

**1314357 [2014] RRTA 185 (14 February 2014)**

**DECISION RECORD**

**RRT CASE NUMBER:** 1314357  
**DIBP REFERENCE(S):** CLF2013/57815  
**COUNTRY OF REFERENCE:** Tonga  
**TRIBUNAL MEMBER:** Rea Hearn-Mackinnon  
**DATE:** 14 February 2014  
**PLACE OF DECISION:** Melbourne  
**DECISION:** The Tribunal affirms the decision not to grant the applicant a Protection (Class XA) visa.

Any references appearing in square brackets indicate that information has been omitted from this decision pursuant to section 431(2) of the Migration Act 1958 and replaced with generic information which does not allow the identification of an applicant, or their relative or other dependant.

## **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).
2. The applicant, who claims to be a citizen of Tonga, applied to the Department of Immigration for the visa [in] March 2013 and the delegate refused to grant the visa [in] September 2013.
3. The applicant appeared before the Tribunal on 11 February 2014 to give evidence and present arguments. The Tribunal also received oral evidence from the applicant's son, daughter-in-law and granddaughter. The Tribunal hearing was conducted with the assistance of an interpreter in the Tonga and English languages.
4. The applicant was represented in relation to the review by his registered migration agent.

### **CONSIDERATION OF CLAIMS AND EVIDENCE**

5. The criteria for a protection visa are set out in s.36 of the Act and 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 in respect of whom Australia has protection obligations under the 'refugee' criterion, or on other 'complementary protection' grounds, or is a member of the same family unit as such a person and that person holds a protection visa.
6. 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 in respect of 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).
7. 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 in respect of 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').
8. In accordance with Ministerial Direction No.56, made under s.499 of the Act, the Tribunal is required to take account of policy guidelines prepared by the Department of Immigration – PAM3 Refugee and humanitarian - Complementary Protection Guidelines and PAM3 Refugee and humanitarian - Refugee Law Guidelines – and any country information assessment prepared by the Department of Foreign Affairs and Trade expressly for protection status determination purposes, to the extent that they are relevant to the decision under consideration.
9. The issue in this case is whether the applicant will suffer harm in Tonga arising from his age, loss of his land and lack of family support. The applicant has submitted that he will not be

able to subsist and that lack of access to health serviced in Tonga will amount to cruel and inhuman treatment or punishment. For the following reasons, the Tribunal has concluded that the decision under review should be affirmed.

10. The applicant travelled to Australia in 2005 on a Tongan passport. The Tribunal accepts that he is a national of Tonga and has assessed his claims against Tonga as his country of nationality and receiving country.
11. The applicant came to Australia on a 3 month tourist visa, with his wife, to visit his son who is an Australian citizen. The applicant (and his wife) remained unlawfully in Australia after the expiry of the tourist visa. When asked why, the applicant stated that he had no one to return to in Tonga. The applicant's wife died in 2013 and is buried in Melbourne. The applicant and his wife were married for more than 50 years.
12. The applicant is 78 years old. He was born on the main island of Tonga, Tongatapu, but moved to [a second] island, his mother's island, in 1940. He has 6 surviving children. His oldest son [Son A] lives in Australia; his son [Son B] lives in [Country 1]; his son [Son C] lives in [Country 2]; his son [Son D], lives in [Country 3]; and his daughter [Daughter E] lives in [Country 4]. His son [Son F] lives with his maternal aunt in Tonga. [Son F] has had [a medical condition] and is currently in hospital waiting to have [further treatment]. [Son F] has no land or employment in Tonga and is supported by his brothers, primarily [Son A]. The applicant has two brothers aged in their 80s, who live with their families in Tongatapu, and a sister who lives with her daughters.
13. The applicant had a house and 3 acres of land in [the second island]. He gave his wife's relatives permission to use his land and his house when he came to Australia. After the tsunami hit [this region] in 2009, the Tongan government sought to redistribute land in [the region] to share remaining land with persons who had lost their land in the tsunami. The Tongan government contacted [Son A], as the person with an inheritance right to land, and [Son A] agreed to the Tongan government redistributing the land as he lives in Australia and the applicant is too old to farm the land.
14. Country information indicates that land is allocated to Tongans by the government depending on availability. Some allotments can be registered, providing greater security of tenure, and some is leased. Allocated land may then be inherited. There is a scarcity of land in Tonga and the government cannot allocate land to everyone who is entitled.<sup>1</sup> As the country information indicates that the Tongan government plays a role in land allocation in Tonga, the Tribunal accepts that the government may have contacted the applicant and [Son A] to discuss land re distribution after the tsunami and that they agreed to the redistribution. The Tribunal accepts that the applicant no longer has land in Tonga.
15. The applicant stated that he still has his house in Tonga however his wife's relatives have been living there since he left Tonga.
16. The applicant stated that he is currently in good health. The Tribunal noted that Tonga has a relatively high quality health service with generally high access to services.<sup>2</sup> The applicant

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<sup>1</sup> Kennedy K H, 2012, 'Why Land tenure reform is the key to political Stability in Tonga', *Pacific Rim Law and Policy Journal*, March

<sup>2</sup> World Health Organisation, 2012, *Health Service Delivery Profile, Tonga*

stated that there are no hospitals on [his island], just a house with no medicine and one nurse. He stated that sick people in [this island] are taken by boat to Tongapatu.

17. The applicant stated that he has been financially supported by [Son A] since coming to Australia and that [Son A] would probably continue to support him if he had to return to Tonga. [Son A] stated that it was his responsibility, as the oldest son, to care for his father. He stated that he is currently able to work 2 jobs - [employment details removed] – because the applicant has been able to help care for [Son A's] children but he would probably have to work less and receive less income if the applicant has to return to Tonga. [Son A] has 6 daughters aged [variously].
18. When asked if he could live with any of his other sons, the applicant stated that they are not financially well off. [Son A] stated that he also sends financial support to his brothers. When asked if he could live with his brothers or sister in Tonga, the applicant stated that his brothers are old and live with their own families who would say that his own children should be responsible for his care. He stated that his sister only has daughters and it would not be appropriate to live with her. He stated that he does not wish to be a burden on his relatives.
19. [Son A] told the Tribunal that he is worried about how his father will survive on his own, away from family and unable to visit his wife's grave, and fears that his health will deteriorate. The applicant's [daughter in law] told the Tribunal that the applicant has supported her with the children and the household and with preparing for weekly church groups which are held at their house. The applicant's [granddaughter] told the Tribunal that the applicant effectively raised her in Tonga until she was 12 years old. She is very close to him and concerned for his welfare. The applicant's family members are distressed and concerned for him. His family members have also made written statements which are on the file.

#### *Findings*

20. The Tribunal accepts that the applicant will lack the care and support of his family if he returns to Tonga but does not accept that he will suffer serious harm or significant harm. He still has a house on Tonga, although his wife's relatives are currently living there, so has access to accommodation. He may be unable to farm or otherwise work because of his age, however, the evidence before the Tribunal indicates that his son [Son A] will continue to provide him with financial support and he will have access to health care services even though these may be limited on [his island]. The applicant therefore has access to shelter, income and health care. The Tribunal

#### *Other matters*

21. The applicant has requested that the Tribunal refer his case for Ministerial consideration pursuant to s.417 of the Act in the event that the Tribunal finds that he is not owed protection. The Tribunal has considered the applicant's circumstances against the Ministerial guidelines contained in PAM 3 and considers that his circumstances fall within the guidelines for referral for the following reasons:
  - the length of time he has resided in Australia - nearly 9 years;

- compassionate circumstances relating to his age and psychological state, lack of family support in Tonga and his distress at having to leave his family and his wife's burial place in Australia which will cause him ongoing hardship;
- compassionate circumstances relating to his family's distress and concern for his wellbeing which will lead to continuing harm to Australian citizens, including the applicant's son who has cultural responsibility for his father's care.

## CONCLUSION

22. For the reasons given above, the Tribunal is not satisfied that the applicant is a person in respect of whom Australia has protection obligations under the Refugees Convention. Therefore the applicant does not satisfy the criterion set out in s.36(2)(a).
23. Having concluded that the applicant does not meet the refugee criterion in s.36(2)(a), the Tribunal has considered the alternative criterion in s.36(2)(aa). The Tribunal is not satisfied that the applicant is a person in respect of whom Australia has protection obligations under s.36(2)(aa).
24. There is no suggestion that the applicant satisfies s.36(2) on the basis of being a member of the same family unit as a person who satisfies s.36(2)(a) or (aa) and who holds a protection visa. Accordingly, the applicant does not satisfy the criterion in s.36(2).

## DECISION

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

Rea Hearn Mackinnon  
Member