he feared in Latvia may seek to find and harm him throughout Europe. The Tribunal commented that the chance of that

happening seemed remote. The applicant stated that he preferred to be further away in Australia. He stated that he had health problems and he did not want to move to another European country.

38. The Tribunal commented that EU countries, for example the UK, provided a high level of protection for persons living there. The applicant stated that he had no details. The Tribunal commented that US Department of State, *Country Reports on Human Rights Practices – 2007*, referred to above, had details of protection arrangements in all of the European countries which he could live. The Tribunal commented that these reports indicate that EU countries in general provided a high standard of protection to persons living within their borders. The Tribunal commented that if he lived in the EU and he needed protection he will have access to it and it would be high quality protection. He stated that he did not wish to live in another European country. He stated that he was old and he suffered from ill health and he wanted to remain here.

#### *Information from external sources*

39. The Tribunal considered information provided by the European Commission, at its [www.ec.europa.eu](http://www.ec.europa.eu) site, including information on *Living in Europe: right of permanent residence and entry procedures in another EU country*; free movement in and out of the United Kingdom at the *EURES - the European job mobility portal*; and *Freedom, Security and Justice* procedures in the EU.

#### **FINDINGS AND REASONS**

40. The applicant claims that he is a citizen of Latvia. He claims that he was harassed by unknown persons in Latvia who wanted to prevent him from expressing his opinion. He claims that he was unlawfully detained on one occasion and held for two hours. He claims that he was harassed and threatened during the detention. He claims he was told to stop expressing his opinions and that he will be killed for expressing his views. The applicant claims that he received threatening anonymous telephone calls despite changing his telephone number and an incident happened. The applicant claims that he approached the police on two occasions but they were unable or unwilling to assist him. The applicant claims that persons in Latvia have told him that inquiries have been made about him by unknown persons. He claims that if he returns to Latvia he will be harmed or killed by the persons he fears. He claims that the authorities will not protect him and the authorities may have been implicated in the harm he has already suffered and the harm he anticipates in the future.
41. The Tribunal accepts that the applicant is a citizen of Latvia. It accepts his claim that he was threatened and harassed by persons who objected to his views. The Tribunal accepts that on one occasion he was unlawfully detained, by unknown persons, who threatened to kill him if he persisted in expressing his views. The Tribunal accepts the applicant's claim that the police were unable to assist him.
42. However, the Tribunal has formed the view that the applicant has very limited information regarding the persons who harassed him in Latvia. The Tribunal is not satisfied by the applicant's evidence that he was denied protection by the police. The Tribunal has formed the view that the applicant has such limited information regarding the persons who harassed him that he could not provide to the police any useful

information on which they could act. The Tribunal is not satisfied that the applicant was denied protection by the police in Latvia.

43. The Tribunal further finds that it is mere speculation on the applicant's part that the police or the authorities in Latvia were implicated in the harassment he suffered. The Tribunal has formed the view that the applicant does not have enough information on which he can logically reach a conclusion that state agents or the police were involved in the harassment. The Tribunal is not satisfied that the applicant was targeted by the state in Latvia or that the persons who harassed him were state agents. The Tribunal finds that the applicant was targeted by non-state agents for reasons of real and imputed political opinion.
44. The Tribunal is satisfied, after considering information from external sources, in the US Department of State, *Country Reports on Human Rights Practices – 2007*, released 11 March 2008, that the citizens of Latvia have access to a reasonable level of protection by the state. The Tribunal is satisfied that the applicant will have access to a reasonable level of state protection if he returns to Latvia. Accordingly, the Tribunal finds that the applicant does not have a well-founded fear of persecution in Latvia for a Convention reason.
45. Nevertheless, despite the finding above, the Tribunal has considered the applicant's claim that he is afraid to return to Latvia or elsewhere in the EU because he anticipates that the persons who harassed him before will seek to harass him again in Latvia and throughout Europe.
46. The Tribunal is satisfied by information from external sources, provided by the US Department of State and referred to above, that EU states, individually and collectively, provide high quality state protection to all citizens living in the EU. The Tribunal is satisfied that the applicant, as a citizen of Latvia, will have access to a reasonable level of protection by the state in Latvia and throughout Europe.
47. The applicant claims that the authorities in Latvia could not protect him from the harm he suffered and he fears that they will not be able to protect him in the future. The Tribunal accepts that even in countries with a high standard of protection the authorities cannot prevent all harm which a citizen may encounter. However, as the High Court of Australia has observed, in *MIMA v Respondents S152/2003*, "no country can guarantee that its citizens will at all times and in all circumstances, be safe from violence": Gleeson CJ, Hayne and Heydon JJ, (2004) 205 ALR 487 at [26]. Justice Kirby similarly stated in the same judgement that the Convention does not require or imply the elimination by the State of all risks of harm; rather it "posits a reasonable level of protection, not a perfect one": *ibid* at [117]. The majority judgement suggests that an appropriate standard of protection requires the state to provide its citizens with an appropriate criminal law and the provision of a reasonably effective and impartial police force with a justice system which is consistent with international standards. The Tribunal finds, after considering the above information from external sources, that the state in Latvia, as well as the other EU countries where the applicant can reside, provide a reasonable standard of protection for persons living within their borders. The Tribunal finds that the applicant will have access to a reasonable level of protection, that is consistent with international standards, in Latvia and throughout Europe.



48. The Tribunal is satisfied that the applicant has a right to enter and reside in all of EU countries because he is a citizen of Latvia. The Tribunal is satisfied that the right is a legally enforceable right to enter and reside (*Applicant C v MIMA* [2001] FCA 229 (Carr J, 12 March 2001) at [28] upheld on appeal by the Full Federal Court in *MIMA v Applicant C* (2001) 116 FCR 154).
49. The applicant has not taken all possible steps to avail himself of that right and indeed he states that he does not want to reside within Europe. Nevertheless, the right to enter and reside is available to him.
50. The applicant has not raised any Convention related claims specific to any of the other EU countries where he can enter and reside. The Tribunal has no information to indicate that the applicant has a well-founded fear of persecution in any EU country.
51. The concept of refoulement does not apply here as the Tribunal has found that the applicant does not have a well-founded fear of persecution in Latvia for a Convention reason. Nevertheless, the Tribunal is satisfied that if he does not wish to return to Latvia, and he settles elsewhere in Europe, there are no EU provisions which will force him to return to Latvia.
52. The Tribunal has considered the applicant's claim that he suffers from ill health and he prefers to be in Australia where he has family. The Tribunal accepts that he has raised legitimate concerns. However, these concerns relate to his individual preferences and they are beyond the scope of the Refugees Convention.
53. Accordingly, the Tribunal finds that the applicant does not have a well-founded fear of persecution in Latvia, or in any of the other EU countries where he can enter and reside, for a Convention reason.

## CONCLUSIONS

54. Having considered the evidence as a whole, 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

55. 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 Migration Act 1958. Sealing Officer's I.D. PRRRNP</p>
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